# Table of Contents

**Editorial**

Editorial, October 2008  
Kate Lewins  

**Refereed Articles**

The Protection Of Seafarers' Wages In Admiralty: A Critical Analysis In The Context Of Modern Shipping  
Michael Wai Shing Ng  
133 - 176

Marine Inquiries: Balancing the "no-blame" investigation with the regulatory investigation to achieve marine safety outcomes  
John Kavanagh  
177 - 219

The Allocation of Taxing Rights of Ship and Aircraft Leasing Profits under Australia’s Tax Treaties  
Kerrie Lee Sadiq

**Casenotes and Articles**

UK Standard Conditions for Towage and s74(3) Trade Practices Act 1974 (Cth) before the Queensland Court of Appeal and the High Court of Australia  
Kate Lewins  
228 - 233

The Dualism of Australian Arbitration Law: A Comment on Paharpur Cooling Towers  
Samuel Ross Luttrell  
234 - 237

**New Developments, CMI Reports**

Report On CMI Executive Council Meeting - New York  
Stuart Hetherington  
238

Digest of Journal Articles Published 1 September 2007 - 1 September 2008  
Lauren Humphrey, Alex Molloy  
239 - 240
The beauty of an online journal is that it can be accessed and operated from anywhere in the world. As a result, I was able to observe the release of the two most recent issues, volume 21(2) and volume 22(1), whilst on sabbatical. Thank you once again to Professor Sarah Derrington and Associate Professor Paul Myburgh for not only taking the helm in my absence, but doing so cheerfully!

The reach of the journal has been further expanded because the journal is now referenced and searchable via Austlil, and is also part of the Hein Online stable of international journals. Currently Austlii only holds the archived editions until 2005 but will be updating its site to include the recent issues soon. Austlil has informed us that of the 42 journals hosted at its site, the MLAANZ Journal is the 11th most popular journal, with over 70,000 ‘hits’ in the six months between January – June 2008. This is testament to the work of past editors of the (then) MLAANZ Journal and the many contributors to our journal over the years.

We have taken on the suggestion that each issue should be capable of download in its entirety. At the foot of the table of contents is a link to a PDF of the complete issue. (Printing doublesided would save paper.)

Each issue of the journal is indeed a collaborative exercise. Once again I would like to thank the Editorial Board for their support; particularly the efforts of the editors of the various sections, Dr Sarah Derrington, Associate Professor Paul Myburgh and Dr Michael Underdown. As always, the reviewers are the unsung heroes of each issue and our collective thanks are due to them.

With the 2008 MLAANZ Annual Conference about to commence in Fremantle, hopefully this issue will whet your appetite for all things maritime.

Kate Lewins
Editor
October 2008
Editorial Board: Volume 22(2) 2008

General Editor
Ms Kate Lewins, School of Law, Murdoch University, Western Australia

New Zealand Editor
Mr Paul Myburgh, Faculty of Law, University of Auckland, New Zealand

Case Note Editor - Australia
Dr Sarah Derrington, Marine and Shipping Law Unit, University of Queensland, Australia

Case Note Editor - New Zealand
Mr Paul Myburgh, Faculty of Law, University of Auckland, New Zealand

Book Review and Addresses Editor
Dr Michael Underdown, Barrister, Octagon Chambers, Dunedin, New Zealand

Editorial Board
Hon. Justice James Allsop, Federal Court of Australia
Hon. Justice Hugh Williams, High Court of New Zealand
Professor Martin Davies, Co Director, Tulane Maritime Law Center, Tulane University Law School, New Orleans

Citation
This issue can be cited as (2008) 22 ANZ Mar LJ (page number).

Refereed articles

All articles published in the refereed section of ANZ Mar LJ have been independently peer reviewed in accordance with the Journal policy. The balance of content is not refereed.

Journal policy on copyright and information on the submissions process can be found at:
THE PROTECTION OF SEAFARERS' WAGES IN ADMIRALTY: A CRITICAL ANALYSIS IN THE CONTEXT OF MODERN SHIPPING

Michael Ng*

There is a well established line of authority in Admiralty that seafarers are entitled to unique legal rights that are not available to land-based employees. The most important maritime law right for seafarers is the maritime lien for wages. The admiralty courts have used colourful rhetoric to justify the special rights afforded to seafarers: the wages lien has been called a "sacred lien"; and seamen have been dubbed "favourites of the law". This paper predominantly focuses on the modern application of the wages lien, with a view to question just how closely the law has followed the rhetoric in reality.

1. Introduction

2. Admiralty Jurisdiction
   2.1 In Personam Jurisdiction
   2.2 In Rem Jurisdiction
   2.3 Exercise of Jurisdiction

3. Historical Development of the Wages Lien
   3.1 Freight as the Mother of all Wages
   3.2 Ordinary and Special Contracts
   3.3 Wages Earned ‘On Board’

4. The Wages Lien
   4.1 Who is a ‘Seaman’?
   4.2 What are ‘Wages’?
      4.2.1 Damages for breach of contract
      4.2.2 Damages for wrongful dismissal
      4.2.3 Damages for non-payment of wages
      4.2.4 Repatriation costs/viaticum
      4.2.5 Severance/redundancy compensation
      4.2.6 Union fees, deductions and contributions
      4.2.7 Interest and costs
   4.3 Foreign Wages Liens/Privileges
   4.4 Creation of the Wages Lien — Contract or Operation of Law?
   4.5 Multiple Contracts and Service on Different Ships
   4.6 When does a Seaman Stop Earning Wages?
      4.6.1 Frustration
      4.6.2 Repudiation
   4.7 Loss or Foundering of the Ship
   4.8 Contracting Out of the Lien

*LLB(Hons) student at the University of Auckland. I owe my thanks Associate Professor Paul Myburgh for supervising this paper.

(2008) 22 A&NZ Mar LJ

133
The Protection of Seafarers’ Wages in Admiralty

4.9 Transferability of the Lien

5. The Statutory Right of Action In Rem (SROAIR)

5.1 Application of the SROAIR for Wages
5.2 ‘Sham’ Transactions and the In Personam Link
5.3 The Effect of The Indian Grace

6. The Effect of the Fisheries Act 1996 (NZ)

6.1 Does Forfeiture extinguish Maritime Liens and/or SROAIRS?
6.2 Relief from Forfeiture

7. Priorities

7.1 In Personam Priorities
7.2 In Rem Priorities
7.2.1 Ranking of maritime liens against other interests
7.2.2 Ranking of maritime liens inter se
7.2.3 Ranking of wages liens inter se

8. Conclusion

1. Introduction

Modern lawyers dealing with the claims of seafarers often look back at the judicial treatment of seamen from the nineteenth century with almost a sense of bemusement. Inevitably, writers and judges will cite famous cases such as The Minerva with memorable descriptions of seamen as:

[A] set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection, even against themselves.

Similar remarks can be found in US cases:

Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached.

Such quotes will generally be qualified by an observation that these descriptions of seafarers may not be entirely accurate today, followed by the assertion that the courts should nevertheless still offer special protection to seamen.

The seaman’s maritime lien for wages was the admiralty courts’ answer to the common mariner’s woes. Sir William Scott said ‘[t]hese are sacred liens, and, as long as a plank remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages.’ In essence, there were three crucial ways in which the admiralty courts protected seafarers’ wages: (1) the acceptance of such claims as being within the courts’ jurisdiction even though foreign ships and persons would often be involved; (2) the categorisation of the claims

1 In this paper I will use the term ‘seaman’ interchangeably with ‘seafarer’, ‘crew member’ and ‘mariner’. Of course ‘seaman’ lacks the gender-neutrality of the other terms, but its recurring appearance in landmark Admiralty decisions and modern legislation makes it difficult to traverse this area of law without referring to it. Therefore, when I use the term ‘seaman’ I intend to include both male and female mariners. For a striking example of 19th Century sexism, see The Jane and Matilda (1823) 1 Hag Adm 187, 188; 166 ER 67, where Lord Stowell feared for the ‘moral disorder’ that would ensue from women working on ships.

2 The Minerva (1825) 1 Hag 347, 355; 166 ER 123, 126.

3 Harden v Gordon, 11 F Cas 480, 485 (1823).

4 See eg Doby Navigation Company Ltd v The Ship ‘ANL Progress’ [20 Feb 2002] HC, Auckland, AD1/02 [28]; Mobil Oil New Zealand Ltd v The ship ‘Rangiora’ (No 2) [2000] 1 NZLR 82, 86.

5 The Madonna D’Idra (1811) 1 Dods 37, 40; 165 ER 1224, 1225.
The Protection of Seafarers’ Wages in Admiralty

as being within the ambit of the wages lien; and (3) providing the wages lien with a high priority over claims from competing creditors. These three elements are of equal import to the seafarers of the twenty-first century as they were to the seamen of Sir William Scott’s time.

This paper will examine the seaman’s legal remedies for unpaid wages, with special regard to the wages lien. I will question whether modern, intelligent, unionised seamen are still regarded as ‘favourites of the law’ in admiralty proceedings. Are seafarers well looked after as ‘wards of admiralty’, or are they just sidelined by an anachronistic jurisdiction that has failed to keep up with its surrounding developments?

As Fisher J observed in *The Margaret Z*, when applying an existing area of maritime law to a novel fact scenario, one must consider two things: the rationale or policy reasons for the area of law; and the relevant legal precedents. To this, I would add a third factor: the desirability of achieving some degree of international consistency, because of the transnational nature of shipping. Thus this paper will adopt a three-pronged analysis of how modern maritime law should treat the recovery of wages by seafarers. First of all, the overarching theme will be whether the courts/legislators have given sufficient mind to the long-standing rationale in Admiralty to protect seafarers’ wages. The second, and perhaps the most substantial, aspect of the analysis will be a discussion of the applicable legal precedents in each topic. Finally, I will attempt to provide comparisons of how different countries have responded to each area of law.

2. Admiralty Jurisdiction

There are two rights in Admiralty for wages: the maritime lien for wages and the statutory right for wages. These rights can give rise to two different remedies: actions *in rem* and actions *in personam*. Before a seafarer can make a claim for wages under maritime law, he or she must first establish that the ship (for a claim *in rem*) or the legal person employer (for a claim *in personam*) is within the court’s admiralty jurisdiction.

2.1 In Personam Jurisdiction

In general, the *in personam* jurisdiction of the Court is established by service. If the employer is located in the same country as where the *in personam* action is commenced, service of the claim and the subsequent enforcement of the judgment over the employer’s assets should be unproblematic. Where the employer defendant is located overseas, however, personal service must comply with both the procedure in the *lex fori* and the rules in the defendant’s country of residence.

In the absence of service, traditionally, a foreign defendant can also incur personal liability if he or she appears unconditionally to defend an *in rem* action against the ship. In that event, both the defendant ship personified and the owner personally will be liable. This position was challenged in *The Indian Grace* where Lord Steyn held that for a statutory right of action *in rem* (but not for maritime liens), the shipowner will automatically be a party to the proceedings as well. The ramifications of *The Indian Grace* for seafarers will be discussed in Part 5 below.

2.2 In Rem Jurisdiction

The *in rem* jurisdiction in Admiralty is a unique and invaluable method of proceeding for seafarers as well as other creditors. Ships are, as described in one text, an extremely ‘elusive sort of property’. In practice, an action *in rem* allows a maritime claimant to arrest the ship as the defendant and to proceed against her, where the only connection the ship has with the forum is her presence in one of the country’s ports. In theory, a country’s admiralty jurisdiction *in rem* extends even further to any ship that is within its territorial sea. Service

---

6 The *Minerva* (1825) 1 Hag 347, 358; 166 ER 123, 127.
7 *Harden v Gordon*, 11 F Cas 480, 485 (1823).
8 *Fournier v The ship ‘Margaret Z’* [1999] 3 NZLR 111, 121.
9 The relevant provisions in New Zealand are sections 387-390 of the *Companies Act 1993* (NZ) and rules 219 and 220 of the *High Court Rules* (NZ).
10 *Metropolitan Glass & Glazing Ltd v The Ship ‘Lydia Oldendorf’* [2000] 8 NZCLC 262.
11 Admiralty Rules (Part 14 of the High Court Rules), rule 773(6) and (7).
12 The *Dictator* [1892] P 304.
16 *Territorial Sea and Exclusive Economic Zone Act 1977* (NZ), section 3.
of a ship involves attaching a copy of the notice of proceeding to a conspicuous part of the ship or showing a sealed copy of the notice to the person in charge (ie the master). 17

2.3 Exercise of Jurisdiction

Having established the existence of jurisdiction, the Court can still use its discretion to decline to exercise jurisdiction. Shipowners will often apply to the Court to utilise its discretion to stay the proceedings, and this is one of the first legal hurdles that a seafarer must pass if his or her claim for wages is to succeed. The exercise of jurisdiction in English admiralty law was traditionally governed by the ‘vexatious or oppressive’ test. 18 The view was that plaintiffs should be entitled to choose the forum for the dispute, unless that choice is unduly vexatious or oppressive. Lord Denning MR (as he was then) was proud to declare: ‘You may call this ‘forum shopping’ if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.’ 19

The House of Lords retreated from this approach in The Atlantic Star, where Lord Reid observed that the doctrine stemmed from a time when the English courts felt an innate sense of superiority over other courts. 20 The Atlantic Star, nevertheless, maintained the ‘vexatious or oppressive’ test, though with the qualification that it was to be read with a ‘more liberal and less nationalistic’ attitude. 21 The doctrine of forum non conveniens was finally adopted from Scottish and US law in The Spiliada, which essentially means that the court will grant a stay if another forum is clearly more appropriate for the claim. 22 The burden of proof lies on the person arguing forum non conveniens. In this respect, it can be said that it is now easier for foreign shipowners to obtain a stay from the courts.

It was held in Longbeach Holdings Ltd v Bhanabhai & Co Ltd that the New Zealand courts should have regard for the plaintiff’s ‘legitimate or personal judicial advantage’ in proceeding in the chosen forum. 23 A major advantage of pursuing an in rem action in Admiralty is that it makes it much more difficult for the defendant to argue forum non conveniens. As was noted in The Anami Taiki Go, the arrested ship (or security in place of the ship) represents full security for the in rem claimant and no other forum can provide the claimant with equal security, which entails that the forum of arrest will usually be the most appropriate forum. 24 Obviously, this consideration is of much less significance if the defendant shipowner is prepared to provide alternative security in another forum (ie the purported forum conveniens). 25

The acceptance of the forum non conveniens doctrine can be contrasted with the jurisdictional liberalisation of claims relating specifically to seamen’s wages. In The Octavie Dr Lushington noted: ‘The ancient practice was that, without the express consent of the foreign consul, the Court would not exercise jurisdiction.’ 26 This was because: ‘suits by foreign seamen were not formerly encouraged in this Court; they are now allowed upon a principle of comity, and with a view to prevent injustice to seamen.’ 27 The practice then evolved to where the foreign consul had to be notified, and the consul could object to the Court’s exercise of jurisdiction over a foreign seaman’s claim for wages. The consul’s objection was not a veto against the Court’s discretion and the consul must provide reasons for objecting. 28 This practice persisted for over a century. Friedman J suggested in The MV Houda Pearl ‘actions for wages against a foreign ship fall into something of a different category from the point of view of the assumption of or refusal to assume jurisdiction.’ 29 The question is whether the exercise of jurisdiction for wages claims still falls into a different category with the advent of the forum non conveniens doctrine.

Section 7 of the Admiralty Act 1973 (NZ) provides:

17 Admiralty Rules, rule 772.
19 Ibid 451.
24 Yoshinari Tomita v The Unnamed Vessel Formerly Known as ‘Amami Taiki Go’ and Also Known as ‘Intrepid’ [8 Dec 2000] HC, Auckland, AD36/00 [19].
27 The Herzogin Marie (1861) Lush 292, 293; 167 ER 126, 127.
28 The Nina (1867) 5 Moo N section 51; 16 ER 434.
29 Magat v The MV Houda Pearl 1982 (2) SA 37, 42 (N).
The Protection of Seafarers’ Wages in Admiralty

Nothing in this Act shall be construed as limiting the jurisdiction of the Court to refuse to entertain an action for wages by the master or a member of the crew of a ship, not being a New Zealand ship.

This section was based on section 5(2) of the Administration of Justice Act 1956 (UK), which is now section 24(2)(a) of the Supreme Court Act 1981 (UK). The modern utility of this statutory provision is dubious. The current New Zealand Admiralty Rules no longer require that the consul be notified of a wages claim by a foreign seafarer. The whole basis of section 7 of the Admiralty Act 1973 (NZ) has been removed. Yet, the Admiralty Act 1973 (NZ) having only fourteen sections, section 7 sticks out like the proverbial sore thumb when one is dealing with claims for wages by foreign seamen. The intervener in The Margaret Z argued section 7 as a basis for having the crew’s action against the ship stay in favour of the bankruptcy proceedings in USA. Salmon J suggested that the Court’s discretion to exercise jurisdiction is ‘emphasised’ in section 7. However, his Honour provided a complete forum non conveniens analysis and reached a conclusion which seems to ignore section 7 altogether.

It would be my view that special considerations relating to an in rem claim by crew against the ship on which they sailed would require that these proceedings be dealt with in the forum of the plaintiffs’ choice.

Likewise, Williams J held that ‘the usual rule should be that the ship is available to meet the seamen’s wages wherever she may be’. Even though Williams J did grant a stay of proceedings in The Cornelis Verolme, his Honour did so under a forum non conveniens analysis. It would appear that section 7 has been outmoded by the doctrine of forum non conveniens. The section is said to ‘emphasise’ or ‘recognise’ the courts’ discretion in exercising jurisdiction, but it is a discretion that requires no emphasis. There is no suggestion that the courts have some kind of ‘limited discretion’ to decline to exercise jurisdiction over a foreign damage lien claim, for example. Furthermore, the genesis of section 7 had long been abandoned. Notification or consent of the foreign consul is no longer a prerequisite to the exercise of jurisdiction, nor is there any recent judicial pronouncement to the effect that wage claims by foreign seafarers are discouraged. Indeed, there is no equivalent to section 7 in the Canada Shipping Act 2001 (Canada) or the Admiralty Act 1988 (Cth) (Australia). Section 7(1)(a) of the Admiralty Jurisdiction Regulation Act 1983 (South Africa) simply imports the forum non conveniens concept into the legislation itself.

Section 7 of the Admiralty Act 1973 (NZ) should be removed in its entirety. It tends to create the misapprehension that seafarers’ wages claims in Admiralty are still governed by another set of jurisdictional rules. This was once the case because the ancient practice of obtaining the foreign consul’s consent did not fit with the English Courts’ perception of itself as the Admiralty Law oracle for unfortunate foreigners and their inferior judicial systems. Neither of these considerations applies in the modern setting and seafarers’ wage claims should be governed by the same jurisdictional rules as other claims in Admiralty. As can been seen in The Margaret Z and The Cornelis Verolme, courts have in recent years tended to gloss over section 7 in preference for a forum non conveniens approach.

The doctrine of forum non conveniens adequately protects the interests of foreign mariners by recognising the valuable security that the action in rem provides. The starting point for seafarers’ wages claims is that the ship should be available to meet the plaintiffs’ claims. As Sir John Nicholl observed in The Prince George, “in suits for wages the Court is anxious that seamen should not be harassed with litigation”. Therefore, even though it is no longer diplomatic for the courts to insinuate that foreign claimants will not obtain justice in other judicial systems, the potential burdens that mariners may face in having to reinitiate proceedings abroad should be a significant factor in the forum non conveniens analysis. It is submitted that the posting of alternative security

---

32 Ibid 639.
33 Ibid.
34 Turners & Growers Exporters Ltd v The ship ‘Cornelis Verolme’ [1997] 2 NZLR 110, 119.
35 Ibid. The reason was that the ship would supposedly fetch a higher price if sold in Belgium via the Belgian bankruptcy proceedings. Compare Holt Cargo Systems Inc v ABC Containerline N.V (Trustees of) [1997] 146 DLR (4th) 136, which involved the same shipowner in insolvency. The Canadian Court in Holt Cargo dismissed the suggestion that the ship could be sold for a better price in Belgium as ‘speculation’ and the Court refused to stay the maritime lien claim.
37 Turners & Growers Exporters Ltd v The ship ‘Cornelis Verolme’ [1997] 2 NZLR 110.
38 The Prince George (1837) 3 Hagg 376, 377; 166 ER 445.
40 Fournier v The ship ‘Margaret Z’ [1997] 1 NZLR 629, 633 and 638 where Salmon J recognised that while the seafarers’ substantial claim will be no worse off under US bankruptcy law, it would nevertheless be inconvenient for them to plead their case again in USA.

(2008) 22 A&NZ Mar LJ 137
in another forum alone should not be enough for the shipowner to obtain a stay against an action in rem — something more should be required.

Another factor warranting a stay may be in the form of a choice of foreign jurisdiction clause in the mariner’s contract. Brandon J held in The Eleftheria that foreign jurisdiction clauses do not deprive the court of its discretion to grant a stay.\(^\text{41}\) The clause has the effect of shifting the burden to the plaintiff to show ‘strong cause’ as to why a stay should not be granted.\(^\text{42}\) In The Makefjell Brandon J appeared to have raised the standard of proof to ‘exceptional’ reasons against a stay, and this was upheld by the English Court of Appeal.\(^\text{43}\) Neither The Eleftheria nor The Makefjell involved claims by seafarers for wages. It is submitted that the ‘exceptional’ standard in The Makefjell is perhaps too onerous for seafarers. The exercise of jurisdiction is the first essential step that the courts have to take in protecting seafarers’ wages. It would make it too easy for shipowners to hinder the action in rem through the use of foreign jurisdiction clauses if the standard of proof against a stay is raised too high. The ‘strong cause’ standard as adopted in The Eleftheria is more appropriate considering the disparity of power that tends to exist between seafarers and shipowners.

3. Historical Development of the Wages Lien

The nature of the wages lien has changed greatly over the years. Therefore, it is necessary to examine its development in order to understand and determine its current scope.

3.1 Freight as the Mother of all Wages

At one time, all those involved in a sea adventure were regarded as co-adventurers, and as such, the crew could only get paid if the ship earned freight. Hence ‘freight is the mother of all wages’.\(^\text{44}\) This changed as seafarers offered their services strictly as employees and not as part-owners or co-adventures of the maritime venture. Staniland writes:\(^\text{45}\)

> The maxim worked some hardship because where the ship perished, or for some other reason no freight was earned, the seamen lost their wages through no fault of their own. By the nineteenth century the maxim began to incur the repugnance of the Admiralty Court.

The concept was abandoned in section 183 of the Merchant Shipping Act 1854 (UK). Therefore seafarers are now allowed to claim a lien for wages even where the ship has earned no freight.

Yet it must be borne in mind that maritime liens can still attach to the freight earned by a vessel (as distinct from attaching to the vessel itself). For a wages lien to attach to freight, the claimant must also have a lien over the ship on which the freight was earned.\(^\text{46}\) Put another way, the lien over the freight must stem from a lien over the ship. Therefore, freight is no longer the mother of all wages, but, as Thomas explains, the wages lien can attach to freight as a sort of ‘consequential charge’, with the ‘first charge’ being on the ship herself.\(^\text{47}\) This consequential charge may prove to be useful for seafarers where the value of the ship itself is insufficient to meet the claims against her. The lien can also attach to cargo if the freight for the cargo is still due. However, once the freight has been paid and there is no freight due on the cargo, no lien can attach to the cargo anymore.\(^\text{48}\)

It was held in The Cape Sounion that money recovered by a shipowner from a charterer through an arbitral award constituted ‘damages’ and was not ‘freight’ to which the wages lien can attach.\(^\text{49}\) That is not to say that the wages lien can never attach to damages recovered by the shipowner. Hobhouse J (as he then was) added:\(^\text{50}\)

> It may be correct that various substitutes for freight can be treated as the subject-matter of the lien. It may be also that various damages claims which are damages claims properly so called for loss of freight can be included in the lien...

\(^\text{42}\) Ibid 100.
\(^\text{44}\) The Minerva (1825) 1 Hag 347, 357; 166 ER 123, 127. See also The Juliana (1822) 2 Dods 501, 510; 165 ER 1560, 1563.
\(^\text{46}\) The Castlegate [1893] AC 38.
\(^\text{50}\) Ibid.
The Protection of Seafarers’ Wages in Admiralty

The problem faced by the claimants in *The Cape Sounion* was that they had earned their wages after the expiration of the charter party which gave rise to the arbitral award. Therefore, it would seem that the crew must demonstrate some kind of relationship between the freight claimed and their services to the ship. This is consistent with *The Beldis*, in which it was held that the lien only attaches to freight which the ship is in the course of earning through the services of the crew.

It may be tempting for seafarers with unsatisfied claims to argue that the wages lien attaches to all freight, regardless of temporal restrictions, and to all financial benefits that the shipowner has derived from the ship. But such an argument would be contrary to the very foundation of the wages lien. The wages lien attaches to the ship for service that is referable to the ship. If the ‘freight’ was earned by service that is not referable to the ship, or by service rendered by someone other than the seafarer claimants, logic dictates that the sum of money cannot be subject to the wages lien. To hold otherwise would be to blur the line between the liability of the ship *in rem* and the shipowner *in personam*. *The Indian Grace*, which did question the distinction between actions *in rem* and *in personam*, cannot bolster this line of argument because Lord Steyn specifically excluded maritime liens from the ambit of the judgment. This leaves the statutory right of action *in rem* (SROAIR) for wages. But as Thomas observes, the admiralty statutes clearly state that SROAIRs can only be against ‘ships’ — freight can never be subject to SROAIRs for wages.

3.2 Ordinary and Special Contracts

Another noteworthy relic of the wages lien was the early distinction between ‘special’ contracts and ‘ordinary’ mariners’ contracts. Originally, the admiralty courts were only given jurisdiction over ordinary contracts which were usually simple voyage-based articles. That being the case, the wages lien was naturally restricted to these ordinary contracts.

It was said that ordinary contracts should only contain two things:

One of them to be stipulated on the part of the shipowner — a description of the intended voyage; and the other, on the part of the seaman — engaging for the rate of wages which he was content to accept for his services on that voyage.

Contracts were ‘special’ if they contained terms that were anything beyond the basic wages for a voyage; these contracts were deemed to be the sole concern of the Common Law Courts. This struggle over jurisdiction ended with the passage of the *Admiralty Courts Act 1861* (UK). Section 10 of that Act extended admiralty jurisdiction to special contracts. However, the wages lien was not automatically extended to special contracts. For many years, the courts maintained that the 1861 Act merely created a statutory right of action *in rem* for wages arising from special contracts, and that the wages lien was still limited to ordinary contracts. In *The Sara* Lord Watson stated:

[S]o far as I am aware, there is no authority for the proposition that there must be a proper maritime lien for every claim which the legislature has made enforceable against the ship.

In the same case, Lord Halsbury LC suggested that, where the Court already has admiralty jurisdiction over a subject-matter, and Parliament extends the jurisdiction within that subject-matter through statute, then: "[in such cases] with regard to the same subject-matter, the legislature must be taken (notwithstanding the absence of any express words) to have intended to create a maritime lien." That statement was obiter, however, because the claim at issue concerned a master’s claim for disbursements under a special contract, which was not a subject-matter over which the admiralty courts enjoyed existing jurisdiction.

In *The British Trade*, it was held that the plaintiff seamen who were employed under special contracts did not have wages liens for their claims of wrongful dismissal. The anomaly in *The British Trade* was that the
intervening mortgagee and debenture holder conceded that the crew had liens for their unpaid wages, expenses and disbursements, and the interveners offered to pay off those parts of the claims in return for subrogated priority — even though those aspects of the claim arose from the same ‘special’ contract.

*The Arosa Star* made the important observation that the courts must keep up to date with the changing conditions of seamen’s employment.61 The Court also recognised that the ‘ordinary’ mariner’s contract of the past had lost its popularity; most seafarers in modern shipping are employed under special contracts which provide for things such as termination periods, paid leave, sick leave and bonuses.62

It took over a century for the courts to overturn *The British Trade* and finally to extend the wages lien to special contracts. In *The Halcyon Skies* Brandon J stated:63

> I would hold that the effect of section 10 of the Admiralty Court Act 1861 was, first, to give the court all the same jurisdiction over wages claims arising out of special contracts as it had previously had over wages claims arising out of ordinary mariners’ contracts, including claims in damages for wrongful dismissal; and, secondly, to extend the maritime lien which had been recognised as existing in respect of the latter claims to the former claims.

It should be noted that his Honour was careful to limit the scope of the extension only to wages claims that relate to damages for wrongful dismissal. This tentative step to clear up the position of special contracts was long overdue, but *The Halcyon Skies* did little to settle whether other rights that employees may have under special employment contracts are ‘wages’ that attract the seamen’s lien.

Due to a paucity of cases since the relatively recent extension of the wages lien in *The Halcyon Skies*, there is still considerable confusion surrounding the eligibility of other ‘special’ contract claims for lien status.64 Therefore, even though the distinction between the two types of contracts has lost its significance, its legacy still lingers on in the current law.

### 3.3 Wages Earned ‘On Board’

Section 10 of the *Admiralty Act 1861* (UK) required that the wages claimed in Admiralty be earned ‘on board the ship’. As should be immediately obvious, this restriction was extremely narrow, and even when the phrase was still on the statute books, the Courts had always taken liberties with its interpretation so as to avoid ‘artificial distinctions’ about wages earned on board or on land.65 Brandon J noted in *The Halcyon Skies* ‘in practice... such limitation was never interpreted strictly and did not prevent [the] court... from exercising jurisdiction, under the head of wages.’66

The phrase ‘earned on board the ship’ is nowhere to be found in any of the modern statutes conferring admiralty jurisdiction to claims for seamen’s wages. The phrase may be regarded as an early, but inelegant, attempt by Parliament to confine the wages lien to true ‘seamen’.

### 4. The Wages Lien

The wages lien is not defined in any statute. Section 2 of the *Admiralty Act 1973* (NZ) simply states:

> Maritime lien, without derogating from the generality of the term, includes a lien in respect of bottomry, respondentia, salvage of property, seamen’s wages, and damage.

Section 5(1) provides:

> In any case in which there is a maritime lien or other charge on any ship, aircraft, or other property for the amount claimed, the admiralty jurisdiction of the [High Court] may be invoked by an action in rem against that ship, aircraft, or property.

---

62 Ibid 403.
64 See Part 4.2 below.
The Protection of Seafarers’ Wages in Admiralty

One must not confuse the wages lien with the SROAIR for wages, even though both can be enforced by an action in rem. While the latter is defined in section 4(1)(o) of the Admiralty Act 1973 (NZ) under the heading ‘extent of admiralty jurisdiction’, that definition only directly applies to in rem actions under section 5(2)(b). As was seen in the above discussion concerning section 10 of the Admiralty Court Act 1861 (UK) and The Halcyon Skies, the courts have been unwilling to accept the notion that statutory terms dealing with the SROAIR for wages automatically extend the ambit of the wages lien. At first glance, this seems to be a fair assumption to make considering the fact that many of the other SROAIRs listed in section 4 of the Admiralty Act 1973 (NZ) do not have corresponding maritime liens.

The starting point is, where a statute makes a claim enforceable in rem, and the claim does not have a corresponding maritime lien, then, in the absence of express language to the contrary, it is assumed that the statute does not create a new maritime lien. This is a fairly uncontroversial position to adopt, given the clear distinction between maritime liens and SROAIRs in the Admiralty Act 1973 (NZ).67 However, the argument that an expansion of a SROAIR has no effect whatsoever on the ambit of the corresponding maritime lien is more problematic. As was noted above, Lord Halsbury was of the view that the opposite is true.68 Cases that have resisted the parallel expansion of maritime liens have tended to be more complicated than a direct ‘cross pollination’ from a SROAIR to a maritime lien. For example, the plea of the master in The Sara was not for the direct application of statutory abolishment of special and ordinary contracts to the seaman’s wages lien. Instead, the master sought to have the statutory expansion applied to the seaman’s wages lien, and then further extended to his claim for disbursements (which in itself was a statutorily-created maritime lien under the then novel Admiralty Court Act 1861(UK)).69 More recently, Fisher J stated in The Margaret Z ‘jurisdiction is not to be confused with lien status’, but that was within the context of an argument that the SROAIR for personal injury under section 4(1)(f) can be used as a basis for expanding the maritime lien for damage.70 The true corresponding SROAIR for the damage lien is in fact section 4(1)(d) ‘damage done by a ship’. That is in effect no different from saying that, ‘the SROAIR for personal injury has no corresponding maritime lien, therefore section 4(1)(f) did not create a new maritime lien’.

The statutory expansions relating directly to the SROAIR for wages have all been unequivocally assimilated with the wages lien: the abolishment of the limitation to freight; the distinction between special and ordinary contracts; and the requirement that wages be earned on board.71 As such, there is no room for the argument that Parliament intended to create two separate maritime laws. Despite initial judicial reluctance,72 the courts have recognised that, just as all maritime liens are ‘supported by considerations of public policy,’73 so too are the statutory expansions to the corresponding SROAIRs.

The drafters of the Admiralty statutes seem to assume that the wages lien is understood by the courts.74 I have argued that statutory enlargements to Admiralty jurisdiction in rem should be applicable to the wages lien, but that takes the matter no further than that it includes any claim by a ‘master or member of the crew of a ship for wages’ and ‘money or property’ recoverable under the provisions of the Maritime Transport Act 1994 (NZ).75 Thus in order to truly comprehend the wages lien, one must inspect each aspect of the lien carefully with reference to the existing case law.

4.1 Who is a ‘Seaman’?

Since section 2 of the Admiralty Act 1973 (NZ) states that the lien is for ‘seamen’s wages’, one must obviously qualify as a seaman to claim the lien. Unfortunately, the term ‘seaman’ is not defined in the Admiralty Act 1973 (NZ). The Maritime Transport Act 1994 (NZ), however, does appear to provide some guidance on the matter. Section 2 defines ‘crew’ as:

---

67 See sections 5(1) and (2), respectively.
68 The Sara (1889) LR 14 App Cas 209, 215.
69 Ibid.
70 Fournier v The ship ‘Margaret Z’ [1999] 3 NZLR 111, 119.
71 See Part 3 above.
72 See eg The British Trade [1924] P 104.
74 For similar treatment of the wages lien in other jurisdictions, see: section 15(2)(c) of the Admiralty Act 1988 (Australia); sections 39 and 41 of the Merchant Shipping Act 1995 (UK). Section 86 of the Canada Shipping Act 2001 (Canada) goes further to provide that crew members and masters have liens for ‘claims that arise in respect of their employment on the vessel, including in respect of wages and costs of repatriation that are payable to the master or crew member under any law or custom’, but even this is not a complete definition of the wages lien.
75 Admiralty Act 1973 (NZ), section 4(1)(o).
The Protection of Seafarers’ Wages in Admiralty

The persons employed or engaged in any capacity on board a ship (except a master, a pilot, or a person temporarily employed on the ship while it is in port).

In the same section, the Maritime Transport Act 1994 (NZ) goes on to provide:

**Seafarer**—
(a) Means any person who—
(i) Is employed or engaged on any ship in any capacity for hire or reward; or
(ii) Works on any ship for gain or reward otherwise than under a contract of employment; but
(b) Does not include a pilot or any person temporarily employed on a ship while it is in port.

Given that the terms ‘seaman’, ‘seafarer’ and ‘crew’ are often used interchangeably, the question is whether the definitions in the Maritime Transport Act 1994 (NZ) affect a person’s ‘seaman’ status for the purpose of claiming a wages lien. First of all, it seems somewhat odd to apply a definition from the Maritime Transport Act 1994 (NZ) to the Admiralty Act 1973 (NZ), especially when the latter predated the former by two decades. However, section 4(1)(o) of the Admiralty Act 1973 (NZ) was subsequently amended so that it specifically refers to the ‘Maritime Act 1994’.76 Therefore, it can be safely said that the admiralty jurisdiction in rem for wages covers the entitlements that the Maritime Transport Act 1994 (NZ) makes available to ‘seafarers’ and ‘crew’ — as they are defined therein. But it is another thing entirely to say that the Admiralty courts are bound by the definitions of ‘seafarer’ and ‘crew’ in the Maritime Transport Act 1994 (NZ) for the purposes of the seaman’s lien for wages.

In the preceding discussion I have argued that a statutory alteration to in rem jurisdiction of a SROAIR should have the effect of enlarging the scope of the corresponding maritime lien, where there is one. There are two ‘heads’ of wages claims in section 4(1)(o) of the Admiralty Act 1973 (NZ): there are ‘wages’; and then there are ‘money or property’ that are ‘recoverable as wages’ under the Maritime Transport Act 1994 (NZ). The definitions of ‘crew’ and ‘seafarer’ in the Maritime Transport Act undoubtedly apply to the second category of money or property recoverable as wages. However, a closer analysis of the claims that are recoverable as wages under the Maritime Transport Act 1994 (NZ) will reveal that they have very little to do with the wages lien.

A seafarer can claim repatriation expenses from the employer or any agent of the employer under section 22(3) of the Maritime Transport Act 1994 (NZ). Therefore, the seafarer has the option of pursuing either the employer or the employer’s agent in personam for repatriation costs. But this provision does not extend the scope of the maritime lien for wages, because repatriation costs had always been awarded as part of the lien against the ship in rem.77

Section 23(1)(c) of the Maritime Transport Act 1994 (NZ) allows a seafarer to claim a minimum of two months’ wages upon the loss or foundering of the ship on which he or she worked. There can be no corresponding maritime lien for wages in such a case because all maritime liens would be destroyed along with the res.78

Section 28(1) of the Maritime Transport Act 1994 (NZ) states that ‘a member of the crew of a ship shall not by any agreement forfeit his or her lien on the ship’. This is simply a prohibitive provision. Section 28(1) does not allow a crew member, as defined in the Maritime Transport Act 1994 (NZ), to claim any wages under the Admiralty Act 1973 (NZ).

There are other problems with directly applying the Maritime Transport Act 1994 (NZ) definitions to the Admiralty Act 1973 (NZ) for the purpose of the wages lien. The definitions of ‘seafarer’ and ‘crew’ in the Maritime Transport Act are very broad in the sense that they cover both employees and contractors on ships. This raises a point of concern. In a classic decision setting out the distinction between employees and contractors, MacKenna J observed in Ready Mixed Concrete v Minister of Pensions that contractors are in charge of their own affairs and are more akin to small businessmen, whereas employees are servants who are subject to their master or employer’s control.79 It seems that the independent contractor is quite far removed from the weak and overreached seaman employee that the admiralty courts have deemed worthy of special protection. It is hard to imagine why independent contractors should have wages liens when they are deemed not

---

77 See Part 4.2.4 below.
78 See Part 4.7 below.
79 Ready Mixed Concrete v Minister of Pensions [1968] 1 All ER 433, 447.
even to be protected by regular land-based employment law. In The Northern Challenger, Williams J held that the actions of an independent contractor were not referable to the ship in the context of the damage lien. By analogy, it is logical to conclude that services provided by an independent contractor are not referable to the ship for the purpose of the wages lien.

It is true that the special protection offered to seamen was extended to masters via statute, but that alone is not sufficient to grant analogous protection to contractors. The master’s liens for wages and disbursements had no corresponding maritime liens at common law; they were created through the express language of section 29(1) and (2) of the Maritime Transport Act 1994 (NZ) (and its predecessors). If Parliament truly intended to broaden the scope of the wages lien to cover contractors, then it could have done so by enacting a provision expressly stating that ‘contractors shall have the same rights, liens and remedies as members of crew.’ Another possibility would be to insert a new definition of ‘seaman’ into the Admiralty Act 1973 (NZ) directly. Parliament did neither. It takes tremendously convoluted reasoning to define ‘crew’ in the Maritime Transport Act, relate the definition to one of two heads of jurisdiction for wages claims in rem through a reference to the Maritime Transport Act in the Admiralty Act, and expand the in rem jurisdiction to the wages lien.

Conversely, the Maritime Transport Act 1994 (NZ) definitions are in a way narrower than the common law definition of ‘seaman’. The exclusion of persons ‘temporarily employed on a ship while it is in port’ is contrary to the existing case law. In R v Judge of the City of London Court and Owners of the SS Michigan the plaintiff worked on the ship as a mate. Once the ship was docked and the terms of his article had expired, the plaintiff was paid off. However, under the direction of the owner, the plaintiff remained on board the ship and continued to work without signing a new agreement or article. The shipowner became bankrupt and the plaintiff sued the ship in rem for a wages lien over the period when the ship stayed in port. Wills J held:83

The right to proceed in rem for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a sea-going instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons in harbour just as much as to services rendered by them at sea.

The conclusion from the above discussion is that the Maritime Transport Act 1994 (NZ) definitions of ‘seafarer’ and ‘crew’ are of little assistance to the determination of who qualifies as a ‘seaman’ for the wages lien. It is submitted that the Maritime Transport Act definitions should be restricted to the second head of wages claims under section 4(1)(o) of the Admiralty Act 1973 (NZ). In the absence of clear legislative intent to the contrary, the definitions in the Maritime Transport Act 1994 (NZ) should not be applicable to the wages lien. The definition of ‘seaman’ should be left to the admiralty courts.

Overall, the courts have taken a liberal view of the definition of ‘seaman’. The position appears to be that, even when one is employed on a ship in a role that has nothing to do with navigational seafaring whatsoever, one can still qualify as a ‘seaman’. This is a logical conclusion, given that in many scenarios a voyage cannot succeed with crewmembers who are solely concerned with the navigation of the ship alone. Schoenbaum comments on the US position:84

The term seaman is intended to be broadly construed as including all marine workers whose work on a vessel on navigable waters contributes to the functioning of the vessel, to the accomplishment of its mission, or to its operation or welfare.

English case law reflects a similar approach. For example, medical practitioners who work on ships are no less worthy of a maritime lien than the crew in charge of the running of the vessel. Nor can the crew sail on empty stomachs.

In The Galaxias members of a Mexican band employed on the vessel were owed a quarter of a million Canadian dollars for their musical services. The Court held that the musicians were an ‘integral part’ of the cruise ship’s crew and that they were entitled to the wages lien just as the rest of the navigational crew were.

---

80 See eg Cunningham v TNT Express [1993] 1 ERNZ 695.
82 (1890) LR 25 QBD 339.
83 Ibid 342-343, emphasis added.
85 See eg The Prince George (1837) 3 Hag Adm 376; 166 ER 445.
86 See eg The Jane & Matilda (1823) 1 Hag Adm 187; 166 ER 67 where a cook was held to be a seaman.
87 [1989] 1 FC 386.
88 Ibid 415.
The Protection of Seafarers’ Wages in Admiralty

The other creditors then objected on the basis that over a substantial period of the band’s employment the ship was docked and ran as a floating hotel (flotel). The Court came to the conclusion that musicians engaged on a flotel do not lose their status as seamen, because if the contrary were true, the absurd conclusion would be that a shipowner can halt the wages liens of all crew members from attaching by transforming the ship into a flotel.89

One should be mindful of the attempts to unify maritime liens through international conventions: the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages 1926,90 the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages 1967,91 and the International Convention on Maritime Liens and Mortgages 1993.92 All three Conventions enlarge the coverage of the wages lien. Article 4(1)(i) of the 1967 Convention allows ‘the master, officers and other members of the vessel’s complement in respect of their employment on the vessel’ to claim the wages lien. This is also found in article 4(1)(a) of the 1993 Convention. Therefore the unmistakable message is that all personnel employed on vessels should enjoy the wages lien and that the lien is not restricted to ‘seamen’ in the narrow sense. The Conventions do, however, restrict the wages lien to employees, which is consistent with the discussion relating to contractors above.

Unfortunately, the Liens and Mortgages Conventions have been met with very little support from the international community. The ratification rates of the Conventions are depressingly low. The 1993 Convention did not have enough ratifications to come into force until a decade after it was created. This is probably due to the disagreement between States in relation to the recognition and priority ranking of non-traditional maritime liens, such as the US lien for necessaries. Therefore, it would not be accurate to regard the low ratification rates of the Conventions as an indication of international reluctance to enlarge the group of employees entitled the wages lien. To the contrary, the wages lien is widely recognised as a traditional maritime lien and the Conventions rank the wages lien first in priority.93 In light of this international trend, it is submitted that the definition of ‘seaman’, as it relates to the Common Law wages lien, should be read with the same breadth if possible.

4.2 What are ‘Wages’?

The definition of ‘wages’ determines the types of claims covered by the wages lien. As a starting point, the simple recovery of a contractual debt for regular wages is no doubt covered by the wages lien. The categorisation of other forms of money that a seaman can claim from the employer is much less straightforward. The wages lien, as the most sought after relief that the admiralty courts can offer seamen, has been stretched to cover many things that would very much surprise a person not familiar with maritime law. The consistency of the coverage, however, has been somewhat haphazard. Therefore, the different heads of claims under the wages lien will be explored below. The overall theme from the judgments is that courts will take a generous view of what constitutes ‘wages’. In *The Nonpareil* Dr Lushington was of the view that seafarers are ‘entitled to the benefit of the doubt’ where there is uncertainty as to the construction of a mariner’s contract.94 Following Dr Lushington, Worley CJ noted in *The Arosa Star*: ‘In doubtful cases, the Admiralty Court seems generally to have adopted a rather benevolent attitude to seamen’s claims when these have been contested by a mortgagee.’ Likewise, Brandon J remarked: ‘In the Admiralty jurisdiction the concept of a wage was always broadly interpreted.’95 The question that remains is just how closely the admiralty courts have adhered to this sweeping rhetoric about the definition of ‘wages’ in practice.

4.2.1 Damages for breach of contract

One of the earliest cases allowing a seaman to claim damages for breach of contract is also one of the most colourful ones. The plaintiff seamen in *The Justitia* were engaged in a voyage from London to Trinidad.96

---

89 Ibid 416.
93 See Part 7 below.
94 *The Nonpareil* (1864) Brown & Lush 355, 357; 167 ER 399, 400.
96 *The Justitia* (1887) LR 12 PD 145.
Somewhere along the way armed insurgents were brought on board the vessel and she was transformed into a battle cruiser. There was even a fight with an enemy gunboat at one point. The Judge held:

I am glad to have been informed that there are some old authorities in which the jurisdiction of this Court to give damages to seamen is recognised, for I am of the opinion that if seamen are subjected to wrongs of the kind here proved, they should have a remedy in this Court.

Yet it is unclear what exactly the damages were for in The Justitia. There was mention of bad food and ‘wrongs’ against the plaintiffs, which strikes one as markedly tortious. Since this case predates the advent of the tort of negligence, it is fair to assume that the learned Judge in The Justitia meant damages for breach of implied terms in the contract of employment (ie that the seamen should not be unwittingly taken into the midst of an armed conflict). The rationale behind The Justitia seems to be that damages, like wages, should be recoverable from the ship in rem so long as there is a factual connection between the damages claimed and the seafarer’s employment on the ship.

Does this mean that wages are equated with damages in Admiralty? The Canadian case of Fraser v North Shipping & Transportation indicates that they are not. Fraser is a peculiar case due to the fact that the crew tried to argue that their claim for wages and overtime pay should be characterised as ‘damages’ and not ‘wages’. They did this because they brought their claim in the Quebec Court of Queen’s Bench which had no jurisdiction over seamen’s claims for ‘wages’ worth over $250. The Court rejected the argument and held that the claim was for wages, not damages. This tends to suggest that wages and damages are not one in the same. The better view is that, in Admiralty, damages arising from employment at sea are a subset of wages. Therefore, in Fraser the claims for wages and overtime pay fit within the broader class of wages, but they were not part of the subset of damages.

4.2.2 Damages for wrongful dismissal

Damages for wrongful dismissal have long been recognised as being recoverable in actions in rem. However, Tetley suggests that the question of whether such damages attract the wages lien has been unclear. As the learned author points out, while damages for wrongful dismissal were awarded in rem in The Norsland, the Court specifically left open the question of whether such a claim would be covered as ‘wages’ for the purposes of a maritime lien. In The British Trade, the Court held that there should be a maritime lien for damages for wrongful dismissal—but only if it arises out of an ‘ordinary’ contract. As was discussed above, the distinction between ordinary and special contracts no longer exists. The suggestion in The British Trade is confusing because it was impossible to have an ordinary contract with a wrongful dismissal clause. The very existence of a wrongful dismissal clause in a contract would presumably have rendered it a special contract.

It is submitted that, despite the cases above, damages for wrongful dismissal are now clearly ‘wages’ protected by maritime liens. Dillon LJ held in The Tacoma City:

The judgment [in Parry v Cleaver [1970] AC 1] confirms that the lien for ‘wages’ covers damage[s] for wrongful dismissal as had been held earlier in The Blessing, (1878) 3 PD 35 and had been recognized in The Ferret, (1883) 8 App. Cas. 329. The basis of that is that, as shown in The Blessing, the damage[s] for wrongful dismissal are founded on the wages and other emoluments which the claimant would have earned on the ship, but for the wrongful act of the shipowner, or of the master on behalf of the owner.

Similar findings can be found in several other recent cases: Udovenko v Karelybfot AO, confirmed in The Rangiora; and in Le Chene. Therefore seafarers should be able to claim a lien and recover wages for the

---

97 Ibid 146.
98 Fraser v North Shipping & Transportation (1968) 69 DLR (2d) 596.
99 Canada Shipping Act RSC 1952, section 214.
100 The Elizabeth (1819) 2 Dods 403; 165 ER 1527.
103 The British Trade [1924] P 104.
104 See Part 3.2 above.
107 Mobil Oil New Zealand v The ship 'Rangiora' (No 2) [2000] 1 NZLR 82.
108 Canadian Imperial Bank of Commerce v The Owners and All other Interested Parties in the Ships Le Chene No 1, L’Orme No 1, Le Saule No 1 and WM Vacy Ash [2003] FC 873 [18] (TD).
contract’s notice period upon being wrongfully dismissed. Where there is no notice period specified in the contract, a reasonable period should be implied into the contract.109

4.2.3 Damages for non-payment of wages

There is still some doubt as to whether ‘wages’ includes damages for the non-payment of wages. While Young J found that a claim for ‘wages’ covers such damages in Udovenko v Karelrybflot AO,110 the Court of Appeal noted the fact that His Honour did so with reference to section 4(1)(o) of the Admiralty Act 1973 (NZ) and that: ‘He does not appear to have considered a common law claim as recognised by section 5(1).’111 Nevertheless, in light of the previous argument in favour of applying statutory expansions to the jurisdiction in rem to corresponding maritime liens, it would not matter if Young J only referred to section 4(1)(o). In Udovenko, there was a dispute regarding the accuracy of the logbook recording the working hours of the seamen. The plaintiffs had arrested the defendant’s ships in New Zealand and refused an offer to be repatriated. The Court of Appeal then held that because the employer had offered to pay the plaintiff seamen (in accordance with the hours recorded in the logbook) if they returned to Russia, it was not open to Young J to hold that they were entitled to damages for non-payment of wages.112 Since the plaintiffs were not entitled to damages in any event, the Court of Appeal found it unnecessary to reach a conclusion as to whether such a claim would have attracted a maritime lien. However, in obiter dicta, the Court of Appeal went on to characterise the claim as one for ‘special damages’ and that it was unsupported by any of the previous wages liens cases for general damages.113

At first glance, the approach of the Court of Appeal in Udovenko is perhaps not as benevolent to seafarers as some would believe that the Admiralty Courts ought to be. Yet given the circumstances, it is admittedly a fair and reasonable outcome. To refuse the employer’s offer to pay and repatriate them and then to seek damages for non-payment of the whole amount, the seafarers in Udovenko were probably pushing the definition of ‘non-payment’ too far. However, it is submitted that the obiter dicta restricting the scope of ‘wages’ was not strictly necessary and the Court of Appeal had gone some way to make things difficult for future claimants, who may actually be victims of non-payment.

The claimants in Udovenko simply were not entitled to damages because of the facts of the case; the obiter dicta that damages for non-payment do not qualify as wages should be disregarded. There is no policy reason for excluding damages for non payment; in fact, to do so fundamentally offends the principle of protecting seafarers in Admiralty. The Court of Appeal’s distinction between special and general damages is also inconsistent with the existing legal precedent. The most obvious example of special damages being awarded as part of the wages lien is the award of damages for wrongful dismissal.114 Wrongful dismissal awards are special damages because they are always easily quantifiable in the form of X days/weeks of regular pay in lieu of notice. Finally, as an interesting international comparison, seafarers are entitled to double pay if the employer fails to pay them without sufficient cause under US law.115 This suggests that the non-payment of the crew is an international problem in the shipping industry and maritime law should offer a reliable form of recompense to victims of non-payment through the wages lien.

4.2.4 Repatriation costs/viaticum

The recovery of repatriation costs had always been treated as part of the seamen’s lien for wages, but there is very little judicial reasoning as to why such costs should be regarded as wages.116 The World Star simply stated that repatriation of the crew is a ‘necessary ingredient in the process of selling the ship’.117 In MV Kingston v Creditcorp Ltd Bristowe J espoused the view that repatriation is the ‘last instalment of wages actually earned’.118 Yet the overwhelming impression is that repatriation is extremely difficult to label as ‘wages’; it is simply something that the courts have always awarded as a matter of practice. The real reason is simply that repatriating the crew is sensible. It stops the crew’s wages from accumulating and diminishing the value of the

109 Ibid [15].
111 Karelrybflot AO v Udovenko [2000] 2 NZLR 24 [21].
112 Ibid [68].
113 Ibid.
114 See Part 4.2.2 above.
vessel any further, especially when there are no worthwhile duties for the crew to perform on the arrested ship. It also saves the port state from having to provide ‘charity’ to the foreign seamen. Indeed, this concern could well have been the basis for the admiralty courts’ initial reluctance to entertain wages claims from foreign seafarers. In the beginning, the English admiralty courts created the sacred wages lien for the protection of English seamen. Only when this xenophobic attitude abated, did the wages lien become available to foreign seafarers. The inclusion of repatriation expenses as wages served two core purposes. Firstly, it helped maintain the Admiralty Court’s reputation as guardian of hapless seafarers — even if they happened to be foreigners. Sir William Scott held in *The Madonna D’Idra*:

The number of Greek vessels which arrive in this country is very small; and the mariners, from the peculiarity of their language and habits, if discharged in England, could not, without extreme difficulty, find an opportunity of returning to their own country.

The second reason can be found in the *The Constanzia*:

If viaticum be not paid, the crew become outcasts and the expenses of their maintenance would fall on this country.

Thus repatriation expenses were not included as wages solely because of the courts’ altruistic love for foreign seafarers. There was a practical need to return foreign claimants to their countries of origin to ensure that they would not become a burden on the forum state.

Some foreign seafarers seem to be well aware of their drain on the local economy and the value of the ship: they would refuse repatriation in order use it as a sort of bargaining chip for other aspects of their claims. The courts have generally been unmoved by such attempts. For example, the Court of Appeal observed in *Karelrybflot AO v Udovenko*:

It seems to us that [the crew] elected to remain in New Zealand, where they knew they could not enter into employment, instead of accepting repatriation (at no cost to them), after which they might well have been able to obtain alternative employment…

Following on from this observation, the Court of Appeal declined the claim for damages. The courts can hardly be faulted for such an approach. Each aspect of the wages lien claim must stand on its own merits and foreign claimants should not be allowed to hold the courts ransom by rejecting repatriation. If the courts are to give in to such pressures, it would lead to the unsatisfactory result of a fragmented wages lien where different standards apply to the claims of foreign and local seafarers.

It is clear that repatriating the crew is expedient for both the forum state and the ship’s other (lower ranking) creditors. As such, it is common for other creditors to pay to have the crew repatriated. These creditors (usually the bank mortgagees) will then find themselves having to argue that the seamen’s wages liens had somehow been transferred to them for the purposes of maintaining priority over the other creditors. The transferability of the wages lien will be considered later.

In a recent decision, Williams J found that a creditor against a defendant ship cannot force the crew to be repatriated solely on the basis that the security will be eroded by the presence of the crew. The repairmen in *The Aleksandr Ksenofontov* wanted the Court to sell the ship even though the shipowner had appeared to defend the ship unconditionally. The shipowner also decided to keep 18 crew members on the ship to maintain her seaworthiness. The repairers argued that the fact that the shipowner had not provided security in place of the ship indicated that the owner was impecunious. The defendant offered evidence that it was still paying the

---

120 *The Herzogin Marie* (1861) Lush 292, 293; 167 ER 126, 127.
121 *The Madonna D’Idra* (1811) 1 Dods 37, 40; 165 ER 1224, 1225.
122 (1866) 15 WR 183.
124 [2000] 2 NZLR 24 [66].
125 Ibid [68].
126 For a more extreme example of aggressive wage claimants, see *Metaxas v The Galaxias* [1989] 1 FC 386, where the Greek Seamen’s Pension Fund threatened that it would prevent the ship from being struck off the Greek ship register (thus interfering with the court’s power of sale) unless the Canadian court gave them a favourable judgment.
127 See Part 4.9 below.
129 Ibid [24].
crew and that they had cut down the workforce to a quarter of what it was before the repairers arrested the ship. Furthermore, the owner had a genuine reason for keeping crew members on the ship and that was so that the fishing vessel would be ready to fish when the squid season came. In these circumstances, Williams J held:130

There is no admissible evidence to the contrary and accordingly it must be taken that the value of the vessel is not being eroded by priority claims for crew wages.

Repatriation is not always a welcome remedy for seafarers. Where the crew is working with the owner’s consent, and there is no evidence that the owner is only keeping the crew on board to ‘erode’ the ship’s value for others, other creditors cannot force repatriation upon the crew. This is a beneficial approach for seafarers who want to stay on the ship and earn wages.

The Aleksandr Ksenofontov can be contrasted with the Australian case of The MV Turakina.131 The seamen in the latter case refused to leave the ship unless the Admiralty Marshal paid their post-arrest wages and repatriation costs. It is not entirely clear from the judgment why the seamen decided to pursue the sum from the Marshal rather than claim a wages lien against the ship. The Court hinted that a possible reason would be to get priority over other maritime lien claimants since the expenses of the Marshal rank ahead of all maritime liens.132 While there were no other maritime liens against the MV Turakina, the crew had no way of knowing this for certain. Another material benefit in pursuing the claim from the Marshal would be that with the state’s backing, the Marshal can never become insolvent, whereas the proceeds of sale from a ship can run dry.133 The Court did not allow the crew to claim their post-arrest wages as part of the Marshal’s expenses in the absence of any agreement between them and the Marshal to work on the vessel.134 However, the Court had the crew repatriated at the Marshal’s expense.135

Repatriation expenses, in my view, in the present circumstances, are an appropriate expense of the Marshal in relation to the arrest because it is in the interest of all parties concerned to minimise the payment of daily expenses pending a determination of the dispute and where appropriate the sale of the vessels.

This once again demonstrates the judicial resistance to seafarers’ attempts to make their success in claiming wages a condition precedent to their acceptance of repatriation. In The MV Turakina the crew were not performing any useful duties on the ship. That being the case, the conclusion is that a foreign crew, performing no worthwhile service to the ship upon arrest, can be repatriated in three ways: of their own volition to claim repatriation expenses as part of their wages lien; at the instigation of another creditor; or as an appropriate expense of the Admiralty Marshal or Registrar. Therefore, repatriation is a remedy that can be forced upon foreign seafarers against their will in certain situations. On the one hand, this seems to be a reasonable outcome because, even though the admiralty courts should protect seamen’s wages, they should only do so where they actually earn their wages. On the other hand, this line of argument loses much of its potency where some other party arrests the ship, which deprives the crew of their ability to earn wages through no doing of their own. One must recall that the crew members in The MV Turakina were not claiming a lien for their post-arrest wages. As will be discussed below, the arrest of the ship, whether by the crew or some other party, does not automatically terminate or frustrate the contracts of employment between the crew and the shipowner.136 The claimants in The MV Turakina could well have recovered their post-arrest wages through the lien because the act of arrest does not end the employment relationship with the shipowner.137 Instead, they pursued wages from the Marshal where no employment relationship existed. Why, then, did the Court hold that repatriation costs are an appropriate expense for the Marshal? It was not because the Marshal owed the crew any ‘wages’ of which repatriation costs were a part. The answer relates to the second purpose of awarding repatriation costs — it was simply to ensure that the foreign crew did not become a burden on the forum state.

---

130 Ibid [41]. The Court of Appeal dismissed the shipowner’s appeal but reinstated its notice of opposition to the sale of the ship in OOO DV Ryboprodukt v UAB Garant (CA) [2008] NZCA 136 [82]. The Court of Appeal judgment will probably not affect the question of whether the crew is deteriorating the ship’s value because Williams J had already determined that part of the notice of opposition in the shipowner’s favour.

131 Patrick Stevedores No 2 Pty Ltd v Ship MV Turakina (No 1) (1998) 84 FCR 493.

132 Ibid 499.

133 There was also an old practice in Admiralty for the Marshal/Registrar to pay the crew’s post-arrest wages as part their costs. But this practice had been out of use for over three decades by the time of The Turakina. See Part 4.7.2 below.


135 Ibid 504.

136 See Part 4.7 below.

137 See eg The Fairport (No 2) [1966] 2 Lloyd’s Rep 7.
In sum, seafarers in foreign ports can almost always claim repatriation under the wages lien. Failing that, the Marshal or Registrar will repatriate them at no cost to them. But this presumes that they manage to arrest the ship in the first place, which is sadly not always possible. This suggests that the wages lien alone cannot resolve the issue of abandonment. The International Transport Workers’ Federation commented on the issue of abandoned seafarers thus:

They suffer the indignity of relying on the charity of local people and welfare organisations. At home their families go hungry, and their children’s school fees remain unpaid.

Short of enlarging the scope of admiralty jurisdiction (both in rem and in personam), there really is not much more that the courts can do to aid abandoned seafarers; there must be some degree of dependency on the port state’s charity in the end.

The Repatriation of Seafarers Convention 1987 (RSC 1987) was an attempt by the International Labour Organisation (ILO) to address the issue of abandonment. The RSC 1987 imposes obligations on member states to repatriate abandoned seafarers. Article 4 of the RSC 1987 places the first duty of repatriation on the shipowner. Where the shipowner fails to provide viaticum, the duty to repatriate falls on the flag state (country where the ship is registered), the port state (country where the abandoned seafarers are) and the crew-supply state (the crew’s country of residence). Though the initial support for the RSC 1987 was weak, the Convention has experienced a recent wave of ratifications. Article 5(b) of the Convention permits states to recover their expenses from the shipowner through the flag state. Therefore, the economic burden of the Convention on a member state should be limited. It is, however, inevitable that a member state would have to bear the costs of repatriation at times (eg where the ship is destroyed and the shipowner is insolvent). Nevertheless, considering the recent international support for the Convention, it is submitted that perhaps New Zealand should consider ratifying the RSC 1987.

**4.2.5 Severance/redundancy compensation**

The UK courts have been unenthusiastic about including severance pay as ‘wages’. In *The Tacoma City* Ralph Gibson LJ affirmed the judgment of Sheen J below that severance pay is outside the concept of ‘wages’ and thus provide no basis for maritime liens.

*The Tacoma City* has been widely criticised. Jackson argues:

> However, it is with respect too general to classify ‘severance pay’ as such as outside a concept which includes damages for unfair dismissal and breach of contract claims. It may form part of the contract payments as a whole and, it is suggested, the critical element is the connection with a particular ship—to exclude this as such risks bringing back the requirement of ‘earned on board’.

Staniland points out that even though Ralph Gibson LJ enunciated a ‘fair and just’ test, he did not apply it to the facts before him. Instead, His Honour held that wages can only include consideration given in return for ‘current service’ to the ship. Pension and severance pay were categorised as consideration for ‘past service’ and held to be not recoverable as wages.

Bristowe J in *The MV Kingston* struggled to make sense of *The Tacoma City*. His Honour commented: ‘It is not so easy, however, to say convincingly why severance pay is different from repatriation expenses.’ Indeed,
neither repatriation nor severance pay can convincingly be said to be payment in return for ‘current service’. Bristowe J suggested that severance payments are different from repatriation expenses because the former are more like liquidated damages for breach of contract. However, as was seen in the preceding discussion, damages for breach of contract have long been recognised as ‘wages’ for the seamen’s lien. In the end it seems that Bristowe J just threw his hands up in submission and concluded:

\[\text{Whatever the reason, I am of the view, I repeat, that Sheen J was correct in holding that severance pay does not fall within the maritime lien for wages.}\]

In contrast with the position in the UK and South Africa, there have been clear judicial pronouncements in Canada and New Zealand that severance/redundancy pay should give rise to wages liens. In *The Rangiora* Fisher J held that ‘wages’ should include ‘any form of payment which had been promised in return for the seafarer's agreement to work on the ship...’ and that ‘[i]n principle, therefore, one would expect redundancy compensation to fall within the lien’. Fisher J dismissed the ratio from *The Tacoma City* as mere obiter dicta.

Snider J reached a similar conclusion in *Le Chene*. Snider J suggested that *The Tacoma City* ‘dealt with the nature of a contractual entitlement to severance payments and concluded that such payments were not, on those facts, ‘wages’’, and that, accordingly, the case should be confined to its own special facts.

It is submitted that there is no reason why severance pay should not be treated as ‘wages’. With respect to Ralph Gibson LJ, the ‘current service’ requirement in *The Tacoma City* is difficult to reconcile with the existing precedent on the definition of ‘wages’. Most of the forms of payment that are covered by the wages liens are not for current service. For example, damages for breach of contract are awarded for the past acts/omissions of the employer, not for the current service of the seaman. Repatriation is always awarded after the current service of the seafarer has ended. Fisher J is no doubt correct in holding:

\[\text{Basic wage claims themselves always relate to past service. Sick leave, wages in lieu of notice, and damages for wrongful dismissal, might well be described as substitutes for ‘current’ or ‘future’ service. But temporal distinctions of that sort have never been regarded as significant.}\]

The distinction between current and past service in *The Tacoma City* has no place in the definition of wages. If one is to take *The Tacoma City* at face value, it would have the absurd effect of overturning all the previous case law where courts have included payment for past service as wages. There was no mention of any such drastic intention in the judgment. Since the very foundation of *The Tacoma City* is problematic, it is submitted that the UK courts should reconsider the exclusion of severance pay as wages.

### 4.2.6 Union fees, deductions and contributions

Where there is a contractual term requiring an employer to make deductions from wages or to pay contributions towards a fund set up for the benefit of seamen, the courts have found little difficulty in classifying such payments as ‘wages’. Willmer J held in *The Gee-Whiz*:

\[\text{I accept the contention... that the arrears of insurance contributions are really, in effect, part of the man's wages, and that therefore he has the same maritime lien in respect of them as he has in respect of the rest of his wages.}\]

Likewise, in *The Arosa Kulm* contributions towards a national health insurance fund were held to be part of the seafarers’ wages.

It is also possible for the administrators of a fund to sue *in rem* on behalf of the seamen. The Greek Seamen’s Pension Fund (NAT) and the Pan Hellenic Seamen’s Federation (PNO) were allowed to sue directly for the
The Protection of Seafarers’ Wages in Admiralty

unpaid contributions as ‘wages’ in The Fairport. In this case, each crew member had signed an agreement allowing the employer to make deductions from their wages to pass on to NAT and PNO. They had also agreed to allow the bodies to institute legal proceedings against the employer either in their own name or together with the crew. Even where the contributions/deductions are made by the master (bypassing the employer completely) and paid straight to the union under quasi-compulsory Greek law, the master and seamen can nevertheless recover the amount from the employer as ‘wages’. The US case of The MV Resolute came to a completely different conclusion, which is surprising, considering the country’s reputation as an attractive forum for seafarers. Judge Reinhardt reached the startling finding that contributions are not ‘wages’ because they usually just accumulate in a fund and are not readily convertible to market value. The Judge also found that there is a ‘distinction between contributions that merely serve to fund benefits and the benefits themselves.’ This reasoning is problematic. As Rix J held in The Turiddu:

It does not seem to me to matter what a crew member seeks to do with his wage: he may intend to give it to his wife, his parents, his friends, or lose it in gambling, or spend it as he wishes.... But the claim remains one for his wages, unless the claim has already been paid, or he has put it out of his power to make the claim.

If a seaman wishes to contribute his wages into a fund and let it accumulate with no immediate quantifiable benefit to him, there is really no logical basis to disallow the seaman from claiming such unpaid contributions as part of his wages lien. As Force points out:

Demands for contributions to trust funds providing benefits increasingly serve as a substitute for wage demands in collective bargaining negotiations.

It is necessary to keep in mind that these contributions and benefits are offered during employment negotiations where the overall climate is the seamen demanding for better pay and conversely, employers seeking to keep crew costs low. If the seamen and their unions manage to bargain for such contributions and benefits as part of their pay package, it only makes sense to regard them as part of the seamen’s wages. Even though the benefits of such contributions may not be immediately calculable, such funds are undeniably set up for the good of seafarers. Given the rhetoric in admiralty law about protecting seafarers, it would lead to a strange sort of irony if the courts are to deny the recovery of contributions to funds that are designed to protect mariners.

4.2.7 Interest and costs

Costs and interest are unquestionably recoverable as part of the seamen’s wages lien. Gault J awarded costs to the seamen in Karelybiflot AO v Udobenko with their wages lien without discussion of the underlying reason for doing so. While Williams J found that there was a ‘surprising dearth of authority’ on the matter, His Honour held that interest and costs should be considered part of the seamen’s wages and enjoyed the same priority. Similarly, Chilwell J stated in The Otago: ‘I have no doubt that if interest is awarded it becomes part of the judgment in rem of the holder of the maritime lien.’ Once again, it would seem that interest and costs are difficult to conceptualise as part of a seaman’s wages for service to the ship. It is simply fair and practical for the courts to award them as ‘wages’ because the lien is the only legal method through which the courts can award interest and costs to successful claimants and maintain their high priority at the same time.

It is interesting to note that some countries have legislation specifically providing for the recovery of interest and costs in maritime claims. It would be desirable to add a similar provision to the Admiralty Act 1973 (NZ). Codifying costs and interest would not disturb the existing substantive law relating to maritime liens in any way.

162 Ibid 187.
164 West Winds Inc v The MV Resolute, 720 F2d 1097 (1983).
166 The MV Resolute, above n 164, 1098.
167 Ibid.
170 Karelybiflot AO v Udovenko [2000] 2 NZLR 24 [75].
173 See eg: the Admiralty Act 1988 (Cth) (Australia), sections 4(2)(d) and 4(3)(w); the Admiralty Jurisdiction Regulation Act 1983 (SA), sections 3(11)(d) and 11(10).
With clear statutory words for the award of interest and costs, the courts will be spared the trouble of engaging in strained reasoning as to why such sums should be called ‘wages’.

### 4.3 Foreign Wages Liens/Privileges

We have seen that the courts have allowed unions and bodies like the Greek Seamen’s Pension Fund to claim a traditional wages lien on behalf of the crew.\(^{174}\) However, where such bodies attempt to claim, not an orthodox seamen’s wages lien for the contributions, but that they themselves have a privilege under a foreign law that is analogous to a wages lien, the courts have been less enthusiastic.

In *The Acrux* the Court refused to recognise an Italian statutory body’s claim that they had a privileged action for seamen’s insurance contributions under Italian law:\(^{175}\)

No case has been quoted to show, much as I desire to do it, that I may enlarge the jurisdiction to benefit the foreign claimants when English claimants have no similar benefits conferred upon them.

*The Acrux* has the effect of treating all claimants who come to the forum the same, without regard for what rights they may be entitled under foreign law. In contrast, the Canadian courts have held that foreign privileges for seamen’s wages should be recognised. Rouleau J held in *The Galaxias* that foreign claims of this nature should be characterised with reference to the *lex causae*, which was Greek law.\(^ {176}\) The Greek Seamen’s Pension Fund (NAT) produced a Greek lawyer to testify to the Canadian Court that Greek statute gave them a privilege much like a maritime lien.\(^ {177}\) Furthermore, Rouleau J found that the NAT scheme was implemented to protect Greek seafarers working on ships flying flags of convenience, and that such a social goal was entirely consistent with Canadian public policy.\(^ {178}\)

The conflicting viewpoints of *The Galaxias* and *The Acrux* correspond with the two countries’ differing attitudes toward foreign privileged claims in general.\(^ {179}\) *The Galaxias* has since been enshrined in Canadian statute. Section 86(2) of the *Canada Shipping Act 2001* (Canada) provides:

> The master and each crew member of a vessel on whom a maritime lien against the vessel is conferred by a jurisdiction other than Canada in respect of employment on the vessel has a maritime lien against the vessel.

Australian statute allows for wages claims arising from the operation of law of a foreign country,\(^ {180}\) but these claims are expressly restricted to SROAIRs, so they cannot be claimed as part of the wages lien.\(^ {181}\) This reflects the country’s judicial stance in the sense that the Australian courts have generally cited the majority approach of *The Halcyon Isle* approvingly.\(^ {182}\) New Zealand statute has nothing to say on the matter, but it is widely recognised that *The Halcyon Isle’s* pure *lex fori* line of argument is applicable here.\(^ {183}\)

For shipowners, one of the main advantages of using flags of convenience (FOC) is that they require less ‘security contributions, pension benefits and other indirect wage elements’.\(^ {184}\) The statutory privileges enacted in large crew-supply states such as Greece were intended to protect seafarers from such practices. It would seem that the Canadian standpoint on the matter of foreign seamen’s privileges is much more agreeable with the Admiralty Court’s position as protector of seafarers.

---


\(^{176}\) *The Galaxias* [1989] 1 FC 386, 398.

\(^{177}\) Ibid 399.

\(^{178}\) Ibid 407.


\(^{182}\) See e.g: *Vostoshipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37; *ABC Shipbrokers v The ship 'Offi Gloria'* [1993] 3 NZLR 576 (HC); *Fournier v The ship 'Margaret Z'* [1999] 3 NZLR 111.


The Protection of Seafarers' Wages in Admiralty

Fisher J suggested in *The Margaret Z*:185

The *Halcyon* principle has the advantage of consistency in the priority treatment of all claims under the same system of law as well as pragmatic advantages in simplicity, speed and cost.

This suggestion seems to ignore the fact that both the Canadian courts and the minority in *The Halcyon Isle* agree that, the issue priority should indeed be determined by the *lex fori*.186 The majority decision in *The Halcyon Isle* conflates two separate questions: whether the nature of a foreign maritime lien should be recognised; and what priority should be assigned to the foreign claim. It is not difficult at all to characterise the nature of a claim in accordance with the *lex loci*. As was seen in *The Galaxias*, such foreign wages privileges are usually well-defined in the relevant country’s statute, and all it takes is for a foreign lawyer to translate the provisions.187 With modern technology, this can easily be done by video-link testimony. Therefore, the impact on simplicity, efficiency and cost of proceedings would be minimal if New Zealand is to depart from *The Halcyon Isle*. Of course, the *lex fori* would not provide a definitive answer to the priority ranking of a newly recognised foreign maritime lien. But the significance of separating the two questions is that, once the *nature* of the foreign right is established via the *lex loci*, one can simply rank the foreign right behind other rights of the same nature that are recognised by the *lex fori*.

Realistically, the majority decision of *The Halcyon Isle* is probably too well established in New Zealand for the courts to abandon it all of a sudden. At the very least, it is submitted that the *Admiralty Act 1973* (NZ) should be amended to recognise foreign wages privileges as part of the SROAIR for wages (explicitly excluding the wages lien), as the Australian statute does. As the current legislation stands, it would seem that foreign wages privileges are not enforceable in *rem* at all in New Zealand.

4.4 Creation of the Wages Lien — Contract or Operation of Law?

The exact manner in which the wages lien is created is somewhat of a mystery. Writers such as Chorley and Giles188 and Hodges and Hill189 say that the wages lien is a ‘contractual lien’ or that it arises *ex contractu*. This conceptualisation of the wages lien has some important consequences for the determination of priorities, as well as to situations where there are multiple contracts and service on several different ships by one claimant.

The other theory is that the wages lien attaches to the ship independently of any contract. The idea is that the service is to the ship and the ship will be liable in *rem* regardless of whether the seafarer claimants have signed any contracts. In other words, the wages lien arises automatically by operation of law, just like the damage lien.190 Davies and Dickey believe that all maritime liens ‘arise independently of the will of the owner, and also independently of the will of the ship’s master.’191 In a similar vein, Jackson traces the theory back to the removal of the phrase allowing seamen to recover wages ‘from the owner of any ship’ from the newer admiralty statues. The phrase last appeared in section 16 of the *Merchant Shipping Act 1844* (UK).192

The US courts have stated the matter much more boldly, probably because of the pure personification theory that holds sway in that country. In *The MT Oilbird* it was held that “the right to wages is founded on *service*, not on *articles*”.193 In *The Edward Peirce* Leibell J found two distinct grounds giving rise to a seaman’s claim for wages:194

1. the contractual relationship between the seaman and the operator of the vessel who hires him, whether the operator be the owner or a charterer, and
2. the personal indenture between the seaman and the vessel. Regardless of who the operator of the vessel may be, or on what terms, the personal indenture exists between the seaman and the vessel, and that would seem to be a basis for his right to libel the vessel herself...

---

190 See *The Bold Buccleugh* 13 ER 884.
194 *The Edward Peirce* 28 F Supp 637, 639 (1939) emphasis added.

(2008) 22 A&NZ Mar LJ
An example of the wages lien arising without the contractual liability of the owner is the case of *The Ever Success*. 205 In *The Ever Success* the company Azov (owner) sold the vessel to another company, Everfast. In anticipation of the transfer of ownership, the crew hired by Azov handed their duties over to a new crew engaged by Everfast. The Everfast crew only signed contracts of employment with Everfast. However, due to Everfast’s failure to pay the purchase price, the sale fell through and the transfer never took place. The Everfast crew then sued for wages liens over the vessel, which belonged to Azov at all material times. Azov argued that the new crew worked on the vessel without its consent and that it had no personal liability to pay their wages. Clarke J cited Thomas, who wrote: 196

Despite the judicial tendency on occasions to associate the wages lien loosely with the contract it is not the case that the maritime lien arises out of the contract. The lien is established by reference solely to the maritime law and its existence is not wholly dependent upon an express or implied contractual term.

Clarke J found that the only requirement is that the service must be ‘referable to the ship’. 197 The fact of the matter, however, is that seamen sometimes claim contractual entitlements as part of their wages lien. It is often the case that these entitlements are what have been traditionally called ‘special’ contract terms which are not easily deduced by solely looking at service that is referable to the ship. It is very difficult to divorce the wages lien from the contract of employment in practice. Courts always instinctively look to the contract when a seaman claims a wages lien, though if there is no contract or if certain terms are missing, the courts have nevertheless found that it is not fatal to the seaman’s claim. In *The Jean Joyce* it was noted that even though ‘the articles did not specify his wages... he would be entitled to a reasonable amount.’ 198 As has already been discussed, *R v The Judge of the City of London and the Owners of the SS Michigan* 199 decided that a deckhand who continues to work after the expiration of his article is nonetheless a ‘seaman’ and entitled to recover wages in the absence of any contractual foundation.

Jackson proposes that there is a way to make sense of the ambivalent treatment of the contract of employment in relation to the wages lien. The author accepts that the lien arises by operation of law independently of contract. 200

Nevertheless, the right to the wages is normally dependent on the contract of employment and in the context of the lien, the amount of wages for which it will lie will normally be quantified by the contract if connected with the service on a ship.

In other words, the lien coexists with the contract (where there is one), and the courts will not normally go behind the contract to evaluate the value of the service to the ship. Black CJ noted in the *Ionian Mariner*; ‘The seafarer’s contract of employment, although not the source of the lien itself, lies at the heart of the matter.’ 201

The notion that the wages lien arises independently of contract has appeared in admiralty cases since the dawn of the wages lien. In *The Minerva*, Lord Stowell commented that beyond the wage and voyage stipulations in the basic ship’s articles, all other mutual duties are ‘not created by contract, but are obligations created by the general law’. 202 The modern practice to place such mutual obligations in contracts should not change the non-contractual basis of the wages lien.

*The Edwin*, much like *The Ever Success*, involved a wages lien claim by a master who was hired by a person who had fraudulently acquired possession of the ship. 203 Dr Lushington stated: ‘independent of contract, the plaintiff acquired a lien upon the ship by the performance of the services.’ 204 In a similar vein, Sir John Nicholl was of the view that ‘[a]n agreement for wages may be made by word of mouth or in writing: the mariner incurs no forfeiture or penalty by not signing articles’. 205

The cases above indicate that, though not as forthright as the bold personification statements of the US courts, the English admiralty courts have consistently recognised the non-contractual nature of the wages lien. It is

---

198 *The Jean Joyce* [1941] 3 DLR 440, 443.
199 *R v The Judge of the City of London Court and the Owners of the SS Michigan* (1890) LR 25 QBD 339.
202 *The Minerva* (1825) 1 Hag 347, 354; 166 ER 123, 126.
205 *The Prince George* (1837) 3 Hagg 376, 378; 166 ER 445.
The Protection of Seafarers’ Wages in Admiralty

beyond contention that the wages lien can arise independently of contract. In a more recent decision, Fisher J cited these older authorities approvingly and stated that seamen: ‘have a lien for unpaid wages against the vessel whether or not their contract of employment had been entered into with the owners as distinct from other parties’.206

The judicial practice of casually relating the terms of the contract to the wages lien is undeniable, and as noted above, some writers choose to call the wages lien a ‘contractual lien’. This view is not really a theory at all — it is more of a misconception. There is no legal precedent for the position that the wages lien cannot exist without a legally enforceable contractual debt. Instead, the categorisation of the wages lien as a ‘contractual lien’ appears to be derived from cases dealing with the issue of priorities between competing maritime liens.207 This categorisation was used as a way to contrast the wages lien with the damage lien, because the latter was thought to be ex delicto and should therefore enjoy priority over the former.208 Yet, one must keep in mind that this categorisation was simply used for the proposition that the wages lien claimant usually has a contract to sue on, and therefore has a more convenient form of alternative redress in personam than the damage lien claimant. Thus, usually, the damage lien should rank ahead of the wages lien in priority. It would be a mistake to take this line of reasoning as definitive proof that the wages lien is a ‘contractual lien’, especially in light of all the cases that have affirmed that the wages lien can attach to the ship in the absence of any contract.

A further problem with relying so heavily on the contract is that in modern shipping seamen usually work under many contracts at a time, each giving them differing, sometimes conflicting rights. If the courts try too hard to find the one definitive contract that creates a nexus between the seaman and the ship for the purposes of calculating entitlements under the wages lien, the seaman may find that some of the benefits that he or she has under the other contracts may be completely overlooked. This issue will be addressed next.

4.5 Multiple Contracts and Service on Different Ships

The days of a seaman signing a single ship’s article for each individual voyage are long gone.209 Land-based employment law regimes usually stipulate that an employee must be party to only one employment agreement at a time; either an individual employment contract or a collective employment contract.210 Seafarers, in contrast, may find themselves employed under multiple co-existing contracts at any particular time, including individual employment contracts, collective agreements, International Transport Workers’ Federation (ITF) agreements, manning agency agreements, ship’s articles, company service agreements, and ship management company contracts. When they attempt to enforce a wages lien against a ship, seafarers will be faced with the unenviable task of convincing the court that their wages should be calculated with reference to certain terms that are mixed and matched from different contracts.

Fisher J was faced with two forms of contracts in The Rangiora.211 The claimants were employed under a collectively bargained company service agreement or ‘umbrella contract’. They were then engaged on specific ships through articles naming the ship on which they were to work. The redundancy payment clause at issue was contained in the umbrella contract. Fisher J observed:212

Ascertaining the precise relationship between those two types of agreement in a particular case may not be simple, given that the two can evidently coexist between the same parties.

In essence, Fisher J required that there be some sort of contractual link between the ‘wages’ claimed and the ship against which the lien will attach. His Honour held:213

It appears to follow that if the true source of the redundancy compensation is not a contract specific to the arrested ship (which necessarily includes a single-voyage agreement) but a company service agreement, the required link between redundancy and the arrested ship is lacking.

Fisher J also took issue with the fact that the redundancy clause was drafted to say ‘surplus to the needs of the employer’, as opposed to ‘surplus to the needs of the ship’.214 With respect to his Honour, the latter is not a

207 See eg The Veritas [1901] P 304, 313.
208 See Part 7.2.2 below.
210 See eg the Employment Relations Act 2000 (NZ), sections 62-65.
211 Mobil Oil New Zealand v The ship ‘Rangiora’ (No 2) [2000] 1 NZLR 82.
212 Ibid 93.
213 Ibid.
particularly natural phrase. Moreover, the phrase ‘surplus to the needs of the employer’ was clearly copied verbatim from the land-based employment law jurisprudence on redundancy dismissals and no special subliminal meaning should be attributed to the phrase in the context of employment at sea.215 Later on in the judgment, Fisher J considered that it could not have been the parties’ intention for the redundancy clause to take effect where the seafarer becomes surplus to the needs of Ship A, but the employer arranges for the seafarer to work on its other vessel, Ship B.216 In such a situation, the seafarer would be happy with the continuity of employment and would probably not be at all aggrieved at having been made redundant to the needs of Ship A. His Honour thought that this supports the view that the right to redundancy ‘stemmed from the company service agreement’, because it would be the failure of the employer itself that would trigger the redundancy clause.217 However, the hypothetical scenario that his Honour posited contradicts the aforementioned distinction between ‘surplus to the needs of the employer’ and ‘surplus to the needs of the ship.’ It makes no sense to use the phrase ‘surplus to the needs of the ship’ where there is a company service agreement and the employer owns/charters several vessels. In such a case, the seafarer can only ever be truly ‘redundant’ if he or she is surplus to the needs of the employer — so long as the employer has a need for the seafarer to work in any capacity, the seafarer cannot be considered ‘redundant’. Furthermore, his Honour does not suggest that this distinction is limited to redundancy clauses only. The logical extension of this finding would in effect mean that the wages lien will only cannot be considered ‘redundant’. Furthermore, his Honour does not suggest that this distinction is limited to redundancy clauses only. The logical extension of this finding would in effect mean that the wages lien will only attach to the ship if the contractual terms refer to the ship personified. So, for example, the contractual term ‘South Pacific Shipping Ltd the employer hereby promises to pay Jill the Sailor 14 dollars an hour for her seafaring services’ will not attract a wages lien. Instead, under Fisher J’s finding, the term must read ‘The ship ‘Rangiora’ hereby promises to pay Jill the Sailor 14 dollars an hour for her seafaring services’. Fisher J’s approach appears to be completely contrary to the admiralty courts’ declarations — let alone the general principle of contra proferentem — that ambiguities and uncertainties in seafarers’ contracts should be read in their favour.

In the Australian case of The Ionian Mariner218 there were even more contracts. Here the Court also refused to allow the seamen’s claim for wages in accordance with the terms of the more attractive contract, although for slightly different reasons. There was a collective agreement, an ITF ‘special’ agreement, a crew management company contract, and individual employment contracts. The crew sued for the more generous terms of the collective agreement as opposed to the crew management contract which only gave them ‘basic’ wages.219 The problem was that the seamen did not ratify the collective agreement itself; nor were they members of the union that bargain ed for the collective agreement. However, their individual agreements did state that they were to be employed under the terms of the collective agreement.

The Court referred to Ryan J’s finding at first instance that, because of the Admiralty Court’s general benevolence towards seafarers, the Court should recognise the obligations under the collective agreement as an operation of law, ‘notwithstanding that each seafarer might not be able to make out a cause of action at law or in equity by way of enforcing that obligation’.220

Black CJ rejected this view and overturned Ryan J. Black CJ thought that an obligation that ‘is not ... enforceable by the employees and is not derived from, or associated with, any contract of employment or any law relating to the relationship of employer and employee’,221 cannot be claimed as part of a wages lien. This finding is clearly inconsistent with the aforementioned cases of The Minerva and The Edwin, which held that there does not have to be any contractual relationship whatsoever for the wages lien to arise.

It appears that in both The Rangiora and The Ionian Mariner the courts became so caught up in the plethora of contracts that they neglected to address the underlying foundation for the creation of the wages lien. As has been seen already, the starting point is that the wages lien arises by operation of law. This is true of the salvage, damage and wages liens.222 Thomas comments on maritime liens in general:

A maritime lien arises solely by operation of law and independently of agreement inter partes. No maritime lien can be created by agreement which is not already recognised as a maritime lien under the maritime law. Moreover,

214 Ibid 98.
216 Mobil Oil New Zealand v The ship 'Rangiora' (No 2) [2000] 1 NZLR 82, 99-100.
217 Ibid.
219 Ibid 567.
220 Ibid 580.
221 Ibid 583.
222 See eg JP Morgan Chase Bank v Mysstras Maritime Corp [2005] FC 864 [70].

(2008) 22 A&NZ Mar LJ
to the extent that a recognised maritime lien is expressly provided for by agreement, the agreement itself is not the legal source of the maritime lien but only endorses that which exists at law and independently of the agreement.

While it is true that the calculation of the wages would often involve close inspection of the contract of employment, the absence of a contractual right to enforce the wages claimed has never been enough to exclude the wages lien. The difficulty faced by the courts in *The Rangiora* and *The Ionian Mariner* was that there were multiple contracts. The dilemma in *The Rangiora* was that the plaintiffs could not relate the contractual term sued for to any particular ship, because they worked on several different ships. In *The Ionian Mariner* it was the fact that the plaintiffs could not enforce the contractual terms sued for against any ship or person, because they were not privy to the collective agreement. Yet, if the underlying foundation of the wages lien is that it arises by operation of law and is triggered by the fact of service referable to a ship, no amount of contractual confusion or unenforceability can actually stop the lien from attaching to the ship.

If the courts are to take the position of seamen as favoured litigants seriously they should place less emphasis on contractual enforceability when dealing with the wages lien. It is common ground that in the shipping industry, seamen are usually the inferior bargaining party. It is conceded that it is possible to question whether this is still the case with the advent of workers’ unions and the ITF. For instance, the shipowner in *The Oriental Victory* argued that the ITF had forced it to sign the collective agreement under duress. Yet, the fact of the matter is that shipowners tend to be much more commercially savvy than their employees. The use of FOC registered ships and crew from developing countries show that shipowners know how to protect their commercial interests. In a recent article, the ITF estimates that around 45 per cent of the world fleet are registered under FOCs. FOC ships have no true nationality and they are almost always beyond the reach of the established seamen’s unions from traditional maritime nations. Christodoulou states in relation to crew from developing countries:

> [T]hey are less expensive than their colleagues from the developed world. The desire and need for work and the supply of work force in those countries will usually reduce the crew's bargaining power to negotiate and dictate terms and conditions protecting them from the risks they undertake, and their ability to inquire as to the financial status of the shipowner.

Following on from these observations, the admiralty courts should protect whatever terms that seafarers manage to negotiate during bargaining. The wages lien should cover such rights regardless of whether the contracts are enforceable against specific ships or whether they are directly enforceable at all by the seamen. The Canadian courts appear to have adopted this approach.

In *Le Chene*, under similar facts to *The Rangiora*, Snider J gave the plaintiff a wages lien for wrongful dismissal even though the clause was located in an umbrella contract which did not name any specific ship. His Honour held: ‘the right to a maritime lien is not contingent on the nature of the seaman's contractual arrangements.’ For the purposes of the wages lien claim, the only role played by the contractual term was to show firstly, that the term existed and secondly, for the calculation of the quantum of damages. Then there was, of course, the question of which ship(s) the wages lien was to attach to, because the plaintiff had worked on three different ships over the years. Snider J simply resolved the issue by attaching the entire lien to the vessel that the plaintiff would have worked on but for the wrongful dismissal, which happened to be the *Chene*. This method of determining attachment may be criticized as being somewhat unprincipled in that it disregards the fact that the wages claimed were not earned exclusively on the *Chene*. The wages liens, including the ‘wages’ for wrongful dismissal, automatically attached to each of the three ships by operation of law as the plaintiff worked on them, which entails that the plaintiff had three different wages liens against three different ships. It is problematic to

224 *The Oriental Victory* [1978] 1 CF 440, 446. The Court rejected the defence of duress because such negotiations are often entered into under considerable pressure with threats of strikes and lockouts from each side. It would not be proper to set aside such employment contracts on the ground of duress so easily.

225 See eg *Competitive advantages obtained by some shipowners as a result of non-observance of applicable international rules and standards* OCDE/GD(96)4 (1996) 11-12. The OECD estimated that shipowners could save around 13 to 15 per cent in annual costs in flying FOCs and engaging in substandard practices on their vessels.


230 Ibid 30.

231 Ibid 32.

combine all three of these liens and attach them all to the Chene simply because of the common ownership between the vessels. For instance, if the three ships were subject to claims from different creditors, then the creditors of the Chene would have to bear the effect of the plaintiff’s wages lien — for services rendered by the plaintiff to other ships, in which the creditors of the Chene had no interest whatsoever. Perhaps a better approach would have been to divide the portions of the wages lien with reference to the relative amount of services rendered to each ship. Notwithstanding this criticism of achieving fairness between creditors in a multi-ship wages lien scenario, it must be acknowledged that Snider J never lost sight of the overarching policy in Admiralty to protect seafarers.

The Oriental Victory provides useful comparison with The Ionian Mariner. In the former case, the shipowner signed individual agreements with the crew. Then under pressure from the ITF, it also signed a collective agreement with the ITF. The shipowner had a dual payment system in place where it would only pay the higher ITF contract wage when the ship was in a port with ITF presence. The plaintiff seamen were not even consulted about joining the ITF at the time, but they sought to sue for the difference in pay between the two contracts nonetheless. Walsh J held that the shipowner had voluntarily entered into the ITF contract, and since the terms of the contract were ‘for the benefit of the individual crew members,’ the crew could accordingly recover their wages in personam. Under this line of reasoning there is no doubt that Walsh J would have awarded the crew a wages lien if it had been an action in rem and the employer was either unable or unwilling to pay the higher wage.

Rix J was also faced with a complex web of contractual arrangements in The Turiddu. The Cuban seamen were engaged through Guincho (crewing agency) to work on ships owned by Pius (shipowner). Due to the internal regulation of the Cuban foreign exchange system, Cuban citizens were not allowed to hold US currency. Through a string of contracts, the crew were only to get 30 per cent of their pay from Pius directly. The other 70 per cent of the money was contractually owed to Guincho, who would in turn pass the money to Agemarca (a Cuban ‘employment company’ of sorts). Finally the money would be converted to pesos and given to the crew’s families (at a rather dubious exchange rate). The issue was whether the 70 per cent that was owed from Pius to Guincho were recoverable by the seamen as part of their wages liens. Rix J did not let the multiple contracts or the involvement of third parties get in the way of the wages lien. His Honour held that the money was for the crew’s service on board the ship and as such, they had a debt against the ship.

The Turiddu, Le Chene and The Oriental Victory decisions fit into the case law surrounding the wages lien seamlessly in that they confirm the long established rule that the wages lien does not depend on any contractual nexus between the seafarer and the ship, or the seafarer and the shipowner. These three cases also indicate that there is no international trend to restrain the wages lien in preference for a more contractually-focused approach in Admiralty. The wages lien is often called a lien ex contractu indiscriminately because the contracts of employment are no doubt important for the calculation of wages. The point to remember is that the wages lien arises automatically on service referable to the ship via the operation of law. The Rangiora and The Ionian Mariner make it too easy for well-advised shipowners to pull the wages lien out of the reach of seamen through the use of multi-layered contractual arrangements. As was noted in The Arosa Star, the courts must keep up-to-date with the changing conditions of seamen’s employment. Indeed, it is rather strange that the courts should place such heavy emphasis on contractual niceties when dealing with claims from a group of men who have historically been treated as ignorant and illiterate. While I am mindful of the famous ratio in L’Estrange v Graucob, I hasten to reiterate that the special treatment of seamen by the Admiralty Courts is not merely an unhappy historical artefact from the 19th Century. Fisher J himself remarked: ‘The desirability of protecting seafarers' emoluments through wages liens is as strong now as it ever was. In another recent decision Salmon J held: ‘There is obviously a disparity of power between them and the owners of the ship. It is appropriate to continue to adopt a benevolent and protective attitude.

234 Ibid 448.
236 Ibid 282.
238 Ibid 286.
240 The Juliana (1822) 2 Dods 501, 509; 165 ER 1560, 1562.
241 [1934] 2 KB 394.
243 The ANL Progress [20 Feb 2002] HC, Auckland, AD1/02 [28].
The Protection of Seafarers’ Wages in Admiralty

It is conceded that *The Rangiora* and *The Ionian Mariner* may be correct from the standpoint of pure contract law. But there is a significant gap between Fisher J’s benevolent remarks about protecting seafarers and the actual result of the decision. Furthermore, the formalistic requirement of a strict contractual nexus represents a steep regression in the established scope of the wages lien. It is difficult to come to terms with the discrepancy between the fraudulent/mistaken possession wages lien cases, and *The Rangiora* and *The Ionian Mariner*. In *The Edwin* and *The Ever Success* it was held that there need not be any enforceable contract for the wages lien to arise. *The Ionian Mariner* requires the crew to show that the wages claimed are derived or associated with some enforceable contract of employment. *The Rangiora* decision goes even further and requires the crew to show a special type of ship-specific contractual term. This retrograde development is not supported in policy, maritime law precedent or international trend and it is submitted that the New Zealand and Australian courts should re-evaluate their approach when the opportunity arises.

4.6 When does a Seaman Stop Earning Wages?

Seamen stand in a very different position from ordinary employees in that, if their place of work is closed down or in the case of ships, arrested, they cannot just go home. They will normally have to remain on board the ship even though they cannot necessarily perform their full services to the ship. Therefore the issue of whether the arrest of the ship stops the seamen from earning wages often becomes a point of contention.

4.6.1 Frustration

Sometimes it is argued that upon arrest of the ship by a third party (ie not by the seamen themselves), the contracts of employment between the seamen and the employer are frustrated. The New Zealand Court of Appeal has vehemently rejected this line of argument. The shipowner in *Karelrybflot AO v Udovenko* unsuccessfully argued that, because the ships were forfeited to the Crown for fisheries offences committed by the charterer, the contracts of employment with the crew were frustrated. Blanchard J, for the majority, accepted that the doctrine of frustration was applicable to contracts of employment. However, His Honour held:

> [I]n view of the nature of a contract of employment, the doctrine will not easily be able to be invoked by an employer because of the drastic effect which it would have on the rights of vulnerable employees...

This seems to be a paraphrase of the widely accepted principle that frustration will not be lightly invoked. But as will be addressed below, it appears that the Court of Appeal took the principle even further so as to make the doctrine of frustration almost impossible to invoke in relation to contracts of employment. It is not clear from the judgment whether this reluctance to invoke the doctrine of frustration applies to all employment contracts, ‘vulnerable employees’, or seafarers only.

The majority suggested that frustration only occurs when the contract becomes impossible or commercially impractical to perform. This is consistent with the classic authority for the doctrine of frustration, *Davis Contractors Ltd v Fareham Urban District Council*, where Lord Radcliffe held:

> [F]rustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

Thus the Court of Appeal ostensibly applied the doctrine of frustration in its regular form to the facts. But then Blanchard J added that the Court would have held that there was no frustration even had forfeiture came upon

---

246 Ibid [36].
247 Ibid [37].
249 *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 [39].
250 *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696.
251 Ibid 729.
Karelrybflot ‘like a bolt from the blue’  

This rather extreme declaration seems to be very generous to seamen employees — almost generous to a fault.

As Gault J argued in his dissent in Karelrybflot AO v Udovenko, the shipowner hired the crew to catch and process fish for the charterer. The charterer and the fishing quota were both gone through no fault of the shipowner or the crew. Blanchard J’s severe rejection of frustration under these circumstances is perplexing. Surely having to employ a fishing crew on a forfeited vessel with no fishing quota was something radically different from what the shipowner had contracted to do? Gault J also indicated that Young J below was in error in finding that frustration of the contracts would have disentitled the crew from being repatriated, in effect marooning them in New Zealand. His Honour (rightly) argued that the right to repatriation under the wages lien does not depend on an existing contract of employment. Robertson comments:

It is difficult to fault the reasoning of Gault J, save by reference to the general dissatisfaction current with the doctrine of frustration.

Yet, Blanchard J did not voice any such dissatisfaction with the doctrine of frustration, nor did his Honour purport to depart from the established law.

The Otago stands for the view that there can be no frustration where the event was brought upon by the shipowner itself. Since the Otago was arrested by the mortgagee due to the default of the shipowner on the mortgage, it was held that the crew’s employment agreements were not frustrated by the arrest. Thus the general proposition can be made that where the ship is arrested by a third party for the shipowner’s wrongdoing or default, there can be no frustration between the shipowner and the crew. Yet, in Karelrybflot AO v Udovenko the vessels were forfeited because of the charterer’s wrongdoing; the alleged frustrating event was not in any way self-induced by the shipowner. The majority was of the view that the shipowner had actual knowledge that the charterer was being investigated for fisheries offences at the time they engaged the plaintiff seamen. As such, it was inferred that the shipowner must have anticipated the possibility of forfeiture at the time the contracts with the crew were formed. This seems to suggest that there was no frustration because the shipowner took a commercial risk. There are several problems with this. Firstly, there is no authority for the proposition that one who takes a commercial risk cannot later rely on the doctrine of frustration. Secondly, it tends confuse the issue of self-induced frustration with the issue of taking commercial risks. Of course, there is always the risk that the charterer of a fishing vessel might commit fisheries offences leading to the forfeiture of vessel. But the act of entering into a charter-party alone should not amount to self-inducement on the part of the shipowner. Thirdly, it ignores the very crucial fact that the shipowner had tried its best to keep its struggling maritime venture afloat. At the time the seafarers were engaged, it would have been wholly impractical for the shipowner just to withdraw all personnel and abandon the ships, simply because the charterer was being investigated for fisheries offences. The majority also said that the fixed-term contracts would expire in five weeks in any event and that frustration would make little difference. But, as Gault J observed, the fixed term contracts should not be viewed as a premeditated exit-plan for the forfeiture of the vessels on the part of the shipowners. After all, the vessels were in fact forfeited before the fixed term contracts expired. One would imagine that, since the frustration of the contracts would only cause the crew to lose a few weeks’ wages, this would mitigate the very ‘drastic effect… on the rights of vulnerable employees’ that the majority mentioned.

The majority’s reluctance to find frustration, especially with regard to the ‘bolt from the blue’ comment, only makes sense if we are to assume that there is a different and much higher threshold for the frustration of seamen’s employment contracts. The protection of seafarers’ wages is a worthy goal, but there should be clear and convincing judicial reasoning for any departure from the established doctrine of frustration. The majority in Karelrybflot AO v Udovenko reached its conclusion without enunciating the necessary reasons. The Court

---

252 Karelrybflot AO v Udovenko [2000] 2 NZLR 24 [40].
253 Ibid [95].
254 Ibid [93].
255 Ibid.
256 Bernard Robertson ‘Case Commentary: Karelrybflot v Udovenko’ [2000] ELB 33, 34. Robertson describes a hypothetical scenario where casinos are outlawed (frustrating event), and the employees of a casino have no contractual right to redundancy payment. Robertson is of the view that it would be unfair to other creditors if a statutory award for redundancy payment is then made to the employees.
258 Ibid 744.
259 Karelrybflot AO v Udovenko [2000] 2 NZLR 24 [38].
260 Ibid.
261 Ibid [91].
262 Ibid [37].
The Protection of Seafarers’ Wages in Admiralty

significantly read down the doctrine of frustration while proclaiming to be merely applying it. As a result, the decision, and its benevolence to seafarers, is left open to criticism.

4.6.2 Repudiation

Sometimes it is argued that the non-payment of wages by the employer is an act of repudiation and that when seamen sue for unpaid wages they accept repudiation, terminating the employment relationship and disentitling them from earning any subsequent wages. *The Carolina* was the original case in which Sir Robert Phillimore held that the issue of writ *in rem* by seamen ended the employment relationship, which meant that they could not earn any wages post-arrest. As Tetley observes, the original rationale for this is that a ship under arrest cannot earn freight, therefore the seamen on the ship could not earn any wages either, pursuant to the old maxim of ‘freight is the mother of all wages’.

Cairns J cautiously overturned *The Carolina* in *The Fairport (No 2).* After *The Carolina*, the practice for almost a century was that the Registrar of the Court would pay the seamen’s post-arrest wages as part of their costs. Cairns J noted:

> [N]obody has been able to explain to me how any remuneration to which a seaman might become entitled to could properly be regarded as part of his costs of action.

It was held that the issue of writ by seamen for wages does not terminate the contract and that ‘wages continue to accrue after proceedings are commenced.’ As discussed above, the costs of the seaman are part of his lien for ‘wages’ anyway, therefore this distinction would prima facie make little difference in practice. However, Cairns J’s finding will be of significance in certain scenarios. For example, if the crew arrests the ship for wages, but for whatever reason, the ship is not judicially sold (eg if the owner provides alternative security, or if the crew’s action ultimately fails), under *The Carolina*, the seafarers would be left without jobs. *The Fairport (No 2)* has the added benefit of ensuring the seafarers post-arrest job security if the shipowner maintains ownership of the ship.

In *The ANL Progress* the owner took the unusual step of arresting its own ship and claiming that the seamen onboard were wrongly ‘in possession’ of her under sections 4(1)(a) and (b) of the *Admiralty Act 1973* (NZ). Pending their *in personam* action against the employer in Australia, the seamen refused to sign the necessary immigration papers to return home and remained on board the ship. The owner wanted the Court to declare that the seamen were entitled to a wages lien over the ship for their unpaid wages and repatriation, and that the lien should be discharged because the owner had posted sufficient security in the Australian Court to cover the claim. The reason the owner wanted to do this was to stop the crew’s wages from accumulating (though in light of *The Fairport (No 2)*, the enforcement of the wages lien would not have the effect of terminating employment in any event). Salmon J rejected the owner’s application, holding that the lien cannot be discharged for the simple reason that no lien had been claimed by the seamen. Therefore, it is clear that seafarers have the final say on when and where they want to exercise and enforce their wages lien. Shipowners cannot enforce the lien claim for the crew, effectively to remove them from the ship and to stop them from earning wages.

Does this mean that seamen are in essence permitted to stay on board and have a paid holiday at the expense of the ship/owner whenever they arrest the ship on which they work? This issue was raised in the cross-appeal by the master in *The Ionian Mariner*. Black CJ was of the view that ‘[t]he guiding principle seems to me to have been what was fair and reasonable between owner and crew in all of the circumstances.’ Therefore, seamen cannot just entrench themselves on board the ship and demand to be paid for the entire duration of the court

---

263 *The Carolina* (1857) 3 Asp Mar Law Cas 141.
266 Ibid 12.
267 Ibid 14.
268 See Part 4.2.7 above.
269 *The ANL Progress* [20 Feb 2002] HC, Auckland, AD1/02.
270 Ibid [26].
272 Ibid 592.
The Protection of Seafarers' Wages in Admiralty

proceedings. The crew can only stay for a ‘reasonable period’. 273 Furthermore, there must be some legitimate reason for the crew to remain on the ship and refuse repatriation. 274

4.7 Loss or Foundering of the Ship

This is perhaps the main weakness of all maritime liens. Staniland compares liens to molluscs that attach to each ship, 'but they do not swim from ship to ship.' 275 If the res is completely destroyed, then any liens that may have been attached to it will also be extinguished. 276 The Beldis provided that a lien can only be enforced against the property to which it attaches. 277

There have been statutory attempts to provide relief for seamen in such situations. Section 23(1)(c) of the Maritime Transport Act 1994 (NZ) makes the employer personally liable for paying the seaman’s wages either (i) until the seafarer finds other employment, or (ii) for 2 months after the loss or foundering. So, if the ship is destroyed, it no longer means that the crew will stop earning wages, it just means the end of their wages liens.

4.8 Contracting Out of the Lien

The law’s patronisation of seafarers is the most obvious in its regulation of the seaman’s ability to contract out of his or her wages lien. Most countries prohibit a seafarer by statute from contracting out of his or her right to the wages and salvage liens. 278 Cynics would regard this absolute legislative protection as evidence of the stereotypical seaman’s reckless and thoughtless character. The more charitable might argue that no such unflattering inference need be drawn when one considers the fact that the wages lien arises independently from any contract. It is possible to say that the legislative prohibition merely confirms that the wages lien attaches to the ship by operation of law, and no contract can prevent this from occurring. However, the statutory wording does not seem to support this view. The statutes do not say that attempts to contract out of the wages lien shall be ineffective for want of proper legal ground; instead, the statutes say that a seaman shall not ‘forfeit’, ‘abandon’ or ‘be deprived’ of the wages lien. Therefore, it appears that in the absence of such statutory prohibition, it would be possible for a seaman to forfeit his wages lien by agreement. Problems may arise if, for example, a New Zealand Court finds that the proper law of a seaman’s contract is that of a foreign jurisdiction, that foreign jurisdiction has no equivalent statutory prohibition against seamen contracting out of the wages lien, and the seaman does in fact forfeit his wages lien by contract. In such scenarios, despite the statutory insinuation to the contrary, it is submitted that the wages lien is inherently incapable of being contracted out of because it arises independently of contract. 279  It would harm the maritime lien’s reputation as a form of universal jurisdiction if national legislation is the only thing preventing seamen from contracting out of the lien. Such an approach would also be consistent with the rationale of the wages lien, in particular, the view that sometimes seafarers need protection from their own ‘ignorance and simplicity’ (or perhaps ‘desperation’ would be more politically correct in the modern context). 280

The question of whether the statutory prohibition extends to the master is debatable. In The Wilhelm Tell Gorell Barnes J thought that since the definition of 'seaman' in the Merchant Shipping Act 1854 (UK) specifically excluded masters, the statutory prohibition against contracting out of the wages and salvage liens, likewise, excluded masters. 281 Fisher J came to an entirely different conclusion. In The Jackson Bay it was held that section 100(1) of the Shipping and Seamen Act 1952 (NZ), which is now section 29(1) of the Maritime Transport Act 1994 (NZ), ‘equate[s] the position of a master with that of a seaman so far as unpaid wages are concerned’. 282 The Jackson Bay has been criticised because section 29(1) does not in fact equate the master with a seaman in absolute terms. Furthermore, the definition of ‘seaman’ in the Maritime Transport Act 1994 (NZ), as did Merchant Shipping Act 1854 (UK), excludes masters. 283 It is accepted that Fisher J probably went too far in suggesting that masters are to be equated with seamen for all matters concerning unpaid wages. But the

273 Ibid.
274 See UAB Grant v The Ship ‘Aleksandr Ksenofontov’ [21 Dec 2007] HC, Auckland, CIV-2006-404-4167 [40]. The shipowner’s appeal was dismissed in OOO DV Ryhroprodukt v UAB Garant (CA) [2008] NZCA 136, though the point was not explicitly considered by the Court of Appeal.
276 The wages lien will be enforceable ‘as long as a plank remains’: The Madonna D’Idra (1811) 1 Dods 37, 39; 165 ER 1224, 1225.
277 The Beldis [1936] P 51.
278 See eg: Merchant Shipping Act 1995 (UK), section 39(1); Maritime Transport Act 1994 (NZ), section 28(1).
280 The Minerva (1825) 1 Hag 347, 358; 166 ER 123, 127.
narrower ratio of The Jackson Bay can still stand on a more restrictive interpretation of section 29(1). The section provides:

The master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his or her wages as a member of the crew of the ship has under this Act or by any law or custom.

One can argue that the section 28(1) prohibition against contracting out of the liens (and, as suggested above, possibly the law or custom that a lien inherently cannot be contracted out of) is a collateral ‘right’ for seamen to recover their wages. Of course, it would be more natural to cast the section as a prohibition against employers rather than as a ‘right’ for seamen, for that is the section’s practical effect. But the words of section 28(1) suggest that the prohibition is more in the nature of a right for the benefit of seamen. Section 28(1) states that ‘[a] member of the crew of a ship’ shall not forfeit his or her lien. This tends to indicate that the provision is a right that safeguards the seaman’s remedy for the recovery of his or her wages. The principle of *generalia specialibus non derogant* should apply to give section 29(1) precedence over the general exclusion of masters from the definition of ‘seamen’ in section 2. As such, the section 28(1) ‘right’ should extend to masters by virtue of section 29(1) and there is good ground to depart from *The Wilhelm Tell*.

### 4.9 Transferability of the Lien

‘Transferability’ can be used loosely to refer to two different situations. The first type of transfer is a contractual agreement by a seaman to assign his wages lien claim to a person in return for whatever contractual consideration that is stipulated. The second type of transfer is subrogation which occurs when a third party pays off the seaman’s wages in full and that third party purports to be the holder of the lien. Tetley characterises subrogation as a type of fictional or notional assignment.284 Both contractual assignments and subrogation of wages liens have been widely rejected in Commonwealth jurisdictions.

*The MT Argun*285 is a recent South African case highlighting the plight of modern seamen and the obstacles they may be faced with when trying to recover their wages. In *The MT Argun*, the seafarers’ own lawyers had threatened them with criminal charges because of their inability to pay their legal fees.286 The seamen, who had difficulties communicating with their legal representatives due to language barriers, signed an agreement with their lawyers which purported to cede their wages liens in return for legal advice and representation.287 The defendant seized the opportunity and made the bizarre submission that since the wages lien is non-assignable, and the seamen tried to assign their liens to their lawyers, the *in rem* action was somehow destroyed. Foxcroft J made it clear that the crew members did not in fact intend to assign their liens, but confirmed that wages liens cannot be assigned in any event.288 His Honour observed that, unlike a subrogation scenario, in a contractual assignment situation the seaman does not even have to be completely paid off.289 This means that in essence, an attempt to assign a wages lien by contract without full consideration for all of the seaman’s wages is tantamount to the seaman contracting out of or being deprived of the wages lien — at least partially. As was discussed above, clauses depriving a seaman of his wages lien are specifically prohibited by statute. Therefore, assignment of the wages lien in exchange for anything less than the complete payment of all wages owed to the seaman will be null and void.

Even when the crew is completely paid off the courts have staunchly maintained that the wages lien cannot be assigned or subrogated without prior leave from the court. The charterer who paid off the crew in *The SS Aragon* was held to have no lien, even though the crew had signed a document accepting the payment in return for appointment of the charterer to ‘prosecute my claim against the Steamship Aragon for seamen’s wages owing to me’.290 Similarly, Hewson J held in *The Leoborg (No 2)*.

---

286 Therefore the common use of contingency legal fees in the USA may be a feature that makes it an attractive forum for seamen to pursue their wage claims.
287 *The MT Argun*, above n 285, 1112.
288 Ibid 1113.
289 Ibid 1117.
290 *The SS Aragon* [1943] 3 DLR 178, 180.
The Protection of Seafarers' Wages in Admiralty

...In my view the weight of authority is strongly against the doctrine that the man who has paid off the privileged claimant stands in the shoes of the privileged claimant and has his lien, whether it be regarded as applied to wages only.

The self-proclaimed assignees in The Leoborg (No 2) had paid the seamen’s wages voluntarily and the wages liens were extinguished when the seamen’s debts were satisfied. Subrogation and assignment of the wages lien have only been allowed where a party is directly ordered or permitted by the Court to pay the seamen.

The judicial motivation for this strict stance over the transferability of liens is unclear. On the face of it, there is no reason to believe that the courts are protecting seafarers if the party arguing for the assignment or subrogation of the lien has paid off all of the crew’s wages. Nevertheless, this judicial reluctance to allow for free transferability of the wages lien does offer an indirect form of protection to seamen. This is because, as we have seen above, the courts will generally not force repatriation upon seamen when a ship is arrested and there are genuine reasons for them to stay on board and keep earning wages. In contrast, third parties who pay off the crew’s wages are usually lower ranking creditors whose only interest is to shoo the seafarers off the ship to stop them from ‘eroding’ its value. Such lower ranking creditors are trying to protect their own commercial interests, and sometimes this may be at the expense of the seafarers. In disallowing the free transferability of wages liens, the courts effectively dispel any motivation for such lower ranking creditors to have the crew paid off and sent home. The prior consent of the court essentially acts as a balance between the commercial interests of other creditors and the protection of seafarers’ wages.

Tetley observes that the US courts have been much more liberal with its treatment of the assignments and advances of seamen’s wages liens. He goes on to suggest that perhaps the UK and Canada, too, should consider allowing lien assignments. Jackson also supports this view.

It is suggested that, insofar as the claim to which the lien is attached is assignable, policy is in favour of assignability of the lien on the basis that it is for the holder of the lien to decide how best to take advantage of it.

With respect to the learned authors, the US approach may not actually be as commercially expedient as it may appear at first glance. As Tetley notes, the person who pays the seamen is not automatically assigned the wages lien: for an advancement the payer must show that the debtor actually used the money for the purpose it was intended for (ie paying off the seafarers’ wages); and for an assignment the payer must show that it is ‘genuinely independent’ from the debtor (so as to ensure that debtor is not just paying the seamen under a different guise and securing a lien in the process). These requirements will not always be easy for the payer to prove. With the UK approach, the payer who obtains the court’s prior consent to pay off the crew is in effect guaranteed a transfer of the wages lien. There is no suggestion that it is particularly difficult to obtain the court’s consent for an assignment/subrogation. As was already noted above, the UK approach offers better protection to seamen in the sense that it provides a judicial check on the wage payer’s goal to protect its commercial interest in the value of the ship. Thus it is submitted that the prior consent of the court is a better safeguard for the seamen’s interests than allowing for free transferability of the wages lien.

5. The Statutory Right of Action In Rem (SROAIR)

Except for bottomry and respondentia (which are both now obsolete), all the recognised maritime liens have corresponding SROAIRs. The SROAIR for wages can be found in section 4(1)(o) of the Admiralty Jurisdiction Act 1973 (NZ). I have argued that the SROAIR provisions do not create fresh maritime liens where none existed before. The statutory alterations to admiralty jurisdiction in rem should affect the meaning of existing maritime

292 See also The Spurti [2000] 2 Lloyd’s LR 618, 620 where Waung J described the wages lien as a ‘personal right’.
294 An ‘advance’ in USA law is where a third party pays the debtor, who in turn pays the creditor.
296 Ibid 417.
299 Ibid 415.
300 The contractual assignment may be the preferable method because the assignment is more in the nature of a bilateral agreement between the wage payer and the seafarer, whereas subrogation is based on the unilateral action of the wage payer. Therefore, the court is more likely to grant permission to transfer the lien in the case of a contractual assignment. The wage payer can simply draft the contract of assignment so as to make the court’s approval a conditional precedent to the parties’ contractual obligations to pay the wages/assign the lien.
liens. I have also contended that section 4(1)(o) does not redefine the wages lien with the provisions of the **Maritime Transport Act 1994 (NZ)**. 301 The recurring theme from the discussion about the wages lien is that the courts have interpreted it quite widely. Therefore, it may not be immediately clear what section 4(1)(o) and the SROAIR for wages are directed at if the wages lien is usually the legal weapon of choice for seafarers. Yet, there are situations where the SROAIR may prove to be useful to seafarers. For example, the seamen’s wages liens sink with the ship if she founders or is otherwise inaccessible. Thus wages due from the employer under section 23(1)(c) of the **Maritime Transport Act 1994 (NZ)** can never be recovered in rem via the wages lien; they can only be enforced in rem against a sister or surrogate ship via the SROAIR for wages.

### 5.1 Application of the SROAIR for Wages

The SROAIR, unlike the maritime lien, does not attach to a ship automatically as an inchoate right upon the occurrence of the event giving rise to the cause of action. Instead it is a procedural right — a chose of action — against a res which only comes into being when the claimant commences an action against it. 302 The res in a SROAIR claim for wages need not necessarily be the ship on which the seaman earned his or her wages. In short, the first requirement for a SROAIR is that at the time the cause of action arose, the person who would be liable on one of the claims listed in section 4 of the **Admiralty Act 1973 (NZ)**, either chartered, owned, possessed, managed or controlled the ship. Section 5 of the **Admiralty Act 1973 (NZ)** states that the SROAIR can be brought either against ‘that ship’ or ‘any other ship’, provided the second requirement is satisfied: when the action is brought, the person who would be personally liable must be the beneficial owner or demise charterer of the ship against which the action is brought.

As far as actions in rem against the ship on which the seafarer earned his or her wages are concerned, the coverage of the wages lien and the SROAIR for wages should be almost identical. This is because of the statutory ‘canon of construction’ that changes to the SROAIR will directly affect the scope of the corresponding maritime lien, unless there are explicit words to the contrary. 303 There really is no conceivable reason why a statutory ‘canon of construction’ that changes to the SROAIR will directly affect the scope of the corresponding coverage of the wages lien and the SROAIR for wages should be almost identical. This is because of the main aspect in which the SROAIR has a broader coverage than the wages lien is its application to ‘any other ship’. Therefore this discussion will focus on the surrogate ship jurisdiction under section 5(2)(b)(ii).

### 5.2 ‘Sham’ Transactions and the In Personam Link

The in personam link requirement for SROAIRs can be thwarted by shipowners in two ways: by transferring ownership of the surrogate ship to another legal entity after the liability has arisen; or by utilising the one-ship company structure from the outset. These two methods are really one in the same in that they are both techniques to sever the tie between the legal person who would be liable and the potential surrogate ship. However, as Christodoulou notes, the timing of incorporation is often a crucial element for the determination of whether the one-ship company or the transfer is considered to be a genuine business arrangement or a sham. 305 If it is a sham, the courts will most likely pierce the corporate veil and find that the person who would be liable is also the beneficial owner of the ship, thus providing the necessary in personam link for a SROAIR claim.

Lord Donaldson found that there are legitimate reasons for running a fleet as a group of one-ship companies in *The Expo Agric*. 306 If the structure is adopted from the outset, then it is difficult to cast the whole enterprise as a ‘sham’. The separate legal personality of each corporation and the limited personal liability (or more accurately, the zero personal liability of a company’s shareholders as it relates to the company’s creditors) of its shareholders are the most important protections offered by incorporation. 307 It would be doing too much violence to this cornerstone of company law to treat all single-ship company structures as ‘shams’.

---

301 See Part 4.1 above.

302 See *The Monica S* [1968] P 741, 768. An action is ‘commenced’ upon the issue of the writ in rem, or, in modern parlance, the notice of proceeding in rem.


304 The only exception to this is in the case of forfeiture and release of the vessel, which would probably extinguish maritime liens but not SROAIRs. See Part 6 below.


307 See eg: *Salomon v Salomon* [1897] AC 22, 47-54; the *Companies Act 1993 (NZ)*, sections 15 and 97(1).
In contrast, where the shipowner adopts the single-ship company structure and transfers the ship(s) after the liability has arisen, the courts have been more ready to label such transfers as shams.\(^{308}\) Also, if the transfer is at an undervalue, the incentive to pierce the corporate veil will be stronger.\(^{309}\)

There, however, should be a word of caution about the consistency of this area of law. Under the outline above, one would expect that the sale in Karelrut v Wallace & Cooper Engineering to be a sham.\(^{310}\) The plaintiffs in Karelrut v Wallace & Cooper Engineering were repairers who sued for SROAIRs. The ships in question were owned by Karelyrbflot, but, due to fisheries offences committed by the charterer, the ships were seized and forfeited to the Crown. The ships were then released, not to Karelyrbflot, but to Karelrut who paid the redemption fee. Young J in the High Court was of the view that the transfer was an attempt to defraud creditors under section 60 of the Property Law Act 1952 (NZ) (PLA 1952), which made Karelrut the beneficial owner of the ships when the plaintiffs brought the action, thus completing the in personam link.\(^{311}\) The Court of Appeal overturned Young J. Blanchard J, delivering the Court of Appeal’s judgment, concluded:\(^{312}\)

For these reasons we are satisfied that even if even if, as Young J found, the agreement between Karelyrbflot and Karelrut was entered into to defraud creditors, on which we do not find it necessary to express a view, for the purposes of section 5(2)(b) it has not been established that at the time of the commencement of the proceedings Karelyrbflot was the beneficial owner of the vessels.

This conclusion is somewhat puzzling. Surely, it was necessary for the Court to express a view on whether the agreement between Karelyrbflot and Karelrut was entered into to defraud creditors, if the only reason that the plaintiffs could not establish Karelyrbflot’s beneficial ownership when the proceedings were commenced, was because of this agreement? After all, ‘sham’ and section 60 of the PLA 1952 would not even have been at issue if the plaintiffs could establish beneficial ownership to start with. In any event, the Court of Appeal’s reasons were that a section 60 PLA 1952 application only makes a transfer voidable, meaning that the transfer is effective up until the time when the application is made, or when the creditor makes an unambiguous act amounting to a manifestation of avoidance, whichever is earlier.\(^{313}\) The problem for the claimants was that they had no knowledge of the transfer until after they had commenced the action, which meant that it was impossible for them to point to some earlier act amounting to avoidance.\(^{314}\) Nor had they pleaded or made an application under section 60 in either the High Court or for the appeal.\(^{315}\) A criticism of this decision would be that it rewards shipowners for concealing underhanded transfers from creditors. In addition, as Myburgh points out, this case also highlighted the inadequacies of the forfeiture and release provisions in the Fisheries Act 1983 (NZ).\(^{316}\) Statutory amendments have since been introduced to address this problem with the fisheries legislation.\(^{317}\) But beyond the fisheries forfeiture and release scenario, this change to the Fisheries Act 1996 (NZ) does little to assist SROAIR claimants where a dubious transfer of ownership is discovered after the commencement of the action in rem.

In light of the Karelrut decision, SROAIR claimants would probably be better off ignoring section 60 of the PLA 1952, and arguing the ‘sham’ and ‘facade’ line of authority found in The Saudi Prince and The Tjaskemolen instead.\(^{318}\) The problem is that Blanchard J appeared to have had these cases in mind when his Honour decided Karelrut.\(^{319}\) However, it seems that under the new Property Law Act 2007 (NZ) (PLA 2007), it is now possible to depart from the Karelrut decision regarding alienation of property with intent to defraud creditors. Section 347(1)(a) of the PLA 2007 allows a creditor who claims to be prejudiced by a disposition of property to apply for an order under section 348, which empowers the court to set aside certain dispositions of property. Of particular interest is section 350(2)(b) which provides:

\[
350(2) \quad \text{A direction under this subsection must specify that the property vests in...} \quad \ldots
\]

---

308 See eg The Saudi Prince [1982] 2 Lloyd’s LR 255.
310 [2000] 1 NZLR 401
311 Ibid [67].
312 Ibid [78].
313 Ibid [74].
314 Ibid [67].
315 Ibid [71]. Young J appeared to have raised the point on his Honour’s own initiative.
319 Karelrut v Wallace and Cooper Engineering [2000] 1 NZLR 401 [74], where Blanchard J specifically refers to The Tjaskemolen.

(2008) 22 A&NZ Mar LJ 166
The Protection of Seafarers’ Wages in Admiralty

Although the statute does not specifically state ‘for the purpose only of enforcing an admiralty action in rem’, it is nevertheless wide enough to encompass such a purpose because of the words ‘or similar process’. The word ‘voidable’ has been left out of sections 348-350 of the PLA 2007. It is therefore submitted that the restrictive time requirements in Kareltrust can no longer apply. If a SROAIR claimant has been genuinely prejudiced by a disposition of property, by virtue of section 350(2)(b), that disposition should be set aside and ownership of the vessel should be vested back to the original owner for the purpose of enforcing the SROAIR against the ship. There is no need to demonstrate any prior application or manifestation of avoidance before the issuance of the writ in rem. This welcome legislative development makes it significantly harder for shipowners to shield their ships from SROAIRs through post-liability arrangements.

5.3 The Effect of The Indian Grace

In The Indian Grace, the House of Lords fundamentally challenged the long established principle that parallel actions in rem and in personam against the ship and the shipowner are not barred by the concept of res judicata. Lord Steyn, who delivered the only speech in the matter, limited the scope of enquiry to SROAIRs only; his Lordship specifically excluded maritime liens from consideration. Lord Steyn found that the personification principle has been outmoded by the procedural theory. As such, the fiction that a ship can be a defendant in legal proceedings ought to be discarded. The effect of this finding is that once an SROAIR is commenced, the shipowner automatically becomes a defendant to the in rem proceedings. Thus no separate in personam claim can be brought against the owner as it would be equivalent to suing the same defendant twice for the same cause of action.

The Indian Grace has been criticised in several jurisdictions. In New Zealand, Young J found the fact that Lord Steyn ignored maritime liens and several relevant SROAIR cases puzzling. The Singaporean courts have limited the effect of The Indian Grace to section 34 of the Civil Jurisdiction and Judgments Act 1982 (UK). The most forceful judicial rejection of The Indian Grace came from Australia in the case of Comandate Marine Corp v Pan Australia Shipping Pty Ltd (Pan Australia). The Federal Court of Australia found that maritime liens and SROAIRs give rise to the same kind of action in rem and that there was no reason for Lord Steyn to set aside maritime liens. It was also said in Comandate that Lord Steyn’s decision turns the pursuit of SROAIRs into a ‘dangerous lottery’ because it effectively makes the SROAIR the one and only chance for a claimant to recover his or her debt.

The implications of The Indian Grace are severe for seafarers who want to pursue SROAIRs for wages. SROAIRs do not enjoy high priority. This means that it is possible, if not likely, that a SROAIR wage claimant will fail to recover the whole debt from the ship alone. If Lord Steyn’s contention that a SROAIR against the ship is also an in personam action against the shipowner is correct, then no subsequent in personam action to recover the shortfall would be possible. The problem will be particularly acute for a SROAIR wages claim against a surrogate ship because the seafarer would in all likelihood have little or no information on the number and value of potential claims against the surrogate ship, due to the fact he or she would have never worked on the said ship. In this respect, The Indian Grace severely cripples the utility of SROAIR claims against surrogate ships — which as was noted above, is probably the most common scenario for a seafarer to pursue a SROAIR instead of a maritime lien.

A fully-fledged discussion of The Indian Grace falls beyond the scope of this paper. For present purposes, it suffices to say that some of the arguments in The Indian Grace are disputable. The international division of judicial opinions on this topic has also made the UK a very undesirable forum for SROAIR claims (Lord

---

321 The Dictator [1892] P 304.
323 Ibid 909.
324 Ibid 913.
325 Ibid.
326 Raaharu Moana Fisheries Ltd v The Ship ’Irima Zharkikh’ [2001] 2 NZLR 801, [90].
329 Ibid [115]-[116].
330 Ibid [118].
331 See Part 7 below.
The Protection of Seafarers’ Wages in Admiralty

Denning would be most dismayed at the decline of England’s shopping standard on the world stage). Lord Steyn’s judgment struck at the very theoretical core of the distinction between *in rem* and *in personam* actions in Admiralty. Therefore, it is not possible to devise some kind of exception to the ratio for seafarers who have not been able to recover their wages through a SROAIR. It is respectfully submitted that the House of Lords should re-examine *The Indian Grace* with reference to the cogent criticisms of the case by the Federal Court of Australia in the *Comandate* case. Meanwhile, seafarers will be well advised to refrain from pursuing SROAIRs for wages in the UK, unless they are utterly confident that the ship’s value can meet their claims.

6. **The Effect of the Fisheries Act 1996 (NZ)**

The purpose of the *Fisheries Act 1996* (NZ) is to regulate and maintain the sustainability of fisheries resources. The Act does so by giving fishery officers extensive powers to seize vessels that are believed on reasonable grounds to have been involved with fisheries offences. The seized property will be held by the Crown if it is not released by the fishery officer. The vessel will then be forfeited to the Crown unless it is released under sections 210-211 of the *Fisheries Act 1996* (NZ). Needless to say, the process of forfeiture can be extremely disruptive to seafarers who happen to be working on such vessels. The fisheries jurisdiction can profoundly affect the seafarers’ ability to earn future wages, as well as their existing rights *in rem* against the vessel.

Of course, if a seafarer wilfully commits fisheries offences leading to the forfeiture of the vessel, there is no reason for the law to protect his or her wages. The point to remember is that there are varying degrees of culpability for fisheries offences, even though the forfeiture provisions operate on a strict liability basis. Sometimes, the crew members may demonstrate a ‘striking degree of dishonesty, furtiveness, disloyalty and avarice’ in committing fisheries offences. In other cases, the crew may be completely blameless. It is not the aim of this discussion to advocate some kind of new culpability-based forfeiture provision in the fisheries legislation. Any such attempt would undoubtedly weaken the strong primacy that New Zealand places on the maintenance of its fisheries resources. However, it is the view of the author that there should be a robust and expedient process through which innocent seafarers (and other creditors, for that matter) can apply for relief from forfeiture in order to protect their wages claims *in rem*. This will help balance the conflict between the policy of the fisheries legislation and the goal of protecting seafarers’ wages in Admiralty.

In addition, it is worth noting that there are similar forfeiture provisions in the customs legislation. *Collector of Customs v Glavish* confirmed that ships acting as a mode of transport for prohibited imports can be forfeited under section 272 of the *Customs Act 1966* (NZ) (now section 225 of the *Customs and Excise Act 1996* (NZ)). However, the New Zealand Customs Service does not appear to have a habit of seeking the condemnation of ships, even though the statutory power to do so clearly exists. In *Collector of Customs v Glavish*, the Collector of Customs sought the forfeiture of a motorcycle with concealed firearms, rather than the forfeiture of the ship on which the motorcycle was carried. Despite the fact that Customs seldom seeks the forfeiture of ships in practice, the following discussion about the effect of forfeiture on seafarers’ wages in the fisheries context, where applicable, should be extended to the customs legislation.

6.1 **Does Forfeiture extinguish Maritime Liens and/or SROAIRS?**

It was held in *Equal Enterprise Ltd v Attorney-General* under the old *Fisheries Act 1983* (NZ) that upon forfeiture, the Crown takes the vessel free of all prior encumbrances. This seems to have remained the case under section 255E(1) of the *Fisheries Act 1996* (NZ):

> If any property, fish, aquatic life, seaweed, or quota is forfeited to the Crown under this Act, such property, fish, aquatic life, seaweed, or quota, despite section 168, vests in the Crown absolutely and free of all encumbrances.

---

332 *Fisheries Act 1996* (NZ), section 8.
333 Ibid section 207.
334 Ibid section 209.
336 See eg Ministry of Agriculture and Fisheries *v* Lee [7 March 1994] DC, Invercargill, CRN 2025004820, where the crew had unknowingly taken undersized oysters because the shipowner had equipped the vessel with culching rings that were the wrong size.
337 *Collector of Customs v Glavish* [1993] 3 NZLR 302, 304.
338 [1995] 3 NZLR 293.
SROAIRs have an important advantage over liens in this respect because they do not exist as an encumbrance upon the vessel until the issue of writ. As Blanchard J found in Karelybyflot, for an unexercised SROAIR, there is nothing to extinguish upon forfeiture.\(^{339}\)

The ability to proceed in rem thus piggybacks upon the proceeding in personam. It is a remedial procedure or enforcement right; it does not arise until invoked, and therefore when the forfeiture happened there was no proprietary interest to be extinguished by it, not even an inchoate right, such as exists immediately when circumstances have occurred giving rise to a seaman's maritime lien.

The inference from the above statement is that the seaman’s wages lien, which does exist in an inchoate form, can be extinguished upon forfeiture. Therefore, the position would appear to be that maritime liens are completely destroyed upon forfeiture, and they will not be revived, even after the forfeited vessel leaves the Crown’s ownership.\(^{340}\) Yet, Blanchard J stated in Karelybyflot v Udovenko, maritime liens ‘survives the process of forfeiture and release’ because they do not depend on possession or ownership.\(^{341}\)

There are two ways to rationalise this statement. The first way is that the lien is extinguished upon forfeiture, but it is ‘revived’ once the vessel is released. But the Court of Appeal provided no reason why this revival only occurs when forfeiture is followed by a release. Furthermore, in all other contexts, once a maritime lien is extinguished it cannot be resurrected.\(^{342}\) The other way to rationalise the statement is that the lien ‘survives’ forfeiture because the Crown takes the vessel subject to the lien, even though it cannot be enforced \textit{in rem} against the vessel so long as it remains forfeited to the Crown because of section 28 of the Crown Proceedings Act 1950 (NZ). As Myburgh notes, the problem with this argument is that it is inconsistent with the Equal Enterprise decision and runs counter to the policy of the fisheries provisions.\(^{343}\) Certainly, in light of section 255E(1) of the Fisheries Act 1996 (NZ), it is difficult to argue that the Crown takes the vessels subject to maritime liens.

The Court of Appeal dealt with SROAIRs slightly differently. As discussed above, if the SROAIR action is commenced after the Crown releases the vessel, then it can be brought provided that section 5(2)(b) of the Admiralty Act 1973 (NZ) is satisfied. The nature of the SROAIR differs from the maritime lien because it is a procedural chose in action against the ship, rather than a substantive proprietary right in the vessel created automatically through an operation of law. Therefore, it is not clear that section 255E(1) of the Fisheries Act 1996 (NZ) will interrupt or destroy a SROAIR in progress under the Admiralty Act 1973 (NZ). The Court of Appeal held in Karelybyflot that where a SROAIR is commenced before the vessel is forfeited, the Crown will take the vessel free of the statutory right, even though it can be enforced after the vessel is released (to the person who would be personally liable, that is).\(^{344}\) But, as Myburgh observes, unlike in Australia, there is no express statutory direction in New Zealand that gives the fisheries statute precedence over the admiralty statute.\(^{345}\) Ultimately, given the obiter of the Court of Appeal in Karelybyflot and the state of the law across the Tasman, it would seem that the Crown will indeed take vessels free from SROAIRs that have been commenced against the vessel before its forfeiture.

### 6.2 Relief from Forfeiture

The outcome from the Karelybyflot/Karelybyflot cases was that a seaman is effectively left with no \textit{in rem} interest in the event of forfeiture. The bold assertion that maritime liens can survive forfeiture and release is groundless, as it is inconsistent with the Equal Enterprise case and section 255E(1) of the Fisheries Act 1996 (NZ). Even though the SROAIR for wages can be resurrected in theory, the chances of the person who would be liable regaining beneficial ownership or demise chartering the forfeited vessel are extremely unlikely in practice.

The Fisheries (Foreign Fishing Crew) Amendment Act 2002 (NZ) was passed to address this problem. Section 3(1) of that amendment act redefined section 256 of the principal Fisheries Act, thus allowing certain claimants to apply for relief from forfeiture through the courts. ‘Interest’ in forfeit property is defined as:

\[
\text{S 256(1)(b) interest: in the case of a foreign vessel, a foreign owned New Zealand fishing vessel, or a foreign operated fish carrier [...]}\]

\(^{339}\) \textit{Karelybyflot v Wallace and Cooper Engineering} [2000] 1 NZLR 401 [63].
\(^{340}\) Paul Myburgh ‘Shipping Law’ [2001] NZLR 105, 123.
\(^{341}\) \textit{Karelybyflot AO v Udovenko} [2000] 2 NZLR 24 [2].
\(^{343}\) Paul Myburgh ‘Shipping Law’ [2001] NZLR 105, 121.
\(^{344}\) \textit{Karelybyflot v Wallace and Cooper Engineering} [2000] 1 NZLR 401 [61].
\(^{345}\) Paul Myburgh ‘Shipping Law’ [2001] NZLR 105, 118.
(ii) an interest, as determined by the Employment Relations Authority or any court, that any fishing crew have in unpaid wages;

(iii) an interest in costs incurred by a third party (other than the employer) to provide for the support and repatriation of foreign crew employed on the vessel.

It can be seen that Parliament truly took the ambit of the ‘Foreign Fishing Crew’ amendment Act to heart. It is indeed strange that only employees working on foreign vessels can qualify for relief while seamen working on New Zealand-registered vessels have no such ‘interest’ in the vessels on which they work.346 Perhaps the idea is that New Zealand-based employers will be easier to serve and have judgments enforced against them in personam and no relief from forfeiture is necessary for seamen working on New Zealand-registered ships. A conspicuous problem with this assumption is that it creates a bizarre distinction based on the nationality of registration alone. While New Zealand is by no means recognised internationally as a flag of convenience, it is nevertheless possible for foreign shipowners to register or demise charter their vessels onto the New Zealand Ship Register. It is difficult to imagine how seafarers can rely on in personam actions alone when the shipowner is not even in New Zealand. The Ship Registration Act 1992 (NZ) does little to help creditors pursue foreign shipowners.347 Therefore, it is contended that the definition of ‘interest’ in section 256(1)(b) should be amended to apply to all forfeited vessels, regardless of where they are registered.

The practicality of the new section 256 has been questioned, namely because subsection (1)(b)(ii) appears to envisage that the seaman has already obtained prior judgment before applying for relief.348 The very nature of employment at sea makes it difficult to commence legal proceedings. Furthermore, the request for relief must take place within 35 working days from the time of forfeiture under section 256(3). In essence this would require seamen to find legal representation, obtain judgment for their unpaid wages and apply for relief from forfeiture all within the span of little over a month. If this time requirement is to be read strictly, it could cause severe difficulties for seamen.

Even if the crew member manages to obtain judgment and file an application for relief from forfeiture in time, it seems that the provision of relief is not guaranteed. The court must consider the eleven factors listed in section 256(7). Under (8) relief from forfeiture will only be given if it is ‘necessary’ to avoid manifest injustice or to satisfy an interest as defined in subsection (1)(b)(ii)&(iii). The only relevant factor for seamen in section 256(7) is:

(f) The social and economic effects on the person who owned the property or quota, and on persons employed by that person, of nonrelease of the property or quota.

The response that seamen are likely to be met with is that it is never ‘necessary’ to give them relief from forfeiture if the foreign employer is still solvent. It is once again suggested that the courts should read this requirement liberally when deciding whether to grant relief. It should be kept in mind that the use of single-ship companies and crew from developing countries are effective and time-proven methods for shipping entrepreneurs to limit and evade their exposure to in personam liability. The courts should have due regard to the importance of in rem actions to unpaid seafarers when dealing with relief from forfeiture applications. Even though section 256(7)(f) is but one of eleven relevant factors for the courts to consider when deciding whether to grant relief or not, it is submitted that it should be a weighty factor where the crew is not responsible for the fisheries offence(s). Granting relief to wage claimants who are innocent of any offending would cause no affront to the policy of the fisheries legislation.

7. Priorities

In this final section I will examine the priorities of seamen’s claims for wages. A claim is only worth pursuing if the defendant can satisfy the judgment. Often the defendant’s liabilities will far exceed its liquidated value. Therefore, the ranking of the claims will be a crucial consideration for seafarers.

7.1 In Personam Priorities

347 Sections 12-13 of the Ship Registration Act 1992 (NZ) require that a shipowner lists its name, address and nationality.
The Protection of Seafarers’ Wages in Admiralty

A seaman who claims wages *in personam* against a natural person or a corporation will normally do so as a mere unsecured creditor. Therefore, seamen should only sue *in personam* if the defendant is solvent. Unfortunately, seafarers will often have little to no information on the employer’s financial status. The *Companies Act 1993* (NZ) offers limited protection for the employees of a corporation (preferential claimants) upon liquidation. Section 312 and Schedule 7 of the *Companies Act 1993* (NZ) require the liquidator to pay the wages of employees directly after the liquidator’s costs and the expenses incurred by the person who applied to put the company into liquidation. Payments to preferential claimants are capped off at $16,420 under clause 3.

It is also worth mentioning that Mareva injunctions or ‘freezing orders’ are purely *in personam* against the defendant and they do not in any way elevate an unsecured creditor to some sort of preferred creditor over the frozen assets.349

### 7.2 In Rem Priorities

Generally, priorities *in rem* rank as follows:350

- Paramount charges
- Costs and expenses of the High Court Registrar
- Costs and expenses of the producer of the fund
- Liens
- Prior possessory liens
- Maritime liens
- Subsequent possessory liens
- SROAIRS
  - Registered mortgages rank by the date of registration
  - Unregistered mortgaged rank by the date of creation
  - All other SROAIRs rank *pari passu*

#### 7.2.1 Ranking of maritime liens against other interests

As Jackson observes, the guide above is only a ‘strong prima facie framework’ based on precedents and the courts maintain an overall discretion to rank claims differently based on the equitable considerations of each individual case.351

For instance, in *The Eva* the master and the crew all had wages liens for their wages, subsistence expenses, and repatriation costs.352 However, the necessaries suppliers and repairers argued that their SROAIRs should rank before the master’s wages and disbursement liens because the master had personally given the orders for the repairs and he was personally liable to the SROAIR claimants. The master was also a part-owner of the vessel. Hill J found that this puts the master in a ‘very unfortunate position’.353 His Honour concluded that the master’s lien would rank behind the necessaries suppliers’ SROAIRs.354

Similarly, in *The Fairport*, the master who took the mortgagee for a cruise against his will had his lien deferred to the mortgage claim.355 This makes it plain that the equitable clean hands doctrine applies to the determination of priorities in Admiralty. Gorell Barnes J held in *The Veritas* that the damage lien ranks before the salvage lien, but His Honour went even further to suggest that the damage claimants would have ranked first ‘even if the damage in this case did not give rise to a maritime lien but only to a right to proceed in rem’.356

Therefore, having a maritime lien does not automatically entitle one to higher priority over SROAIR claimants. It was held in *Nicholson Marine Coatings Ltd v The Ship ‘Saint Giovanni’* that the ordinary order will be varied

---


352 *The Eva* (1921) 8 Lloyd’s Law Rep 315.

353 Ibid.

354 Ibid 316.

355 *The Fairport* (1885) LR 10 PD 13.

356 *The Veritas* [1901] P 304, 314.

(2008) 22 A&NZ Mar LJ 171
The Protection of Seafarers’ Wages in Admiralty

if ‘equity demands such a course to be taken’. However, there does not seem to be any recorded instance of seamen themselves being subject to these equitable demotions in priority; it is usually the master or some other lien claimant. It is nevertheless submitted that there must be circumstances where seafarers can be blameworthy enough to have their wages lien downgraded to rank behind SROAIRs. For example, if the crew causes a collision through their gross negligence, which leads to a significant decrease in the ship’s value.

7.2.2 Ranking of maritime liens inter se

The damage lien outranks the wages lien by default. The salvage lien tends to rank before the wages lien. At this point, seamen may be wondering why it is that their ‘sacred lien’ ranks last out of the three important maritime liens. The courts have advanced several recurring lines of arguments and each will be addressed below.

The ex delicto and ex contractu distinction has historically been a crucial element in the determination of the ranking of maritime liens inter se. It has been said that the damage lien should rank first because the damage lien claimant has no choice over its relationship with the defendant, whereas the salvage lien and wages lien claimants are voluntary contractual creditors. Steel J rightly pointed out a flaw with this distinction: ‘Once engaged the seaman has no option but to continue to volunteer his services.’ As was already argued above, it is confusing to simply label the wages lien as a contractual lien generally because there have been numerous instances of courts stating that the wages lien attaches to the ship in the absence of any binding employment contract. Therefore, it is contended that if there is no enforceable employment contract or if there is in fact no real choice for the seafarer’s rendering his or her services, then the ex delicto/contractu distinction should have little impact on the determination of priorities.

There is the view that the wages lien should rank behind the damage lien, because usually some member of the crew would have been responsible at least in part for the collision, and it would be unfair to prefer the crew’s wages lien over the damage claimant’s lien. This consideration obviously cannot apply if the wage claimants can show that they were in no way responsible for the collision. For instance, the wage claimants in The Ruta were employed after the collision. In The City of Windsor the master had dismissed the negligent engineer who was allegedly solely to blame for the collision. The rest of the crew continued with the voyage, earning freight and subsequent wages, and it was held that the subsequent wages lien ranked ahead of the damage lien.

The salvage lien ranks before prior damage liens and all wages liens because the salvors are regarded as ‘preservers of the res’. It has been argued that the salvors’ efforts give the opportunity for the crew to earn any subsequent wages on the ship. But, as should be obvious, this type of bare but-for causation is questionable. If that were the case, the shipbuilding contract would rank ahead of everything else because the ship builder is the ‘creator of the res’ and nothing would be possible but-for the shipbuilder building the ship! Hodges and Hill suggest that sometimes the crew can be regarded as the preservers of the res because they were the ones who sailed the ship into the port for the salvors to arrest to begin with. The authors go on to argue that the crew’s wages liens should rank ahead if seafarers have done something beyond the call of duty to preserve the ship for the other claimants. Therefore, it is possible for wages lien claimants to cast themselves as preservers of the res in order to improve their priority.

---

358 See eg The Chimera (1852) 11 LT 113.
359 See eg The Lyra (No 2) [1978] 2 Lloyd's Rep 30.
360 See eg The Veritas [1901] P 304.
361 Ibid 313, where it was suggested that the ex contractu lienors are in effect ‘part owners’ of the vessel.
364 The Elin (1883) LR 8 PD 129.
366 (1896) 5 Ex CR 223.
367 Ibid [15].
368 The Lyra (No 2) [1978] 2 Lloyd's Rep 30.
370 Ibid.
Traditionally, seamen were thought to have ample alternative forms of redress. The view was that it would cause them no hardship to rank the damage lien first. *The Duna*\(^{371}\) held that seamen have a threefold remedy because they can sue the ship, the owner and the master. The historical reason for recovering wages from the master seems to be that masters were usually part owners of the vessel.\(^{372}\) It was said in *The Salacia*:\(^{373}\)

It is an established rule, so ancient that I do not know its origin, that the seamen may recover their wages against the master...

This proposition can no longer stand because masters are hardly ever personally liable in modern shipping — they are usually employees just like the rest of the crew.\(^{374}\) The internationalisation of the shipping industry has also made it difficult to proceed *in personam* against the owner. Even where the owner can be sued, it will often be the case that it is a single-ship company, teetering towards insolvency. Thus the threefold security available to seamen in the time of *The Duna* is now but a distant memory: today, seafarers can often look only to the ship *in rem* for their wages. The fact that the court had no alternative remedy was recognised in *The Ruta*. This was probably the most potent reason for Steel J to rank the wages liens ahead of the damage lien.\(^{375}\)

Mention must be made of the fact that the wages lien ranks first under article 4(1)(a) of the International Convention on Maritime Liens and Mortgages 1993.\(^{376}\) The USA courts have also given the wages lien ‘super priority’.\(^{377}\) This indicates that the traditional English ranking of maritime liens is not universally accepted. It is not argued that the Common Law should always give first priority to the wages lien. The ranking of claims in admiralty should be flexible and based on equitable considerations. While it is often helpful to have a guideline of priorities to refer to, there is no definitive, or inherently ‘correct’ order. No one can convincingly say that the protection of seafarers’ wages is always more important than encouraging safe navigation at sea, or vice versa. It is submitted that the courts should not feel constrained by the default priority rules where there is sufficient ground to depart from the default rules. As Steel J observed, priorities in admiralty are not set in stone and they should be governed by the equity, public policy and commercial expediency of each case to arrive at a just result.\(^{378}\) It is hoped that the foregoing discussion has shown that at least some of the reasons in the older authorities for ranking the wages lien last will not always be applicable.

### 7.2.3 Ranking of wages liens *inter se*

*The Salacia*\(^{379}\) stood for the old view that the lien for the master’s wages and disbursements rank after the seamen’s wages lien because of the master’s personal liability for the crew’s wages. *The Salacia* was overturned in *The Royal Wells* where it was held: ‘Today a master is not personally liable to the crew for their wages. Accordingly, the whole foundation of the decision in *The Salacia* has been removed.’\(^{380}\) Therefore the master’s lien will rank equally with the crew’s liens, unless it can be shown that the master is a part-owner of the vessel or that he or she is in some way personally liable for the crew’s wages.

All of the wages liens in a ship will normally rank *part passu* among themselves.\(^{381}\) However, it is possible to argue for the application of the ‘inverse priority rule’ where there is some intervening event to render the subsequent wages as being separable from the earlier wages. Jackson suggests the scenario where the earning of wages is interrupted by an act of salvage, which is followed by the earning of subsequent wages. In such a case the subsequent wage claimants should rank ahead of the earlier wage claimants because they preserved the ship for the earlier claimants.\(^{382}\) Another example would be *The Ruta* where the pre-collision and post-collision crews were different. In such a case, the wages liens of the crew employed after the collision should rank ahead of those of the pre-collision crew. This approach allows for a measure of fairness between seafarers’ claims for wages and avoids the old judicial tendency to lump all seamen’s claims together.

---

371 (1861) 5 LT 217.
372 See eg *The Eva* (1921) 8 Lloyd’s Rep 315.
378 Ibid.
381 See eg *The Leoborg (No 2)* [1964] 1 Lloyd’s Rep 380.
The Protection of Seafarers’ Wages in Admiralty

It is not possible to dissect the wages lien and assign different priorities to different components of the wage package. In The Otago, it was held that the Court had no power to alter the priority of the interest part of the seaman’s wages lien. This is a sensible approach. If a form of payment is determined to be part of the seaman’s ‘wages’, then the entire wage package should enjoy the same ranking. Otherwise the courts would be inundated with arguments about the priority of each and every part of the wage package.

8. Conclusion

The wages lien is no doubt the seafarer’s most important legal remedy. The overall impression from all of the above discussion is that, throughout the history of the lien, the courts have largely been sympathetic to the seaman’s plight. The historical development of the wages lien demonstrates that there is a perpetual need to alter and refine the wages lien, because the shipping industry itself is constantly changing. When special contracts replaced ordinary contracts as the industry standard, the admiralty courts and Parliament responded by abolishing the distinction between the two types of contracts. Harsh restrictions on the application of the lien, such as the requirement that wages be ‘earned on board’, and the maxim ‘freight is the mother of all wages’, were also discarded. These developments were consistent with the admiralty courts’ rhetoric about the long-suffering seaman. The underlying rationale of protecting seafarers was always the driving force behind the direction of the wages lien’s evolution.

The wages lien itself is a simple, elegant and powerful solution to the seaman’s woes. Its minimalist definition allows it to cover just about any unpaid sum that a seaman would ever care to recover. The definitions of ‘seaman’ and ‘wages’ have been left to the admiralty courts, and the courts have read both terms quite widely. However, there has been extensive judicial disagreement across jurisdictions relating to the scope of ‘wages’, especially in relation to what have traditionally been ‘special’ contract claims.

Though damages arising from a seafarer’s employment have long been accepted as recoverable through the wages lien, the Court of Appeal in Karelybflo AO v Udovenko made the surprising suggestion that damages for non-payment do not attract the wages lien. The exclusion of severance pay in The Tacoma City, and the rejection of contributions in The MV Resolute are other examples of courts departing from the rationale of protecting seafarers in Admiralty. These cases indicate that, even though the legal coverage of the wages lien is theoretically wide enough to include most forms of payments owed to seafarers, there is nevertheless a degree of judicial reluctance to embrace novel claims as ‘wages’. Of course, there would be no reason for seafarers to complain if the courts provide convincing reasons for the exclusion of certain aspects of their pay from the wages lien. However, some of the reasons advanced by the courts have been rather questionable. The distinction between special and general damages in Karelybflo AO v Udovenko, for instance, is inconsistent with the established law, which has always allowed special damages as claims for wages. The requirement of payment for ‘current service’ in The Tacoma City ignores the fact that, even payment for regular wages would normally be for past service. It is not helpful to devise some new legal test, for the purpose of determining whether a novel claim should be regarded as a claim for wages, if the new legal test does not account for the plethora of other claims that have already been established as part of the wages lien. Provided that the inclusion of the claim is compatible with existing legal precedents, and if there are no opposing policy considerations outweighing the need to protect seafarers, there is no reason to exclude the claim on the basis of some new and arbitrary distinction. With the widespread increase in the use of contributions and benefits as substitutes for traditional wages, the admiralty courts should keep an open mind about expanding the wages lien to meet the demands of modern times.

The admiralty courts have strived to address the issue of abandonment of seafarers by readily awarding repatriations expenses as part of the wages lien. However, the lien and the in rem jurisdiction in Admiralty rely on the plaintiff’s ability to arrest the ship. In situations where the ship sails away before the abandoned seafarer can arrest her, the seafarer would be beyond the reach of the court’s benevolence.

The divergent international views in regard to the recognition of foreign privileges for wages will be difficult resolve. Attempts to unify maritime liens and mortgages through international conventions have been largely

384 See Part 4.2.3 above.
385 See Part 4.2.5 and 4.2.6 above.
386 See Part 4.2.4 above.
387 If the International Labour Organisation can gather enough support for its Repatriations of Seafarers Convention 1987, the problem of abandonment would be a thing of the past.
388 See Part 4.3 above.
The Protection of Seafarers’ Wages in Admiralty

unsatisfactory. The reality for the foreseeable future is that seamen from certain countries will have more statutory rights and privileges than seamen from other countries, under their respective national laws. It is stressed that these statutory wage privileges are instituted by crew-supply states to protect their workers as a countermeasure to the international trend of flying flags of convenience. It is not an adequate answer to say that, ‘all seafarers who come to the forum should be treated the same’, because the fact is, their rights are often not the same. The conflict of laws response to the recognition of these foreign rights and privileges should be informed by the ostensibly aim in Admiralty to watch over the welfare of seafarers. On a more general level, it is submitted that the majority decision in The Halcyon Isle is flawed because foreign rights in the nature of maritime liens, like actual maritime liens themselves, attach to the ship and travel with the ship wherever she goes. It is logical that if a foreign law creates a valid maritime lien, it cannot be ‘shaken off’ by moving the ship.\^389 The nature of such foreign privileges should be determined by the lex loci.

There has also been considerable confusion in relation to the situation of multiple contracts of employment. It is evident that the contractual arrangements between seafarers and their employers are now more complex than ever. However, the overwhelming weight of authority supports the view that the wages lien is not a ‘contractual’ lien.\^390 In this regard, the direction of the law in Australia and New Zealand is particularly alarming. In The Rangiora and The Ionian Mariner, the courts ignored the strong line of authority in Admiralty that the wages lien does not depend on a contractually enforceable debt.\^391 Instead of developing the wages lien to keep up with the changing practices of the shipping industry, the Australian and New Zealand courts have retreated to a strict contract law approach. This is perhaps the most astonishing combination of: disregard for the principle of protection; rejection of applicable Admiralty precedents; and bucking the international trend without sufficient cause. Yet again, the theoretical legal basis of the wages lien is broad enough to encompass contractually unenforceable claims by seafarers. But the Australian and New Zealand courts chose to introduce artificial barriers to stifle such claims. It is also disturbing that the Court can reach such a conclusion, while at the same time reciting the view that the desirability of protecting seafarers is ‘as strong now as it ever was’, like a mechanical mantra.\^392

In other areas of law, however, the admiralty courts have been overly generous to seafarers. The severe refusal by the Court of Appeal to find that the contracts of employment had been frustrated in Karevybyflot AO v Udovenko is extremely advantageous for seamen.\^393 But the Court of Appeal did little to address why it was necessary to read down the general doctrine of frustration in the context of employment at sea to such a grave extent. If the protection of seamen would lead to a conclusion that is deprived of all commercial sense, then one can argue that the rationale of protection is outweighed by competing policy reasons. Maritime law should be benevolent to seafarers, but there is no call for benevolence to turn into blind devotion.

The wages lien must remain practical and relevant to sustain its continued development. An overabundance of protection for seamen is likely to lead to a decline in the commercial efficacy of the shipping industry. Shipowners would also find it harder to obtain adequate financing if the growth of seafarers’ wage protection becomes too rampant. Therefore, the admiralty courts must maintain a suitable level of protection for seafarers at all times. In the end, it all comes down to a fine balance between policy, precedent and international uniformity.

Because of its blunt and simple constitution, the wages lien has its limitations. There are times when seamen must rely on SROAIRs to pursue their claims for wages against a surrogate ship. The core area of concern for seafarers claiming SROAIRs is the discrepancy in the application of the ‘sham’ transfer doctrine. Thankfully, the Property Law Act 2007 (NZ) seems to have rectified the problem. The effect of The Indian Grace decision must also be borne in mind for any seaman looking to sue for a SROAIR.\^394 In certain circumstances, the SROAIR for wages can be a viable and useful alternative to the wages lien.

It is desirable to reconcile the aim of deterrence in the fisheries legislation with the principle of protecting seamen. One must commend the legislative efforts to ease the adverse effect of forfeiture on foreign seafarers. The coverage of the relief from forfeiture, however, leaves much to be desired.

\^390 See Part 4.4 above.
\^391 See Part 4.5 above.
\^392 Mobil Oil New Zealand v The ship ‘Rangiora’ (No 2) [2000] 1 NZLR 82, 87.
\^393 See Part 4.7.1 above.
\^394 The Indian Endurance (No 2); Republic of India v India Steamship Co Ltd [1998] AC 878.

(2008) 22 A&NZ Mar LJ 175
In respect of the priorities of the seamen’s wage claims, it would appear that much of the traditional rationalisations for ranking the wages lien last out of the three main maritime liens can no longer be sustained. The equitable nature of admiralty priorities leaves the courts with adequate flexibility to tailor the claims’ rankings to the demands of each individual case.

As for seamen’s unenviable reputation as being collectively clueless and in need of protection, it seems that it has done nothing but good for them in the courtroom. The perception of the vulnerable seafarer forms the very basis of the rationale for having the wages lien, and throughout the years this ancient rationale manifested itself in a rich pool of legal precedents in favour of protecting seafarers. It was seen in cases like *The MV Turakina*\(^\text{395}\) and *Karelybflot AO v Udovenko*\(^\text{396}\) that the courts may experience a sense of trepidation about being so benevolent to seamen when they get too cunning or demanding for their own good. It is also apparent that even in this age of mass unionisation, shipowners can still engage weak and desperate seafarers from developing countries to work on their ships. The admiralty courts must remain vigilant and offer aid to these wards of Admiralty wherever possible.

\(\text{395}\) *The MV Turakina* (No 1) 84 FCR 493.

\(\text{396}\) *Karelybflot AO v Udovenko* [2000] 2 NZLR 24, especially on the issue of damages for non-payment of wages in part IV B 3 above.
MARINE INQUIRIES: BALANCING THE ‘NO-BLAME’ INVESTIGATION WITH THE REGULATORY INVESTIGATION TO ACHIEVE MARINE SAFETY OUTCOMES

John Kavanagh∗

In recent years a new style of incident investigation has emerged to challenge the continued relevance of the marine inquiry jurisdiction. Known colloquially as ‘no-blame safety investigation’, safety investigation agencies exercise an investigative response to serious marine incidents. Safety investigation is fundamentally concerned with finding the causes of the incident in order to prevent its recurrence, and the attribution of blame is expressly not one of its functions. By contrast, the marine inquiry jurisdiction requires a consideration of fault as well as causation, and sometimes results in criminal, civil and administrative liability consequences. The legal regimes associated with each style of maritime incident response are compared and contrasted and it is suggested that the marine inquiry regime, whilst it has presently fallen out of favour, has characteristics that offer greater utility and possibly superior marine safety outcomes than the safety investigation regime alone.

1. Introduction

Marine Inquiries† are a traditional response to serious marine incidents with a centuries-long heritage. A marine inquiry generally consists of a judicial-style of investigation into the circumstances of an incident, with a view to making findings of fact and attributing blame, often assisted by nautical experts or assessors. In times past, marine inquiries also had a disciplinary function, with the ability to cancel or suspend the certificates of mariners concerned.

In recent years a new style of incident investigation has emerged to challenge the continued relevance of the marine inquiry jurisdiction. Known colloquially as ‘no-blame safety investigation’, safety investigation agencies, such as the Australian Transport Safety Bureau, have been established to exercise an investigative response to serious marine incidents. The essential characteristics of no-blame safety investigation include the abrogation of the privilege against self-incrimination and the isolation of the evidence collected and the final report from any other use aside from safety purposes. Safety investigation is fundamentally concerned with finding the causes of the incident in order to prevent its recurrence, and the attribution of blame is expressly not one of its functions.

Notwithstanding the emergence of the no-blame safety investigation agency in a number of Australian jurisdictions, the marine inquiry continues to exist in marine safety legislation, at least at state level, and the marine inquiry remains an important element in the administration of marine safety in Australia.

∗ LLB (Hons), DAppSci (Nautical). John Kavanagh is a graduate of the Australian Maritime College, and served as a ship's officer in the Australian Merchant Navy for 9 years. John then studied law and has worked as a solicitor in both private practice and in Government. John's current role is Project Officer for the implementation of the Wunma Board of Inquiry recommendations. John's previous role was as Manager of the Compliance Unit within Maritime Safety Queensland (MSQ). In that role, he was responsible for the investigation of marine accidents, marine pollution from ships and other contraventions of Queensland's marine legislation. I am indebted to my colleagues, Dr Gerard Sammon (Crown Law Queensland) and Mr Warren Wilson (NSW Maritime), for their comments on an earlier version of this paper. All errors and omissions remain my own. The opinions expressed in this article are my own, and not that of Maritime Safety Queensland nor the Queensland Government.

† A short note on usage: a reference to a ‘board of inquiry’ means a board of inquiry established under part 12 of the Transport Operations (Marine Safety) Act 1994 (Qld); a reference to a ‘court of marine inquiry’ means a Court of Marine Inquiry established under the Navigation Act 1912 (Cth); whereas a reference to ‘marine inquiry(ies)’ is a reference to marine inquiries generally, not necessarily a particular inquiry established under a particular Act.
Part 12 of the *Transport Operations (Marine Safety) Act 1994* (Qld) (‘TOMSA’) provides for the establishment and conduct of boards of inquiry into marine incidents. Since the introduction of TOMSA in 1994, two boards of inquiry have been established to investigate marine incidents in Queensland. In each case, the terms of reference for the inquiry included consideration of systemic and regulatory issues, rather than simply focussing on the proximate causes of the marine incidents themselves.

Boards of inquiry are established by the Queensland Minister responsible for maritime safety and are tasked to inquire into the circumstances and probable causes of a marine incident and to give the Minister a written report of the Board's findings.

The conduct of boards of inquiry is contrasted with the establishment of 'no-blame' safety investigation agencies at Commonwealth level by the *Transport Safety Investigation Act 2003* (Cth) and State level in Australia in the maritime jurisdiction. To facilitate the discussion, no-blame safety investigation reports are compared to reports prepared by regulatory agencies using traditional investigative methods. The most recent board of inquiry into the marine incident concerning the ship Wunma is also considered, and in particular, how the board approached its consideration of systemic and regulatory issues.

It is argued that the powers and limitations created by the *Transport Safety Investigation Act 2003* (Cth) exceed what is necessary to achieve an appropriate safety outcome. Further, the powers and limitations created by the no-blame safety investigation regime unnecessarily interfere with the marine safety regulator's ability to perform their legislative responsibilities, such as by denying access to crucial evidence. Finally, the no-blame safety investigation regime can only report on substantially untested findings of fact and circumstances and make recommendations. Those whose role it is to support any action taken in relation to a recommendation because of the limitations imposed by the no-blame safety investigation regime.

These criticisms are considered in the context of three main themes: first, the tension between the dual objectives of an inquiry, that is, to investigate into the facts and circumstances of an incident to prevent its recurrence and also the possibility for the attribution of blame to participants in the incident where appropriate; second, the evolving use of nautical expertise to inform the inquiry by the use of assessors and expert investigators; and third, the development of the safety investigation agency and its attendant characteristics of no-blame attribution, confidentiality of evidence, and the removal of legal protections such as self-incrimination, procedural fairness and rights to representation.

### 2. Marine Inquiries

#### 2.1. What is a Marine Inquiry?

The starting point is a consideration of the common characteristics associated with marine inquiries. According to Ogilvie:

> Courts of marine inquiry occupy a unique place in the Australian legal system as do shipping courts in the British legal system, in that their jurisdiction over national ships and seamen is worldwide. They are administrative courts of a special character. They are a compromise between administration within the discretion of a government department unaccustomed to judicial procedures and an ordinary court of justice, which may not possess the special knowledge which is desirable for matters of nautical inquiry. They are entirely independent of the department for whose assistance they were created.

---


3 New South Wales has established a safety investigation body, The Office of Transport Safety Investigations (OTSI), which is responsible for, amongst other things, investigating incidents involving Passenger Ferries in NSW. The OTSI has similar powers and responsibilities to the ATSB, but a detailed examination of that agency lies outside the scope of this paper. For more, see [www.otsi.nsw.gov.au](http://www.otsi.nsw.gov.au). Victoria also has a no-blame safety investigator: see [http://www.transport.vic.gov.au/chiefinvestigator](http://www.transport.vic.gov.au/chiefinvestigator) accessed 4 July 2008.

White\(^5\) quotes with approval an extract from a 1929 English book entitled ‘Shipping Inquiries and Courts’\(^6\) as encapsulating the principal characteristics of a marine inquiry. Marine inquiries, it is said, are:

- administrative in character but whose decisions can have consequences for the private rights of individuals;\(^7\)
- effectively created by the relevant regulatory body (such as the Ministry for Transport in the United Kingdom or previously the Australian Maritime Safety Authority in Australia) or the relevant Minister or other appropriate authority;
- vested with a specific jurisdiction relating to the investigation of certain kinds of maritime casualty; often specific questions are asked of the inquiry by the establishing authority; in later years the jurisdiction of the inquiry may be described by ‘terms of reference’;\(^8\)
- the inquiry is assisted by the relevant government department representing the public interest and also as the holder of expert knowledge in relation to shipping and marine matters;
- the inquiry is usually constituted by a person or persons of legal training and so the proceedings of the inquiry are usually conducted in accordance with the usual legal formalities;
- such legally qualified persons are often assisted by assessors who have the skills appropriate to the subject matter of the inquiry;
- the inquiry makes a formal report of its decision, including reasons, together with such recommendations as are appropriate;
- at least originally, marine inquiries also had a disciplinary component, with the ability to suspend or cancel the certificates of masters, mates and engineers;\(^9\) and
- the inquiry is independent, impartial and entirely distinct from the government for whose assistance the inquiry was created.\(^10\)

A marine inquiry therefore is a specially constituted administrative 'court' or tribunal, created for a specific purpose; that is, to investigate the facts and circumstances of particular maritime incident; using a peculiar combination of legal and nautical expertise; in some cases able to take disciplinary action against the participants in the marine casualty; and to deliver a report on the incident to the government of the day.

The marine inquiry fills an important niche role in achieving marine safety whilst balancing the regulatory role; it is independent of the regulatory agency, enabling it to exercise its inquirial functions independent of any influence of government, whether perceived or actual; and it also allows an independent examination of culpability that is unaffected by the prevailing views of the regulator.

\(^6\) ARG McMillan Shipping Inquiries and Courts, Stevens and Sons Ltd London 1929.
\(^7\) In Marine Board; Ex parte Dalton (1876) 14 SCR (NSW) 277, Sir James Martin CJ said (at 281) that the NSW Marine Board ‘…has all the elements of a Court-the power of summoning parties and witnesses, and punishing them if they disobeyed the summons-of hearing evidence on oath administered, and of deciding questions which might deprive persons of civil rights.’
\(^9\) See for example Robbie v Director of Navigation (1944) 44 SR (NSW) 407.
2.2. Assessors

One distinctive feature of the marine inquiry worthy of additional comment is the use of the assessor as, in effect, a court-appointed expert. Assessors are generally persons with specific skill or knowledge within the area under consideration by the marine inquiry. The concept of a person with special nautical or technical skill is also relevant to a consideration of the investigators appointed under the safety investigation agencies that are considered later in this paper.

The use of assessors has a long tradition in the English Admiralty Court, dating back to the 14th century. The use of assessors survived the absorption of Courts of Admiralty by the common law courts in the 19th Century.

In Australia, the practice of using assessors in the Admiralty jurisdiction fell out of favour in the 20th century, although there are some 19th Century examples of Colonial Courts appointing assessors to assist in Admiralty matters.

Dickey describes the use of the Assessor as follows:

Assessors… are not called by the parties, are not sworn, and cannot be cross-examined. Indeed their advice is both sought by and given to the court in private and is disclosed to the parties at the court’s discretion and then usually at the end of the case in the judgment.

Further, the ordinary rule was “that expert evidence relating to matters of nautical skill within the competence of the marine assessors was not admitted”, except in extraordinary circumstances, such as where the assessors themselves felt they would benefit from hearing that evidence.

The usual justification for the use of an assessor is that the assessor possesses special nautical skill that the judicial officer does not possess, in order to allow the judicial officer to properly interpret the evidence and form legal judgments. Expressed differently, ‘to provide the judge with such general information as will enable him to take judicial notice of facts which are notorious to those experienced in seamanship’.

There are some persuasive efficiency arguments associated with using assessors, permitting the judge to have “the advantage of experts who sat with the judge and heard all of the evidence”. Further, the advantage of using such well-informed persons:

... is that the court can obtain such assistance as it needs on nautical matters without the necessity of hearing long and conflicting and often unpersuasive opinion evidence on such matters. Moreover, the court can obtain such assistance from assessors right up to the time when judgment is pronounced.

But the use of assessors has not been without controversy, with suggestions that the judicial decision-makers were perhaps abdicating their responsibility, and instead relying upon the opinion of the assessor. The tension inherent between the two roles is encapsulated in the judgment of the Master of the Rolls, Sir Baliol Brett in *The Beryl*:

---

17 *Egmont Towing & Sorting Ltd v The Ship Telendos* (1982) 43 NR 147, 165 (Thurlow CJ), leave to appeal dismissed by S Ct, id, 446.
19 *Egmont Towing & Sorting Ltd v The Ship Telendos* (1982) 43 NR 147, 165 (Thurlow CJ), leave to appeal dismissed by S Ct, id, 446.
In the Court of Admiralty the application of the rules is to be made by a mixed tribunal. The tribunal which has to try the case is the judge himself, and the judgment is his and his alone. The assessors who assist the judge take no part in the judgment whatever; they are not responsible for it, and have nothing to do with it. They are there for the purpose of assisting the judge by answering any question, as to the facts which arise, of nautical skill…

Still, it would be impertinent in a judge not to consider as almost binding upon him the opinion of the nautical gentlemen who, having ten times his own skill, are called in to assist him.20

Assessors tread the fine line between advising the judicial officer appropriately in their area of special skill without venturing into opinions on the merits of the case; and equally, for the judicial officer to differentiate the assessor’s opinion on technical matters from the ultimate legal issue.

Further, as what passed between the assessor and the judicial officer was not known to the parties in a case in Admiralty or to the participants in a marine inquiry, questions of procedural fairness arise. Thus, as Lord Justice Scrutton said in *The Tovarisch*:

>The judge in Admiralty talks to them [assessors] and gets information from them. The parties do not know what the witnesses are telling the judge; they have no opportunity of cross-examining the so-called witnesses.21

White describes this wryly as ‘a slight bending of one of the rules of natural justice but was the English system which had stood the test of time and was kept on in Australia’.22 One could well understand the concern of some parties and their legal advisers about a system that allows specialist advice to be given to a judge without the opportunity of testing such advice in open court. As the learned authors of the Australian Law Reform Commission Report into Admiralty Jurisdiction comment *‘It [cross examination] may be the only way of bringing out the fact that an assessor, while not partisan, belongs to a particular school of thought on a subject in issue’*.23

Fully cognisant of such disadvantages, Mr Justice Neasey, a member of the Commonwealth Court of Marine Inquiry into the *Lake Illawarra* collision,24 who had the benefit of four assessors sitting with the Court,25 queried whether the ordinary English rule concerning the non-admission of expert evidence relating to matters of nautical skill within the competence of the marine assessors was appropriate. He also inquired whether the marine assessors were to advise the Court privately or in open Court, and what course the Court should take if independent expert evidence conflicted with advice from assessors.26

After hearing submissions on these questions, the Court allowed the admission of expert evidence without restriction, even on areas within the competence of the assessors. Ogilvie concludes that the approach adopted by the court was preferable to the English practice of not allowing such expert evidence, principally on the basis that the parties should have the opportunity to call all relevant testimony on the issues before the Court, and it is for the Court to decide whether to accept the opinions of the experts or not, whether in consultation with the assessors or independently of them.27

---

24 Constituted by the Governor-General on 16 January 1975 under Part IX of the *Navigation Act 1912* (Cth) (ss355A-377A) and the *Navigation (Courts of Marine Inquiry) Regulations* (Cth).
25 2 master mariners and 2 marine engineers.
26 AG Ogilvie ‘Courts of Marine Inquiry in Australia’ (1979) 53 Australian Law Journal 129 at 137
27 Ibid.
But with respect to the learned author, that position seems to be the worst of both worlds. That is, allowing expert evidence to be admitted on the areas of expertise of the nautical assessors, together with cross-examination, would inevitably extend the sittings of the inquiry, and therefore increase costs. But the use that was made of the expert evidence by the assessors, and the advice that the assessors gave to the court, was still concealed from the parties (until perhaps the final report was handed down) and was not tested by cross-examination. In other words, the efficiency and cost advantages associated with using nautical assessors had been lost without completely addressing the procedural fairness issues associated with undisclosed advice being given to the judicial decision-maker.

Having said that, the procedural fairness issues can largely be overcome if assessors have the opportunity to put questions to witnesses directly during the hearings. By asking questions, and permitting parties to cross-examine or re-examine on issues disclosed by such questioning, there should be no surprises in the final report.

It is submitted that the advantages associated with the use of assessors in marine inquiries, in terms of cost, time and availability of technical expertise to the inquiry on an ongoing basis, are very persuasive in the context of an administrative tribunal such as a marine inquiry, where the public interest is an important factor and it is desirable to conduct the inquiry and publish the findings in an expeditious manner as possible.

However, such advantages are much less persuasive in the wider Admiralty jurisdiction, where transparency and procedural fairness considerations assume greater importance; which probably explains why the use of assessors has persisted in the marine inquiry context and fallen away in the wider Admiralty jurisdiction, at least in Australia.

Considerations of cost, time and availability of nautical expertise remain relevant to the modern safety investigation agency jurisdiction, which will be discussed at greater length later in this paper. Suffice to say for present purposes that the investigators of such agencies are ordinarily technically skilled master mariners and marine engineers (in the marine context) who have received appropriate investigation training. In many ways, such investigators fulfil the same role as their nautical assessor ancestors; they review the evidence and form nautical opinions based on the evidence, which opinions are then documented in a written report. The principal distinction appears to be the removal of legal consequence or blame from such reports and therefore the corresponding removal of legal expertise from the preparation of such reports. This point will also be developed further later in this paper.

3. Commonwealth Marine Inquiries

In this section, the development of marine inquiries at Commonwealth level is considered.

The provisions for marine inquiries were originally contained in part IX of the Navigation Act 1912 (Cth). These provisions were modelled upon the Merchant Shipping Act 1894 (UK), and like that Act, provided for an inquiry into the ‘circumstances of the casualty and also into the conduct of the master, mate, engineer or pilot whose licences or certificates were at risk as the Court had power to cancel or suspend them’.  

There were a number of inquiries conducted under Part IX; perhaps most memorably, a Commonwealth Court of Marine Inquiry set in Hobart on 30 January 1975 to inquire into the collision between the SS Lake Illawarra and the Tasman Bridge in the Derwent River at Hobart in Tasmania. The bridge collapsed, and 12 people were killed when cars fell from the bridge into the river and parts of the bridge collapsed onto the ship.

---

28 M White ‘Marine Inquiries’ (1993) 9 Queensland University Of Technology Law Journal 61 at 62
A Commonwealth Court of Marine Inquiry was constituted by at least one judge (who could be from almost any court), assisted by not less than two assessors who, by section 359 of the Navigation Act 1912 (Cth), ‘shall advise the Court but shall not adjudicate on the matter before the court’.

A Commonwealth Court of Marine Inquiry was granted the jurisdiction to make inquiries as to casualties affecting ships ‘…and as to charges of incompetency or misconduct, or a failure of duty in regard to any collision or in any matter relating to the navigation, management or working of the ship, on the part of masters, mates or engineers of ships…’.

Immediately it should be observed that a Commonwealth Court of Marine Inquiry had a kind of duality to its role: an inquirial responsibility to investigate the facts and circumstances of a particular marine casualty; and also a role in determining whether a mariner should be charged with ‘misconduct’; defined as ‘careless navigation, drunkenness, tyranny, improper conduct or, without reasonable cause or excuse, failure of duty.’

This dual jurisdiction has inherent tension; Ogilvie summarises the issue as follows:

Inherent in the conduct of a Court of Marine Inquiry where the issue of fault arises is the coupling of the inquiry as to the general circumstances and causes of the disaster, on the one hand, with a quasi-criminal proceeding vis-a-vis the ‘accused’, on the other. The result is a proceeding of the type which would arise if a Coroner’s Inquest was combined with a prosecution.... the difficulties which arise from combining these two processes are an inevitable result of the clash between the public interest in ascertaining the circumstances of the casualty without the fetters of strict criminal and evidentiary procedure, and the protection of any individual's rights in so far as he is at risk of punishment as a result of the findings of the Court.

The difficulties associated with such a fused procedure were evident in Robbie v Director of Navigation, an appeal to the New South Wales Supreme Court by the master of a ship whose certificate had been suspended by a Court of Marine Inquiry established under the Navigation Act 1912 (Cth). During the course of the inquiry, at the conclusion of the evidence called by the Director of Navigation, the Court of Marine Inquiry was called upon to show cause the master why his certificate should not be suspended. After giving the master the opportunity to make submissions and to call further evidence, the Court of Marine Inquiry suspended his certificate for three months.

The master, Captain Robbie, appealed, arguing amongst other things that he did not have a full opportunity of making a defence and that he did not have a copy of a report or statement before the commencement of the inquiry; both obvious procedural fairness points.

The Court agreed. In granting the master's appeal Halse Rogers J stated:

I am of the opinion that it was clearly the duty of the representative of the Director of Navigation at the conclusion of the evidence to put the matter in order by formulating a charge, and I think it would have been proper for the Court, in calling upon the master to show cause to intimate to him, that an adjournment would be granted to him if he so desired. In that way only does it seem to me that effect can be given to the statutory direction contained in section 369 that ‘every inquiry shall be so conducted that if a charge is made against any person, that person shall have full opportunity of making a defence.’

However, it is interesting to note that the court cited, with apparent approval, The Carlisle, where Sir Gorell Barnes said:

---

30 Section 364 Navigation Act 1912.
31 Section 6C Navigation Act 1912.
33 (1944) 44 SR (NSW) 407.
34 (1944) 44 SR (NSW) 407 at 414.
35 [1906] P. 301.
If, on the other hand, the case is a strong one, showing gross negligence and impropriety of conduct on
the part of the master… I think the Board of Trade is quite justified in the discharge of its duties in saying
to the magistrate it is a case of that character, and the certificate should be dealt with… it seems to me
desirable in the interest of all concerned that the Board of Trade should have the power I have indicated,
and that it should be exercised.

In Robbie, it was noted that the 'fused' procedure, combining the inquirial and disciplinary
jurisdictions, was a deliberate initiative of the Commonwealth Parliament to avoid holding two courts.
The previous procedure was to hold the first Court of Marine Inquiry into the facts and circumstances
of the incident and then to provide a charged person with 48 hours notice before holding a second
court in relation to the disciplinary matter. There was considerable objection to that, and the
regulations were amended to create the combined inquiry.37

It may be inferred that the public interest associated with the efficient holding of marine inquiries, and
dealing with all matters arising out of them, including a disciplinary procedure where appropriate, was
thought at the time to outweigh the almost inevitable procedural fairness issues that arise for a person
whose certificate was at peril in the combined inquiry.

Nevertheless, in 1979, Ogilvie concluded by suggesting ‘that separation of the two aspects of the
inquiry, in accordance with orthodox legal tradition, would be preferable to the present fused
procedure’.38

A Commission of Inquiry into the Maritime Industry into Australian Maritime Legislation39 came to a
similar conclusion, recommending that the power to cancel or suspend certificates should be exercised
by a delegate of the Minister, with the Court of Marine Inquiry's only function to be inquirial. Such
recommendations were adopted in the Navigation Amendment Act 1979, with the repeal of section
372, which effectively removed the power for Courts of Marine Inquiry to cancel or suspend
certificates.

However, as observed by Sheppard J in the TNT Alltrans,40 the repeal of section 372 ‘did not make
any difference to the way in which it [the Court of Marine Inquiry] should conduct an inquiry. Section
364 remains in force and empowers the court to inquire into charges of misconduct. Furthermore, it
remains expressly bound to afford a person charged with misconduct the opportunity of making a
defence.’

In that case, His Honour was also concerned about the form of the questions put to the inquiry for
answering, which, in His Honour’s words ‘are designed to implicate the officers of the TNT
Alltrans’.41 It appears that even though the express power to suspend or cancel an officer's certificate
had been removed from the court, the tension between the dual purposes of the inquiry remained.

Part IX was subsequently repealed in 1990,42 and provision was made for Courts of Marine Inquiry in
the Navigation (Marine Casualty) Regulations.43 The new regulations introduced a two-step process;
a preliminary inquiry conducted by an ‘Inspector of Marine Accidents’; followed, where appropriate,
by a Board of Marine Inquiry appointed by the Minister. The Board was constituted by a judge, who
was assisted by a secretary and at least two ‘technical advisers’, who appear to fulfil the same role as
assessors, as they were required to possess ‘suitable qualifications and experience in navigation,
marine engineering or other fields relevant to the investigation of the incident’.44

---

37 Navigation Act 1942 (Cth) and the Navigation (Courts of Marine Inquiry) Regulations 1943.
40 Re Grounding of MV ‘TNT Alltrans’ 67 ALR 106 at 111.
41 Ibid.
42 Transport and Communications Legislation Amendment Act 1990 (Cth), section 45.
Importantly, the functions of the Board were confined to identifying the circumstances of the incident and to determine its cause. The new regulations had no power to deal in any way with persons by way of disciplinary procedure (except by failing to comply with the directions given by the investigator or the judge or making a misleading or false statement). The separation of the inquirial and disciplinary jurisdictions was clear.

As White notes, the amendments were ‘more in line with modern concepts of administrative law than was the former procedure of having an inquiry into circumstances surrounding the incident combined with allegations concerning the conduct of persons concerned with it’. Such allegations were dealt with separately, by means of suspending or cancelling certificates, under the Navigation (Orders) Regulations, also made under the Navigation Act 1912 (Cth).

Another important change was the introduction of confidentiality. Regulation 15 obliged the Inspector of Marine Accidents not to divulge any evidence obtained in relation to the inquiry other than to the person who provided the evidence, a subsequent Board of Inquiry appointed to investigate the incident, the secretary to such a Board, or the Minister. Further, the Board was not required to conduct hearings in public and the ultimate report was to be provided only to the Minister, who could release the findings at the Minister’s discretion.

These amendments present a seismic shift in the way marine inquiries were to be conducted at Commonwealth level; from a publicly held inquiry combining inquirial and disciplinary objectives, marine inquiries were now solely inquirial, were not required to be held in public, and the subsequent reports were confidential and may or may not be disclosed at the Minister’s discretion. It can be inferred that the principal driver for this change was an overriding drive for better marine safety outcomes (a fuller discussion of this issue follows in section 4).

Support for that proposition can also be found in the amending regulation the following year, which amended the obligation imposed by regulation 33 to provide that a person could not refuse to answer a question or produce documentary evidence on the ground that such an answer or evidence would tend to incriminate the person. Some protection was provided by a new regulation 33A, which provided that such incriminating answers or evidence could not be used in a criminal proceeding against the person. The explanatory memorandum to the amending regulation states that:

The amendments to the Regulations ensure that where the Regulations require a person to provide information or answer questions, then the person cannot refuse to do so solely on the grounds that it might incriminate him or herself or make him or herself subject to a penalty.

It seems that getting the answer or evidence became more important than assigning culpability for the incident, and the coercive powers conferred on the Court of Marine Inquiry, combined with the protection against criminal action, were a significant step towards ensuring that the inquiry had all the evidence it needed to determine the cause of the incident.

However, even more change was in the air, with the establishment of the Australian Transport Safety Bureau in 1999.

---

47 M White Marine Inquiries (1993) 9 Queensland University Of Technology Law Journal 61 at 64.
48 There was no express provision requiring hearings to be held in public (c.f. s 138 TOMSA), and the Board had the power to give directions as to the admission of a person to or exclusion of a person from a sitting of the Board in regulation 22 (e), Statutory rules 1990, number 257.
49 Regulation 31, Statutory rules 1990, number 257.
50 Navigation (Marine Casualty) Regulations (Amendment) 1991 No. 462.
4. Australian Transport Safety Bureau

The Australian Transport Safety Bureau (ATSB) is an operationally independent body within the Commonwealth Government. According to its literature, the ATSB is Australia’s prime agency for transport safety investigations. The ATSB is separate from transport regulators and service providers and its objective is safe transport. Its mission is to maintain and improve transport safety principally by independent investigation of transport accidents.

The ATSB has four divisions: aviation, road, rail and maritime. The ATSB presently administers the Transport Safety Investigation Act 2003 (Cth), which covers all four transport modes, and the ATSB derives its various powers and responsibilities from that Act (more of which later).

It is useful to consider the origins of the ATSB and the transition from marine inquiries under the Navigation Act 1912 (Cth) to safety investigations conducted under the Transport Safety Investigation Act 2003 (Cth), whilst briefly touching on the academic literature relating to human error and ‘no-blame’ safety investigations.

4.1. Origins of the safety investigation agency

The ATSB model is not unique; the United Kingdom’s Marine Accident Investigation Bureau (‘MAIB’) was established in July 1989 under section 33 of the Merchant Shipping Act 1988 (UK), and operates under the Merchant Shipping (Accident Investigation) Regulations 1989 (UK). These include the powers to investigate accidents involving or occurring on board any United Kingdom ship worldwide, and any other ship within UK territorial waters. Its creation made possible the investigation of marine accidents independently of the Marine Directorate which is the regulatory authority for ship safety and where this work was formerly undertaken. In other words, the separation of the formal work of the marine inquiry was now made not only independent of the disciplinary jurisdiction (where previously it had been fused), but was also now completely separated from the relevant government regulatory body.

Even further though, recent developments have seen the complete quarantine of the investigation from any other legal purpose, whether criminal, disciplinary or civil. So the United Kingdom Merchant Shipping (Accident Reporting and Investigation) Regulations 2005 provides at Regulation 5:

The sole objective of the investigation of an accident under the Merchant Shipping (Accident Reporting and Investigation) Regulations 2005 shall be the prevention of future accidents through the ascertainment of its causes and circumstances. It shall not be the purpose of an investigation to determine liability nor, except so far as is necessary to achieve its objective, to apportion blame.

Consequently, all investigation reports published by the MAIB contain the following preface:

This report is not written with litigation in mind and, pursuant to Regulation 13(9) of the Merchant Shipping (Accident Reporting and Investigation) Regulations 2005, shall be inadmissible in any judicial proceedings whose purpose, or one of whose purposes is to attribute or apportion liability or blame.

The ATSB now uses a similar formulation in its reports, as follows:

The ATSB performs its functions in accordance with the provisions of the Transport Safety Investigation Act 2003 and, where applicable, relevant international agreements. ATSB investigations are independent of regulatory, operator or other external bodies. It is not the objective of an investigation to determine blame or liability. However, an investigation report must include factual material of sufficient weight to support the analysis and findings. At all times the ATSB endeavours to balance the use of material that could imply adverse comment with the need to properly explain what happened, and why, in a fair and unbiased manner.

Initially, the Commonwealth's Navigation (Marine Casualty) Regulations 1990 did not go so far as to separate the Inspector of Marine Accidents from the regulatory authority; but there were confidentiality obligations that prevented the Inspector from disclosing evidence 'to any person' other than the persons prescribed, including a Board of Inquiry. Notwithstanding these minor differences, the Australian reforms can be directly linked to these initiatives in the United Kingdom.

### 4.2. Human Error Theory

The change in focus in casualty investigation and the conduct of inquiries into marine incidents can also be linked to the significant academic work on human factor relationships in the causes of accidents, particularly in aviation, such as the influential work of Professor James Reason.\(^{59}\)

The principal thesis of Professor Reason's work has been described as the 'Swiss cheese model' of accident causation. That is, most accidents can be traced to one or more of four levels of failure: organizational influences, unsafe supervision, preconditions for unsafe acts, and the unsafe acts themselves. In the ‘Swiss Cheese’ model, an organization's defences against failure are modelled as a series of barriers, represented as slices of Swiss cheese. The holes in the cheese slices represent individual weaknesses in individual parts of the system, and are continually varying in size and position in all slices. The system produces failures when all of the holes in each of the slices momentarily align, so that a hazard passes through all of the holes in all of the defences, leading to a failure. The failures can be both active and latent, in that the direct failure maybe an active human error, but a contributory factor may be a latent error in the system that could have been present for some time.

One of the criticisms made against 'traditional' investigation techniques, including marine inquiries, are that such investigations and inquiries are predicated on a 'blame culture'. Blame culture is concerned with attributing blame to participants, and the supporting legal framework supports this adversarial approach; but the legal framework also provides corresponding protections, such as a requirement for procedural fairness and the privilege against self-incrimination. This focus on blame, it is said, results in a concentration of attention on active failures that caused the incident, usually the negligence or recklessness of participants, and provides insufficient attention to latent or system failures which may, in some circumstances, be of even greater importance. If such system failures are not detected, or if detected are not effectively remedied, then incidents may recur without the underlying causes having been remedied.

The aviation industry in particular were quick to realise the potential of this work, resulting in the development of a 'Human Factors Analysis and Classification System' for investigating aviation accidents.\(^{60}\)

Parallel to this work on human error, Reason also hypothesised that in order to improve safety, an organisation needed to have a ‘safety culture’ (as distinct from a blame culture) to ensure reporting of human error and organisational failures.\(^{61}\) Such a safety culture is evidenced by monitoring and

---

\(^{58}\) Statutory Rules 1990 number 257.

\(^{59}\) In monographs such as Reason J 'Human Error' Cambridge University Press; 1 edition (October 26, 1990) and Reason J 'Managing the Risks of Organisational Accidents' Ashgate Publishing; 1 edition (December 1, 1997).


review of organizational safety systems, including awareness of the numerous factors that have an impact on such safety systems, such as human, technical, organizational, and environmental factors.

These academic developments had a profound affect on incident investigation. Where previously investigators were looking for direct proximate causes of marine casualties, usually with an eye on culpability of the participants, investigators were now actively looking for secondary causes, including latent organisational, managerial, systemic and cultural failures.62

4.3. Legal reform of Commonwealth marine inquiries

As we have seen, this shift in investigation focus away from the culpability of the human participants towards a more holistic approach to human error, safety culture and causation of accidents resulted in a shift in the legal apparatus in which such investigations and inquiries were conducted. In Australia, this legal reform started with the separation of the inquirial and disciplinary jurisdictions with the Navigation (Marine Casualty) Regulations 1990. It should be recalled that these Regulations had important confidentiality obligations; neither the evidence gathering nor any hearings need be conducted in public; and the subsequent report need only be disclosed as a matter of discretion. The relationship between a marine inquiry conducted under the Regulations and the concept of a marine inquiry as defined at the beginning of this paper was becoming increasingly remote.

The 1991 amendment to the Regulations, which abrogated the privilege against self-incrimination whilst preventing the use of any such evidence being used in a prosecution, put further distance between the 2 kinds of inquiry.

Up until the full commencement of the Transport Safety Investigation Act 2003 (Cth) in July 2003, the ATSB in its maritime jurisdiction continued to rely upon the Navigation (Marine Casualty) Regulations 1990 made under the Navigation Act 1912 (Cth) as amended from time to time.

4.4. Confidentiality

It appears that the confidentiality provisions, when combined with the abrogation of the privilege against self-incrimination, were intended to facilitate the holistic human error approach to accident investigation by encouraging participants to engage fully and frankly with investigators without any fear of criminal punishment or other consequences, such as civil liability for admissions of negligence. It is thought that by quarantining such evidence from being disclosed and therefore used for any other purpose, then witnesses and participants will more readily divulge possibly incriminating matters when being interviewed by the then Inspector of Marine Accidents.

However, this intention was not necessarily supported by the courts. In the Sanko Steamship Company Limited v Sumitomo Australia Limited,63 in a case concerning limitation of liability relating to the grounding of the ship ‘Sanko Harvest’ near Esperance in Western Australia on 14 February 1991, the preliminary issue arose whether the interviews conducted with the officers of the ship obtained by the then Inspector of Marine Accidents under the Navigation (Marine Casualty) Regulations 1990 could be inspected by the parties.

The evidence before the court was that Captain Filor [the Inspector] explained to the Master of the ship that the inquiry was a confidential one and ‘that he [the Master] should feel relaxed about talking to him because of the confidentiality of it’.64

It should be recalled that regulation 15 of the Regulations at that time prevented an investigator from divulging a record of evidence obtained to ‘any person’ other than the person who provided the evidence, a board of inquiry, the secretary to a board of inquiry or the Minister.

---

62 See for example Cullen WD 1990 The Public Inquiry into the Piper Alpha Disaster. HMSO, London.
64 (1992) 37 FCR 353 at [14].
In deciding that regulation 15 did not impair the courts' ordinary powers to compel the production of documents in a civil case which is to be heard by it, Sheppard J. concluded that ‘it would seem that there is a clear preponderance of authority for the view that the words ‘to any person’ do not apply to a court’65 and that further:

Despite the reasons which there are for the presence of regulation 15 in the regulations, the regulations relating to investigations by the Inspector and investigators and the provisions of the regulations relating to marine inquiries show that disclosures made by persons interviewed in the course of an investigation may become public. The very procedure which is set in train may well lead to that occurring. No person interviewed can therefore safely assume that what he or she says will not or may not eventually become public.66

This conclusion, and the subsequent disclosure of the evidence obtained by the Inspector to the parties in the civil litigation, led to further amendment of the Regulations, and in particular regulation 15, in 2001.67 Specifically, regulation 15 was amended to implement the Code for the Investigation of Marine Casualties and Incidents adopted by the assembly of the International Maritime Organisation on 27 November 1997 (the 'Code'), which Code was set out in schedule 1 to the then Regulations.

The objective of the Code, expressed in article 2, is to:

…prevent similar casualties in the future. Investigations identify the circumstances of the casualty under investigation and establish the causes and contributing factors, by gathering and analysing information and drawing conclusions. Ideally, it is not the purpose of such investigations to determine liability, or apportion blame.

The influence of the human error and safety systems approach to incident investigation pioneered by Professor Reason, amongst others, is clear. The concept of an investigation for safety purposes as distinct from determining liability or apportioning blame is also made express. It appears that there is an inherent link between an investigation for a safety purpose and ensuring that the investigation is not used for other purposes that carry liability or blame consequences; it is suggested that one element of this link lies in the belief that participants in a casualty or incident will not fully cooperate with investigators unless the evidence they provide is quarantined from legal consequence; that is, made confidential.

In order to give effect to this 'quarantining of evidence', article 10 of the Code relevantly provides:

The State… should not make the following records, obtained during the conduct of the investigation, available for purposes other than casualty investigation, unless… their disclosure outweighs any possible adverse domestic and international impact on that or any future investigation.

This disclosure test was incorporated into the Regulations at subregulation 15(5), which provided that a court may order or authorise the disclosure of information 'to any person' only if the public benefit outweighs the possible effect on the investigation itself or future investigations, and the disclosure is permitted by the parties.68

This apparent restriction on the court's power to compel disclosure of documents was considered shortly afterwards by Tamberlin J in Craig the Pioneer.69 A marine safety investigation was conducted by the ATSB into a collision between a prawn trawler ‘May Belle II’ and the woodchip carrier ‘Craig the Pioneer’ that occurred near Newcastle New South Wales on 9 October 1999. In the resulting civil claim for damages brought by the owners of the trawler against the various interests in the woodchip carrier, a subpoena was issued to the ATSB to produce documents relating to the investigation. The amended regulation 15 of the Regulations was relied upon by the ATSB to claim privilege for some of the documents; in particular, the records of interview conducted by the

---

65 Ibid [22].
66 Ibid [27].
investigator with the ship's crew and some other records taken from *Craig the Pioneer* during the investigation.

The court rejected the ATSB's claim for privilege, relying on similar reasoning to that in the *Sanko Harvest*; specifically, that the production of documents on a subpoena to a court is not an ‘order’ or ‘authorisation’ of the disclosure of information by any person within the meaning of regulation 15(4). Tamberlin J stated at paragraph 21 that:

> again, the use of the expression ‘person’ in these provisions does not include the court and therefore these provisions do not apply… this language simply does not fit with the way in which courts deal with the production of documents produced on subpoena.

His Honour went on to be critical of the ATSB's submissions relating to the public benefit test encapsulated in regulation 15(5), which requires a balancing of the public benefit in the disclosure of information against any possible effect on the investigation to which the information relates, saying:

> I am not persuaded from the generalised and speculative material presented by the ATSB, including the matters referred to in the evidence of Mr Alan Stray, that if the material were made available under a strict confidentiality regime there would be any significant detrimental effect which would restrict the availability of information in the future to the extent that this consideration would outweigh the powerful public interest in the Court having full and sufficient information. The Court should not lightly be constrained from performing its functions in the light of full access to all relevant material. If, however, there were clear and express provisions which precluded the court from adopting such an approach, then effect must be given to such provisions. But that is not the present case. If the Legislature had intended to apply regulation 15 to court proceedings, such as the present, it would have been a simple matter to make that clear. In my opinion, the Legislature has not done so.

This is the central policy issue in the safety investigation model, that is, the contest between the public policy in resolving disputes and ascribing legal responsibility in an efficient and fair way by ensuring the availability of relevant evidence; as against the public policy, as expressed in article 10 of the Code and regulation 15 of the Regulations, about keeping evidence confidential in the belief that granting such confidentiality will encourage full and frank disclosure during the investigation process, and therefore lead to improved safety outcomes. It is clear that the court in *Craig the Pioneer* was not convinced that the latter public policy was adequately supported by the evidence available when describing the material presented by the ATSB supporting that position as ‘generalised’ and ‘speculative’.

Nevertheless, the Legislature considered that ensuring that the evidence provided to ATSB investigators should be confidential was the more important public policy and subsequently amended section 15 of the *Navigation (Marine Casualty) Regulations 1990*. The explanatory memorandum states that the amendment was necessary:

> ... in view of the inconsistent interpretation of this provision by courts in the past. In particular, Tamberlin J's interpretation of sub regulation 15(1) in Christoforidis v Cygnet Bulk Carriers SA [2002] FCA 690 could have had an adverse impact on the future free-flow of safety information to the ATSB if the provisions were not going to be applied to information required to be produced to a Court. The amendment clarifies that the confidentiality provisions are applicable to the production of documents to a Court, so as to ensure information collected by the ATSB will not be used for the purposes of blame apportioning court proceedings except in accordance with the regime set out under sub regulation 15(3) to 15(8) [which refer to the public benefit test described above] [emphasis added].

The net effect of the amendments was to ensure that the confidentiality obligations contained in regulation 15 expressly applied to the production of evidence to a Court as well as to any person. As stated in the explanatory memorandum, the amendment ‘better reflects the ATSB's intent to protect

---

70 ‘A person may apply to a Court for an order authorising a person to disclose information that is held by the person and to which sub regulation (1) applies’.

71 *Christoforidis v Cygnet Bulk Carriers Sa [2002] FCA 690* at paragraph 36.


information that is required to be kept confidential, in order to ensure the future free-flow of safety information to the ATSB for the purposes of no-blame safety investigations.’

The evolution of the Court of Marine Inquiry into the ‘no-blame safety investigation agency’ was almost complete. The Commonwealth provisions had evolved from the traditional Court of Marine Inquiry; constituted by a judge sitting with and advised by nautical assessors; with hearings conducted in public; and having a fused inquirial and disciplinary jurisdiction; to a ‘no-blame’ safety investigation conducted entirely by trained nautical investigators; with no hearings; with the privilege against self-incrimination expressly abrogated; and with the evidence obtained effectively quarantined from any other legal purpose, whether disciplinary, criminal, civil or otherwise, subject to a public benefit test.

This evolution would shortly reach its current form in the Transport Safety Investigation Act 2003 (Cth), which brought together similar no blame safety investigation powers and confidentiality provisions across the four major transport modes: aviation, road, rail and maritime.

However, before considering the Transport Safety Investigation Act 2003 (Cth) in more detail, it is worth reflecting upon Tamberlin J.’s criticisms of the ATSB’s concerns about the release of the documents as ‘generalised’ and ‘speculative’. The explanatory statement to the 2002 amending regulation stated that Tamberlin J.’s decision ‘could have had an adverse impact on the free flow of information to the ATSB’. It seems reasonable to infer from the language used that the amendment to the Regulation was made before any such adverse impact was observed or measured. It is submitted that the tenor of both of these statements is that there is no evidence, or at least no convincing evidence, that disclosure of material gathered by an ATSB investigation to a Court, as occurred in Sanko Harvest and Craig the Pioneer, had any subsequent effect on the ‘free flow of information to the ATSB’. Whilst the difficulties associated with quantifying any such impact are recognised, the author is not aware of any attempt to do so.

Further, given the wide powers granted to the ATSB by the then Navigation (Marine Casualty) Rules 1990 and the current Transport Safety Investigation Act 2003 (Cth), it is difficult to see how such a ‘free-flow’ would be restricted by the contingent release of some evidence, subject to appropriate orders concerning confidentiality as envisaged by Tamberlin J, for specific purposes, generally years after the event. For example, in the Sanko Harvest, the initial application concerning the use of the evidence was 18 months after the event, and the litigation was not ultimately concluded until 4 years later; it is suggested such time frames are fairly typical of major litigation.

It is also worth remembering that the only evidence where the ‘flow’ could be ‘obstructed’ in this sense are admissions of fault by responsible persons; such persons, in a maritime context, are often foreign, for whom English is a second language and who come from varied cultural backgrounds and from differing legal systems. It is arguable that such persons may still not fully cooperate with a ‘no-blame' investigation process, even when fully explained, due to a natural reticence to make admissions to government officials investigating an incident in a foreign country. Indeed, part of the problem may be that 'full cooperation' is difficult to measure, and that apparently cooperative witnesses may fail to fully disclose information without the failure ever being discovered.

The ATSB has the power to compel answers; it is an offence provision of strict liability. However, the vast majority of the evidence of any marine casualty, including the majority of the evidence provided by responsible persons, is objective, is obtainable by traditional enforcement powers without relying upon abrogating the privilege against self-incrimination; and could, it is submitted, be used in 'blame-apportioning proceedings' without having any affect on the 'free-flow' of information to the ATSB.

In other words, in the quest for obtaining admissions from participants that may (or may not) inform a safety investigation, the whole of the evidence obtained by the ATSB has been quarantined from any other use. In the author's opinion, this is a disproportionate response to the issue of obtaining full admissions, and can, in some circumstances, lead to the safety investigation actually hindering the

74 Transport Safety Investigation Act 2003 (Cth) section 32.
desired safety outcome [see later discussion on quarantining of VDR in the Endeavour River investigation in the next section].

Quarantining the evidence, and the use of the report for any other purpose, is also unnecessary to ensure that the investigation has a no-blame safety focus. In the author's view, such a focus is principally a matter of construction and interpretation of the evidence, rather than any relationship with the confidential status of the evidence itself. An illustration of this point is the ANL Excellence grounding, considered in more detail in section 6.

5. Transport Safety Investigation Act

The Navigation (Marine Casualty) Regulations were repealed\(^\text{75}\) on the commencement of the Transport Safety Investigation Act 2003 (Cth) in July 2003.

The essential characteristics of the Act, insofar as it relates to maritime casualties, are as follows:

- the object of the Act is to improve safety by:
  - requiring the reporting of accidents;
  - providing for independent investigations;
  - allowing for the making of statements and recommendations arising from the independent investigations; and
  - permitting the publication of investigation reports.\(^\text{76}\)

- the Act applies to accidents in which death or serious injury to a person, or damage to a ship or property, occurs that is associated with the operation of the ship;\(^\text{77}\)

- the constitutional limitations of the Commonwealth Parliament are recognised by limiting the application of the Act to the safety of ships and marine navigation which have an international, interstate or other constitutional nexus, such as the trade and commerce power;\(^\text{78}\)

- the position of ‘Executive Director of Transport Safety Investigation’ is created,\(^\text{79}\) and the independence of that position from ministerial direction is provided for;

- investigation reports must be published as soon as practicable and may include submissions made by persons in response to a draft report, thereby permitting a form of procedural fairness;\(^\text{81}\)

- if a draft report is provided to a person, than the person may not copy the draft report or disclose the draft report to any other person or to a Court (both the copying and disclosure is an offence, with the disclosure offence carrying a maximum penalty of two years imprisonment);\(^\text{82}\)

- neither the draft report nor the final report is admissible in evidence in any civil or criminal proceedings, other than a coronial inquiry;\(^\text{83}\)


\(^{76}\) Transport Safety Investigation Act2003 (Cth) section 7.

\(^{77}\) Transport Safety Investigation Act2003 (Cth) section 3.

\(^{78}\) Transport Safety Investigation Act2003 (Cth) section 11 (2).

\(^{79}\) Transport Safety Investigation Act2003 (Cth) section 12.

\(^{80}\) Transport Safety Investigation Act2003 (Cth) section 15.

\(^{81}\) Transport Safety Investigation Act2003 (Cth) section 25.

\(^{82}\) Transport Safety Investigation Act2003 (Cth) section 26.

\(^{83}\) Transport Safety Investigation Act2003 (Cth) section 27.
• the Executive Director (and delegated investigators) is granted a wide variety of powers, including the power to require a person to attend and answer questions, enter ‘special’ premises (generally accident sites and ships) without consent or warrant, to search for, record, copy, operate, secure, remove (with consent or warrant) evidential material, and to stop and detain ships;

• self-incrimination is not an excuse for a person to refuse to answer a question or fail to provide evidential material; but for an individual, protection is provided in that the answer or the material is not admissible in evidence in any civil or criminal proceedings against the individual. It may be concluded that admissions may be compelled from a corporation by use of this provision, and such admissions may subsequently be used against the corporation in civil or criminal proceedings, subject to the restrictions on the release of such evidence under Part 6 Division 2;

• it is an offence, carrying a maximum penalty of two years imprisonment, to copy or disclose on-board recordings (known on ships as voyage data recorders or VDR’s), unless the Executive Director allows the on-board recordings to be disclosed or released;

• on-board recordings cannot be used for disciplinary action against employees, are inadmissible in criminal proceedings against crew members of ships and are not admissible in civil proceedings unless the Executive Director discloses the information and the Court makes a public interest order;

• restricted information, which principally comprises the evidence gathered during an investigation, cannot be disclosed unless certified by the Executive Director; disclosure to courts is subject to a public interest test, taking into account domestic and international impact on current or future investigations.

The net effect is quite similar to the preceding Navigation (Marine Casualty) Regulations 1990, but with consistency across transport modes, and with specific provisions concerning on-board recordings.

5.1. On-board recordings

On-board recordings or VDRs are extremely important for fairly obvious reasons. Similar to the ‘black box’ in aviation, VDRs capture a range of data from various instruments on board the ship, together with recordings of what was said by the ship’s crew members at the critical time. Consequently, the VDR information enables an investigator to almost completely reconstruct a sequence of events.

---

84 Transport Safety Investigation Act2003 (Cth) section 32.
85 Transport Safety Investigation Act2003 (Cth) section 33.
86 Transport Safety Investigation Act2003 (Cth) section 36.
87 Transport Safety Investigation Act2003 (Cth) section 39.
88 Transport Safety Investigation Act2003 (Cth) section 47.
89 Transport Safety Investigation Act2003 (Cth) section 53.
90 VDRs are required on ships by the International Convention for the Safety of Life at Sea 1974 (SOLAS) at chapter V, as follows: Under regulation 20 of SOLAS chapter V on Voyage data recorders (VDR), the following ships are required to carry VDRs:
   • passenger ships constructed on or after 1 July 2002;
   • ro-ro passenger ships constructed before 1 July 2002 not later than the first survey on or after 1 July 2002;
   • passenger ships other than ro-ro passenger ships constructed before 1 July 2002 not later than 1 January 2004; and
   • ships, other than passenger ships, of 3,000 gross tonnage and upwards constructed on or after 1 July 2002.
91 Transport Safety Investigation Act2003 (Cth) section 50.
92 Transport Safety Investigation Act2003 (Cth) section 51.
93 Transport Safety Investigation Act2003 (Cth) section 54.
94 Transport Safety Investigation Act2003 (Cth) section 55.
95 Transport Safety Investigation Act2003 (Cth) section 56.
96 Transport Safety Investigation Act2003 (Cth) section 60.
leading up to an incident with information such as position, speed, course, engine and helm movements, as well as what was said and perhaps done by the crew in relation to all of these things.

It is hard to imagine better evidence in relation to an incident involving a ship than the evidence contained in the VDR. Therefore, VDR information assumes a critical importance to the safety investigator, but also to other parties concerned in the incident, such as the relevant regulatory agency, the owner of the ship and other interests such as cargo owners and charterers, as well as the crew members themselves.

The provisions relating to on-board recordings in the Transport Safety Investigation Act 2003 therefore also assume critical importance. As may be seen from the brief summary above, access to such recordings has been heavily restricted, and the uses to which the recordings can be put has also been effectively confined to safety investigation only.

It is suggested that the underlying basis for these restrictions on the use of onboard recordings lies in the International Maritime Organisation guidelines on VDR recordings, which relevantly state that:

> Any disclosure of VDR information should be in accordance with section 10 of the Code for the Investigation of Marine Casualties and Incidents.

It will be recalled that section 10 of the Code required that any records obtained during an investigation, including on-board recordings, should not be available for purposes other than the investigation (such as civil, disciplinary, or criminal purposes) unless the disclosure outweighed any impact on the current or any future investigation. However, the provisions concerning on-board recordings in the Transport Safety Investigation Act 2003 appear to go further than the Code requires.

As noted above, section 50 of the Act provides that the Executive Director may issue a certificate in relation to on-board recordings stating that the disclosure of the information is not likely to interfere with any investigation. However, such a certificate can only be used for the admissibility of on-board recordings in civil proceedings; it cannot be used in criminal proceedings at all. This clearly exceeds the protection required by the Code.

Even in respect of civil proceedings, the issue of a certificate by the Executive Director is not enough on its own to obtain admissibility of on-board recordings. The court must also make an order in relation to the public interest in relation to the admission of the on-board recordings, having to be satisfied that:

- a material of question of fact will not be able to be properly determined from other evidence available; and
- the on-board recording information will assist in the determination of the question of fact; and
- any adverse domestic and international impact that the disclosure of the information might have on any current or future investigations is outweighed by the public interest in the administration of justice.

It is submitted that this two-step process, requiring both the Executive Director and the court to decide that any investigations will not be interfered with by the disclosure of information, together with the additional hurdle involved with requiring that no other cogent evidence is available on the material point, is excessive in all the circumstances and certainly exceeds the requirements of the Code.

---

Further, asking the court to decide whether current or future investigations are not going to be affected by the disclosure calls in to play the same ‘generalised’ and ‘speculative’ evidence to be considered by the court that was criticised by Tamberlin J in the Craig the Pioneer 98, especially when the Executive Director, who must be in a much better position to decide whether any future investigations are going to be affected, has already issued a certificate stating that investigations will not be affected. The test is necessarily speculative in the sense that the court is required to predict what effect the disclosure will have, if any, on an investigation into an incident that has yet to occur. It also begs the question whether a court should only take into consideration the issue of the certificate by the Executive Director in deciding whether there is any ‘adverse domestic and international impact…on any current or future investigation’ 99 or whether further evidence is required, and what that further evidence might be.

Such restrictions cannot be justified by reference to the previously described ‘could have had an adverse impact on the free flow of information to the ATSB’ 100 argument. On board recordings are automatically generated on a continuous basis and cannot be tampered with. It is spurious to suggest that crew members are going to change their behaviour in case they have an accident and in case such recordings might be used for other purposes than a safety investigation. This is a double contingency beyond the realms of probability when considering the ordinary performance of operational tasks on the bridge of a ship. Given the ATSB has ample powers to seize such recordings and secure them, the restriction of the subsequent use of such recordings is not necessary in order to ensure that the recordings are available for a safety investigation or for any other purpose.

Indeed, in the author's experience, the quarantining of such vital evidence can actually be detrimental to the overall safety outcome. For example, during the investigation into the grounding of the Endeavour River in Gladstone Harbour in December 2007, there were three concurrent investigations: a safety investigation by the ATSB; a regulatory investigation conducted by Maritime Safety Queensland; and an investigation by the owner of the ship for their own safety purposes. The ATSB, exercising their powers under Part 6 of the Transport Safety Investigation Act 2003 (Cth), denied access to the on-board recordings to the owners of the ship and to Maritime Safety Queensland until some months after the event.

The owner of the ship was concerned about the causation of the incident, because it has ships berthing at the facility in Gladstone Harbour on a very frequent basis, and denial of the VDR recordings for months effectively delayed the owner from putting in place its own remedies to the incident for some time.

Maritime Safety Queensland is responsible for the safe movement of ships in the port, including interactions between shipping movements, administers a vessel traffic advisory service with the key role of ensuring the safety of shipping movements in the port, and also exempted the master from the requirement to carry a pilot. The denial of the on-board recordings during MSQ’s investigation and response period effectively handicapped Maritime Safety Queensland from fulfilling its safety responsibilities. As the safety agency responsible for the regulation of a crucial export port, the investigation and implementation of effective countermeasures needs to be done as soon as practicable. MSQ does not have the luxury of waiting for more than six months to obtain the ATSB’s report before taking effective action to improve safety.101

[Since this article was submitted for publication, the ATSB Report on the Endeavour River has been published (August 2008). Comments in relation to the ATSB Report are made at the end of this paper.]

99 Transport Safety Investigation Act2003 (Cth) section 56 (3)(iii).
100 Explanatory Statement to the Navigation (Marine Casualty) Amendment Regulation 2002 (No 1) 2002 Statutory Rules number 199, page 2
Similar restrictions on access to VDR data do not appear to be the norm in other maritime jurisdictions. For example, Johan Wong, a maritime law practitioner from Singapore,\(^ {102} \) notes that:

> With the evidence from devices such as AIS, VDR and ECDIS now more commonly available on board ships, it is easier to establish what happened more quickly and far more accurately. This means parties will have fewer disputes relating to the facts and are able to focus instead on the issues of liability and quantum. The net result is collision matters are now concluded within a much shorter period of time, which is good news for shipowners and underwriters but not so for lawyers!

It may be inferred that the legislators in Singapore take a more robust view of Article 10 of the Code in determining what kind of use of the VDR information might affect future safety investigations. Perhaps there is also more emphasis on the public interest involved in the efficient resolution of disputes arising out of maritime casualties, permitting the use of VDR information in civil litigation more readily. There is no suggestion that marine safety investigation in Singapore is adversely affected by this use of VDR data.

In sum, it is submitted that the restrictions on the use and availability of VDR exceed both the international guidelines and what is reasonably necessary to ensure that there is no impact upon current or future safety investigations. Further, given the powerful public interest considerations in ensuring that all other matters arising from the incident, such as criminal and civil proceedings, are resolved as effectively and efficiently as possible, it is unnecessarily obstructive to prevent the best evidence relating to the incident, comprising the VDR data, from being used at all (in relation to criminal proceedings against crew members) or its use being heavily restricted (in relation to civil proceedings).

Finally, it is submitted that preventing VDR data from being used by other responsible persons who have an interest in the incident can, in some circumstances, be detrimental to the overall safety outcome.

### 6. ANL Excellence

In the author's experience, if there is any distinction between the evidence gathered using the 'free-flow of information' to the ATSB based upon the confidentiality incentive, compared with the use of more traditional investigative powers and techniques, then the difference may be indistinguishable in the key findings of the final reports. Of course it is not possible to directly compare the evidence because of the restrictions placed on the release of evidence gathered by the ATSB under the then *Navigation (Marine Casualty) Regulations 1990* (Cth) and the current provisions of the *Transport Safety Investigation 2003* (Cth).

The author has access to only one investigation that is directly comparable; the grounding of the *ANL Excellence* in Moreton Bay on 19 July 2002 at 0318 hours. The incident was investigated by both Maritime Safety Queensland\(^ {103} \) and the ATSB\(^ {104} \). The essential findings of fact are virtually identical; what changes is the interpretation of those facts by the relevant investigators, which reflect their respective organisational prejudices.

The facts can be shortly stated, as follows:

- the ship had a foreign crew and was under the conduct of a Queensland marine pilot;
- the pilot ordered an alteration of course to starboard during the inbound voyage to the Port of Brisbane;
- the order was acted upon by the ship's crew;


\(^{103}\) Maritime Safety Queensland departmental file.

• the order was given too early, with the result that the ship left the marked channel and grounded in Moreton Bay;
• before giving the order, the pilot did not verify his visual perception of the ship's position by using his navigation computer or by any other means; and
• the ship's crew did not detect or correct the pilot's error in time to prevent the grounding.

Notwithstanding the commonality of key facts, the description of the incident in the ATSB and MSQ reports are quite different, as follows.105

### Table 1 – description of the ANL Excellence grounding incident

<table>
<thead>
<tr>
<th>ATSB Report</th>
<th>MSQ Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>As the vessel passed starboard lateral beacon E3, the pilot ordered starboard rudder to bring the ship to a heading of 240° and then called Brisbane Port Control to advise that the ship would be at the entrance channel at 0600. The master, sitting in front of one of the two radars, realised that the relative bearings of Beacons E4 and E2 were changing and went to the helmsman to see what was happening. The pilot went to his electronic chart system, which had reverted to a blank screen stand-by mode. He tapped a key and when the chart was restored he suddenly realised that he had ordered the course alteration too soon. The main engines were stopped and put astern, but the ANL Excellence grounded before the ship had begun to slow.</td>
<td>At 0525, [the Pilot] ordered an alteration of course to starboard, believing that Beacon E3 was Buoy E5. Simultaneously, whilst making the alteration, [the Pilot] was communicating his ETA [estimated time of arrival] to the Entrance Beacons with Brisbane Port Control. Shortly after the alteration the ship grounded on Middle Banks, Moreton Bay between E3 and E5 navigation aids (the 'Grounding'). The time of the Grounding was approximately between 0527 and 0530. [The Pilot] reported the Grounding to Brisbane Port Control at 0539 hours.</td>
</tr>
</tbody>
</table>

A difference in focus by each investigator in describing the incident is apparent; yet of even greater interest is the conclusions drawn from these facts. The following table summarises the relevant conclusions of each report:

### Table 2 – ANL Excellence report conclusions

<table>
<thead>
<tr>
<th>ATSB Report</th>
<th>MSQ Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>The pilot did not follow his normal procedure of checking the position of the course alteration using his portable electronic chart system</td>
<td>The pilot lost situational awareness because he did not use all the equipment on the bridge. He did not check his position visually.</td>
</tr>
<tr>
<td>The temporary buoy marking the original position of the original east cardinal beacon E5 (the turning mark) was obscured by rain.</td>
<td>There did not appear to be any attempt by the pilot to check the navigation aids visually…The wipers on the bridge windows were functional and operating and were only used occasionally.</td>
</tr>
<tr>
<td>The green light on the temporary buoy was not as conspicuous as a white light, which would normally be associated with a cardinal navigation mark.</td>
<td>The pilot assumed beacon E3 was beacon E5, and failed to check that assumption. The pilot had rounded the [temporary] E5 at night in at least 12 inward ships and 17 outward ships since E5 was</td>
</tr>
</tbody>
</table>

105 Ibid., p 1.
changed to a buoy…and a further 34 ships around E5 by day.

<table>
<thead>
<tr>
<th>Although not suffering from chronic fatigue, the pilot's performance was probably affected by the trough in his circadian rhythm associated with the hours between 0400 and 0600</th>
<th>In my [the investigator's] opinion, the pilot did not have sufficient rest and did not manage his rest period properly.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The pilot's electronic chart system was placed at a significant distance from where he was standing, with its display in power saving mode at a critical moment.</td>
<td>The Pilot spent the majority of his time on the starboard side of the wheelhouse and behind the console. The Pilot seems to have been using his laptop almost exclusively to navigate…The Pilot did not use other equipment available in the wheelhouse.</td>
</tr>
<tr>
<td>The bridge team did not detect the erroneous helm order and failed to challenge the pilot.</td>
<td>…there was very little communication or exchange of information between the pilot, the master and the remainder of the bridge team. The role of the bridge team was ill-defined and bridge resource management was poor…the mate who plotted and recorded the times of passing the various navaids recorded passing E3 at 0525 but did not challenge the early alteration of course and did not alert the master.</td>
</tr>
</tbody>
</table>

An additional factor which does not appear in the ATSB report, but is commented upon in the MSQ report, was that ‘the master stated that the pilot was very talkative and perhaps this was a factor for him losing concentration’.

The essential difference in the conclusions presented by the two reports appears to be on the construction that is placed upon the facts. The ATSB concluding that the principal causes were external to the pilot, relating to the placement of a temporary buoy and the pilot's computer powering down at the crucial moment. By contrast, the regulator concluded that the actions and omissions of the pilot were the principal causes of the incident, using the language of blame, for failing to observe basic principles of seamanship, such as verifying the ship's position before altering course, and for possibly being distracted by talking to the master and reporting by radio at critical decision making moments. This difference can be explained by the different objectives of the respective agencies, rather than any difference in the legal powers used to collect and protect the evidence.

At its foundation though, organisational prejudice aside, there is no difference in the essential facts due to the different legal regimes used to investigate the incident. Indeed, it appears that the evidence relied upon by the ATSB may have been slightly less complete (see for instance the 'obscured by rain' point in table 1 above) than the evidence available to MSQ. This conclusion cannot be fully supported however, because of the disclosure limitations imposed on the evidence obtained by the ATSB.

In respect of the ANL Excellence investigation, the legal framework of an ATSB investigation, that is, superior evidence gathering powers; the quarantine of the evidence; and the inability of the report to be used from any other purpose; had very little bearing upon the essential findings of fact. The MSQ report, using traditional investigation powers that afford participants the privilege against self-incrimination, as well as the ability to use the report for any purpose, including disciplinary purposes, was essentially the same in relation to the key facts.

The only real difference appears to lie in the approach of each investigative agency to the construction of those facts in drawing conclusions and making recommendations, with the ATSB focussing on systemic causes, and MSQ focussing on the pilot's personal performance. It is recognised that much depends upon the facts of each case. In the ANL Excellence there were a number of witnesses who would not be found culpable on any construction of the facts and who owed no loyalty to the pilot, and
so could therefore be relied upon to give full and frank evidence. The result may be different if the only witnesses may have committed an offence or are loyal to persons who may have committed an offence. But the important point is that the TSIA regime is not correspondingly flexible.

It may be concluded that there is no apparent difference in key findings due to the different legal frameworks under which the evidence was gathered; rather, the differences between the conclusions of the 2 reports may be entirely attributed to the construction of the evidence by the respective agencies in meeting their differing objectives.

For the sake of completeness, it should be noted that the ATSB's recommendations were:

Where port authorities use a buoy or other temporary aid to replace an established navigation aid, the shape and the light characteristics of the temporary aid should be consistent with those of the aid it replaces. [comment – the temporary aid was consistent with IALA\(^{106}\)]

Brisbane Marine Pilots should review the power management settings and placement of a pilot's portable electronic chart system to ensure that the information displayed remains easily visible from the pilot's conning position at all times during a pilotage. [comment - the evidence was that the pilot did not check the laptop until after giving the order to alter course, and so the 'power-down' was not strictly a cause of the incident]

By contrast, MSQ commenced disciplinary action against the pilot, and as a consequence suspended the pilot's licence for six months\(^{107}\).

In the author's view, the similar fact findings in the reports do nothing to justify the public policy associated with the restrictions on the use of the ATSB report or the confidentiality of the evidence gathered by the ATSB. It is submitted that the common safety purpose of both MSQ and ATSB could have been achieved by each respective agency drawing on the same evidence in order to draw their respective conclusions. In this case at least, the different legal regimes did not produce any difference in the material facts and it may be inferred that the evidence available to each agency, from which those facts were drawn, although collected separately and using different powers, was substantially the same. All the differences in the conclusions can be explained by the differences in organisational objectives and prejudices. It begs the question of whether a traditional marine inquiry into the incident, with a fused inquirial and disciplinary function, would have formed similar conclusions to that of both the ATSB and MSQ; in the author's opinion, that is likely.

A final issue is timeliness: the MSQ report is dated 12 August 2002, a matter of only weeks after the incident; the ATSB Report was not released until May 2003, 9 months later.

### 7. The Pasha Bulker

The Pasha Bulker came to national and international attention when it ran aground on Newcastle's famous Nobby's Beach at the height of a winter storm in June 2007.

Both the ATSB and the relevant New South Wales marine safety regulator, NSW Maritime\(^{108}\), conducted an investigation into the grounding of the ship. The relevant facts and circumstances of the incident, succinctly described in the New South Wales Maritime report, were as follows:

On Friday 8 June 2007 a strong gale passed through the Newcastle region, producing winds from the south-east of up to nearly 50 knots (93km/h) and waves of about 7 metres. The gale created dangerous and untenable conditions in the anchorage off Newcastle, particularly for lightly ballasted large bulk ships with limited manoeuvrability.


\(^{107}\) The pilot had previous history for similar errors resulting in incidents that was taken into consideration in the disciplinary process.

On 7 June 2007, there were 56 ships at anchor waiting to enter the Port of Newcastle. In response to the forecast south-easterly gale two ships departed the anchorage late on 7 June. From about 0200 on 8 June, ships began to put to sea and at 0400 there were 41 ships remaining at anchor…

…By 0700 only nine ships (including the Pasha Bulker) remained in the anchorage. All vessels, except the Pasha Bulker, eventually put to sea during Friday 8 June. At least three ships experienced difficulties in manoeuvring or dragging anchors during the morning.

One ship, the Pasha Bulker, was driven ashore by the weather and grounded on Nobbys Beach. Another, the Sea Confidence, had difficulty manoeuvring and closed the coast to 0.7nM (1.3km) off Stockton Beach and nearly ran aground. A third ship, the Betis, was unable to weigh anchor and dragged towards the coast.

The grounding of the Pasha Bulker created a very public spectacle with much interest. Fortunately there was no loss of life and no lasting damage to the environment. All costs associated with the ship’s salvage, its repairs and the contingency preparations which were put in place in the event of an oil spill are the subject of a claim on the ship’s insurers.

Both organisations published a report: the NSW Maritime report was released on 5 December 2007, within 6 months of the incident; the ATSB report was released on 23 May 2008, almost 12 months after the incident.

The principal findings of each report are contained in the table below.

<table>
<thead>
<tr>
<th>ATSB Report</th>
<th>NSW Maritime Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>The ATSB investigation found that <em>Pasha Bulker</em>’s master did not appropriately ballast the ship and did not weigh anchor until it dragged in severe weather.</td>
<td>The Investigation assessed that the grounding of the <em>Pasha Bulker</em> resulted from a series of judgements and decisions made by the Master. The most significant being:</td>
</tr>
<tr>
<td>The unwise decision to not ballast the ship for heavy weather and remain at anchor were the result of his inadequate knowledge of issues related to ballast, anchor holding power and local weather.</td>
<td>• his failure to realise the potential impact of the weather forecast for the anchorage on 7/8 June;</td>
</tr>
<tr>
<td>After the ship got underway, the master became increasingly overloaded and affected by fatigue and anxiety and his inappropriate control of the ship at critical times inevitably led to its grounding.</td>
<td>• an initial decision to ride out the gale at anchor; and a decision not to ballast the ship for heavy weather.</td>
</tr>
<tr>
<td>Furthermore, the master incorrectly assumed that Newcastle VTIC would, if necessary, instruct</td>
<td>In addition, the handling of the ship while weighing anchor and when trying to depart the anchorage contributed to the <em>Pasha Bulker</em>’s dire situation and the eventual outcome.</td>
</tr>
</tbody>
</table>

In general the standard of seamanship and decision making displayed by the Master of the

---


The NSW investigation went on to find that:

- there was evidence that the Master of the *Pasha Bulker* may have committed the offence of Negligent Navigation under the *Water Traffic Regulations – NSW*.
- On examining the evidence and the elements of the offence that must be proved to the criminal standard, that is ‘beyond reasonable doubt’, the likelihood of a successful prosecution is low.
- Following this conclusion and in applying the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, NSW Maritime will not proceed to a prosecution.

Similar to the *Endeavour River* discussed above, the ATSB seized the highly relevant VDR recordings and neither the recordings nor the data derived from them were made available to NSW Maritime for the purpose of preparing their report.\(^{111}\)

Very similar conclusions to the *ANL Excellence* report can be drawn from the summary of the key findings outlined above. Despite the superior powers of the ATSB for evidence gathering, and the isolation of key evidence such as the VDR recordings from further use, even by key stakeholders like NSW Maritime, the key findings of each report are essentially the same. Such differences as there are can be readily explained by organisational prejudice and NSW Maritime's responsibility, as the regulator, to consider whether any offences have been committed.

It is submitted that none of the exclusive investigative powers granted by the *Transport Safety Investigation Act 2003*, nor the restrictions on use of the evidence gathered, nor the restrictions on the use of the final report, can be justified on the basis that the key findings would have been different without these powers and restrictions. Manifestly they are not. Further, the issue of timeliness is relevant, with NSW Maritime delivering a substantially similar report, within the context of its own legislative responsibilities, almost 6 months before the ATSB report.

For balance, it should be noted that the most important material difference between the two reports is the role of the Vessel Traffic Information Centre in the incident, with the ATSB report making strong recommendations about that role. Nonetheless, it is suggested both the safety and regulatory outcomes could have been achieved by using traditional methods, such as a marine inquiry, without the unnecessary duplication of effort and positive interference that occurs when regulators and safety investigators compete for evidence.

---

\(^{111}\) At page 21 of the report, NSW Maritime state: ‘NSW Maritime does not have the equipment to decipher the VDR data. The Australian Transport Safety Bureau (ATSB) has the necessary equipment but would not release their interpreted data. NSW Maritime tested its analysis with the ATSB within the extent permitted by the *Transport Safety Investigation Act 2003* to verify the broad conclusions reached by this investigation.’
8. The ATSB - concluding remarks

The ATSB was created to ensure that accident investigation had a systemic and human error focus in order to ensure that the causes of incidents were properly determined so that such incidents were not repeated. That this is a worthy objective is beyond argument, and the academic literature overwhelmingly supports the concept of safety investigation. The investigative function of the ATSB has effectively replaced the marine inquiry at Commonwealth level, even though the marine inquiry had a different legislative framework and delivered a report that could be relied upon for a variety of purposes. The loss of that functionality is of concern.

It is acknowledged that the ATSB has been very successful in its investigation function; more than 200 investigations have been conducted and published, 112 and the ATSB is well-regarded for its expertise and professionally presented findings and recommendations.

It is not intended to re-visit the Transport Safety Investigation Act 2003 in this section. A summary of the Act's powers and legal issues in comparison with the powers of a board of inquiry under part 12 of the Transport Operations (Marine Safety) Act 1994 are contained in Table 3 below.

Rather, it is useful to consider some of the principal characteristics of the ATSB's powers, and the legal consequences attendant to those powers, when considering the utility of the ATSB's functions in the overall context of maritime incident investigation and the other legal consequences flowing from a shipping casualty.

In summary, the Transport Safety Investigation Act 2003 (Cth):

- has the principal objective of investigating maritime accidents, and the making of safety statements and recommendations, which are then published;
- provides for powers of compulsion to require information and answers to questions, which powers are strict liability offence provisions;
- abrogates the privilege against self-incrimination;
- there is no right of procedural fairness to participants in marine casualties, although draft reports may be provided on a confidential basis for comment within the discretion of the ATSB;
- reports, and the vast majority of the supporting evidence, cannot be used in evidence in any civil or criminal proceedings, other than a coronial inquiry;
- arguably the most crucial evidence, the on-board recordings, also cannot be used in criminal matters against the participants, in civil matters unless the onerous two-step process is followed, and even for coronial inquiries, the use of such vital evidence is conditional upon satisfying a public interest test.114

A number of criticisms can be made about the ATSB's jurisdiction. Whilst the importance of the safety objective cannot be doubted, the legal mechanisms used are, in the author's opinion, excessive for the benefit conferred. In particular, the prohibition against using evidence for any other purpose, particularly on board recordings, is a significant price to pay for the only apparent benefit; that is, to obtain admissions from participants in the accident.

113 Restricted information – Transport Safety Investigation Act 2003 (Cth), part 6 division 2 and section 3.
114 Transport Safety Investigation Act 2003 (Cth), section 59.
Further, the evidence gathered by the ATSB is effectively quarantined from further use. Even the coroner, with a similar inquirial jurisdiction to the ATSB, might be refused access to evidence by the Executive Director if future investigations might be affected. It is submitted that the appropriate use of selected evidence, subject to relevant court directions on matters such as confidentiality, could lay a proper foundation for the expeditious conduct of a matter, whether the matter is coronial, disciplinary, civil or criminal.

Such restrictions on the use of evidence, and the reports derived from that evidence, are not justified by reference to the supporting IMO Code for the investigation of marine casualties. The provisions in the Transport Safety Investigation 2003 (Cth) clearly exceed the protections envisaged by the Code.

It is also worthwhile considering the ATSB jurisdiction in contrast to the traditional marine inquiry. There seems little doubt that the ATSB jurisdiction has rendered the Court of Marine Inquiry obsolete by apparently fulfilling the same function; that is, conducting an investigation into the causes of an incident in order to make recommendations. Putting to one side the disciplinary aspect (which the ATSB definitely does not fulfil), the inquirial jurisdictions exercised by the ATSB and the former marine inquiry are very similar.

However the key difference is that the report of the inquiry would have been given to the relevant marine regulator to take appropriate action, potentially both in a safety and a disciplinary aspect. The report, and the evidence given to the inquiry, could have been relied upon in other forums and for other purposes. To balance this, the participants in the inquiry could be legally represented, and procedural fairness to all parties was a key element in the conduct of an inquiry.

Now however, the ATSB is not required to afford procedural fairness to any party (although its practice is to make draft copies of reports available for comment to affected persons). The report cannot be used for any other purpose (save for the coronial jurisdiction). Nor can much of the evidence and the report itself have legal standing. The ATSB has no responsibility for the implementation of its recommendations or for the findings in its reports. The ATSB also does not have to consider the cost/benefit relationship when making recommendations, unlike its counterpart in New Zealand.115

Such a report leaves the maritime regulator, whether at Commonwealth or State level, in something of a quandary. The regulator does not have access to the evidence used to prepare the report, is not required to be consulted in relation to the draft report (although typically is), has no recourse regarding adverse findings or impracticable recommendations, and yet recommendations are routinely made to the relevant regulator to take actions concerning the findings of the Report. This separation of the recommendation making power from regulatory responsibility is not of itself the problem; the same issue arises with marine inquiries. The essential difference is that the regulator now has to obtain the evidence afresh in order to justify the implementation of the recommendations, and also in order to fulfil its regulatory and safety responsibilities.

In other words, the safety and regulatory purpose have been so effectively separated that it could be argued that the safety purpose may actually be frustrated by the provisions intended to promote safety. At the very least it leads to wasteful duplication. Before a safety regulator can take effective action to ensure safety in its area of responsibility, evidence of the kind obtained by the ATSB and protected from disclosure is required. Yet such evidence cannot be used because of unquantified concerns about the future ‘free-flow’ of information to the ATSB. This justification is in any case flawed, because it necessarily involves speculation about future consequences. It also has no bearing to on-board recordings, and yet such recordings are specifically protected from disclosure.

It is also worth reflecting upon the role of the ATSB investigator as the descendant of the marine inquiry assessor. Like assessors, ATSB investigators are usually technically skilled mariners and engineers, but with the benefit of additional investigation training to assist them in obtaining evidence relevant to human error and safety investigation findings. The key difference is that the ATSB investigator is now using the evidence to draw conclusions about the causation of incidents without reference to a legally trained or judicial officer. The other key difference is the absence of procedural fairness as a requirement of the procedure; rather it is now a matter of discretion.

Let us now consider the development of BOI provisions in Queensland, and the current provisions under TOMSA for a comparison with the ATSB jurisdiction.

9. Marine boards of inquiry in Queensland

9.1. History

The development of marine inquiries in Queensland has a common starting point with the Commonwealth provisions. The first Queensland legislation providing for marine inquiries was the Navigation Act of 1876 (Qld), which, like the Commonwealth's Navigation Act 1912, was modelled on the equivalent Imperial legislation in force at the time, that is, the Merchant Shipping Act 1854.

These early provisions provided for a preliminary inquiry and also for an investigation by the Marine Board of Queensland or two justices, who could be assisted by one assessor if the cancellation of a certificate or licence was an issue.

The Queensland Navigation Act of 1876 was repealed and replaced by the Queensland Marine Act 1958. Part IX of that Act dealt with ‘Inquiries and Investigations into Shipping Casualties, Incompetency, and Misconduct’.

Part IX of the Queensland Marine Act 1958 provided for a system of investigation and inquiry consequent to a shipping casualty that is typical of the characteristics of the marine inquiry summarised at the beginning of this paper. That is, the Act provided for:

- a preliminary inquiry, usually conducted by an experienced mariner employed by the then Department of Transport;
- consideration of that report by the Marine Board (that was constituted by the Act), which had power to caution or reprimand the holder of a licence;
- if appropriate, a formal investigation by the Marine Board itself or, with ministerial approval, before a stipendiary magistrate;
- if the investigation was conducted by a stipendiary magistrate, the Governor-in-Council had the power to appoint one or more assessors of appropriate skill, with two assessors mandatory if suspension or cancellation of licenses was involved;
- all persons with an interest in the proceedings to be notified so that they could seek leave to appear; and
- the investigation's powers are statutory, not those of a court.

These characteristics of a formal investigation are unsurprising and, with the exception of the role of the Marine Board, are quite similar to the equivalent Commonwealth provisions at the time.

---

117 M White Marine Inquiries (1993) 9 Queensland University Of Technology Law Journal 61 at 64.
9.2. Marine inquiries under TOMSA


Part 12 of TOMSA provides for Boards of Inquiry into marine incidents to be established by the Minister by gazette notice. Such Boards must inquire into the circumstances and probable causes of the relevant marine incident and give the Minister a written report of the findings. The report may contain recommendations and, when provided, must be tabled by the Minister and the Legislative assembly within 14 days of receipt.

The essential characteristics of a TOMSA Marine inquiry are as follows:

- the board must observe natural justice; and act as quickly and with as little formality and technicality as is consistent with a fair and proper consideration of the issues;
- the board is not bound by the rules of evidence; may inform itself in any way it considers appropriate, including by holding hearings; and may decide the procedures to be followed;
- the inquiry is to be held in public unless there are special circumstances;
- the members, legal representatives and witnesses of the Board have the same protections and immunities conferred on judges, barristers and witnesses in a Supreme Court;
- by a notice, require witnesses to attend at the inquiry; failing to attend is an offence; as is failing to answer a question without reasonable excuse;
- self-incrimination is expressly abrogated. However the answer is not admissible in evidence against the person in any criminal proceeding provided that the person claims the privilege prior to answering; and
- if the board considers the evidence before it discloses an offence, it may make a report accordingly to the relevant authority to take further action as appropriate.

Thus a marine inquiry under TOMSA retains many of the essential elements normally associated with marine inquiries, but it has evolved from the combined disciplinary and inquirial functions to only fulfilling the inquirial; the Board has no disciplinary powers to suspend or cancel a licence.

\[126\] *Transport Operations (Marine Safety) Act* 1994, s 139.
\[130\] *Transport Operations (Marine Safety) Act* 1994, s 151.
\[131\] A licence is an 'authority' under the *Transport Operations (Marine Safety) Regulation* 2004 and the procedure for suspension and cancellation is in part 6. The power to cancel or suspend licences resides with the general manager of Maritime Safety Queensland or the chief executive of Queensland Transport – see s 63 *Transport Operations (Marine Safety) Act* 1994.
The abrogation of the privilege against self-incrimination, balanced with the inadmissibility of such evidence in criminal proceedings, allows a Board to fulfil its inquirial function and get to the cause of incidents by compelling incriminating admissions. However, the material before the Board, and also the Board's report, can be used for any other purpose, that is, civil, disciplinary or criminal, with the sole exception of material that may be incriminating and for which privilege is claimed, in which case it is inadmissible in a criminal proceeding.

Indeed, it might be said that the discretion conferred on the Board to report offences to the relevant authority requires the Board to at least consider whether the material before it discloses an offence, in addition to performing its principal function of establishing the causes of the marine incident.

In the disciplinary context, the chief executive and the general manager of Maritime Safety Queensland have the discretion to suspend authorities, including licences, after a marine incident. Whist Boards of Inquiry do not have any direct input into that decision, or any other subsequent disciplinary action, the holding of a Board of Inquiry may have a direct impact upon a person whose licence has been suspended, because the term of suspension may be extended until seven days after the Board has given the Minister's report. Depending upon the efficiency of the Board in gathering evidence and holding its hearings, and the speed with which it delivers its report, such a suspension could be extended well beyond the six months provided for in section 164 of the Transport Operations (Marine Safety) Regulation 2004.

It is notable that there is no express role for assessors in the legislation, although it has been the practice for Boards of Inquiry established under TOMSA (more of which below) to have persons with technical expertise appointed to the Board.

A fuller discussion of the board of inquiry provisions under TOMSA, together with the comparison with the ATSB jurisdiction, follows at Table 3 below. For present purposes, White's remarks, written before TOMSA came into effect, seem remarkably prescient:

But reform is in the air in the Queensland Department of Transport with the newly passed [Transport Operations] Marine Safety Act 1994 (Qld) which repeals some or all of the Queensland Marine Act 1958 (Qld). The Marine Safety Act has quite modest pretensions in the area of marine inquiries, as its terms merely empower the Minister to set up a marine inquiry at his discretion. The Act has no constraints as to the circumstances in which the Minister must set up an inquiry, nor as to who should conduct it, nor as to the procedure which it should follow. Such a wide provision gives great flexibility which, provided it is exercised by knowledgeable and temperate persons, has many advantages. However, if such powers come to be exercised by persons who lacked those qualities, they may well become a source of abuse, as the act contains no constraints on how they are to be used. It is to be hoped that some restraint on such powers may be contained in the Regulations, which will follow the Act. The Marine Safety Act 1994 (Queensland) does, however, address the deficiencies that investigations for purposes of safety and the preferring of charges of incompetency or misconduct are to be kept quite separate.

At present, there are no Regulations under TOMSA that refer to Boards of Inquiry.
10. The Wunma Board of Inquiry

Since the commencement of TOMSA, there have been two boards of inquiry established under part 12. The first was held in August 2002, and inquired into the circumstances of a collision between the *Sun Paradise* and the *Pride of Airlie* in the Whitsunday Passage on 18 November 2001. The subsequent report of the Board was delivered on 9 October 2003 and was published after being tabled in the legislative assembly.136

Interestingly, the Board made no recommendations for prosecution or disciplinary action,137 with the recommendations focused upon developing a safety culture, appointing an officer to manage the implementation of the Board’s recommendation, continuous education, marine safety standards and training programs. In short, the Board focused upon systemic issues in considering the causes of the marine incident, quoting from Professor Reason in the preface to the report, and referred extensively to the literature on human error and generating a safety culture.

Whilst this report will not be considered in detail in this paper, it is a useful illustration of the value of the marine inquiry process, with:

- procedural fairness being observed;
- extensive evidence being heard;
- cross-examination of witnesses allowing the board to consider all aspects of the evidence;
- the use of assessors being continued, with members of the board having nautical expertise (one member was a master mariner, the other members, including the chairperson, were experienced maritime lawyers with the Royal Australian Navy). The use of such persons removed the necessity for expert evidence;
- the conduct of separate criminal prosecutions arising out of the incident did not inhibit or deter the evidence that was given before the inquiry, because of the protection granted by section 147 TOMSA.

Whilst the timeliness of the Board's report should be criticised, taking almost 2 years to deliver from time of the incident to the delivery of the report, it is submitted that the inquiry was otherwise successful. The inquisitorial jurisdiction was exercised effectively, the causes of the marine incident were established and effective recommendations were made about the prevention of a similar kind of incidents, principally by the promotion of a safety culture in the maritime industry in Queensland and in the Whitsundays region in particular. Further, the conduct of a regulatory response, including the prosecution of one of the masters involved in the incident for offences under TOMSA, was also allowed to proceed independently of the Inquiry and did not interfere with the safety aspect of the Board's work.

It is interesting to note that, similar to the consideration of the *ANL Excellence* above, the organisational prejudices of the inquiry may have a greater impact upon the construction of the findings and the ultimate recommendations than the legal regime used to collect the relevant evidence. In this inquiry, the terms of reference required a consideration of the safety culture of the maritime industry, and that focus was realised in the ultimate report. However, it is suggested that the marine inquiry model, permitting representation, procedural fairness and cross-examination of witnesses, when combined with criminal prosecution immunity to witnesses, permitted the inquiry to obtain a superior marine safety outcome than mere investigation alone.

The establishment and conduct of the second board of inquiry under TOMSA into the marine incident concerning the ship ‘Wunma’ is considered in more detail below.

---


137 Although the master of the Sun Paradise was independently prosecuted for offences under TOMSA arising out of the incident.
10.1. The Wunma Marine Incident

The Wunma (the ship) is a 5140 DWT barge engaged in transporting zinc ore between Karumba and anchored bulk carriers in the Gulf of Carpentaria. The ship is registered as a commercial ship in Queensland, as it is engaged in primarily intrastate voyages.138

In early February 2007, the ship had partially loaded a bulk carrier anchored in the Gulf of Carpentaria, the MV Ernest Oldendorff, when the forecast for a tropical depression was given by the Bureau of Meteorology.139 The ship proceeded to sea fully laden, but was unable to discharge into the MV Ernest Oldendorff because of the weather conditions.

The ship’s ‘dirty water tanks’ filled with rain water, and the ship returned to Karumba and emptied the dirty water tanks. The tropical depression forecast was upgraded to a tropical cyclone, and so the ship proceeded to sea to ride out the cyclone in the Gulf of Carpentaria, still laden from its previous journey.

The ship took on water, both rainwater and seawater, beyond the capacity of the ship to remove it - the ‘dirty water tanks’ filled again. Water ingress into the ship eventually led to a loss of propulsion and electrical power.

The ship anchored and was relatively secure, but worsening weather conditions and concern of continued water ingress caused the master to send a distress call. On 7 February, the crew were rescued by helicopter and returned to Karumba.

The owners of the ship entered into a salvage agreement with professional salvors; the salvors boarded the ship and, with the chief engineer, and the assistance of a tug operated by the Commonwealth's Australian Maritime Safety Authority (‘AMSA’), proceeded to take the ship safely to Weipa, where it was subsequently repaired.

In these circumstances, a marine incident occurred within the meaning of s123 TOMSA, in that the ship was abandoned and material damage was done to the ship. Consequently, shipping inspectors from Maritime Safety Queensland commenced investigating the marine incident in accordance with s126 TOMSA.

10.2. Establishment on the board of inquiry

During the preliminary stages of that investigation, it became apparent that the causation of the marine incident was complex and multi-faceted, and that therefore, the marine incident could properly be the subject of a board of inquiry.

The then Minister for Transport and Main Roads, the Hon Paul Lucas MP, established a board of inquiry into the marine incident (‘the Board’) on 15 March 2007 pursuant to part 12 of the Transport Operations (Marine Safety) Act 1994.

In his media press release140 the then Minister stated:

‘While this incident ended with the safe rescue of the crew and salvage of the ship, it highlighted a number of concerns about the safe operation of vessels in cyclonic conditions,’ Mr Lucas said.

‘This is one of those incidents that could easily have ended in tragedy and I think it is beholden on all parties concerned to consider the circumstances leading up to and during this incident, to identify ways to reduce the risks of similar incidents in the future.’

‘Boards of Inquiry aren’t about playing a blame game, and the aim is not to point fingers at individuals,’ Mr Lucas said.

---

138 As to the application of TOMSA, see sections 11-16. As to the requirement for registration, see part 5, Division 2 TOMSA.
'However, while you can't stop cyclones from occurring, it is important that there are stringent procedures and practices for ships that operate in these environments. The board will look at all of the facts and make recommendations that will hopefully have safety benefits for the whole of the marine industry operating in far north Queensland.' [emphasis added]

Underlying the decision to establish the board of inquiry were the following considerations:
a the operation of the ship from Karumba is a vital one from a mining and shipping perspective, and a proper and independent examination of the issues was important to guarantee its future;
b the incident raised technical issues of significance relating to the design and operation of the ship, upon which independent expert assessment was required;
c the incident raised the possibility of a conflict between marine safety and operational and commercial decision-making. Given that one of the objectives of TOMSA is to balance safety and cost, it was prudent to obtain an independent assessment of that issue;
d there were no deaths or serious injuries, meaning that the coronial and criminal jurisdictions were not enlivened. The exclusive jurisdiction of a board of inquiry under TOMSA into this incident was clear and unambiguous.

On 16 March 2007 the Board of Inquiry and terms of reference were established by Gazette Notice.144

10.3. Conduct of the inquiry

After a Directions Hearing that took place on 22 May 2007, the public hearings of the Board commenced on 13 August 2007 and were completed on 6 September 2007; the Board conducted public hearings for a total of eleven days.

Given the Board has complete flexibility in relation to its procedures, the Board made a number of directions about the manner on which the Board would be conducted, including:

• leave being required to appear as a party;
• evidence-in-chief to consist of written statements, with cross-examination by leave of the Board;
• expert evidence admissible by statement;
• claims of confidentiality permitted in relation to evidence, including identity;
• the scope of oral evidence within the discretion of the chairperson, with cross-examination also within the discretion of the chairperson;
• order of witnesses selected by the Board within availability constraints; and
• permitting oral address and written submissions to the Board by a party with leave to appear.

---

141 Section 3 of TOMSA provides that the overall primary objective of the act is to achieve an appropriate balance between regulating the Queensland maritime industry to ensure marine safety and to enable the effectiveness and efficiency of the Queensland maritime industry to be further developed. Specifically, section 3 (2) (iii) provides that account must be taken of the need to provide adequate levels of safety with an appropriate balance between safety and cost.


143 See Criminal Code Act 1899 (Qld) available from http://www.legislation.qld.gov.au/OOPChome.htm, and in particular, s328A regarding dangerous operation of a vehicle, which includes a vessel.


145 As no regulations have been made as envisaged under Section 136(3) TOMSA.

146 Practice Direction, 16 May 2007, Exhibit 3 to the Inquiry.
Evidence in the form of witness statements was presented to the Board from 57 witnesses, many of whom were called to supplement their written testimony with oral evidence. A total of 141 exhibits - comprising several hundred pages - were tendered in evidence.

The Board considered all of the submissions made by the parties, along with the evidence given during the course of the Inquiry, and delivered the final report of the Board on Monday, 19 November 2007 to Maritime Safety Queensland on the Minister's behalf.

Pursuant to s132(3) Transport Operations (Marine Safety) Act 1994, the Board's report was tabled on Monday 3 December 2007. Although Parliament was not then sitting, the report was tabled under s59 of the Parliament of Queensland Act 2001.

The Board's report is publicly available and is available on Maritime Safety Queensland's website at http://www.msq.qld.gov.au/.

10.4. Wunma Inquiry Findings and Recommendations

It is not proposed to fully review the conduct of the inquiry and the findings and recommendations made by the Board. For present purposes, it is sufficient to note that the Board concluded that one cause (listed first in a list of 29 causes) was the absence of appropriate infrastructure to which the ship could be moored during cyclonic conditions. The absence of that infrastructure meant that the ship went to sea when the tropical cyclone was imminent, exposing it to hazards for which it was not designed, and allowing inherent defects to come into play. These defects included:

- the presence and location of a ventilation grill that allowed water to enter the emergency generator room and the engine room, blacking out the ship at the time of greatest storm activity; and
- the 'dirty-water system', which was designed and operated to retain water on board the ship for environmental protection reasons, rather than the usual marine safety purpose of spilling water from the ship as quickly as possible.

The conduct of the Wunma Board of Inquiry is considered in the context of the principal themes discussed in this paper; that is, the role of the assessor and the relationship with expert evidence, the relationship between the inquirial function of the marine inquiry, and the legal powers used to collect the evidence; and the uses of the report and the confidentiality of evidence.

10.5. The Inquirial function

The terms of reference for the inquiry required it to consider the direct and proximate causes of the incident. This is unsurprising, and is simply a restatement of the statutory function of a board of inquiry under part 12 TOMSA. The scope of the inquiry was described in the Board's own words:

The Board is not concerned simply with what occurred on 6 and 7 February 2007, after the ship went to sea. The Board must inquire into the probable causes of the marine incident and is asked to consider whether there were any systemic or regulatory arrangements that contributed to the incident.

The consideration of such systemic and regulatory issues included the adequacy of the managerial systems and processes in place, and whether persons involved in the ship's operation followed those systems and processes.

148 Reproduced at chapter 2 of the Report.
149 Section 132 (1).
It may be concluded that such terms of reference were included to ensure that there was express consideration by the Board of the systemic factors and human errors that are now an ordinary element of modern safety investigation practice and which is integral to the ATSB's jurisdiction. But it also begs the question of whether the Board saw itself as having a disciplinary jurisdiction, given that it would be considering whether persons had failed to follow procedures, and if so, in what way.

Interestingly, the Board said that:  

150

The Board’s function is not to apportion responsibility for the incident, or make findings in terms of culpability. It is required to report on the causes of the marine incident.

But perhaps against that statement, the Board drew conclusions that have clear culpability implications, such as the use of the word ‘failure’ in the following findings:

151

(10) The failure to take adequate steps on 5 February 2007, or beforehand, to prepare the ship and her crew for a prolonged voyage in open waters during cyclonic conditions, including:

- bunkering sufficient fuel to enable the ship to remain at sea for an extended period whilst operating all three of her engines;
- unblocking deck drains to permit, so far as possible, rainwater to be directed overboard through deck drains;
- familiarisation by navigation officers of procedures in the ship’s Safety & Quality System to avoid cyclones at sea.

(11) The failure during the voyage that commenced on 5 February 2007, and particularly during the period prior to the decision at around 1140 hours on 6 February to turn South, to obtain current weather information by email or satellite phone. The consequential lack of plotting of the cyclone’s position and path, and the ship’s position in relation to the cyclone. The making and recording of only infrequent observations of wind direction and barometric pressure.

(12) In general the failure to apply the procedure to avoid cyclones at sea contained in the ship’s Safety & Quality System (SQS 06; D 220) or similar procedures to avoid cyclones at sea.

(13) The decision of the Master at approximately 1140 hours on 6 February 2007 to turn South without:

- adequate current information about the cyclone’s position and path;
- adequate analysis of the limited information that was on hand at 1140 hours;
- adequate consideration of the consequences of turning South;
- consultation with the Chief Mate, the Second Mate, the Designated Person Ashore or other persons ashore about the proposed course of action.

It takes little imagination to conclude that these findings, which principally relate to the master's management of the ship, could found disciplinary, civil and possibly criminal liability.

On the other hand, the Board itself has no power to take disciplinary or regulatory action against any person. The highest the Board may go is to refer any incriminating material to a relevant authority pursuant to s151 TOMSA. As previously noted, this may mean that the Board must consider whether any criminality is involved in a particular incident in deciding whether are not to make such a report.


151 Ibid at chapter 17.
In any event, aside from making findings that could possibly be used in subsequent ‘blame attributing proceedings’ and considering whether material should be referred for criminal prosecution, the Board has no other disciplinary role; as noted above, the board confined itself to determining the causes of a marine incident.

Given the great disparity in the legal mechanisms for gathering evidence under the ATSB and the marine inquiry jurisdiction, it is worth considering briefly how that mechanism worked in the Wunma board of inquiry. Overall, the protections provided to witnesses by part 12 TOMSA include:

- a person summoned to attend or appearing before the board as a witness has the same protection as a witness in a proceeding in the Supreme Court;\(^{152}\)
- whilst the privilege against self-incrimination is abrogated, the incriminating evidence cannot be used in a criminal proceeding against the witness (other than for a proceeding about the false or misleading nature of the evidence), provided that the witness first claims privilege before giving the incriminating evidence;\(^{153}\)
- whilst not strictly a protection of a witness, to the extent that the owner and the master usually do testify, then legal representation is important. Consequently, the board must give the owner and master the opportunity of making a defence to all claims made either in person or by counsel, solicitor or agent.\(^{154}\)

In the event, the only witness to claim privilege against self-incrimination under s147 TOMSA was the master. The master had willingly provided a statement to a shipping inspector employed by Maritime Safety Queensland immediately after the incident. No privilege was claimed at that point, and the statement was tendered in evidence as an exhibit to the Board. All subsequent statements by the master, including his oral evidence, were prefaced by the privilege against self-incrimination. After having done so, the master willingly answered all questions put, both in his evidence in chief and under cross-examination by various parties, at the inquiry. Given that the master's evidence occupied the better part of two days of the hearings, it might be concluded that the protection conferred by s147 TOMSA was more than sufficient to ensure that the inquiry had the benefit of the master's full cooperation in obtaining the evidence required to make findings about the causation of the incident in a safety context.

All other witnesses called, in particular the ship's crew, gave evidence in a frank manner, and many made suggestions about how to improve the safety of the ship. Notably, the master and the chief mate made suggestions concerning the arrangements on board the ship to prevent a recurrence of the incident, which suggestions were adopted by the board as recommendations.\(^{155}\)

In the author's view, the protections granted by part 12 TOMSA to witnesses were sufficient to ensure the ‘free flow of information’ to the board. This is so even in the absence of the kinds of protection is provided by the Transport Safety Investigation Act 2003 (Cth), meaning that the potential for criminal, disciplinary and civil action arising out of the evidence being provided was present. It is notable that the master was independently legally advised.

For the sake of completeness, the author is not aware of any criminal action that has been commenced in relation to any party arising out of the Wunma inquiry. Further, because the master was licensed by the Commonwealth authority (the Australian Maritime Safety Authority) and not in Queensland, MSQ has no jurisdiction in relation to any disciplinary decision. The author is also not aware of any civil litigation arising out of the Wunma inquiry. The Board did not make a report of material disclosing a criminal offence pursuant to s 151 TOMSA.

---

\(^{152}\) Section 139 (3) TOMSA. The protections of witnesses include the protection from suit for defamation, breach of confidence and professional confidentiality.

\(^{153}\) Section 147 TOMSA.

\(^{154}\) Section 141 TOMSA.

\(^{155}\) Report of the Board of Inquiry into the Marine Incident Involving the Ship Wunma in the Waters of the Gulf of Carpentaria on 6 and 7 February 2007 at 18.2.6 and 18.2.7.
10.6. Confidential evidence

The board also considered submissions from parties concerning the confidentiality of certain kinds of evidence, and made an appropriate direction accordingly.

The Board stated:156

Under section 138 of the TOMS Act, an Inquiry must be held in public unless a direction is given to the contrary, and such a direction may only be given if the Board is satisfied that it is proper to make the order in ‘the special circumstances of the Inquiry’.

The Board’s Practice Direction made provision for parties to apply for the preservation of certain confidential information contained in exhibits and the like, such as commercially confidential information. In some instances proper claims to confidentiality in respect of certain financial matters justified portions of a small number of exhibits being redacted. However, those few exceptions apart, the evidence before the Inquiry was accessible to the public. Public access was facilitated by the uploading of transcripts and exhibits on the Board’s website.

It is submitted that the Board's flexibility in setting its own directions in the context of allowing some evidence to be provided on a confidential basis, within the context of a public inquiry, was sensible and appropriate. It is certainly preferable to the blanket confidentiality provisions contained in the Transport Safety Investigation 2003 (Cth).

Having said that, it would be desirable for future boards to have the benefit of some criteria by which the granting of confidentiality could be assessed. Such criteria might include, as referred to by the board, matters of a significant commercial nature, but other issues might also be the proper basis for confidential evidence being provided, such as a reasonable fear of recrimination.

10.7. Expert evidence and assessors

As has been previously discussed, there is a trade-off in the use of assessors informing a judicial officer in a marine inquiry. The presence of assessors, when combined with the general rule that expert evidence within the assessor's field of expertise was not admitted, meant that the assessor was giving expert opinion to the judicial officer throughout the hearings, was able to interpret the evidence and advise right up to the moment that the report was delivered. This facility has obvious efficiency and cost benefits, obviating the need for lengthy and possibly conflicting expert evidence.

However it also has disadvantages in a procedural fairness sense, as the parties to the inquiry do not know what advice is being given by the assessor, have no opportunity to test or challenge that advice, and they cannot call their own expert evidence to support that party's position. In the past, the advantages associated with the use of assessors were seen to outweigh the disadvantages. However, in more modern times, the use of assessors has fallen out of favour in the Admiralty jurisdiction altogether in Australia, and lingers on only in the marine inquiry jurisdiction.

Both boards of inquiry established under TOMSA have had persons with professional qualifications and expertise appointed, presumably to function in the assessor's role. However, part 12 TOMSA is silent on the use of assessors and also silent on the issue of expert evidence.

In the Wunma inquiry, the chair of the board was a respected member of the Queensland Bar.157 The other two members appeared to be assessors (although were not expressly appointed as such), with qualifications as a master mariner and as a naval architect.

156 Ibid, Chapter 2.
157 His Honour, Justice Applegarth SC, was appointed to the Queensland Supreme Court on 3 September 2008.
The directions of the Board\textsuperscript{158} permitted the admission of expert evidence and the Board called for expert evidence in relation to the design of the ship. The Board also permitted the admission of expert evidence in relation to matters of nautical expertise, naval architecture, marine engineering and meteorology.

It is submitted that the combination of using both assessors and permitting the admission of expert evidence is a poor option. The use of expert evidence inevitably increases the costs and length of the inquiry, even if oral testimony is not taken. Further, the nature of the opinions of the board, in their professional and expert capacities, is not known to the parties and has not been tested. Consequently, it is suggested that the appointment of assessors to the board, and the use of expert evidence, be the subject of legislative amendment to make clear whether the use of assessors is required, and if so, also provide for corresponding reasonable limitation on the admission of expert evidence.

\textbf{10.8. Frequency}

A final minor point can also be made about the frequency of Boards of Inquiry under TOMSA. In the almost 14 years the Act has been in force, 2 inquiries have been held under Part 12. By contrast, between the years 1863 and 1945, almost 2000 marine inquiries were held under the applicable marine legislation in force in Queensland; an average of approximately 20 per annum.\textsuperscript{159}

Given the overall increase in the maritime industry and marine incidents generally,\textsuperscript{160} the relative infrequency of Boards of Inquiry under TOMSA should be considered, and if necessary, regulations under Part 12 TOMSA should be introduced to facilitate the efficient and cost effective conduct of Boards of Marine Inquiry, so as to give full effect to the benefits of the jurisdiction and to enhance marine safety.

\textbf{11. The role of the marine inquiry against the safety investigation agency}

The principal aim of this paper has been to trace the development of the marine inquiry jurisdiction, and to consider and contrast the present expression of that jurisdiction at Commonwealth level in the ATSB and at state level with boards of inquiry established under part 12 TOMSA.

To facilitate the discussion, some of the key characteristics of each jurisdiction are summarised in table 4 below.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{158} Dated 16 May 2007, Exhibit 3 to the inquiry, at paragraph 15.
\item \textsuperscript{159} Harbours and Marine Department \textit{List of vessels involved in accidents on Qld Coast, 11 Sept. 1863-7 Dec. 1945 Har/83 Queensland State Archives, File Issue 20150 Item 17749.}
\item \textsuperscript{160} Refer to the marine incident annual reports published by Maritime Safety Queensland, available from \url{http://www.msq.qld.gov.au/Home/Publications/Marine_incident_annual_reports/} accessed 22 May 2008.
\end{itemize}
\end{footnotesize}
Table 4 – Summary of key characteristics of ATSB investigations and Boards of Inquiry under TOMSA

| Establishment and jurisdiction | Australian Transport Safety Bureau  
*Transport Safety Investigation Act 2003* (Cth) | Maritime Safety Queensland Board of Inquiry  
*Transport Operations (Marine Safety) Act 1994* (Qld) |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Director of Transport Safety Investigation (ATSBI permanently established: s12</td>
<td>ad hoc; established by the Minister at Minister's discretion: s131</td>
<td></td>
</tr>
<tr>
<td>inquire into transport safety matters: s23</td>
<td>inquire into the causes of marine incidents (s123) to which TOMSA applies (ss 11-16): s132(1)(a)</td>
<td></td>
</tr>
<tr>
<td>within Commonwealth jurisdiction: s11</td>
<td>must provide a report to the Minister: s132(1)(b)</td>
<td></td>
</tr>
<tr>
<td>discretion to investigate unless directed by Minister: s21</td>
<td>Report must be tabled in Legislative Assembly: s132(3)</td>
<td></td>
</tr>
<tr>
<td>publish report: s25</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| Evidence powers | powers of entry and seizure: Part 5 Division 3  
require persons to attend and answer questions: s32  
inspect and take possession of evidence: s36  
protection orders on evidence: s43 | shipping inspectors may exercise powers to board ships and seize evidence: s135  
compel witnesses to attend: s143  
inspect and take possession of evidence: s144 |
|--------------------------------|------------------------------------------------|--------------------------------------------------|
| Self-incrimination | privilege is abrogated: s47  
if individual, evidence cannot be used in civil or criminal proceeding against the person: s47(2) | privilege is abrogated: s147(1)  
evidence cannot be used in a criminal proceeding: s147(2) |

| Confidentiality of evidence | disclosure of restricted information (evidence) is an offence: s60  
disclosure to a court not permitted unless public interest test is satisfied: s60(6)  
if disclosure not permitted, then restricted information is not admissible: s60(8) | not expressly provided for  
parts of inquiry can be held in private in special circumstances: s138 |
| Confidentiality and use of on-board recordings (OBR) | • copying or disclosing OBR is an offence: s53  
• not basis for disciplinary action: s54  
• not admissible in criminal proceedings against crew: s55  
• not admissible in civil proceedings unless certificate from ATSB and public interest test: s56  
• can be made available to coronial inquiry unless ATSB believes that investigation would be interfered with: s59 | • not expressly provided for  
• parts of inquiry can be held in private in special circumstances: s138 |
| --- | --- | --- |
| Procedural Fairness and Representation | • procedural fairness and representation are not expressly provided for.  
• draft reports may be provided on a confidential basis for comment: s26 | • Must observe natural justice: s136  
• master and owner of ships(s) must have opportunity to make a defence against claims: s141  
• master and owner have right to be represented: s141  
• may permit or refuse person to be represented: s142(1)(c) |
| Hearings and public access | • not expressly provided for. | • must act quickly, with minimal formality (s136)  
• may hold hearings (s136)  
• must be held in public unless there are special circumstances (s138) |
| Role of assessor – use of expert evidence | • The role of assessor is not expressly provided for.  
• No restriction on the use of expert evidence | • The role of assessor is not expressly provided for.  
• No restriction on the use of expert evidence |
| Use of Report | • reports not admissible in evidence in any civil or criminal proceeding: s27  
• it is an offence to disclose or copy draft report: s26 | • unrestricted. |
| Disciplinary Role | • None.  
• Apportioning blame, determining liability, assisting court proceedings and even allowing adverse inferences to be drawn are expressly excluded as objectives of the Act: s7(3) | • may report offence and provide evidence to police or other persons: s151 |
Many of these characteristics have been discussed previously, but for present purposes, the comparison table is a useful aid in comparing certain key features, in particular:

- self-incrimination is abrogated under both pieces of legislation, but the corresponding protection under the ATSB jurisdiction is broader, extending to civil liability;
- there is little evidence protection granted under TOMSA, compared to the extensive and far-reaching prevention of disclosure under the TSIA provisions;
- there is no prohibition against using a report created by a TOMSA Board of Inquiry, as against the almost complete quarantine of the ATSB report. Only the coronial jurisdiction is exempted;
- procedural fairness is enshrined in TOMSA, but is not required under the TSIA;
- assessors and the use of expert evidence are not provided for in either Act. In the ATSB jurisdiction, this is perhaps unsurprising given the very prominent role of nautical expertise provided by the investigators themselves; although there is no requirement for the investigators to have such skills.\(^{161}\) By contrast, TOMSA envisages the appointment of a board to inquire into the causes of an incident, and yet provides no guidance on the skills, qualification or experience considered desirable for board members. Further, if it is desirable to have board members with expertise in the areas relevant to the incident, then consideration should also be given to the question of whether expert evidence in the board member's area of expertise ought to be prohibited or restricted for the reasons set out earlier in this paper. It is submitted that these omissions should be rectified by appropriate subordinate legislation.

### 11.1. A short note on jurisdiction

A detailed examination of the respective jurisdictions of the ATSB and Boards of Inquiry under TOMSA is outside the scope of this paper. For present purposes, it should be noted that there is considerable overlap between the 2 jurisdictions, as highlighted by the *ANL Excellence* and *Endeavour River* examples used in this paper.

Shortly stated, the TSIA empowers the ATSB to investigate 'Transport Safety Matters' that occur in Australia; such matters generally involve death or injury, or damage, destruction or abandonment of transport vehicles, including ships. TOMSA permits Boards of Inquiry to investigate 'Marine Incidents' that fall within the jurisdiction of the Act, principally involving ships in Queensland Waters and ships connected with Queensland wherever they may be.

---

\(^{161}\) c.f. the requirement for shipping inspectors appointed under TOMSA, who investigate marine incidents, to have the necessary expertise or experience to be a shipping inspector or to have completed approved training at s 157 TOMSA.
Consequently, a shipping casualty that occurs in Queensland waters will most likely enliven both jurisdictions. Given also that TOMSA prescribes the use of pilots in Queensland Pilotage Areas for all ships greater than 50m in length, the safety and regulatory aspects of a major shipping incident regularly arise.

12. Conclusion

It is argued that the powers and limitations created by the *Transport Safety Investigation Act 2003*, whilst laudable in intention:

- exceed what is necessary in order to achieve the safety purpose. Indeed, there is no evidence from the findings of the reports considered in this paper that there has been any material increase in the 'free-flow of information to the ATSB' that is often used to justify the powers and limitations conferred on the ATSB;
- exceed what is required under international treaty, particularly the use of VDR recordings;
- unnecessarily interfere with regulatory agencies performance of their respective duties by isolating key evidence from their use; and
- results in a report that has limited utility, and which contains largely untested evidence.

By contrast, the marine inquiry process contained in part 12 TOMSA is a robust and sound method of achieving marine safety outcomes whilst retaining the flexibility of using the report, and the evidence given to the inquiry, for other purposes that would best serve the public interest, such as use in civil, disciplinary and criminal proceedings.

Where the use of evidence before a board of inquiry under TOMSA is circumscribed, such as by claims of privilege against self-incrimination or confidentiality, such limitations are sensible and proportionate to the goal of promoting candour from witnesses, and so facilitate the board of inquiry's function.

It is submitted that the marine inquiry procedure in part 12 TOMSA, if appropriately amended and constrained to address the issues highlighted above (such as the use of assessors and limiting hearings to the minimum necessary for procedural fairness), is a superior method of obtaining safety outcomes in some incidents, as compared to the safety investigation regime established under the *Transport Safety Investigation Act 2003*, because it permits a robust examination of the issues, fully engages the parties, allows legal representation and provides procedural fairness, and also serves the public interest in ensuring that all consequential matters arising out of the incident, including 'blame-apportioning proceedings', are dealt with in an efficient manner.

However, Boards of Inquiry are established ad hoc and only for some incidents. To date, Boards of Inquiry under TOMSA have been infrequent, especially compared to previous eras. The permanent establishment of the ATSB and its safety investigation remit have certain advantages for responding to incidents and obtaining evidence quickly. However, there does not appear to be a corresponding efficiency gain, with reports from the ATSB generally taking 6 months or longer to be published; a time-frame similar to that for the Wunma board of inquiry.163

Neither Boards of Inquiry under TOMSA nor investigations under the TSIA expressly utilise the concept of the nautical assessor, although both jurisdictions retain the function; under TOMSA as a board member, and under TSIA as an investigator with technical expertise. It is submitted that both jurisdictions would benefit from a proper consideration of the role of the assessor, and the corresponding use of expert evidence.

---

162 See generally Part 8 TOMSA.
End note: The ATSB report into the grounding of the Australian registered bulk carrier Endeavour River at Gladstone on 2 December 2007 was publicly released on 3 September 2008. As discussed in section 5.1 above in relation to VDR data, the ATSB investigators exercised their powers under Part 6 of the Transport Safety Investigation Act 2003 (Cth) to take control of, and deny 3rd party access to, the VDR data. Consequently, both the owners of the ship and the state regulator responsible for the safe movement of ships in the port of Gladstone independently investigated the facts and circumstances of the grounding without the benefit of the VDR data.

Further, both the owners of the ship and the state regulator then took prompt action to rectify what were perceived to be the causes of the incident on the basis of their own investigations. These separate investigations and actions were taken and implemented within a matter of weeks of the incident. The MSQ investigation in particular was finalised and delivered to the General Manager of MSQ before the end of January 2008. Such urgency is necessary in the context of a busy world-class export port, where a grounding and subsequent blockage of a channel could have far-reaching and very large safety and financial implications.

The conclusions of the ATSB Report, released 9 months after the incident, are sound and certainly reflect the findings of the MSQ and ship owner's investigations. Ironically, the ATSB ultimately made no recommendations, saying that:

The ATSB acknowledges the safety actions that ASP Ship Management and Maritime safety Queensland have taken to address all the safety issues identified during this investigation. Because of these actions, the ATSB has not issued any recommendations or safety advisory notices.

In short, despite not having access to the VDR data, the ship's owner and MSQ implemented appropriate countermeasures.

The importance and relevance of an independent safety investigation agency is not challenged. However, it is submitted that the legal framework under which the ATSB operates, particularly the extreme restrictions on the release and use of VDR data, is excessive for the benefit conferred. The ATSB's use of its powers to seize and restrict access to evidence can and does interfere with agencies and organisations that are actually responsible for ensuring safety outcomes. The legal framework of the ATSB should be reviewed to align it with international obligations, international practice and the obligations of regulators and industry to better achieve a timely overall safety outcome.

165 Ibid, p 44.
The Australian Federal Commissioner of Taxation recently released Draft Taxation Ruling TR 2008/D3 with the stated purpose of clarifying ‘what profits derived from the leasing of ships or aircraft fall within the ship and aircraft articles of each of Australia’s tax treaties’. In particular, TR 2008/D3 explains the taxing rights over different types of leasing profits, such as a full basis lease in respect of any transport by a ship operated in international traffic and bareboat leases which are ancillary to the lessor transport operations of ships in international traffic. This article outlines the Commissioner’s views on the application of the standard ships and aircraft articles in the tax treaties to which it is a party as well as considering the major variations on the standard adoption. In doing so, guidance is provided as to the allocation of taxing rights of ship and aircraft leasing profits under Australia’s tax treaties.

1 Introduction

The taxation consequences of international transactions have always been complex. International shipping is no exception. To this extent, the taxation treatment of leasing profits within the maritime industry has been considered recently, both by the Court and by the Federal Commissioner of Taxation (the Commissioner). In particular, in 2005 the Full Federal Court handed down its decision in McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation. In this case the question arose as to whether a fiscal non-resident had a deemed permanent establishment in Australia under the Singapore-Australia double tax treaty, thereby giving the taxing rights to Australia. Subsequent to, but independent of, McDermott Industries, the Commissioner released Taxation Ruling TR 2007/10. This Ruling deals with the treatment of shipping and aircraft leasing profits of United States and United Kingdom enterprises under the deemed substantial equipment permanent establishment provision of the respective taxation treaties. Both the Federal Court decision and the opinion of the Commissioner offer insight into how the Australian taxation regime applies to particular aspects of the maritime industry and have added some certainty to the taxation of international shipping profits. However, until recently there has been no general statement as to the taxation treatment of ship and aircraft leasing profits under the ships and aircraft articles which are generally contained in all of Australia’s international tax treaties.

Given the fiscal significance of ship and aircraft profits, both to the Federal Government and individual taxpayers, it is important that the application of the Australian income tax law be clarified. To this extent, the Commissioner has addressed the uncertainty by releasing a draft Taxation Ruling. Earlier this year the Commissioner released Draft Taxation Ruling TR 2008/D3 (TR 2008/D3) entitled ‘Income Tax: the taxation treatment of ship and aircraft leasing profits under the ships and aircraft articles of Australia’s tax treaties’. The aim of TR 2008/D3 is to clarify the scope of the ships and aircraft articles of the tax treaties to which Australia is a party. Specifically, it sets out the Commissioner’s views on which profits derived from the leasing of ships or aircraft fall within the relevant ships and aircraft profits provisions. TR 2008/D3 also considers the circumstances under which Australia has the exclusive right to tax the profits and the method of assessment of those profits under the relevant Income Tax Assessment Acts. While the draft taxation ruling is primarily

---

* Senior Lecturer, TC Beirne School of Law, The University of Queensland, Research Fellow, Taxation Law and Policy Research Institute, Monash University.
1 While the specific provisions of Australia’s international tax agreements focus on shipping and aircraft, this article primarily considers the application to the maritime industry.
3 Taxation Ruling TR 2007/10 Income Tax: the treatment of shipping and aircraft leasing profits of United Stated and United Kingdom enterprises under the deemed substantial equipment permanent establishment provision of the respective tax Treaties.
Taxing Rights Of Ship And Aircraft Leasing Profits

centered with leasing profits, it also considers the more general application of the ships and aircraft article by briefly discussing non-leasing profits.  

2 The Current ‘International’ Tax Regime

Prior to a consideration of TR 2008/D3, it is necessary to appreciate the general operation of Australia’s ‘international’ tax regime. The overarching principle embodied in international tax is that each jurisdiction imposes taxes according to domestic law. Therefore, when considering the tax consequences of international, or more appropriately cross-border, transactions it is a misnomer to refer to an ‘international’ tax regime, as put simply one does not exist. Rather, each jurisdiction has domestic legislation imposing the right to tax certain income. This domestic law is then supplemented by international tax treaties which may alter the domestic taxing rights to either prevent or enable the relevant jurisdictions the right to tax income because of certain events. These taxation laws apply to relevant taxpayers through the two broad principles of residence and source. Generally, a resident taxpayer is assessable on worldwide income, while a foreign resident is assessable on income sourced within the jurisdiction.

The application of the two principles of residence and source can lead to conflict for taxpayers entering into international or cross-border transactions, with a result for the taxpayer of double taxation. That is, the taxpayer is liable for tax on the same income in more than one jurisdiction. Therefore, the issue then becomes a question of allocating the taxing rights between the relevant domestic jurisdictions. The question then being asked is: who has the taxing rights where there is a resident taxpayer with foreign source income? For the purposes of ship and aircraft profits, the answer is often found in the double tax treaties, or agreements, to which Australia is a party. To date, Australia has negotiated 42 double tax treaties with other nations, including many trading partners. This means that the application of the ships and aircraft articles to profits derived by taxpayers often provides for the allocation of those profits and, therefore, is fiscally significant.

3 The Force and Effect of Double Tax Treaties for Ships and Aircraft

The double tax treaties mentioned operate by overriding Australia’s domestic taxation regime contained in the Income Tax Assessment Act 1936 (Cth) and Income Tax Assessment Act 1997 (Cth). These Acts are incorporated into the International Tax Agreements Act 1953 (Cth), with the consequence that this latter Act, along with Australia’s international tax treaties which are Schedules to that Act, take priority. For the purposes of ships and aircraft, each of the double tax treaties contains an article which specifically provides for the distribution of taxing rights between the Contracting States.

Treaties are negotiated and concluded bilaterally, with the consequence that the wording of the ships and aircraft article will vary from treaty to treaty. However, Australia’s double tax treaties are generally based on the OECD Model Tax Convention on Income and on Capital. The standard ships and aircraft article provides for the exclusive taxing rights of profits from the operation of ships and aircraft in international traffic to the State of residence, or more specifically, the place of effective management of the enterprise. While Australia bases its treaty provisions on this general principle, it is subject to one major reservation. Australia has traditionally reserved the right to preserve the source jurisdiction taxing rights over profits derived from operations which are internal. Further, Australia treats operations of ships and aircraft as being internal even when they are part of an international voyage. This extension of the article, while not part of the OECD Model Tax Convention on Income and on Capital (OECD Model Tax Convention), is recognised in the commentary to that Convention. Specifically, the commentary states:

Australia reserves the right to tax profits from the carriage of passengers or cargo taken on board at one place in Australia for discharge in Australia. Australia also reserves the right to tax profits from other coastal and continental shelf activities.


6 UK, USA, Canada, New Zealand, Singapore, Japan, Germany, Netherlands, France, Belgium, Philippines, Switzerland, Malaysia, Sweden, Denmark, Ireland, Italy, Korea, Norway, Malta, Finland, China, Austria, Papua New Guinea, Thailand, Sri Lanka, Fiji, Hungary, Kiribati, India, Poland, Indonesia, Vietnam, Spain, Czech Republic, Taipei, South Africa, Slovakia, Argentina, Romania, Russia, and Mexico.

7 The first Model Tax Convention was issued in 1963 with periodical updates since. The OECD adopts the approach of an ambulatory Model Tax Convention.

8 Commentary to the OECD Model Tax Convention on Income and on Capital, Article 8, paragraph 38.

(2008) 22 A&NZ Mar LJ
Given this major variation, rather than being able to interpret the standard OECD article entitled ‘Shipping, Inland Waterways Transport and Air Transport’, it is necessary to specifically consider the articles contained in Australia’s double tax treaties. The most recently negotiated Australian tax treaties generally adopt an approach containing a provision effecting the reservation. The following provision in relation to ships and aircraft provides a standard illustration of the wording:9

ARTICLE 8

Ships and Aircraft

1. Profits of an enterprise of a Contracting State derived from the operation of ships or aircraft in international traffic shall be taxable only in that State.

2. Notwithstanding the provisions of paragraph 1, profits of an enterprise of a Contracting State derived from the operation of ships or aircraft may be taxed in the other Contracting State to the extent that they are profits derived directly or indirectly from ship or aircraft operations confined solely to places in that other State.

3. The profits to which the provisions of paragraphs 1 and 2 apply include profits from the operation of ships or aircraft derived through participation in a pool service or other profit sharing arrangement.

4. For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise which are shipped in a Contracting State and are discharged at a place in that State shall be treated as profits from ship or aircraft operations confined solely to places in that State.

While the Australian version of the article provides for the distribution of taxing rights between the Contracting States, it does not provide any commentary for the purposes of interpretation. Given that Australia’s double tax treaties generally extend the OECD Model Tax Convention to include the reservation, it then becomes difficult to rely on the generic commentary attached to the OECD Model Tax Convention. Therefore, it is necessary for relevant domestic taxing authorities to provide an interpretation where the application is not clear. In Australia this is achieved via a taxation ruling regime which allows the Commissioner to provide written binding advice on the way in which, in the Commissioner’s opinion, a particular aspect of the tax regime applies to relevant taxpayers.10 The ruling regime then affords taxpayers the certainty that is often lacking.

The aim of TR 2008/D3 is to provide certainty to taxpayers who derive profits from the leasing of ships or aircraft that are then subject to the ships and aircraft article of the double tax treaties. The category of taxpayers to which it applies is broad as it is relevant for Australian treaty residents and treaty partner residents, that is, residents of Australia for the purposes of tax treaties as well as residents of countries which has a tax treaty with Australia. It will then apply to those treaty residents who ‘engage in the operation of ships or aircraft; and derive profits from leasing out ships or aircraft’.11

TR2008/D3 is not the first time the Commissioner has considered the tax implications of the shipping and aircraft industries. However, it is the first to deal specifically with the ships and aircraft article. While outside the scope of the current discussion, it is worth noting that to date there have been three separate rulings issued which may also be applicable to taxpayers engaged in the shipping industry, with the first two specifically dealing with shipping, and the third considering both shipping and aircraft.

Taxation Ruling TR2003/2 Income Tax: the royalty withholding tax implications of ship chartering arrangements considers the liability to royalty withholding tax arising under the Income Tax Assessment Act 1936 and whether a payment under a charterparty constitutes a ‘royalty’ being a payment for the ‘use of, or the

---

9 Draft Taxation Ruling TR2008/D3, paragraph 12. ‘International traffic’ is defined in Article 3 as ‘any transport by a ship or aircraft operated by an enterprise of a Contracting State, except where the ship or aircraft is operated solely between places in the other contracting state.


right to use’ equipment.\textsuperscript{12} Taxation Ruling TR2006/1 Income Tax: the scope and nature of payments falling within section 129 of the Income Tax Assessment Act 1936 considers the domestic law tax implications of ‘payments made under arrangements relating to the carriage of passengers, livestock, mails or goods by sea internationally as well as for “coasting trade”’.\textsuperscript{13} The third taxation ruling to consider similar issues is Taxation Ruling TR2007/10 Income tax: the treatment of shipping and aircraft leasing profits of United States and United Kingdom enterprises under the deemed substantial equipment permanent establishment provision of the respective Taxation Conventions. As previously stated, while all of the earlier Taxation Rulings deal with the taxation implications of the shipping industry, none specifically consider the taxation implications under the ships and aircraft article of the tax treaties to which Australia is a party.

The focus of the taxation rulings mentioned above, along with any decisions have tended to focus on articles of the double tax treaties other than the ships and aircraft article, or alternatively, have considered the interaction between various articles. For example, Taxation Ruling TR2007/10 considers the business profits article which allocates profits to the source jurisdiction where there is a permanent establishment within that jurisdiction. However, the current draft taxation ruling, TR2008/D3 is the first specifically aimed at the scope and operation of the ships and aircraft article. To this extent, it does not consider any interaction and specifically states that ‘it is not necessary to consider whether an enterprise had a permanent establishment in Australia as the business profits article does not apply to the profits’.\textsuperscript{14} The reason for this is that, where the profits from ships and aircraft fall under the specific article, the business profits article provides a priority rule giving way to the specific article. The Commissioner also gives priority to the ships and aircraft article over the royalties article\textsuperscript{15} unless there are clear words to the contrary.\textsuperscript{16}

4 Interpreting the Standard Ships and Aircraft Article

The object of the ships and aircraft article is to ensure that profits from operations in international traffic will be taxed in one State alone.\textsuperscript{17} The overarching taxation principles applied in this article consist of paragraph 1, which provides a residency rule, and paragraph 2, which provides an overriding source rule. Paragraph 1 of the Article allows for an exclusive residence country taxing right where profits are derived from international traffic.\textsuperscript{18} ‘International traffic’ is defined as ‘any transport by a ship or aircraft operated by an enterprise of a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State’.\textsuperscript{19} Qualifying this taxing right is paragraph 2, which provides that where the profits are derived from operations between places solely between places in the non-residence (source) State, the taxing rights vest in that source State.

4.1 Exclusive Resident Country Taxing Rights

Consistent with previous taxation rulings the Commissioner considers the application of the ships and aircraft article to both bareboat leases and leases on a full basis. In doing so, the Commissioner states that first paragraph of the article, with its exclusive residency taxing rights, also allows the residence country to tax the profits derived by the lessor of the ship or aircraft where the lease is on a full basis and used by the lessee in international traffic.\textsuperscript{20} However, the Commissioner treats a ‘bareboat lease’\textsuperscript{21} of a ship or aircraft differently.

\textsuperscript{12} Taxation Ruling TR2006/1, paragraph 2.
\textsuperscript{13} Taxation Ruling TR2006/1, paragraph 2.
\textsuperscript{14} Taxation Ruling TR2008/D3, paragraph 52.
\textsuperscript{15} The profits may fall within the scope of the royalties article as a payment of an ‘industrial, commercial or scientific equipment royalty’.
\textsuperscript{16} Taxation Ruling TR2008/D3, paragraph 53.
\textsuperscript{17} OECD, Model Tax Convention on Income and on Capital, 2008 Edition, Commentary on Article 8, 139.
\textsuperscript{18} Draft Taxation Ruling TR2008/D3, paragraph 20.
\textsuperscript{19} Draft Taxation Ruling TR2008/D3, paragraph 96.
\textsuperscript{20} For taxation purposes, a ‘full basis’ lease is defined in Taxation Ruling TR2007/10 as follows: ‘A full basis lease involves a situation where a lessee wishes to have a ship or an aircraft for its use for a given period of time, but has no wish to operate the ship or aircraft itself. The owner of the ship or aircraft provides the captain, crew (who remain its servants) and equipment and the owner is responsible for the technical operation and navigation of the ship or aircraft. The lessee pays hire to the owner in order to have the ship or aircraft at its disposal for the specified period of time. The lessee therefore obtains the right to commercially exploit the carrying capacity of the ship or aircraft for its own purposes.’
\textsuperscript{21} Draft Taxation Ruling TR2008/D3, paragraph 22.
\textsuperscript{22} For taxation purposes, a ‘bareboat lease’ is defined in Taxation Ruling TR2007/10 as follows: ‘A bareboat lease involves a situation where a lessee wishes to take a ship or an aircraft and to treat it as its own for a certain period of time. The ship or aircraft will usually, but not invariably, be leased without captain and crew. The practical effect,
The profits from these leases will not be taxable by the residence country under paragraph 1 unless they are ancillary to the ship or aircraft operations of the lessor in international traffic.\textsuperscript{23} The Commissioner states that the rationale for this is that the lessor under a bareboat lease is not operating the ship or aircraft and therefore does not fall within paragraph 1.\textsuperscript{24} For taxation purposes, a bareboat leasing activity will be ancillary where is does not make more than a minor contribution to the lessor’s overall transport operations and does not amount to a separate source of income or separate business operation.\textsuperscript{25} For example, where a resident of Australia occasionally leases its ships on a bareboat basis, but primarily runs its own international shipping operation or leases ships on a full basis, the profits from the bareboat leases will be considered ancillary to the overall activities of the lessor and Australia, as the country of residence, will be allocated the exclusive taxing rights over the profits of its resident.

\textbf{4.2 Exclusive Source Country Taxing Rights}

While paragraph 1 provides an exclusive taxing right to the residence country, paragraph 2 overrides that exclusive right by providing the ‘source country with taxing rights over profits from the operation of ships or aircraft to the extent that the profits are derived from operations that are ‘confined solely to places in that other State’.’\textsuperscript{26} To this extent, paragraph 2 is given priority over paragraph 1. The Commissioner adopts a broad approach to the application of paragraph 2 stating that it applies to both transport and non-transport profits (unlike paragraph 1 which only applies to transport profits), including voyages that start and end at the same port or in two different ports, even if part of that transport takes place outside the other State.\textsuperscript{27} He also includes the internal leg of an international voyage where it involves the same passengers or cargo being loaded and unloaded in that State.\textsuperscript{28} Profits from ancillary activities will also be taxable by the source State under paragraph 2 on the basis that they make a minor contribution and should not be regarded as a separate business or source of income.\textsuperscript{29} However, it is provided that the activity or activities undertaken must be sufficient to constitute a distinct operation that is identifiable from other operations of the enterprise.\textsuperscript{30}

Because paragraph 2 of Australia’s ships and aircraft article is not a standard paragraph the Commissioner has provided detailed explanation of its interpretation in TR 2008/D3. First and foremost is a consideration of what is meant by ‘operations confined solely to places in that other State’. For the purposes of determining whether paragraph 2 applies, the relevant activities are those which involve the physical operation of the ship rather than any administrative activities such as contract negotiation or ongoing management.\textsuperscript{31} Further, the activities undertaken in the ‘other state’ must constitute distinct operations which can be separately identifiable.\textsuperscript{32}

Paragraph 2 must also be read in light of paragraph 4, which at the very least clarifies the profits covered in the former paragraph, but potentially expands the scope. Paragraph 4 provides that profits derived from the carriage of passengers, livestock, mail, goods or merchandise, where they are shipped and discharged within the one State shall be treated as profits from operations confined solely to places in that State. Further, where there is an Australian leg of an international voyage and passengers or cargo embark and disembark in the one State, that State will have a taxing right over those profits derived from the activities within the Source State.\textsuperscript{33}

In addition to its application to transport operations, paragraph 2 also applies to non-transport operations. The Commissioner provides that ‘whether or not activities undertaken in the other State constitute an operation in that State will depend on the type of non-transport operation and nature and extent of the particular activities being undertaken. Provided the activities consist of an active process, activity, performance and discharge of function in their own right, they would constitute an ‘operation’.’\textsuperscript{34} The Commissioner qualifies this broad

\begin{itemize}
\item\textsuperscript{23}Draft Taxation Ruling TR2008/D3, paragraph 23.
\item\textsuperscript{24}Draft Taxation Ruling TR2008/D3, paragraph 102.
\item\textsuperscript{25}Draft Taxation Ruling TR2008/D3, paragraph 24.
\item\textsuperscript{26}Draft Taxation Ruling TR2008/D3, paragraph 26.
\item\textsuperscript{27}Draft Taxation Ruling TR2008/D3, paragraph 27.
\item\textsuperscript{28}Draft Taxation Ruling TR2008/D3, paragraph 27.
\item\textsuperscript{29}Draft Taxation Ruling TR2008/D3, paragraph 31.
\item\textsuperscript{30}Draft Taxation Ruling TR2008/D3, paragraph 29.
\item\textsuperscript{31}Draft Taxation Ruling TR2008/D3, paragraph 115.
\item\textsuperscript{32}Draft Taxation Ruling TR2008/D3, paragraph 117.
\item\textsuperscript{33}Draft Taxation Ruling TR2008/D3, paragraph 121.
\item\textsuperscript{34}Draft Taxation Ruling TR2008/D3, paragraph 125.
\end{itemize}

(2008) 22 A&NZ Mar LJ
interpretation by providing that ‘this does not mean that any ship or aircraft activity, or group of activities will constitute ship or aircraft operations in their own right. The activity or activities undertaken in the other Contracting State must be sufficient to constitute a distinct ship or aircraft operation that is identifiable separately from other ship or aircraft operations.’35

It may be the case that a ship departs from a location within a State and returns to the same or another location within the same State but travels outside domestic waters. Where this occurs, that is, there is a ‘voyage to nowhere’, the question arises as to whether profits derived from those activities fall within the scope of paragraph 2. The Commissioner adopts the view that provided the operations do not involve the ship stopping at a port outside the State, entering international waters will not preclude the application of paragraph 2. Therefore, profits derived from ‘voyages to nowhere’ are taxed solely in the source State.

While paragraph 4 potentially expands the scope of profits which are considered to be derived from the operations of ships confined solely to places in the source state, it does not apply to leasing arrangements. This is because leasing profits are not profits derived from ‘the carriage of passengers or cargo, rather they are profits that the lessor derives from the provision of services under the lease that facilitate the carriage…’.36 However, paragraph 2 will apply where, as a stand alone provision, the shipping activities of the lessor are ‘sufficient to constitute an identifiable and separate operation in that State.’37

Profits derived from bareboat leases may also be subject to exclusive source State taxation where, similar to the approach adopted to paragraph 1, the leasing of a ship on a bareboat basis is merely ancillary to operations which fall within paragraph 2. This will be the case no matter where the lessee uses the ship.38

5 Variations on the Standard Ships and Aircraft Article

The above discussion focuses on the Commissioner’s interpretation of Australia’s standard ships and aircraft article. However, several double tax treaties to which Australia contain non-standard articles.

5.1 Variations on Paragraph 1

The first variation of note is contained in several of Australia’s agreements. Australia’s treaties with the Philippines, Japan and Germany provide a reciprocal exemption from, or limitation of the source country taxing right over profits derived from certain shipping activities. The effect of this variation is, in practice, of little significance as it has the same effect as providing the exclusive taxing right to the country of residence. Therefore, the variation is in the wording only. By way of example, the Japan-Australia agreement provides:

A resident of one of the Contracting States shall be exempt from tax in the other Contracting State on profits from the operation of ships or aircraft other than operations confined solely to places in that other Contracting State.

The second variation of note is the broader scope of paragraph 1 in more than half of Australia’s international tax agreements.39 In these agreements, paragraph 1 does not limit the exclusive residence country taxing rights to profits derived from ‘international traffic’. The effect of omission is to broaden the application of paragraph 1 to cover both transport and non-transport profits, thereby including leasing profits that are not only derived from transport operations but also non-transport operations.40

In addition to the above variations contained in numerous agreements, there are three specific agreements of note. First, the United States Convention provides specific restrictions on the exclusive residence country taxing rights over leasing activity profits.41 Secondly, the Taipei agreement applies to both transport and non-transport

38 Draft Taxation Ruling TR2008/D3, paragraphs 143-144.
39 Canada, New Zealand, Singapore, France, Italy, The Netherlands, Belgium, Switzerland, Malaysia, Sweden, Denmark, Ireland, Korea, Norway, Malta, Austria, Papua New Guinea, China, Thailand, Sri Lanka, Fiji, Hungary, Kiribati, India, Indonesia, Vietnam, Spain, The Czech republic, Slovakia, Russia, Argentina, Romania and Mexico.
operations. However, it then provides that before there is exclusive residence taxing rights, the lease must be merely incidental to the international operations of the lessor and the lessee operates ships in international waters. The third specific agreement of note is the South African agreement which provides that in the case of bareboat leasing profits, in addition to the requirement that the lease be merely incidental to the international operations of the lessor, the lessee must operate in international traffic for the residence country to have exclusive taxing rights.

5.2 Variations on Paragraph 2

It will be remembered that paragraph 2 provides for an exclusive source country taxing right where profits are derived solely from internal voyages in the source country. However, Australia’s agreements with the US, Japan and Korea vary from this provision by either failing to include the equivalent paragraph at all, or restricting the source State taxation rights to profits derived from carriage. Where one of these treaties applies, leasing profits derived from operations solely within the source State will not be dealt with under the ships and aircraft article, but rather the business profits article or the royalties article will need to be considered.

There are also some agreements to which Australia is a party which limit the rate of tax that the source State can apply. A maximum of 5 per cent of the payment ‘in respect of carriage’ is allowed in the French, Finish, Swiss, Belgian, Dutch and German agreements. While these agreements limit the amount of tax assessed by the source State, the Kiribati, Sri Lankan and Thai agreements extend the source State’s right to tax beyond operations confined solely in that State to ‘half the profits from the operation of ships other than confined solely to places in that State’.

In addition to the above major variations, the South African and Taipei agreement need to be considered because of the flow-on effect of major variation to paragraph 1. First, the Commissioner provides that variation in paragraph 1 of the South African agreement will not limit the application of paragraph 2 to incidental bareboat leases. Secondly, the Commissioner provides that requirement in the Taipei agreement that the lease of a ship by a lessor must also be used in international waters by the lessee does not limit the operation of paragraph 2 in that agreement.

6 Method of Assessment

Where the profits of a lease are taxable in Australia, whether those profits are derived by an Australian treaty resident or a treaty partner resident, those profits are taxed under the ordinary provisions of the Income Tax Assessment Act 1997. ‘Profits’ under an international treaty will be given the same meaning as ‘taxable income’ for the purposes of Australian domestic legislation. This means that the profits are taxed on a net assessment basis. That is, the leasing profits are assessed after taking into account outgoings incurred in gaining or producing those profits.

However, in certain circumstances the ordinary income provisions may be overridden by s129 of the Income Tax Assessment Act (Cth) 1936. This section provides:

Where a ship belonging to or chartered by a person whose principal place of business is out of Australia carries passengers, livestock, mails or goods shipped in Australia, 5% of the

This restriction will only apply to certain full basis leasing profits.
Draft Taxation Ruling TR2008/D3, paragraph 44.
Section 3(2) of the International Tax Agreements Act 1953 provides that ‘For the purposes of this Act and the Assessment Act, a reference in an agreement to profits of an activity or business shall, in relation to Australian tax, be read, where the context so permits, as a reference to taxable income derived from that activity or business’.

(2008) 22 A&NZ Mar LJ
amount paid or payable to him in respect of such carriage, whether that amount is payable in or out of Australia, shall be deemed to be taxable income derived by him in Australia.

Section 129 may apply to profits derived by a lessor with a place of business outside Australia where that lessor leases a ship on a full basis. The effect of this provision is to deem the taxable income to be 5 per cent of the amount paid or payable in respect of the carriage. As such, where this section applies, there is no requirement to calculate taxable income or deductions and no deduction is allowable against the 5 per cent for any expenditure incurred in producing income.

7 Conclusion

The ease of applying the ships and aircraft articles of Australia’s international tax agreements is not apparent. Rather, this is a complex and often unclear area of international taxation law. However, the Commissioner, by releasing TR2008/D3, goes some way in clarifying these difficult provisions by outlining his interpretation of the relevant standard articles along with the different variations. As stated, the aim of the draft Ruling is to clarify ‘what profits derived from the leasing of ships or aircraft fall within the ships and aircraft article of each of Australia’s tax treaties’. Rulings must always be read with caution, as they are merely the Commissioner’s interpretation of the law, and not the law itself. However, if the aim of the draft taxation ruling is to provide clarification, appears that TR 2008/D3 achieves this in many circumstances.

---

53 Taxation Ruling TR2006/1 Income Tax: the scope and nature of payments falling within section 129 of the Income Tax Assessment Act 1936 specifically considers the application of s29 ITAA36.
54 Union Steamship Co of NZ v FC of T (1924) 35 CLR 209.
UK Standard Conditions for Towage and s74(3) Trade Practices Act 1974 (Cth) before the Queensland Court of Appeal and the High Court

Dalrymple Marine Services Pty Ltd v PNSL Berhad; The Owners of the Ship ‘Koumala’ v PNSL Berhad

[2007] QCA 429 (30 November 2007)
[2008] HCA Trans 246 (18 June 2008)

Kate Lewins∗

Introduction

This case concerns damage done to the ship Pernas Arang (the ship) as a result of a collision between it and the tug Koumala (the tug) whilst the latter was readying itself to tow the ship. The judgment of the trial judge has been noted in a previous issue of this journal. The towage operator Dalrymple Marine Services Pty Ltd (Dalrymple) appealed from that decision to the Queensland Court of Appeal which dismissed that appeal. Dalrymple then sought special leave to appeal to the High Court. Both the appeal and the special leave application are the subject of this casenote.

The Koumala is a significant case for two reasons. First, it deals with the important question as to whether the warranty to exercise due care and skill imposed by s74 of the Trade Practices Act 1974 (Cth) (TPA) applies to a towage contract, or whether such a towage contract can be said to fall within the exception contained within ss3. Subsection 3 reads:

S74 (3) A reference in this section to services does not include a reference to services that are, or are to be, provided, granted or conferred under:

(a) a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored. (emphasis added).

Secondly, it discusses the operation of the phrase ‘whilst towing’ as it is used in the UK Standard Conditions for Towage and other Services (Revised 1974) (UK Standard Conditions).

The facts

The towage was the subject of a contract between Dalrymple and the owner of the ship, PNSL Berhad. The terms of the towage contract were the UK Standard Conditions and the fee for the service to the ship was agreed at $12,500.2

The collision occurred on 28 February 1995. The ship, a dry bulk carrier, was approaching the Dalrymple Bay Coal terminal at the port of Hay Point, Queensland in order to load a cargo of coal. The tug and another, the Kungurri, were preparing to tow the ship to the terminal. A pilot was on board the ship and had ordered the tugs to ‘make fast’ at points on the starboard side. At the time of that order, the tug was 1 nautical mile away. The tug steamed towards the ship and, once close by, crossed ahead of its bow. Once on the starboard side of the ship the tug turned quickly to starboard and was then seen to be blowing black smoke.3 It had lost steering due to a blocked air filter element in the

∗ Senior Lecturer, Murdoch University School of Law. My thanks to the counsel of both parties who provided me with their summary of arguments for the special leave application to the High Court.


2 Cite (2007) FLR 243 at [29]. Because the consideration was under the TPA threshold of $40,000 the shipowner was considered a ‘consumer’ of services under the TPA.

3 (2007) FLR 243 at [4].
starboard generator providing power for steering. Within a minute or so, the tug collided with the ship, causing damage sufficient to abort the planned loading of cargo to as to effect repairs in Brisbane. The time between the giving of the pilot’s orders and the collision was about 20 minutes.

The trial judge found that the incident did not occur ‘whilst towing’ within the meaning of the UK Standard Conditions, which meant that the tug could not exclude its liability under the contract. The trial judge found that the tug had been negligent. S74 did apply to the contract and ss3 was not triggered. Even if the incident had occurred ‘whilst towing’ the exclusion in UK Standard Conditions could not be relied upon by the tug as it was rendered void by s68 of the TPA.

Judgment of Court of Appeal (Supreme Court of Queensland)

Dalrymple appealed from the first instance decision of Helman J. The appeal was on 2 primary grounds –

- first, that the collision occurred ‘whilst towing’ (in which case an exclusion clause in the contract would apply) and
- secondly, that the towage contract was caught by the exception in s74(3), such that s74 did not operate and the contractual exclusion was operable (the TPA issue).

Justices Williams and Muir gave separate judgments, with which Justice Daubney concurred.

‘Whilst towing’

Dalrymple sought to argue that the exclusion clause contained within the contract was triggered because the collision occurred ‘whilst towing’ within the meaning of that phrase as contained in the Standard Conditions:

The expression ‘whilst towing’ shall cover the period commencing when the tug… is in position to receive orders direct form the hirer’s vessel to commence pushing holding, moving, escorting, or guiding the vessel or to pick up ropes or lines, or when the tow rope has been passed to or by the tug… whichever is the sooner, and ending when the final orders from the Hirer’s vessel to cease… and the vessel is safely clear of the vessel.

The Court of Appeal agreed with the trial judge that the incident did not occur ‘whilst towing’. A review of the authorities convinced the court that the definition required the tug to be in close proximity to the vessel - either to receive orders ‘direct’ or to pick up ropes or lines, (even if some manoeuvring was required to get to the lines). Only at that point would the defined state of affairs exist which would lead to an application of the exemption clause.

The order from the pilot was not given at a time when the tug was sufficiently proximate within the terms of the definition. The judgments sought to distinguish various cases where prior to a collision, the tug had made close approaches for the purposes of acting on orders.

Dalrymple argued that just prior to the steering failure, the tug was in a sufficiently proximate position, in terms of being able to take direct orders or take on lines. Williams JA said that the tug:

Was proceeding to a point where she would have been able to accept orders directly from the [vessel] and pick up the necessary ropes or lines. But she never reached that point. When heading towards the starboard side…and about 150 metres away, the

---

4 The exact time between loss of steering and collision was not certain, but the trial judge found it was between one and a half and two minutes – ibid at [11]. It was another 5 -7 minutes before the steering control was restored.
5 Ibid [4].
6 [2007] QCA 429 per Williams JA at [6].
9 Williams JA at [7], Muir JA at [53].
10 Williams JA at [12].
steering failed…from that moment on until the collision occurred the Koumala was not in a position to accept orders or carry them out.

Muir JA found that if the tug was, just prior to the steering failure, in close proximity as the definition required (or within ‘hailing distance’) it was only for a matter of seconds. To argue that, technically, the requirements were met for the vessel to be acting ‘whilst towing’ and then seconds later, suffer the steering failure was ‘too restrictive’. On a practical commonsense view, all facts were to be considered:

Including the disposition of the Koumala’s crew, the speed of the Koumala, the manoeuvres it was required to undertake before coming alongside…and the Koumala’s mechanical capacity to carry out relevant orders. On the state of the evidence there is no reason to conclude that the primary judge’s finding that the Koumala was not in a position to receive relevant orders direct was wrong.

The question of ‘hailing distance’ as a measure of physical proximity between tug and tow was discussed at various points in the judgment. It was apparently accepted by Dalrymple as one of the criteria required for the tug to be ‘in position to receive orders direct’ as established by the authorities. As we shall see, a different view was taken by Dalrymple in its special leave application.

The TPA argument

Strictly speaking their honours did not need to deal with the TPA point, because they had found that the exemption clause did not apply. However, the Court considered it desirable to give their views on the TPA argument.

Dalrymple had argued that s74(3)TPA was triggered in one of two ways – either because the towage contract facilitated the transportation of coal which the vessel was about to load (the first argument), or that the towage contract was itself a contract for the transportation of goods, as the definition of ‘goods’ in s4 of TPA includes a ship (the second argument). Either way, Dalrymple contended that the subsection applied, which removed towage from the ambit of the warranty imposed by s74(3).

The Court of Appeal rejected Dalrymple’s arguments unanimously, finding no error in the trial judge’s findings in this regard.

Briefly disposing of the second argument, the Court found that the contract was not a contract to transport, carry or take the ship from one place to another. It was for the purpose of guiding the ship to its berth under its master and on the pilot’s advice.

The first, albeit ‘stronger’ argument did not fare much better. Justices Williams and Muir both cited the dicta of the Full Court of the Federal Court in Braverus Maritime Inc v Port Kembla Coal Terminal Ltd v Anor, (Braverus), that had been similarly relied on by the trial judge in Koumala. In the Braverus case, the Full Court of the Federal Court decided that there was no relevant contract for pilotage onto which the warranty in s74 could be grafted. Nonetheless, dicta made it clear that had there been a contract, the court would have held that subsection 3 would not exempt it from the operation of the warranty. A contract for pilotage would not be a contract ‘in relation to transportation of goods’:

Was it a contract in relation to the transportation of goods for the purposes identified by the subsection? We think not. The purpose of s 74(3) was to ensure that the well-known law governing transportation of goods (by air, land or sea) and storage of goods was not to be radically amended by s 74, in particular given the well

---

13 See Williams JA at [7], [9]-[10], [15], Muir JA at [55]-[56], [64] – [69].
14 Muir JA at [55] – ‘the correctness of these propositions was not disputed by the appellant.’
16 Ibid. Muir JA, [81], with whom Daubney J concurred. Williams JA did not deal with this argument expressly.
17 Williams JA at [82].

230
established insurance arrangements in respect thereof: Explanatory Memorandum accompanying Trade Practices Revision Bill 1986 at para 153; see Heydon JD Trade Practices Law Vol 2 at para 16.850. With that purpose understood, there is no relevant relationship between the contract to provide the services and the transportation of goods. It could be no more said that a contract to provide pilotage services related to the transportation of goods because it was a necessary precondition to get the ship to the berth, than it could be said that a contract to repair the ship before sailing related to the transportation of goods because, without the repairs, the ship would not sail. 20

The key to the operation of s74(3) was to identify the purpose of the contract. 21 Here the contract could not be said to be ‘for’ the purpose of transporting the coal’ (although the towage contract was a necessary prerequisite for loading the coal). The contract:

concerns a service to be rendered to the ship itself without regard to whether the ship is laden or unladen, and without regard to the identity, characteristics or movement of any goods. Nor can the ‘purpose of the business for whom the [coal is] transported’ be relevant to a contract of towage. Such purposes and the identity of the relevant business are not matters of concern to the tug owner. 22

Dalrymple’s appeals were dismissed.

**Application for special leave to appeal to the High Court**

Dalrymple applied for special leave to appeal to the High Court. The special leave application was heard on 18 June 2008.

Dalrymple sought the right to argue an appeal before the High Court to consider the following issues:

- whether the ‘whilst towing’ clause required the tug to be in position to take up ropes and lines, as indicated by the judgment of JA Williams, or needed to be in ‘hailing distance’ or some other proximity to the ship as suggested by JA Muir;
- whether the proper interpretation of s74(3) was to focus on the purpose of the transportation, rather than the connection referred to by the words ‘for or in relation to.’
- Whether Braverus was inconsistent with the High Court judgment in Wallis v Downard-Pickford (North Queensland) Pty Ltd, 23 and whether Braverus was distinguishable from the Koumala case in any event as towage has a more direct connection with transportation than pilotage services. 24

Dalrymple argued the case had public importance as the interpretation of s74(3) was relevant beyond towage contracts and submitted it was important to reconcile the judgments in Wallis with those in Braverus. Dalrymple argued that the High Court decision in Wallis meant that the critical question was the purpose of the transportation, rather than the words ‘for or in relation to’, which were emphasised in Braverus. 25 Dalrymple argued that the relevant question was: is the transportation ‘for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported’. If so, the ss3 exemption was satisfied, and this was interpretation was consistent with the objective of the TPA, namely to protect consumers. 26 If it is necessary to consider the connection between the towage and the transportation, then the words ‘for or in relation to’ should not be read down or given a narrow interpretation as they are words wide enough to cover every conceivable connection. 27

---

20 Ibid, [195].
21 Ibid. Williams JA at [33]; [80] – [83].
22 Ibid. Muir JA at [83].
25 Ibid, [27]
26 Applicant’s written summary of argument [20] – [25], [28]
27 Citing O’Grady v Northern Queensland Co Ltd (1990) 169 CLR 367 per Dawson J.
Dalrymple submitted that the UK Standard Conditions were of great importance and represented arrangements about which shipowners, tug operators P&I Clubs and insurers conduct their affairs, and that this decision was likely to create uncertainty as to the scope and operation of those Standard Conditions.

In response, PNSL argued that Dalrymple was misconstruing the Wallis case. There had been no issue in that case as to whether the contract for carriage of the police officer’s domestic belongings constituted a contract for transportation. Clearly it was. Therefore the Court in that case did not need to dwell on the words ‘for or in relation to the transportation…. of goods’ but moved on to consider the contentious point as to whether that transportation was for ‘a commercial purpose’. In the case before the Court, it was entirely correct to consider whether the contract of towage at issue in the present case answered the description of a contract ‘for or in relation to the transportation or storage of goods’. Further, Dalrymple’s interpretation of s74(3) would result in a very large proportion of contracts between corporations and consumers being removed from the ambit of s74, thus severely limiting its operation. In effect, it would mean not only those involved in the transportation of goods being entitled to rely on s74(3) but also those concerned with providing services to the transport industry. As to the issue of uncertainty over the scope and operation of the Standard Conditions, PNSL argued that the US Courts have found such contractual clauses to be void against public policy and in any event, towage operators are entitled to limit their liability for breach of the s74 warranty pursuant to s86A TPA.

After a short adjournment, Acting Chief Justice Gummow pronounced the decision of the Court:

‘The actual decision of the Queensland Court of Appeal on question [sic] of whether section 74(3) of the Trade Practices Act was engaged is not attended by doubt. That being so, the matter does not provide a suitable vehicle to explore questions of construction and application of the United Kingdom Standard Conditions… that would otherwise arise. The applications are dismissed…

Comment

The decisions of the lower courts concerning s74(3), and that of the Federal Court in Braverus, have effectively been given the High Court’s imprimatur. Clearly the court was not so convinced about the veracity of the lower court’s conclusion on the ‘whilst towing’ point. However, until overturned, the judgment of the Queensland Court of Appeal will remain binding in Queensland, and persuasive elsewhere, as regards the interpretation of that provision of the UK Standard Conditions.

It was submitted to the High Court that the consequence of s74 (3) was ‘inevitably to increase towage costs’. That will only be the case if the towage operators do not amend their standard terms. As a result of this case, towage operators and their advisors should now write standard terms that comply with Australian laws. It is possible for an effective limitation of liability contained in a set of standard terms to reduce the towage operator’s liability for damage arising from negligence to the invoice cost of the service in question. In this case, that would have been the difference between $12,500 (plus interest) and 167,000 SDRs.

28 Respondent’s written summary of argument, at [4].
29 Ibid [5].
30 Ibid [10].
31 Ibid. Examples given were contracts made by a corporation that fitted tyres to trucks that transported goods, a corporation which painted trucks or cargo planes, or a corporation which provided accountancy or legal services to a carrier.
32 Ibid [16], citing Bisso v Inland Waterways Corporation 349 US 85 ( 1955)
33 Ibid.
34 Counsel for the Appellant, transcript of Special Leave Application [2008] HCA Trans 264.
35 SECT 68A Limitation of liability for breach of certain conditions or warranties
(1) Subject to this section, a term of a contract for the supply by a corporation of goods or services other than goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 68 by reason only that the term limits the liability of the corporation for a breach of a condition or warranty… to:
(a) in the case of goods, any one or more of the following:
.....
Each towage operator in Australia may choose to amend their own terms independently. However it would be far wiser for them to commission an Australian version of the UK Standard Conditions.\(^37\) That would assist in uniformity and consistency of interpretation within Australia. Perhaps at the same time the troublesome notion ‘whilst towing’ could be reconsidered with the notion of a triggering event that is more amenable to proof and less likely to lead to litigation. Such a clause may rely, for instance, on a combination of a specified distance from the vessel and a requirement as to the purpose of the tug’s approach.

In a more general sense, the attitude of the Court of Appeal and High Court toward the \textit{TPA} and maritime law is telling. It seems no longer worth arguing, before courts at least, that the so called ‘consumer provisions’ of the \textit{TPA} ought not apply to commercial transactions. Further, there is no indication from the courts that maritime law can be considered in some way immune from the operation of the \textit{TPA} and its provisions; in fact, there is now every indication to the contrary. There may be concerns that this somehow marks Australian law as deviating from international comity.\(^38\) A case could be made for amending of the \textit{TPA} so as to excise maritime and other commercial international transactions from its influence,\(^39\) although, in relation to \textit{s74}, the case is weakened somewhat because of the legislative entitlement to limit liability to the cost of the service. It is within the power of towage operators to achieve much the same end by adapting their trading conditions to take advantage of the local legislative landscape. The conclusion of the High Court in the \textit{Koumala} case makes that process a necessity for towage operators who wish to limit their liability to a reasonable sum.

\begin{itemize}
  \item \textbf{(b) in the case of services:}
  \begin{enumerate}
    \item the supplying of the services again; or
    \item the payment of the cost of having the services supplied again….
  \end{enumerate}
\end{itemize}

\(^{36}\) The agreed limitation amount in this case. As at the date of the High Court decision, one SDR equalled AUD $1.71. If the judgment sum was to be calculated at 18 June 2008, Dalrymple would have been obliged to pay AUD $285,570.

\(^{37}\) Any issues this might have in competition law are outside the purview of this paper.

\(^{38}\) Although, in reality, maritime cases are brought in the domestic courts and the domestic laws of any country will be brought to bear on such a case.

The Pitfalls of Arbitral Dualism: A Comment on Paharpur Cooling Towers Ltd v Paramount (WA) Ltd [2008] WASCA 110

Sam Luttrell∗

Australian arbitration law is dualist: domestic arbitrations are regulated by the uniform state Commercial Arbitration Acts (1984-85) and international disputes fall under the International Arbitration Act 1974 (Cth). The IAA adopts the UNCITRAL Model Law on International Commercial Arbitration (1985) and ratifies the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Whilst dualism can have practical benefits, in a federated context it can cause undesirable variation in the way state and federal courts read arbitration clauses. Australian state courts sometimes arrive at narrower interpretations than federal courts, where the public policy imperative of promoting International Commercial Arbitration (ICA) is seen as requiring liberal constructions of agreements to arbitrate. The decision in Paharpur Cooling Towers Ltd v Paramount (WA) Ltd illustrates this variance: the Court of Appeal of the Supreme Court of Western Australia held that a dispute relating to a subcontractor’s liability under a bill of exchange was not arbitrable because the bill named as co-acceptor a third party who had not signed an agreement to arbitrate with the Claimant.

The dispute in Cooling Towers arose out of a contract for the design, supply and installation of two cooling towers at an ammonia plant being built by Hong Kong company Paramount for Australian company Burrup Fertilisers Pty Ltd (BFPL). The contract price was $8,074,770. Indian company Paharpur Cooling Towers undertook to procure and ship from India certain items equipment, and Paramount agreed to pay the contract price (less 5%) within thirty days of the date of shipping as confirmed by the bill of lading. Clause 22 of the contract specified that, in the event of a dispute, the Principal (meaning Paramount) at its sole discretion—shall determine whether the parties resolve the dispute by litigation within the jurisdiction of the courts of Western Australia or arbitration under the Commercial Arbitration Act. [Paramount] shall notify [Paharpur], by notice in writing, of its decision to refer the dispute to litigation or arbitration within 28 days of either [Paramount] or [Paharpur] electing that the dispute be determined be either litigation or arbitration.

Significantly, the clause further provided that the arbitration was to be conducted by an engineer. About a year later the parties agreed to amend the payment terms of the contract. The new arrangement was that Paramount would pay the balance of the contract price, less $4,000,000 (plus interest) on first clearance of the equipment from India. The remaining $4,000,000 was payable to Paharpur 180 days from the date of shipment of the last batch of equipment from India. The parties agreed that this final instalment would be the subject of a bill of exchange accepted by Paramount and its principal, BFPL. Guarantees were put in place by Burrup Holdings Pty Ltd and Mr Pankaj Oswal as trustees for the Burrup Trust. Burrup Holdings owns BFPL. The equipment was delivered and Paramount refused to pay. Paharpur commenced action against Paramount, BFPL and the trustee guarantors in the Supreme Court of Western Australia for the monies said to be due and payable under the agreement. After serving Paharpur with a notice referring the dispute to arbitration under Clause 22, Paramount applied to the Supreme Court for a stay.

Paramount’s application was brought under IAA section 7, with applications in the alternative under section 53(1) of the Commercial Arbitration Act 1985 (WA) and the inherent jurisdiction of the court. The matter came on before Acting Master Chapman on 5 September 2007. At the hearing, Paharpur conceded that its claim under

∗ Lecturer in Law, Murdoch University, Solicitor (Western Australia)
1 Hereinafter referred to as the ‘IAA’.
2 Paharpur Cooling Towers Ltd v Paramount (WA) Ltd [2008] WASCA 110 at [5], hereinafter referred to as ‘Cooling Towers’.
3 Above note 2 at [8].
4 Civ 1549 of 2007.
5 Hereinafter referred to as the ‘CAA’.

(2008) 22 A&NZ Mar LJ
the contract should go to arbitration, but argued that its claim against Paramount and BFPL under the bill of exchange should remain before the court. Acting Master Chapman held that Clause 22 was wide enough to encompass the claim under the bill, commenting in *obiter* that the bill of exchange ‘was born out of the contract and the issues in dispute under the contract have a clear connection with the payment under the bill of exchange’. Acting Master Chapman also rejected Paharpur’s contention that the disputes clause of the contract excluded the operation of the *IAA*. Paharpur’s action was stayed in full.

Paharpur appealed on a number of grounds, of which the Court of Appeal only had occasion to consider the first: that the learned Acting Master erred in law by finding that the bill of exchange was subject to the dispute resolution clause in the contract and that Paharpur’s action on its should be stayed in favour of arbitration along with the rest of its claims. Counsel for Paharpur argued that the bill of exchange was a ‘stand alone contract’ between three parties and was not subject to the arbitration clause. Counsel also contended that it could never have been the intention of the parties to bind a third party to their arbitration clause, and that because BFPL never was not a party to the arbitration agreement its liability under the bill of exchange could only be resolved by the court. It was also submitted that that it would be inappropriate for an engineer to determine the strictly legal issue of liability under the bill of exchange. Paramount responded that it was a matter of construction. Counsel for the Respondent submitted that it is well settled that arbitration clauses should be construed broadly and liberally, and the mere fact that a third party had assumed concurrent liability under the bill of exchange did not mean that the rights and liabilities of Paharpur and Paramount under that instrument could not be settled by arbitration. Both parties made submissions on the applicable law, Paharpur arguing that Clause 22 adopted the *CAA* as *lex arbitri* and Paramount arguing for the application of the *IAA*.

The matter was heard by President Steytler and Acting Justice of Appeal Newnes. The Court of Appeal quickly identified the question as being whether the claim under the bill of exchange was a ‘Dispute’ for the purposes of Clause 22. Clause 2 of the contract defined ‘Dispute’ in broad terms:

> ‘Dispute’ means a dispute or difference between the parties as to the construction of the Contract or as to any matter or thing of whatsoever nature arising, whether antecedent to the Contract and relating to its formation or arising under or in connection with the Contract, including any claim at common law, in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration or a dispute concerning a direction given and/or acts or failing to act by the Engineer or the Engineer’s Representative or interference by the Principal or the Principal’s Representative.

Although the Court of Appeal did cite a number of state, federal and House of Lords decisions as authorities for the liberal construction of arbitration agreements, the Court showed itself reluctant to accept the principle of liberal construction as a ‘rigorous notion’. Instead, the Court of Appeal preferred the contractual intentions of ‘rational businessmen’ as the touchstone for interpretation. This is consistent with the doctrine of leading ICA seats: the agreement to arbitrate is a contract and must be interpreted as such. The Court concluded that the arbitration clause in the instant matter was

> intended to apply to a dispute between the parties to the contract only. It was not intended to apply to a dispute involving the parties and a stranger to the contract such as that which arose here, where the dispute involves the liability of to one party to the contract (as the drawer/payee) of two acceptors of a bill of exchange, one of the acceptors being a party to the contract and the other a stranger to it.

---

6 Above note 2 at [21].
7 Above note 2 at [25].
8 Above note 2 at [26].
9 Above note 2 at [27].
10 Above note 2 at [30].
11 Above note 2 at [6].
12 This expression comes from the judgment of Austin J in *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896, cited at paragraph 34 of the judgment of the Court of Appeal in *Cooling Towers*.
13 Above note 2 at [37], citing with approval the judgment of Lord Hoffman in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40 at [13].
14 Above note 2 at [45].
The Court of Appeal concluded that Paharpur’s claim in relation to the bill of exchange did not give rise to a dispute within the meaning of Clause 22 of the contract.\(^{15}\) The appeal was allowed, and the Acting Master Chapman’s decision was set aside in so far as it stayed the civil proceeding on the bill.\(^{16}\)

The Court of Appeal in *Cooling Towers* characterised BFPL as a ‘stranger’ to the otherwise widely cast agreement to arbitrate. This would appear to be a narrow reading of the clause. The Court of Appeal’s apparent reluctance to accept the public policy rule of liberal interpretation – sometimes referred to as the ‘Mitsubishi Doctrine’ after the landmark United States Supreme Court decision in *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*\(^{17}\) - is to be contrasted with the *dicta* of Justice Allsop of the Federal Court in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd.*\(^{18}\) In *Comandate Marine* Allsop J approved of the liberal approach to the construction of arbitration clauses and declared the narrow approach taken in *The Kiukiang Career*\(^{19}\) to be bad law.\(^{20}\) Allsop J also expressly referred to the public policy consideration that favours arbitration as a means of settling international commercial disputes as a source of the rule that arbitration agreements are to be broadly and effectively construed.\(^{21}\) In *Cooling Towers* the WA Court of Appeal challenged the primacy of public policy in this context when it approved the statement of Austin J in *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 that ‘Australian courts are not constrained by considerations of public policy to adopt a “liberal” construction of arbitration clauses’.\(^{22}\)

The decision in *Cooling Towers* suggests that the Australian version of the *Mitsubishi* Doctrine is more a feature of federal arbitration law than state arbitration law. If the *Cooling Towers* appeal was run in a federal court the writer suspects that it would have been dismissed. This is because Australian federal courts have developed the rule of liberal construction in a UNICTRAL Model Law/New York Convention setting in which international jurisprudential trends are received directly from leading ICA seats. Although the common law that informs the state commercial arbitration statutes is in a process of harmonisation with Model Law jurisprudence – and state arbitration law is thereby indirectly receiving doctrine from leading ICA seats - *Cooling Towers* illustrates the sporadic resistance of state courts to this process of reception. As a matter of law, the characterisation of the co-acceptor BFPL as a ‘stranger’ reflects a strict approach to arbitrability and the prohibition against arbitration without privity. Broadly speaking, the doctrine of ‘non-arbitrability’ is founded upon the public policy rule which holds that the rights of the public must be determined in public. In arbitral contexts there is growing authority for the proposition that privity is a matter of degree: there are distant third parties (true ‘non-parties’ such as consumers in a *Trade Practices Act* price fixing claim) and there are proximate third parties (or mere ‘non-signatories’). Where complex corporate structures and are involved, the rule of ‘no arbitration without privity’ is challenged by the emerging ‘Group of Companies Doctrine’. This doctrine was first applied in 1982 by an International Chamber of Commerce tribunal in the *Dow Chemical* arbitration.\(^{23}\) In upholding the decision of the ICC tribunal the Paris Court of Appeal held:

> The arbitration clause inserted in an international contract has self-standing validity and effectiveness which requires that its application be extended to parties which are directly implicated in the performance of the contract...\(^{24}\)

German courts have shown themselves unwilling to accept the Group of Companies Doctrine. After also initially resisting, Swiss courts now accept *Dow Chemical*: in the 2003 case *X S.A.L., Y S.A.L. et A v Z* the Federal Supreme Court held that the fact that a contract containing an arbitration clause was not signed by a

---

\(^{15}\) Above note 2 at [46].

\(^{16}\) Above fn 2 at [50].

\(^{17}\) 473 US 614 (1985). It is important to note that the United States is not a Model Law jurisdiction. US federal arbitration law has, instead, been brought into line with Model Law standards by Supreme Court Action.

\(^{18}\) [2006] FCAFC 186.

\(^{19}\) *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No. 5)* (1998) 90 FCR 1.

\(^{20}\) Above fn 18, at [194] per Allsop J.

\(^{21}\) Ibid, at [184], [193-4].

\(^{22}\) *ACD Tridon* per Austin J at [120].


\(^{24}\) Decision of the Paris Court of Appeal, 21 October 1983 [1984] Rev Arb 98; (1st Ch D) 1997 Rev Arb 550
third party did not operate as a formal bar to the extension of the clause to that third party.\textsuperscript{25} The Group of Companies Doctrine has enjoyed a mixed reception in the common law world. United States superior courts liberally apply theories of agency, trust and veil-piercing to bind non-signatories to agreements to arbitrate.\textsuperscript{26} From the decision of the Commercial Court in Peterson Farms Inc v C&M Farming Ltd [2004] EWCH 212 it is clear that English courts treat the identification of the parties to an agreements to arbitrate as a matter of substantive (rather than procedural) law and require clear evidence of agency before they will bind related companies to arbitrate.\textsuperscript{27} Despite this divergence in municipal judicial opinion, leading ICA practitioners agree that Dow Chemical addressed a real procedural need. Writing in 2006 Professor William Park observed:

\begin{quote}
the complex structures of many corporate groups means increasingly frequent challenges related to ‘non-signatories’ whose right or duty to arbitrate is not obvious. In such instances, the arbitrators’ jurisdiction must be justified on principles such as agency, piercing the corporate veil, or estoppel.\textsuperscript{28}
\end{quote}

In the instant matter the Group of Companies doctrine was not pleaded. The corporate relationship between BFPL and Paramount was not before the court; the Court of Appeal decided the matter on the definition of ‘Dispute’ at Clause 2 of the contract. It is submitted, however, that certain facts should have informed the court’s reading of Clause 2. BFPL was directly implicated in the performance of the contract. BFPL was principal of the Karratha ammonia plant project. The parent company of BFPL guaranteed Paramount in the transaction, and Paramount appears to have acted as agent for BFPL in the purchase of the equipment from India. In the writer’s opinion, the appearance is one of a complex international group of companies.\textsuperscript{29} The party-crafted definition of ‘Dispute’ to mean ‘any matter or thing of whatsoever…arising in connection with the contract’ appears \textit{prima facie} to be wide enough to capture a claim brought under such a crucial contractual instrument as the bill of exchange (which secured payment for almost half of the contract price) even though the instrument was co-accepted by as proximate a ‘stranger’ as BFPL.

The writer is of the opinion that the learned Acting Master’s decision at first instance was consistent with the jurisprudence of leading ICA seats on clause construction and arbitral privity in multi-party disputes. The Court of Appeal’s decision in Cooling Towers is, on the other hand, at odds with the Federal Court’s confirmation of the Mitsubishi Doctrine in Comandate Marine. Cooling Towers isolates Western Australian law from certain important doctrinal developments in leading ICA seats such as the United States,\textsuperscript{30} France,\textsuperscript{31} Switzerland\textsuperscript{32} and England.\textsuperscript{33} In this sense, the decision demonstrates Australian dualism in practice: if Australian arbitration law was monist, important doctrines like Mitsubishi and Dow Chemical\textsuperscript{34} would not take so long to filter down to the level of the state court. The increasing international engagement and macro-economic significance of Western Australia dictates that the incorporation of these key new ICA rules should be a priority.

\textsuperscript{25} Y.S.A.L., Y.S.A.L. et A v Z, SARL et Tribunal Arbitral CCI, BGE 129 III 727
\textsuperscript{28} Park, above note 28 at 26.
\textsuperscript{29} This appearance is supported by the fact that a director of Paramount is now a director of BFPL’s parent company. According to [Pankaj] Oswal and Ambalavanner has a senior position as director commercial’, see ‘Legal doubts cloud the rise of the awesome Oswals’, The Australian, 7 June 2008.
\textsuperscript{30} Thomson-CSF, S.A. v American Arbitration Assoc. and Evans & Sutherland Computer Corp., 63 F.3d 773
\textsuperscript{32} Y.S.A.L., Y.S.A.L. et A v Z, SARL et Tribunal Arbitral CCI, BGE 129 III 727
\textsuperscript{33} Peterson Farms Inc v C&M Farming Ltd [2004] EWCH 212

(2008) 22 A&NZ Mar LJ
The CMI Executive Council met in New York on 30 April and 1 May 2008, at the same time as the US MLA was having its Spring Meeting. The CMI Executive Council was entertained to lunch by the US MLA Executive at the New York Yacht Club. The highlight of the visit to the New York Yacht Club was a tour of the premises, which included a visit to the area where the America's Cup used to be displayed.

At the Executive Council Meeting, it was reported that the substantive program for the Athens Conference had been finalised and papers were being prepared for publication in the CMI Yearbook - Athens 1. At the time of the Executive Council Meeting, there were already over 100 delegates registered.

For those still unaware of the date of the Athens Conference, I confirm that it is to take place between 12 and 17 October. Details of the Conference can be obtained from the Conference website (www.cmi2008athens.gr). If you wish to contact the Conference organisers, Triaena Tours and Congress SA, their email address is congress@triaenatours.gr.

The two principal topics being discussed during the conference are Places of Refuge and Procedural Rules Relating to Limitation of Liability in Maritime law. In addition, there will be a distinguished panel of speakers discussing the recently concluded UNCITRAL draft convention. Other topics to be covered include non-technical measures to promote quality shipping for carriage by sea, implementation of Maritime Conventions, Charterers Rights of Limitation, Ship Recycling and Wreck Removal.

An update on the current status of the HNS Convention will also be given.

I hope to see as many MLAANZ members as possible at the Conference. As you may know, Jean-Serge Rohart will be stepping down as President and his successor will be chosen at the Assembly Meeting.

The Executive Council Meeting noted that discussions were still taking place with the Chilean Association concerning the holding of a Colloquium in that country in 2010 and the Chinese MLA has offered to host the next CMI conference in 2012.

It is also possible that CMI and the Dutch MLA will arrange a Colloquium to take place in September 2009, when it is anticipated that the UNCITRAL Convention will be signed.

The balance of the Executive Council Meeting was taken up with discussion of a report submitted to the Executive Council Meeting by a Steering Committee consisting of the Secretary General, (Nigel Frawley), and the two Vice Presidents (Karl Johan Gombrii and the writer). That Steering Committee had met to discuss a number of issues that had been raised by National Maritime Law Associations in response to the questionnaire which had been sent to them. As a result of the Executive Council Meeting, there were some further matters that needed to be considered by the Steering Committee. That has now taken place and it is hoped that the Steering Committee's report will be finalised, and its recommendations put before the Assembly in Athens.

The recommendations deal with topics such as a revision of the subscription amounts paid by MLAs, greater contact between MLAs and CMI (principally by a revamped CMI website), shorter periods in office for Executive Councillors and office bearers, a greater focus on seeking to assist start up MLAs (as well as fostering the development of established MLAs by Executive Councillors), and the promotion of Young Lawyers.

In relation to other "Work in Progress" matters, Mans Jacobsson reported on developments relating to the HNS Convention. He noted that a focus group had been established by the IOPC Fund to prepare a Protocol dealing with three particular matters which appear to have impeded ratification of this Convention. A draft Protocol is to be considered by the IMO Legal Committee in October 2008, at which time the convening of the diplomatic conference is likely to be considered.
The following journal articles have been published between 1 September 2007 and 21 September 2008 on matters relating to Australian and New Zealand maritime law:


* Students, TC Beirne School of Law, University of Queensland.


