

# Frank Stuart Dethridge Memorial Address 2011

## MARITIME LAW - TWELVE YEARS INTO THE CENTURY

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### Introduction

When Sarah Derrington asked me to speak during the Australian CLE Program, I readily agreed. She mentioned something about a Frank Dethridge or some name like that. Even though I had no idea what she was talking about, I said fine. When I read up about Mr Dethridge and saw the formidable list of past, distinguished speakers of the Memorial Address, I had the same reaction that Honorable Mr Justice Waung of the Hong Kong High Court had in 2004. I wanted to back out. However, I thought that if I tried, this might put this entire joint meeting in jeopardy. Not wanting to rupture the good relations between the United States and Australia, I decided to soldier on. However, I must start with some caveats. I am not an Australian lawyer and know very little about Australian law. I realised that I would bore you death if I spoke about American law and American cases so I had to come up with a topic that I thought would be relevant to you and might even hold your interest.

A few years ago, I read a book called *Crazy 08* by Cait Murphy.<sup>1</sup> I thought it was going to be about Hillary Clinton, Barack Obama and the Presidential race in 2008. However, it was about the New York Giants, the Chicago Cubs and the Baltimore Orioles and the baseball pennant race of 1908. I took her idea to heart and decided to speak about maritime law twelve years into the century. Not the 21<sup>st</sup> Century but the 20<sup>th</sup> Century. Yes, 1911 and 1912.

I think the years 1911 and 1912 mark the start of the modern era in maritime law. The sinking of the *Titanic* and subsequent investigations and conventions led to some semblance of international uniformity and eventually, the establishment of the IMO. The *Titanic* was responsible for the birth of the International Ice Patrol and indirectly for the birth of the United States Coast Guard. The Coast Guard remains the prime regulator of maritime commerce in the United States. During this time in Australia, the *Navigation Act 1912*, the *Lighthouse Act 1911* and the *Seamen's Compensation Act 1911* all passed during these years. This era may be the start of Australian nationalism in maritime law and also the supremacy of the Federal Government over the states in maritime law. In the United States, we also had the *Jason*<sup>2</sup> case which in effect allows parties to contract away protections given by maritime legislation. In the forefront as usual, New Zealand's maritime law was largely settled by 1911 and 1912 but I will discuss some important maritime developments involving New Zealand during these years later on in the program.

### *Titanic*

We all know the basics of the *Titanic* story. A British flagged ship, operated by White Star Line, she was the largest passenger steamship in the world. She was on her maiden voyage from Southampton to New York when she hit an iceberg four days into the crossing. She hit the iceberg at 11:40 PM on 14 April 1912 and sank at 2:20 the following morning. The sinking resulted in 1 517 deaths, one of the deadliest peacetime maritime disasters in history.

Many wealthy Americans were onboard including John Jacob Astor; Meyer Guggenheim; Joseph Hays, President of the Grand Trunk Railroad; John Thayer, President of the Pennsylvania Railroad; and of course, the Unsinkable Molly Brown.<sup>3</sup> A first class parlor suite supposedly cost about US\$69 000 in today's dollars.<sup>4</sup> In addition to the stewards and crew, 41 of the passengers brought their own personal maids. Traveling third class was not as pricey with the cost being US\$172 to US\$640 in today's dollars.

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<sup>1</sup> Cait Murphy, *Crazy 08: How a Cast of Cranks, Rogues, Boneheads and Magnates Created the Greatest Year in Baseball History* (Smithsonian Books, 2007).

<sup>2</sup> *The Jason*, 225 US 32 (1912).

<sup>3</sup> Daniel Butler, *Unsinkable: The Full Story of the RMS Titanic* (1998) 23-32.

<sup>4</sup> The History on the Net Group, *The Titanic – First Class Passengers* (2000) History on the Net <<http://www.historyonthenet.com/Titanic/firstclass.htm>> at 8 October 2011.

Following the sinking, there were investigations in the United States and Great Britain. In the United States, the investigation was chaired by the junior Senator from Michigan, William Alden Smith, who had absolutely no maritime background. Smith started out as a popcorn salesman and then moonlighted as a correspondent for a newspaper. Prior to the *Titanic* investigation, his main claim to fame was that he was the nation's first paid game warden. After obtaining his law license, he became a recognized expert in railroad law. This apparently led to the US House of Representatives and eventually the Senate.<sup>5</sup> When he heard of the casualty, he reviewed the existing legislation and saw that there was very little regulating passenger vessels in the trans Atlantic trade. He quickly introduced a resolution in the Senate authorizing the formation of a sub-committee from the Committee on Commerce and naming him as its Chairman. He was quick enough to get the Senate to agree to the resolution and he was off to New York on 18 April 1912, four days after the casualty. He met the *Carpathia* in New York as many of the *Titanic* survivors were leaving the ship. He boarded the vessel and confronted Bruce Ismay, the managing director of White Star. Ismay promised to appear the next morning as the first witness in the inquiry. Smith's investigation lasted six weeks during which time he called 82 witnesses, including 59 British subjects. Many in Britain questioned his right to subpoena and detain British citizens. His naiveté and inexperience with maritime matters made him a laughing stock in the British press. In fact, the Hippodrome offered him US\$50 000 to appear there and give a one hour lecture on any subject he chose. What we would call the tabloids of the day in Britain referred to him as Senator Watertight Smith because he asked one of the witnesses whether watertight compartments were meant to shelter passengers. One newspaper said that a schoolboy would blush at his ignorance. Another said that British seamen know something about ships. Smith does not.

In England, the Board of Trade conducted an inquiry. Lord Mersey, formerly President of the Admiralty Division of the High Court, chaired the English proceedings whose members included a number of admirals, a professor of Naval Architecture and the senior engineer assessor to the Admiralty. However, in effect, the Board of Trade was investigating itself because it had approved many of the practices that lead to the disaster. Senator Smith caustically pointed this out and said 'we shall leave to the honest judgment of England its painstaking chastisement of the British Board of Trade, to whose laxity of regulation and hasty inspection, the world is largely indebted for this awful fatality.'<sup>6</sup>

The many causes of the casualty came out in the investigations. Senator Smith was especially hard on the *Titanic*'s Captain Smith. He stated 'his indifference to danger was one of the direct and contributing causes of this unnecessary tragedy.' Captain Lord of the *Steamship Californian* sent a message to the *Titanic* that Sunday night stating that he stopped his ship because he was surrounded by ice. The *Titanic* operator replied to 'shut up' and that he was 'busy.'<sup>7</sup> In all, six messages were sent to the *Titanic* from other vessels about the ice. One asks why were they ignored? A simple answer is that Bruce Ismay was a passenger and he wanted the publicity in New York that would surround the ship after making a fast passage across the Atlantic. In fact, he had given Captain Smith a list of the speeds he wanted the vessel to make during various parts of the passage. Ismay wanted the *Titanic* to make a quicker passage than her sister ship, the *Olympic*.<sup>8</sup> A slower passage would be comparable, in today's world, for a computer company to bally-ho a new model that turned out to be slower than the model it was replacing. Imagine Bill Gates announcing a new version of a program that was slower than the previous one.

The total lifeboat capacity on the *Titanic* was for 1 178 people, about a third of the *Titanic*'s total capacity of 3 547. The vessel was in compliance with the most recent British law dating from 1894 that required a minimum of 16 lifeboats for ships over 10 000 tons. In fact, the White Star Line actually exceeded the regulations by including four more collapsible life boats. Many of the lifeboats were not filled and only 704 people made it onto the lifeboats. There was criticism about discipline loading the life boats and Senator Smith said 'it is said by some well meaning persons that the best of discipline prevailed. If this is discipline, what would have been disorder?'<sup>9</sup>

The *Californian* was close to the *Titanic* as the *Titanic* was sinking. In fact, crewmembers on the *Californian* saw flares shot by the *Titanic* but the *Californian* Captain thought them to be ship identification signals. The wireless operator on the *Californian* had gone to bed for the night and therefore was not at his station to receive the distress

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<sup>5</sup> Butler, above n 3, 180-184.

<sup>6</sup> William Alden Smith, 'United States Senate Inquiry Report' (Speech delivered in the United States Senate, Washington DC, 28 May 1912).

<sup>7</sup> Ibid.

<sup>8</sup> Butler, above n 3, 58-59.

<sup>9</sup> Smith, above n 6.

signals from the *Titanic*. The *Californian* Captain did not contact the *Titanic* once he was told about the flares since it would have meant waking up the wireless operator.<sup>10</sup>

The *Titanic* sank despite having a double bottom and sixteen internal bulkheads that allowed for the rupture of the side hull and subsequent flooding in up to three compartments. Unfortunately, the *Titanic* had ruptured and flooded more than three of her compartments and she slowly filled with water. The bulkheads only went up to about three meters above the water line so once she started to lean forward due to the flooding in the forward compartments it was inevitable that she was going to sink.

The US Senate report was blunt and direct. They recommended that there be lifeboats onboard the ship for every person on the ship. Each ocean steamer carrying a hundred or more passengers should be required to carry two electric searchlights. There must be a radio operator on duty at all times, day and night. The firing of any flares or rockets at sea for any reason other than an emergency will be a misdemeanor. Finally, they recommended specific measures regarding water tight integrity and water tight bulkheads.<sup>11</sup>

The British report was not as direct. They appointed a bulkhead committee to study water tight integrity. In general, there should be life boats for everyone onboard but the Board may modify this requirement 'as the Board may think right.'<sup>12</sup> They required radios and a continuous service by night and day. The Board's most important contribution came in paragraph 24:

that (unless already done so) steps should be taken to call an International Conference to consider as far as possible to agree upon a common line of conduct in respect of a) the subdivision of ships; b) the provision in working of life-saving appliances; c) the insulation of wireless telegraphy and the method of working the same; d) the reduction of speed or the alteration of course in the vicinity of ice, and e) the use of searchlights.<sup>13</sup>

I think the English Board recognized that shipping was on its way to becoming a truly international business. Although the *Titanic* was built in Belfast, Ireland, flew the British flag and was crewed primarily by English seafarers, the registered owner was UK White Star Line that was controlled by the American industrialist, J P Morgan and most of the passengers were American. Thus, both countries had a strong interest in the casualty. Both countries had set up high level, totally independent investigations. The recommendation of the British Board was a large step towards uniformity.

Thirteen countries accepted the invitation of the British Board and the first International Conference on the Safety of Life at Sea convened in London on 12 November 1913. This Conference produced the first *Safety of Life at Sea Convention (SOLAS)* in 1914. The *Convention* was to enter into force in January 1915 but by then, World War I had broken out in Europe. The *Convention* did not enter into force but many of its provisions were adopted by individual nations. In 1927, proposals were made for another conference which was held in 1929. This time eighteen countries attended and a new *SOLAS Convention* was adopted. It entered into force at 1933. There have been subsequent SOLAS Conventions and the large majority of the world's shipping nations have ratified the most recent *SOLAS Convention*. When the United Nations set up IMCO in 1958, its purpose was to update *SOLAS*. IMCO became the IMO which is now the major worldwide regulatory body in the maritime field.

The other important program established at the 1914 Convention was the International Ice Patrol. It was agreed that the International Ice Patrol would consist of two ships which would patrol the traveling routes on the Atlantic to warn ships of possible ice hazards. All countries that had ships travelling to and from the United States would finance this patrol. The United States Navy had started to patrol the Atlantic for ice after the *Titanic* disaster. Due to its experience, the United States Government was invited to undertake the management of this service with the expense to be defrayed by the thirteen nations who attended the London Convention. The International Ice Patrol was founded on 7 February 1914 in Groton Connecticut.<sup>14</sup> This service eventually became the United States Coast

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Wreck Commissioner's Court, British Government, *British Wreck Commissioner's Inquiry Report on the Loss of the Titanic* (1912) [8].

<sup>13</sup> Ibid [24].

<sup>14</sup> US Coast Guard, *International Ice Patrol History* (2011) International Ice Patrol < <http://www.uscg-iip.org/General/history.shtml>> at 8 October 2011.

Guard. Thus, in addition to *SOLAS* and all the other maritime conventions that followed, the US Coast Guard also owes its birth to the *Titanic*.

## Navigation Act 1912

The years 1911 and 1912 were key years in the development of Australian Maritime Law. Prior to this paper, I had not studied much Australian history and this may be an advantage or a disadvantage depending upon your point of view. We New Yorkers think of New York as the center of the world but after checking a number of libraries in the city, I found only one book on Australian maritime law. It had articles by Sarah Derrington and Ron Salter, who are in the audience. Obviously, I could not speak to them about what they wrote so I had to find something else. Luckily, there was a friendly woman from New Zealand who was at the Library of Congress in Washington DC. She found many original documents for me and had them waiting for me when I visited the Library. Some of them looked like they had not been touched since 1912.

I think in the years leading up to 1912, the country wanted to assert its own identity separate from that of the United Kingdom and it also wanted to assert the authority of the central Government over the states in many matters, including navigation. What was later known as the *Navigation Act 1912* furthered both of these aims.

The *Navigation bill* was originally drafted in 1902 under the direction of Charles Cameron Kingston and was first introduced into the Senate in 1904. It was withdrawn that year and a Royal Commission was appointed to examine the proposed legislation and to report to the Governor General of Australia, Henry Stafford Northcote.<sup>15</sup> It seems that a Royal Commission is the preferred way to bury controversial proposals. The Royal Commission was composed of the Minister of State, five members of the House of Representatives and three members of the Senate. The reason for the controversy seems to be the cabotage sections in the bill. The power of the British Shipping Companies was greatly resented in Australia around this time.<sup>16</sup> The British controlled shipping in Australia at the time. However, one would not necessarily know this from reading the *1906 Report of the Commissioners*.<sup>17</sup> Most of the report deals with seamen issues.

An indication of the controversy is contained on pages 5 and 6 of the *1906 Report*.<sup>18</sup> The Report states that due to the wide range of inquiry and number of suggested alterations, the Commissioners had to redraft the 1904 Bill. However, they put in the following pithy statement that says a lot. They stated:

this redraft, which has largely added to their labors, they had proposed to attach to this report; but, in view of the suggestion of the Imperial Government, that delegates from Australia and New Zealand should attend a conference to be held in London, at which the whole question of navigation as it affects the empire might be discussed, its revision has been postponed for the present.

In other words, the Imperial Government said – do not bother.

In the *1906 Report*, the Commissioners tried to put a good spin on the *Navigation Bill*. The first point, which takes up over two-thirds of the report deals with the decline in the number of British seamen and the increase of foreign seamen on vessels. The *Report* states ‘a radical change is urgently needed.’<sup>19</sup> The *Report* said that seaman must be treated more like workers ashore. This was the lynch pin for the provisions in the *Navigation Bill* that governed accommodations, provisions, cooks, wages, etc. in the *Bill*.

The *Bill* was again introduced into the Senate in September 1907 but lapsed. It was introduced again in 1908 and in 1910 and it was ultimately agreed to by both Houses in 1912. However, there had been a change in the interim. The British had adopted the *Merchant Shipping Act* in 1906 which improved the conditions for seamen on British vessels. During the second reading of the *Navigation Act* on 16 July 1912, Representative Frank Tudor recognized that since the amendment of the *Merchant Shipping Act 1906* regarding crew accommodations, there had been an

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<sup>15</sup> Select Committee, Parliament of Australia, *Select Committee on the Navigation Act* (1924) 2.

<sup>16</sup> Frank Broeze, *Island Nation: A History of Australians & the Sea* (1998).

<sup>17</sup> Commonwealth, Royal Commission on the *Navigation Bill* of the Australian Commonwealth, *Report* (1906).

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid* 8.

increase of British seamen and a decrease of foreign seamen working on British ships. So one would ask- why bother with the new bill? I think there are two reasons they bothered - Frank Tudor and the cabotage provisions.

Tudor was a staunch union man and prior to entering Parliament had been President of the Victorian Trades Hall Council. He was a felt hat maker by trade and he was one of the driving forces behind the bill. From the House debates, it seems clear that he wanted to improve the lot of seamen and also wanted to protect Australian trade. Although he led the fight in Australia against conscription and was the leader of the Labour Party, he never became Prime Minister.

The *Navigation Act 1912* goes further than the *British Merchant Shipping Act 1906*. In the *British Act*, the space allotted to each seaman for his own use was increased from 72 cubic feet (Tudor described this as the size of a grave)<sup>20</sup> to 120 cubic feet. Section 236 of the *Navigation Act* increased this to 140 cubic feet. In addition, the *Navigation Act* includes requirements that each ship have a separate mess room for the taking of meals by seaman and apprentices, bathrooms with an adequate supply of fresh hot water for the use of all members of the engineering gang and that the berthing accommodations not be below the water line of the ship.

Both the *British Act* and the *Navigation Act* required certified cooks. The *British Act* required certified cooks for foreign going vessels while the *Australian Act* required cooks on all British ships, Australian ships and all ships engaged in the coasting trade. The debate in Parliament on this point is funny. Representative Paddy Glynn talks about a cook being the man the seamen must eventually swallow. Frank Tudor responded by quoting Gilbert & Sullivan's the *Bab Ballads* about a cook who is eventually eaten by the rest of the crew and says that Glynn will have to recite the ballad during the final debate on the bill.<sup>21</sup>

Not all the sections of the *Navigation Act* are so benevolent. Section 280 states that no person shall engage or pay for a passage on any ship for a lunatic or bring or send a lunatic onboard ship as a passenger without informing the owner, master or agent of the ship that the person is a lunatic. The fine is 50 pounds. The definition of lunatic does not just cover lunatics but any person who is liable to become a lunatic or a person of unsound mind. I could find no comparable section in the *British Merchant Shipping 1906* or in American law.

## Cabotage

I do not think anyone was fooled by the 1906 Commission's inference that the *Navigation Bill* was about the decline of the number of British seaman. The controversial sections were about Cabotage.

I cannot say how much of the controversy was real or how much was stirred up by English ship owner interests. With the advent of iron hulls, British shipping companies dominated world trade at the time. In 1890, roughly 90% of American trade was carried on foreign vessels, primarily British flag. Due to this monopoly, owners were often able to contract out of all cargo liability. Thus, some places, such as the United States, Australia, Canada and New Zealand retaliated by enacting pro shipper cargo liability legislation. In the U.S., we enacted the *Harter Act* in 1893. In 1904, Australia enacted the *Sea-Carriage of Goods Act* which prohibited owners from contracting out from their negligence. New Zealand passed a similar law, the *Shipping and Seamen Act 1903*. In 1910, Canada passed the *Water Carriage of Goods Act* also based on the *Harter Act*.<sup>22</sup> These pro cargo laws applied to domestic and outbound bills of lading only.<sup>23</sup> The English ship owners were thus fighting two battles - the cargo liability fight and the cabotage battle. After the U.S. enacted the *Harter Act*, there was little they could do in Parliament on the cargo liability front. This eventually led the British shipping interests to call for the International Law Association to do something. This led to the *Hague Convention* which enacted the *Hague Rules* in 1921. However, the British ship owners continued to fight on the cabotage issue.

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<sup>20</sup> Commonwealth, *Parliamentary Debates*, Legislative Assembly, 16 July 1912.

<sup>21</sup> Ibid 7; Gerald O'Collins, *Glynn, Patrick McMahon* (2012) Australian Dictionary of Biography <<http://adb.anu.edu.au/biography/glynn-patrick-mcmahon-paddy-6405>>. I have no doubt Glynn could do this. Glynn was said to be extremely well read. He was from Galway and had difficulty attracting legal work when he first came to Australia. He wrote to his brother that 'trying to get business here as a stranger is like attacking the Devil with an icicle.'

<sup>22</sup> Raoul Colinvaux, *Carver's Carriage of Goods by Sea*, (13<sup>th</sup> ed, 1957) 441-443.

<sup>23</sup> Joseph Sweeney, 'COGSA and the Hague Rules' (1991) 22 *Journal of Maritime Law and Commerce* 18.

On cabotage, there was an Imperial Conference in 1907 and the conference recommended that the coastal trade of the Commonwealth 'be reserved for ships on the Australian register, i.e. ships conforming to Australian conditions and licensed to trade on the Australia coast.' Although the *Navigation Bill* was eventually passed in 1913, there was no Royal assent until after World War I had begun and at the request of the British government, the operation of the *Act* was postponed. The coasting trade provisions did not come into effect until 1 July 1921. Even after that, there was still great controversy and another commission was formed in 1924 to study the *Act*.

The *Navigation Act* did not specifically close the coast wise trade to foreign vessels but it required that foreign vessels comply with Australian law. Thus, s 288 states that no ship may engage in coasting trade unless it is licensed to do so. Every seaman employed on a ship engaged in coasting trade had to be paid at the current rate for Australian seaman engaging in the same trade. If a seaman on a British ship was not engaged in Australia, the Master had to sign a memorandum specifying that the seaman would be paid Australian wage rates. Those sections of the *Navigation Act* on special provisions and accommodations space applied also to coasting vessels. Similarly, the rule on a certified cook also applied to coasting vessels. In effect, the *Act* made Australian law applicable on every vessel engaging in the coasting trade.

The speech of the Representative Tudor on 16 July 1912<sup>24</sup> sets forth the main reason for the coasting provisions. I am sure he was quite passionate (and maybe a little un PC), when he said:

our aim is to ensure that the conditions prevailing in the coasting trade onboard foreign ships shall be the same as applied to our own people. This policy may be taken to be an example of the new protection. It must be recognized by everyone that if we desire to build up a mercantile marine, we must protect Australian shipowners against unfair competition from subsidized foreign ships or poorly paid crews from other countries. If there is unfair competition on part of vessels carrying colored crews, we have a right to protect ourselves against it.... Firemen receive about 9 pounds per month and it is not fair to expect shipowners who have to pay these wages to compete with ships employing colored labor at about 1 pound per month per man. The owners of these ships obtain practically the same rates for carrying passengers and cargo between Australian ports as to Australian Shipowners... that is not fair competition. There is no intention, however, to preserve this trade for the Australian shipowner alone, but it is intended that the men who worked the ships, and who imperil their lives in doing so, shall also receive a share of benefits in the shape of Australian rates of wages, adequate accommodations, good food and other advantages conferred by the Bill.... this bill affords protection to Australian shipowners by providing that every outside ship which engages in the coasting trade shall carry a certain crew, according to a scale laid down, shall provide the prescribed accommodation for the men and shall pay them Australian rates or wages.

What was the effect of this?

An issue would not be controversial if there was an easy answer. The Commissioners who examined the *Act* in 1924 were divided 2-3-2.<sup>25</sup> The Chairman and one commissioner stated that the interstate shipping companies of Australia were still to a great extent owned and controlled by British overseas shipping companies. The cabotage sections did not change this. Therefore, these two commissioners voted that the section on coastal trade be repealed. Three commissioners disagreed and found that the *Navigation Act* did not retard trade, industry or development of any of the states of the Commonwealth, and that there were few complaints in Australia about the application of the *Act*. These commissioners voted that the *Act* be maintained as it stands. The final two commissioners studied four companies and found that even though these companies had increased their fares and freights, the earnings were not matched because of the increases in crew pay and the costs of improving accommodations. These commissioners voted that the Coastal Trading Provisions of the *Act* be repealed and separate *Tariff Acts* be enacted against foreign shipping. There is a basis for their view as there was evidence given by the Melbourne Steamship Company that wages had increased by 65% over the 1914 figure and dockside labor was up 137%. A considerable sum was also paid making alterations to eight of its vessels to comply with the accommodation requirements of the *Navigation Act*.<sup>26</sup>

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<sup>24</sup> Commonwealth, *Parliamentary Debates*, Legislative Assembly, 16 July 1912, 15 (Frank Tudor).

<sup>25</sup> Select Committee, above n 15.

<sup>26</sup> John Bach, *A Maritime History of Australia* (1982) 313.

## Wireless Provisions

The *Navigation Act* was amended after the *Titanic* sinking to include wireless requirements. Every foreign going ship, Australian trade ship, and coasting ship carrying fifty or more persons was required to be equipped with wireless communication that was capable of transmitting and receiving messages over a distance of at least 100 miles both day and night and to be powered by a battery in the event that the ordinary supply of electrical power failed. The *Act* also called for regulations prescribing the times and hours during which an operator shall be in attendance at the wireless ready to receive and send messages.

## Seaman's Compensation Act 1911

The original 1904 Act contained a provision for compensation of insurance for injured seaman. In the 1906 Report on the original *Act*, the Commissioners recommended that the workman's compensation system be extended to seamen. In addition, the commissioners pointed out that numerous nations, including Austria, France, Italy, Denmark, Switzerland and Belgium had statutory schemes of insurance to cover accidents to workers. The Commissioners were also in favor of compulsory insurance for seamen to cover deaths and injuries.<sup>27</sup>

This section was not included in the *Navigation Act 1912* but was in a separate act, *The Seaman's Compensation Act 1911*. Under this Act, a seaman who was injured is entitled to compensation unless the injury was attributable to his serious and willful misconduct.<sup>28</sup> An employer was not liable under the *Act* for any injury which did not disable the seaman for a period of at least one week. If the injury was caused by a third party, the seaman could take action against the third party and also collect compensation but he would not be entitled to both damages and compensation.<sup>29</sup> If he had received compensation, the person who paid the compensation was entitled to indemnity from the person causing the injury. There were schedules in the *Act*. For instance, if a seaman died and left dependents wholly dependent upon his earnings, they were entitled to a sum equal to his earnings during the three years prior to the death or 200 pounds, whichever is larger. There is an upper limit of 500 pounds for a death. For total or partial incapacity for work, a seaman would be paid not less than 50% of his average weekly earnings during the previous year. The employer was entitled to require a medical examination by a duly qualified practitioner, and if the seaman refused to submit himself to such an examination, his right to compensation was suspended. Any disputes under the *Act* were to be settled by arbitration.

For many of you, this may not be too interesting because this system has been in effect for so long. However, it was quite revolutionary at the time. Indeed, in the United States we took a different course and remain on it to this day. In the United States, a seaman can sue his employer under the *Jones Act 1920* and is entitled to have a jury decide not only his lost compensation but his pain and suffering for the injury. Although one would think it made common sense to have worker's compensation system for seamen, there has never really been a push to do so in the United States. In the US the vast majority of workers are covered by Workmen's Compensation Laws but due to an anomaly, seamen and railroad workers can sue and have juries hear their injury cases.

## Lighthouse Act 1911

There was a section in the *1904 Act* about the Commonwealth taking over lighthouses, beacons and buoys except those within the limits of ports. The 1906 Royal Committee was unanimous in favor of this. The result was the *Lighthouse Act 1911*. This *Act* authorized the Commonwealth to enter into an agreement with the Governor of any State or any person for the acquisition of any lighthouse or marine mark that was the property of that state or person. Why would the Governor of a State turnover a light house or marine mark to the Commonwealth when there may be money to be made by retaining the lighthouse or mark? Well, the *Act* gave the Commonwealth the right to inspect any marine mark which may affect the safety or convenience of navigation. No one could obstruct the inspector and the Commonwealth could require the owner of the lighthouse or marine mark to remove it, move it to some other position, to modify it or alter its character to cease from exhibiting the light or to refrain from lighting it for such a period as the Commonwealth may direct. If the owner of the light did not comply with the order, the

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<sup>27</sup> Commonwealth, above n 17, 23-24.

<sup>28</sup> *Seamen's Compensation Act 1911* (Cth) s 5(c).

<sup>29</sup> *Ibid* s 10.

Commonwealth could then take possession of the lighthouse or marine mark. Thus, the Commonwealth gained control over all the lighthouses and marine marks. This is another example of the Federal Government assuming control in a maritime matter.

## The Jason Clause

The year of 1912 was also an important one in U.S. maritime law. In May 1912, the U.S. Supreme Court issued a landmark case on general average. Prior to the *Harter Act*, ship owners did not have a right to general average if the peril arose through their fault. There was also public policy that did not allow clauses exonerating the vessel owner from liability to cargo for negligence. Section 3 of the *Harter Act* exonerates the ship owner from liability under certain conditions for cargo damage due to the negligence in the navigation and management of the vessel. Some argued that this section of the *Harter Act* also removed the bar to ship owners collecting general average from cargo if the peril arose through the ship owner's fault. In the *Irrawaddy* 171 US 187 (1898) our Supreme Court rejected this argument and said that nothing in general average had changed due to the *Harter Act*. As might be expected, the next step of the ship owners was to include a clause in bills of lading that if the general average situation arose through negligence of the ship, from the effects of which she would be exonerated by the *Harter Act*, her owners having exercised due diligence to make her seaworthy, general average was to be payable. The Supreme Court allowed the clause in the famous case of the *Jason* 225 US 22 (1912). The Court held while s 3 of the *Harter Act* did not change the law on general average, it had in effect abolished the public policy against contractual stipulations relieving the ship from the consequence of her own negligence in navigation and management.

In charter recaps you will often see reference to the *Jason Clause* which is printed herein and also reference to the new *Jason Clause* which covers liability under the *Carriage of Goods by Sea Act 1991*. I am sure we are all waiting anxiously to draft new and improved *Jason* clauses to cover liabilities under the *Rotterdam Rules*.

## New Zealand

The maritime law in New Zealand was largely settled by 1911- 1912. However, no paper about 1911 or 1912 would be complete without two amazing stories from New Zealand. The first is about the launching of the *TSS Earnslaw*. Everything about this ship from her construction to her operation is unique. She is named after Mount Earnslaw which is a peak at the head of Lake Wakatipu. Shipbuilders in Dunedin built the vessel and then took her apart. All the quarter inch steel hull plates were numbered for reconstruction like a jigsaw puzzle. Then the parts were then taken by rail from Dunedin to Kingstown at the south end of Lake Wakatipu. The vessel was then rebuilt and on 24 February 1912, the *Earnslaw* was launched and began her lengthy career. She continues in operation to this day, almost 100 years since her launching, and reportedly is the only coal fired ship in Lloyd's Register. Harrison Ford recognized the star power of the ship and the *Earnslaw* made a cameo appearance in the movie *Indiana Jones and the Kingdom of the Crystal Skull*. It is safe to say that the New Zealanders know how to make things that last.

I am breaking one of the cardinal rules of public speaking. I am sure I broke many today already. They say you should always end on a high note. I will not be doing that and the second story is a sad one. It is about the disappearance or death of Pelorus Jack in 1912. Pelorus Jack was a Risso's dolphin that was famous for meeting and escorting ships between Wellington and Nelson through the Cook Strait between 1888 and 1912. He was first noticed in 1888 when he appeared in front of the schooner *Brindle* when the ship approached French Pass, a channel located between D'Urville Island and the South Island. The area is dangerous to ships with rocks and strong currents but no shipwrecks occurred when Jack was present. He would guide the ships by swimming alongside for 20 minutes at a time. If the crew could not see Jack at first, they would often wait for him to appear. Many sailors and travelers swore by Pelorus Jack and he was mentioned in local newspapers and depicted in post cards.

Over the years his fame grew. However, his celebrity attracted not only well wishers but others who did not have his best interests in mind. In 1904, someone aboard the *SS Penguin* tried to shoot Pelorus Jack with a rifle. Despite the attempt on his life, Pelorus Jack continued to help ships, although according to folk lore he would no longer help the *Penguin*. The *Penguin* was shipwrecked in 1909.

Following the shooting incident, a law was proposed to protect Pelorus Jack. He became protected by order in council under *Sea Fisheries Act* on 26 September 1904. He remained protected by that law until his disappearance in 1912. It is thought that Pelorus Jack was the first individual sea creature to be protected by law in any country.



There are many rumors about his death. Some believe that he was harpooned by Norwegian whalers in late April 1912. There is also an account of an anonymous death bed confession by a man who said he helped his father kill a dolphin stranded after a storm. They later realized that it had been Pelorus Jack. The man was haunted by his actions for the rest of his life.

In New Zealand his legend lives on. There was a chocolate bar named after him and he is the subject of a number of songs.

So it is on this sad note that I end. If you are having a beer or a glass of wine with lunch, raise a toast to Pelorus Jack.