

AUSTRALIAN MARITIME LAW UPDATE 2011

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1 Introduction

This update on maritime law events during 2011 addresses the events relating to maritime law that have occurred in the Australian region in 2011, but it also takes into account some developments in 2012.

It commences with developments about the ever-present interest in asylum-seekers and other peoples who arrive by boat from overseas without prior authorisation, generally referred to as 'boat people'. It then goes on to deal with the inauguration of the many aspects of shipping reform and the laws that are changing as a result, followed by notes on marine pollution spills, regional maritime casualties and a short comment on the continuing voyage of the annual Japanese whaling fleet to take whales in the Southern Ocean. The significant number of maritime cases decided in 2011 is summarised. This 2011 update finishes with notes on the new legislation and piracy patrols off Africa by Australian naval ships.

Regular readers of the annual updates may note that this update is not also printed in the *Journal of Maritime Law and Commerce*, as has been the case for Australian updates since 1998, and is written for the *Australian and New Zealand Maritime Law Journal* alone.

2 Boat People

The number of boat people is still only a small proportion of the illegal entrants to Australia, but the media and the politicians give it prominence, and hence it has a high profile. For 2011 the total number who arrived was 4,522, of which some 40% arrived in the last two months of the year; in other words, after the *Plaintiff M70/2011 v Case* judgment, discussed below, was handed down.¹

To help deal with the fact that most of the boats set out for Australia from Indonesia, the Australian Federal Government presented three new high-speed patrol boats to the Indonesian National Police (INP) in 2010, enhancing the region's joint capability against people smuggling. The boats were provided through a \$7.1 million grant to the Australian Federal Police (AFP) in July 2010, part of a new policy step of improving regional law enforcement capability.²

The High Court in *Plaintiff M70/2011 v Minister for Immigration & Citizenship* held by a majority on 31 August 2011 that the Act supporting the arrangement with Malaysia for boat people to be transferred there and 4,000 genuine refugees to come to Australia in lieu of these boat people was invalid. The Act was struck down as beyond Commonwealth power.³ The hope of the Commonwealth government that this arrangement to send the boat people direct to Malaysia would deter boat people was, therefore, lost. This case is discussed in some detail below.

2.1 SIEV221 Tragedy at Christmas Island 15 December 2010

Many of the boat people arrive at Christmas Island, an Australian offshore territory in the Indian Ocean. This was the scene of the tragedy on 15 December 2010, when some 50 people were drowned when the Suspected Illegal Entry Vessel (*SIEV 221*) lost power only a few miles from the only port, Flying Fish Cove. This incident was reported last year in the Australian update 2010.

The authoritative Coroner's Report, after an inquiry held over some months in 2011, was delivered on 23 February 2012.⁴ There were 89 passengers, from Iran and Iraq, and three crewmembers. Of this total, some 50 people were drowned; the largest loss of life in a maritime incident in Australian territorial waters during peace

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¹ Vasek, L, 'Parties Slug it Out as Year's Asylum Tally Nears 1000', *The Australian*, 22 February 2011, 6.

² 'Border Protection', (1 February 2012) 209 *Australian Maritime Digest*, 3.

³ [2011] HCA 32. The main order of the Court was: 'Declare that the declaration made by the "Instrument of Declaration of Malaysia as a Declared Country under subsection 198A(3) of the Migration Act 1958" dated 25 July 2011 was made without power and is invalid.': *ibid*, 1.

⁴ State Coroner A N Hope, Coroner's Court of Western Australia 'Record of Investigation into Death', (23 February 2012), <www.coronerscourt.wa.gov.au/1/inquest> (Record).

time in 115 years.⁵ Heavy weather resulted in the huge Indian Ocean swell crashing onto the northwest of the island, which was where the vessel smashed into the cliffs as it made its way for shelter in Flying Fish cove, on the other (leeward) side. The RAN patrol boat HMAS *Pirie* and the Customs vessel ACV *Triton* happened to be in the area. Their crews performed skilled and dangerous work to rescue 41 persons from drowning and they were much assisted by citizens of Christmas Island throwing life jackets from the cliffs down to them in the sea below. The Coroner found that the bravery of those involved in the rescue efforts — navy, customs and local people — was exceptional; that the officers and crew on the small craft in the rescue demonstrated ‘great courage and resourcefulness in the circumstances’; and that he had ‘nothing but praise for them’.⁶ Of the 92 people onboard, five babies and 10 older children were amongst those who died in the tragedy.⁷

2.2 Change of Government Policy on Visas

In November 2011 the Minister for Immigration, Hon Chris Bowen MP, announced that, as from 24 March 2012, the current process for assessing asylum seekers arriving by boat would be ended, and they would be merged into the general system of assessment of their claims by the Refugee Review Tribunal. He confirmed this government policy on 19 March 2012, and confirmed that these people, many of whom having suffered great hardship to escape their dangers in Sri Lanka, Afghanistan and Iraq, would be awarded a Single Protection Visa until their claims are assessed and judgment made on them.⁸

There had been much criticism of the former system. According to one newspaper article, the Federal Magistrates Court records show that about 24% of the assessments by Immigration officials were legally invalid due to bias by the assessors, and the Department conceded error in a further percentage.⁹ Of course, the life of the immigration officials is not easy. Over the period 1 July 2010-17 October 2011, of 3,237 people who arrived by boat, approximately 3,200 had admitted to prior arrival in Indonesia with passports or other identification documents, but then later came into Australian waters with none of them. One inference is that they had, therefore, deliberately destroyed their identification documents, thereby making accurate identification of their claims difficult for the officials.¹⁰ Another reason may be that those organising such voyages (‘people smugglers’) provided the passengers with forged travel documents in order to get from the source country to Indonesia, which documents are then either returned to the organiser or discarded: see, for example, the evidence to this practice in the trial of *The Queen v Randy Ado and Robet Okana* in 2011.¹¹

While it hardly involved maritime law, one aspect of this surge in the arrival of boat people and their detention is Australia is the increase in payments to, and profits by, the company, Serco Australia,¹² to which the general management of the detention centres has been outsourced by Federal government. In the 2010-2011 financial year Serco admitted a total of 8,874 people into detention, and for this it was paid AU\$693 million (up from \$369 million from the previous year) and made a net profit of \$59 m (up 45%).¹³

Another aspect of this issue is that many of the Australian naval vessels are being employed on non-naval tasks in being ordered to be active in border protection. Apart from the squadron of patrol boats taken up with fisheries and illegal entrants by boat, the RAN survey vessels HMAS *Leeuwin* and HMAS *Melville*, based on the Australian east coast, were taken off their important hydrographic duties to steam to the west coast in order to transport the numerous newly arrived boat people from various locations in the Indian Ocean to Christmas Island.¹⁴

2.3 Boat People Smuggler Trial: Ruling on Unlawful Boarding

For some years the trials of the crew of these boats used for people smuggling were being held in the courts in Western Australia (Perth) and the Northern Territory (Darwin) but the resources of these courts were overwhelmed by the increasing numbers. At considerable expense, therefore, the accused and witnesses are now flown to other Australian capital cities for the trials. In one trial, in the District Court in Brisbane in April

⁵ *Ibid*, Executive Summary, iii.

⁶ *Ibid*, Executive Summary, xv.

⁷ The Coroner’s list of dead showed 10 children under 10 years and five babies of one year or less: *ibid*, first four pages, unnumbered.

⁸ Media Release of 9 March 2012; <www.minister.immi.gov.au/media/cb/2012/cb184344.htm>.

⁹ Needham, K, ‘Boat Refugees will be Assessed as Air Arrivals’, *Sydney Morning Herald*, 20 March 2012, 6.

¹⁰ Maley P, ‘Lost at Sea: 37 of 2337 Boatpeople had Passports’, *The Australian*, 30 January 2011.

¹¹ Supreme Court of Queensland, Indictment No 31 of 2011, 15 March 2012, 1-37 and 1-40.

¹² A division of the British and international company, Serco International, which has many different industries and operates in the UK, Asia Pacific, Europe, the Middle East, and North America, <<http://www.serco-ap.com.au/locations/locations.html>>.

¹³ West, M, ‘Boat Surge Leads to Huge Profits’, *The Sun-Herald*, 6 May 2012, 4.

¹⁴ Dodd, M, ‘Navy Survey Ships Being Used as ‘Water Taxis’ for Boatpeople’ *The Australian* 16 May 2012, 3.

2012,¹⁵ there was an interesting ruling on whether the Naval patrol boat boarding from HMAS *Childers* was so unlawful as to require the trial judge to stay the charges permanently,¹⁶ or in the alternative to exclude all evidence obtained from this boarding and detention.

In *The Queen v Mohammad Jubair and Wawan*,¹⁷ his Honour Judge Reid heard preliminary argument from defence counsel¹⁸ that the boat in question had been boarded and arrested beyond the Australian Contiguous Zone, and consequently that the relevant law conferring powers to board and detain such vessels did not apply. The defence submitted that the indictment be stayed permanently or, in the alternative, that all of the evidence associated with this illegality should be excluded (with the result that the prosecution case would collapse). In his reasons for his ruling, his Honour set out a careful review of all of the evidence, which included the naval messages between the Royal Australian Navy patrol boat, HMAS *Childers*, and the shore command and oral evidence from the Commanding Officer¹⁹ and others in the Naval and the Customs Department vessels. His Honour found that the boarding was unlawful as there was no Australian law that allowed a boarding beyond the Contiguous Zone in these circumstances.²⁰ This view, the naval messages revealed, was shared by Border Protection Command within hours of the boarding and detention, if not earlier.²¹

The Crown Prosecutor put up a valiant argument that the vessel was in distress and the arresting naval vessel had a duty under international law and Australian national law to board it for its own safety. Judge Reid found there was no evidence to support this argument and there was no basis for 'a belief that they were at that time at a significant risk of being lost, or to be classified as in distress'.²²

However, his Honour found that the passengers, some 39 Afghans, were delighted to have the Navy and Customs vessels intercept them and, the accused crewmembers not having given evidence to the contrary, the boat would have come into the Australia jurisdiction anyway.²³ He held, therefore, that under the circumstances it would not be 'so unfair, oppressive or unjust' as to justify a stay. He ordered that the application for a stay be dismissed, that a certain part of the evidence between the accused Mr Wawan and the Australian Customs Service be excluded, but that he would not exclude any of the other evidence.

This was a preliminary ruling and the trial later proceeded before Judge Martin SC from 2 April 2012 but ended in a hung jury. The re-trial then commenced before Judge Griffin SC on 30 April 2012 and ended with both accused being acquitted.²⁴

3 Shipping Reform

On 9 September 2011 the Minister for Transport, Hon Anthony Albanese, in his speech to the maritime industry conference in Sydney, reminded the audience that 99% of Australia's international trade by volume is carried by ships, of which only 0.5% are Australian-flagged vessels. This shipped cargo is valued at AUS\$200 billion and Australian ports have an annual throughput of 10% of the world's sea trade.²⁵

He then developed the theme of the Australian federal government reforms and mentioned the major points of reform to commence from 1 July 2012:

3.1 Fiscal Changes

- Tax reform at a zero company tax rate for Australian resident companies with Australian registered vessels (including those ships on the International Register);
- Accelerated depreciation for Australian owners;

¹⁵ The authors are indebted to Mr Mark McCarthy, Barrister, for information about this case.

¹⁶ Section 232A of the *Migration Act* (Cth).

¹⁷ District Court, Brisbane Registry, Indictment No 1556 of 2011, heard on 2 April 2012, Judge David Reid.

¹⁸ Mr Mark McCarthy and Mr Andrew Boe, Barristers at the Queensland Bar.

¹⁹ Lieutenant-Commander Richardson RAN, the Commanding Officer of HMAS *Storm Bay*.

²⁰ Transcript, 23.

²¹ Email 5 May 2010 at 2.09 pm from Border Protection Command to ACV *Storm Bay*.

²² Transcript, 23, 29.

²³ Transcript, 25.

²⁴ *The Queen v Mohammad Jubair and Wawan*, District Court at Brisbane, Indictment No 1556 of 2011.

²⁵ Hon Anthony Albanese, 'Stronger Shipping for Australia', Speech to the maritime industry, Sydney (9 September 2011)

<<http://www.minister.infrastructure.gov.au/aa/>>. See also 'Regulation Impact Statement Issued for Shipping Reform', (1 November 2011) 207 *Australian Maritime Digest*, 1.

- Roll-over relief for selected capital assets where old ships were sold and replaced with new ones;
- Tax exemptions for seafarers working overseas on qualifying vessels for at least 90 days a year; and
- A royalty withholding tax exemption where vessels are leased by an Australian company from foreign owners under a demise (or bareboat) charter.

The conditions to access these benefits were that the vessels must be Australian-flagged, must meet a minimum training obligation to help build up Australian seafaring skills, and must opt into the scheme for a minimum of 10 years.

3.2 International Shipping Register

The Australian International Shipping Register will be encouraged. This will register Australian-flagged ships and will employ crew under conditions set out in the *Maritime Labour Convention*.²⁶ Those vessels on the Australian domestic coastal routes would need to employ all of the crew, irrespective of nationality, under conditions so that the *Fair Work Act* would apply to protect their rights. Australian legislative, environmental, safety, and occupational health and safety standards would apply. Also, at least two of the crew, preferably the master and chief engineer, would need to be Australian.

The object, said the Minister, was not to exclude foreign shipping from coastal trade where no Australian service was available, but to make Australian ships competitive with foreign ships, and to build up Australian personnel numbers and skills. To this end, the former 'permit' system would be replaced by a 'licence' system which would give effect to this policy, with general, temporary and emergency licences available, and with a five year transitional period for current permits.

3.3 Building up a Skilled Seafaring Workforce

The policy was directed to the development of a skilled Australian seafaring workforce, which had run down to very low levels over the past 30 years. The Australian Maritime College, as part of the Tasmanian University, was receiving increased funding and a new Maritime Workforce Development Forum of experienced people had been established to advise about this aspect.

3.4 Increased Labour Productivity

The Minister expressed the need to increase labour productivity, which required changes to some of the current (wasteful) work practices, a review of the (currently high) safe manning levels, and riding gangs on coastal vessels. He expressed the hope that the industry and the maritime unions would work to achieve compact to this end.

3.5 Concerns about Increased Costs in Coastal Cargos

The reforms introduced by Mr Albanese are long overdue and are welcomed by most of those who know of the parlous state of the Australian shipping industry. On the other hand, a number of interested shipping industries expressed concern that the new permit system restricting coastal shipping to Australian ships with crews having Australian pay and conditions will mean increased costs of sea freight. These concerns were well summarised by Mr Richard Griffiths, the Chair of the Australian Association for Maritime Affairs, when he said:

By trying to restrict foreign shipping from carrying domestic sea freight, as opposed to allowing Australian businesses to use the cheapest shipping transport available at the time, the permit policy has the effect of increasing the cost of domestic sea freight to Australian business and thus the national economy.²⁷

Part of his concern was that rising costs would drive coastal sea freight to be carried by road or rail instead. This is a continuing debate. One advantage of the increased use of Australian-trained officers, both deck and

²⁶ On 15 December 2011 Australia lodged its ratification of the *Maritime Labour Convention 2006* with the International Labour Organisation in Geneva; being the 22nd of the 30 ratifications needed to bring the Convention into force. This was done with some ceremony, including the Secretary of the Maritime Union of Australia being present, Mr Paddy Crumlin; see <<http://www.mua.org.au/news/australia-ratifies-maritime-labour-convention-in-g>>.

²⁷ 'Stronger Shipping for a Stronger Economy', (1 March 2012) 210 *Australian Maritime Digest*, 6.

engineers, will be a distinct rise in the skills on some of the ships that ply Australian waters, thus lessening the risks of maritime casualties.

3.6 Other Aspects of Shipping Reforms

Naturally these, and other, changes in Australian shipping governance mean major legislative changes. In 2011 the Council of Australian Governance, ie the meeting of the Premiers of the States and the Prime Minister, agreed to the establishment of a single national shipping safety body under the direction of the Australian Maritime Safety Authority. The aim was that, by 2013, there should be a single Commonwealth set of laws and regulations for all Australian commercial vessels, irrespective of whether otherwise under State or Commonwealth jurisdiction. A specialised committee has been working on this for some time but arriving at agreement of eight governments on numerous issues has been difficult. One issue was the definition of a 'commercial vessel' and whether it would include vessels in fishing, tourism and service of offshore oil and gas rigs. Another issue was how to agree and then implement the geographical division of the seas between State and Commonwealth jurisdictions. Public consultation on the exposure draft of the *Marine Safety (Commercial Vessel) National Law Bill 2012* is complete and it is proposed that an amended bill will be introduced into the Parliament some time during 2012.²⁸ It will be further addressed in the 2012 update.

Another legislative reform involved revision of the *Navigation Act 1912* (Cth), which was one of the early Acts passed after federation in 1901 and it followed and gave effect to the British wide-ranging *Merchant Shipping Acts*. A draft *Navigation Bill 2012*, of some 340 sections and over some 250 pages, is available for comment. It has numerous changes from the current Act. Finally, a further area giving rise to legislative change relates to implementation into Australian domestic law of the *Maritime Labour Convention*.

Other activities relate to Australia being re-elected to the IMO Council for the 2012-2013 biennium.²⁹ Australia is a foundation member of the IMO and has supported and contributed to it ever since.

The two recent shipping incidents in and near the Great Barrier Reef has meant that the area covered by the GBR Vessel Trafficking System (REEFVTS) has been extended to cover the whole of the GBR. The extension was to the south so it included the port of Gladstone which is rapidly expanding to cope with very large shipping movements, including new tonnages of LNG for export over coming years.

The bills introduced into the House of Representatives on 22 March 2012 to give effect to these reforms, other than those mentioned above, are:

- Coastal Trading (Revitalising Australian Shipping) Bill 2012;
- Coastal Trading (Revitalising Australian Shipping) Bill (Consequential Amendments and Transitional Provisions) Bill 2012
- Shipping Registration Amendment (Australian International Shipping Register) Bill 2012
- Shipping Reform (Tax Incentives) Bill 2012
- Tax Laws Amendment (Shipping Reform) Bill 2012.

As mentioned above, they will be further addressed in the 2012 update.

4 Marine Pollution Spills

Australia's National Plan to Combat Pollution of the Sea by Oil and other Noxious and Hazardous Substances (the National Plan) is administered the Australian Maritime Safety Authority (AMSA). AMSA's *Annual Report 2010-2011*³⁰ sets out a number of items of interest:

- There were no major oil spills over the period, although there were numerous minor ones, mainly in marinas and small harbours, and there was one ship-sourced chemical spill;³¹

²⁸ *AMSA Aboard*, Australian Marine Safety Authority Newsletter (April 2012), 3.

²⁹ 'IMO Assembly Elects New 40-Member Council', (2012) 1 *IMO News*, 19.

³⁰ AMSA, *Annual Report 2010-2011*, <www.amsa.org.au>.

- Major flooding and the destructive Cyclone *Yasi*, both in Queensland, resulted in many small craft being destroyed or damaged and some of them caused some minor pollution spills;³² and
- The *Pacific Adventurer* accident in spills over 30 containers some of which punctured the hull and released bunker oil, reported in the 2009 update, had resulted in a levy on shipping being made to reimburse the Queensland government for cleanup costs not able to be recovered at the rate of 3 cents per leviabale shipping tonnage. It had raised a total of A\$6.131 million at the time of the Report.³³

5 Regional Maritime Casualties

5.1 New Zealand's Shipping Accident: The *Rena*

On 5 October 2011 the 2236 metre, Liberian-flagged MV *Rena* went aground on Astrolabe Reef, to the east of New Zealand's North Island. The Astrolabe Reef is well marked and obvious on all relevant charts and taking one's ship across it is not on most navigators' planned routes. The *Rena*, a 50,000 tonne container ship, had onboard 1300 containers and 1700 tonnes of heavy fuel oil. The ship spilled some 400 tonnes of oil which fouled several New Zealand beaches and cost about NZ\$108 million cleanup, being New Zealand's worst marine pollution event to date. Despite the best efforts of salvors to refloat the *Rena*, which were much hampered by heavy weather, the ship remained on the reef and in January 2012 it broke its back and split in two, with both halves remaining aground.

Since the accident, the salvors have managed to rescue most of the containers onboard and took about 1,000 tonnes of bunker oil off the ship.³⁴ The director of Maritime New Zealand (MNZ) requested assistance from Australia under the Memorandum of Arrangement between AMSA and MNZ on oil pollution preparedness. Pursuant to the National Plan arrangements some 75 Australians were provided from AMSA and the Australian Marine Oil Spill Centre (AMOSC), plus some 40 tonnes of stockpiled clean-up equipment; including three skimmers, 1200 metres of boom, three beach sweepers and some oil spill dispersant spraying equipment.³⁵

On 12 October, MNZ charged both the master and mate under section 65 of the *Maritime Transport Act 1994* (NZ) (MTA), 'for operating a vessel in a manner causing unnecessary danger or risk'. Further charges were laid by MNZ on 2 November, against each man under section 338(1B) and (15B) of the *Resource Management Act 1991* (NZ) (RMA) relating to the 'discharge of harmful substances from ships or offshore installations'. On 21 December, both men were also charged under section 117(e) and 66 of the *Crimes Act 1961* (NZ), alleging they 'wilfully attempted to pervert the course of justice' by altering ship's documents subsequent to the grounding.

On 29 February 2012 in the Tauranga District Court, the master entered guilty pleas to all six charges laid against him, and the second officer pleaded guilty to the MTA charge and all three Crimes Act charges but entered no plea to the RMA charge. Hearings on the remaining charge and sentencing were adjourned over (sentencing on 25 May).³⁶ The charges allow sentences of imprisonment and substantial fines.

As at May 2012 Svitzer, the salvors, had undertaken salvage of sections of containers and cargo from both the seabed and the wreck site over the reef. Their work has been frequently interrupted by heavy seas, but at that time a total of 772 containers have now been recovered from the *Rena* and brought to the port for processing.³⁷

5.2 Papua New Guinea's Shipping Accident: The *Rabaul Queen*

On 2 February 2012 the MV *Rabaul Queen*, a large ferry servicing the northern ports and islands off Papua New Guinea, sank on a voyage between Kimbe and Lae. The AMSA Rescue Centre in Canberra provided major assistance to the Papua New Guinean authorities in co-ordinating the rescue. Some 15 merchant ships, many smaller vessels and a number of aircraft from Australia and Papua New Guinea assisted over the next few

³¹ *Ibid*, 14-15. A spill of 5 tonnes in the Brisbane River, Queensland, on 25 January 2012 resulted in some pollution but it was well contained with booms and collected with skimmers. The owners and master were charged under the Queensland legislation covering marine pollution from ships and released on bail following the letter of undertaking up to A\$2 million to cover penalties and costs of clean up; see 'Brisbane River Oil Spill', (April 2012) 21 *On Scene*, Newsletter of the National Plan, 8.

³² *Ibid*, 42.

³³ *Ibid*, 7.

³⁴ *Ibid*.

³⁵ 'National Plan Assistance in *Rena* Incident Response', *On Scene*, above n 31, 3.

³⁶ Maritime New Zealand Media Release, 1 March 2012, < www.maritimenz.govt.nz >.

³⁷ See Maritime New Zealand web site <<http://www.maritimenz.govt.nz/rena>>.

days.³⁸ Some 250 people were rescued but it is not sure how many perished, as the ticketing system and the records were not accurate, but it is estimated that well over 200 people died. A Papua New Guinea Commission of Inquiry has been established into the tragedy, with retired judge Warwick Andrew presiding, and with assisting counsel Mr Mal Varitimos, of the Queensland Bar, and Emmanuel Assigau, a Papua New Guinean lawyer.³⁹

There has been a lot of media coverage about the tragedy, but an accurate picture of the events leading up to it will need to await the report from the Commission of Inquiry.

5.3 Australia's Christmas Island Incident; MV Tycoon

Christmas Island, mentioned above in the context of the 'boat people' tragedy, came into the news again from a shipping casualty on 8 January 2012 when the 84 metre, 4,129 dwt, Panamanian-owned and registered ship, MV *Tycoon*, lost its moorings in heavy weather and smashed against the rock wall in Flying Fish Cove and sank there the next day. The *Tycoon* was moored about 25 metres off the cliff face on top of which the only suitable cargo crane was discharging containers and general cargo before loading 3,700 tonnes of bagged phosphate.⁴⁰ Mooring lines ran to buoys moored offshore, and to bollards onshore, and they kept the vessel in position under the crane and off from the cliff face.

However, the onshore swell size and the wind velocity both rose, some mooring lines parted, and finally the bow drifted against the rock wall which resulted in the *Tycoon* sinking. The Cove was polluted to some extent but the crew were taken to safety by jumping into the sea and being rescued by small craft from the two nearby RAN patrol boats, HMAS *Leeuwin* and *Maryborough*. No loss of life occurred. AMSA activated the National Plan and co-ordinated the clean-up of the oil pollution and wreckage.⁴¹

The clean-up of oil was tackled by activation of the National Plan by AMSA, whose members were assisted by a large contingent of volunteers. Cleaning up the oil proved to be challenging during the heavy swell but this weather also assisted in dispersing much of it.⁴²

6 Whaling in the Southern Ocean

Previous updates have set out the issues, the laws and a summary of the facts about the annual Southern hemisphere summer excursion of a Japanese government sponsored whaling fleet to the Southern Ocean. The only point of interest since the update last year is the development in pleadings in the case in the International Court of Justice commenced by Australia against Japan on 31 May 2010. Various orders for relief are sought in relation to Japan's JARPA II program, but the core of the case by Australia is that taking whales for 'scientific research' is in breach of international law and in particular of the *Whaling Convention*.⁴³

Australia filed its Memorial on 9 May 2011 and Japan its Counter-Memorial on 9 March 2012. The ICJ decided that no Reply by Australia and hence no Rejoinder by Japan is necessary.⁴⁴ The written proceedings are, therefore, concluded and no doubt the case will make its slow advancement to a hearing. The speed of the ICJ in handling its case load reminds one of the Australian poet Henry Lawson's description of a bullock team: 'inch by inch with the weary load'.⁴⁵ Success in the matter will probably turn on how well the Australian government marshals suitable evidence to support its case.

³⁸ (April 2012) *AMSA Aboard*, Australian Marine Safety Authority Newsletter, 5.

³⁹ Callick, R, 'Passengers Weren't Counted so Nobody Knows How Many Died', (May 19-20 2012), *The Weekend Australian*, 18.

⁴⁰ Facts are taken from the Australian Transport Safety Bureau Report 'Foundering of the general cargo ship *Tycoon* at Christmas Island 8 January 2012, MO-2012-001 Preliminary, <www.atsb.gov.au>.

⁴¹ *AMSA Aboard*, above n 38, 8-9.

⁴² 'MV *Tycoon* Incident at Christmas Island' (April 2012) 21 *On Scene*, Newsletter of the National Plan, 2.

⁴³ See Australian update 2010 for details.

⁴⁴ International Court of Justice Press Release, No 2012/18, 18 May 2012, <www.icj.org>.

⁴⁵ *The Teams* by Henry Lawson (1867-1922): 'A cloud of dust on the long white road, / And the teams go creeping on, / Inch by inch with the weary load; / And by the power of the green-hide goad, / The distant goal is won.'

7 Overview of Maritime Cases

7.1 Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32

This was a case, mentioned above, brought in the High Court of Australia challenging the legal validity of the Australian Government's controversial 'Malaysian solution' for the processing of asylum seekers that arrive in Australia by boat.

The background was that on 25 July 2011 Australia and Malaysia signed the *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* (the *Arrangement*). The *Arrangement* declared the countries' intention to enter into a new partnership to help tackle people smuggling in the Asia-Pacific region, under which 800 irregular maritime arrivals would be transferred from Australia to Malaysia for refugee status determination. In return, Australia agreed to resettle 4000 refugees currently residing in Malaysia over four years. The transfer of the 800 asylum seekers to Malaysia was to take place before any assessment of their claim for protection as refugees. Assessment was to be carried out in Malaysia by the United Nations High Commissioner for Refugees (UNHCR) rather than by the Malaysian Government.

The *Arrangement* was to be supported legislatively by ss 198(2) and 198A(1) of the *Migration Act 1958* (Cth). Section 198(2) imposed on an officer a duty to remove from Australia as soon as reasonably possible an unlawful non-citizen who was *in detention*. Section 198A provided for the removal of offshore entry persons to specified countries, which the Minister for Immigration and Citizenship (the Minister) had declared met the characteristics in s 198A(3)(a). Significantly, pursuant to the terms of the *Migration Act*, individuals dealt with under this section were considered *not to be in detention*. The requirements set out under s 198A(3)(a) included:

- Access to effective procedures for assessing their claims;⁴⁶
- Protection for persons seeking asylum, pending determination of their refugee status;⁴⁷
- Protection to those given refugee status, pending voluntary repatriation or resettlement in another country⁴⁸; and
- Meeting relevant human rights standards in providing that protection.⁴⁹

On 25 July 2011 the Minister made the required declaration⁵⁰ that Malaysia was a country that met the four requirements set out in s 198A(3)(a).

The plaintiffs had arrived by boat at Christmas Island on 4 August 2011 and were detained by an officer of the Commonwealth pursuant to the *Migration Act*.⁵¹ M106 was 16 years of age and arrived unaccompanied by a parent/guardian. Each plaintiff was a citizen of Afghanistan and claimed to have a well-founded fear of persecution in Afghanistan on grounds that would, if established, have made them refugees to whom Australia owed protection obligations under the *Refugee Convention*. On 7 August 2011, an officer of the Department of Immigration and Citizenship determined that plaintiff M70 should be removed from Australia to Malaysia pursuant to the *Arrangement*. With respect to plaintiff M106, the Department assessed that the only impediment to his removal was the establishment in Malaysia of relevant support services for unaccompanied minors pursuant to the *Arrangement*. The plaintiffs commenced proceedings against the Minister and the Commonwealth Government under ss 75(iii) and 75(v) of the *Australian Constitution*.

The plaintiffs' primary submission was that the power to remove them to Malaysia under s 198A(1) was dependent upon the existence of a valid declaration under s 198A(3) in respect of Malaysia, and that that the four criteria in s 198A(3)(a)(i)-(iv) were a necessary precondition to the valid exercise by the Minister of his power to make a declaration. Further, it was argued that s 198A(3)(a) required that the processes and protections provided to asylum seekers and refugees must be secured by the existence of legal obligations, either domestic or international, on the part of Malaysia. Without such legal protection, any undertaking by the Malaysian

⁴⁶ *Migration Act 1958* (Cth) s 198A(3)(a)(i).

⁴⁷ *Ibid*, s 198A(3)(a)(ii).

⁴⁸ *Ibid*, s 198A(3)(a)(iii).

⁴⁹ *Ibid*, s 198A(3)(a)(iv).

⁵⁰ The declaration's official title was the *Instrument of Declaration of Malaysia as a Declared Country*.

⁵¹ *Migration Act 1958* (Cth) s 189(3).

government of protection and proper treatment could not be enforced. With respect to plaintiff M106 it was also contended that, pursuant to s 6A of the *Immigration (Guardianship of Children) Act 1946* (Cth) (the IGO Act), the Minister acted in the capacity of his legal guardian and was required to provide a written consent before he could be lawfully removed from Australia.

In response, the Minister submitted that the existence of the criteria in s 198A(3)(a) may be determined by reference to the level of care and protection provided to asylum-seekers and refugees in Malaysia as a practical reality, irrespective of whether this treatment was enshrined as a legal obligation on the part of Malaysia. Accordingly, the Minister was entitled to rely upon advice from the Department of Foreign Affairs and Trade (DFAT) that the practical reality in Malaysia satisfied the requirements of the Act. Of course other arguments were also advanced on behalf of the Minister.

A majority of the High Court of Australia (Heydon J dissenting) held that the Minister did not have the power under s 198A(3) to remove asylum seekers to another country in the absence of basic legal safeguards to ensure their rights were protected.⁵² As Malaysia lacked these necessary legal safeguards, the Minister had not possessed the power to make the declaration of 25 July 2011 and accordingly, it must be considered invalid. The majority also held that Australia's obligations under the *Refugee Convention*⁵³ necessitated that it ensure minimum standards of protection and care for asylum seekers. The effect of the combined operation of ss 198 and 198A was to prevent an offshore entry person claiming to be refugee from being removed to another country unless that person's claim for protection was first assessed within Australia.⁵⁴

In short, the Court held that, having regard to the wording of the requirements in s 198A(3)(a), notwithstanding the practical reality of the treatment of asylum seekers in Malaysia, the Minister could not be properly assured of the ongoing provision of the protections prescribed in s 198(3)(a) in the absence of an enduring legal framework that enshrined asylum-seekers' rights to those protections.⁵⁵ This was particularly so as Malaysian law did not recognise the status of refugees, as Malaysia was not a signatory to the *Refugee Convention*. Finally, Malaysia had made no legally binding arrangement with Australia obliging it to accord the protections required under s 198A(3)(a) to asylum seekers sent to Malaysia.

A majority also held that, pursuant to the IGO Act, plaintiff M106 could not be removed from Australia without the prior written consent of the Minister.⁵⁶ The Court considered that a determination by the Minister that an unaccompanied minor should be taken from Australia to a country declared under s 198A(3)(a) of the *Migration Act* would not constitute a consent in writing of the kind required by s 6A of the IGO Act. Accordingly, the removal of plaintiff M106 from Australia would have been unlawful.

The Court made appropriate declarations and orders, including that the Minister be restrained from taking Plaintiff M106 from Australia in the absence of a consent in writing of the Minister given under s 6A(1) of the *Immigration (Guardianship of Children) Act 1946* (Cth). The defendants were ordered to pay the plaintiffs' costs of the proceedings.

7.2 *Birdon Pty Ltd v Houben Marine Pty Ltd & Ors* [2011] FCAFC 12

In October 2011 the Full Court of the Federal Court⁵⁷ ruled in a special case stated in relation to monies claimed by Houben Marine Pty Ltd, which were denied by Birdon Pty Ltd. The point was whether the interaction of other legislation with the *Admiralty Act 1988* (Cth) raised certain constitutional issues that precluded the Federal Court from dealing with the matter.

The case arose from the charter of the backhoe dredge *Ain Dschalut* and hopper barges by Birdon from Houben Marine to take them from Sydney to do dredging work on the west coast of Australia and then, if needed, back in Sydney. The charterparty was made up of the BIMCO standard bareboat form Barecon 21, as amended, other documents, oral agreements and emails.⁵⁸ The dredge was taken apart and transported by road to Western Australia where it did its work and it was then returned to Sydney where it was not further used. Claims were made and invoices paid for this work. Then, some seven months after the dredge was redelivered to it, Houden

⁵³ *Ibid*, [54] (French CJ), [116] (Gummow, Hayne, Crennan and Bell JJ), [226]-[234] (Kiefel J).

⁵⁴ *Ibid*, [95]-[98] (Gummow, Hayne, Crennan and Bell JJ).

⁵⁵ *Ibid*, [62] (French CJ), [125]-[127] (Gummow, Hayne, Crennan and Bell JJ), [244]-[245] (Kiefel J).

⁵⁶ *Ibid*, [143] (Gummow, Hayne, Crennan and Bell JJ), [69] (French CJ concurring), [257] (Kiefel J concurring).

⁵⁷ Keane CJ, Rares and Buchanan JJ.

⁵⁸ The facts are taken from the judgment of Rares J in *Birdon Pty Ltd v Houben Marine Pty Ltd & Ors* (No 2) [2011] FCA 1313 (27 October 2011).

Marine sent a further eight invoices, amounting to about A\$2.133 million, for further hire under the charter party. The matter should have gone directly for adjudication but instead the Federal Court found itself dealing with this special case.

The main submission was that the terms of the *Building and Construction Industry Security of Payment Act 1999* (NSW), which covered disputes between contractors, interfered with the *Admiralty Act 1988* (Cth) and other legislation that conferred jurisdiction on the court. The result, so it was submitted, was that the NSW Act was invalid.

The provisions of the NSW *Building and Construction Act* required that any dispute as to progress payments under the contract go to an adjudicator, that his or her determination was final, and that the money had to be paid, in default of which the certificate could be filed in a competent court as judgment. However, the defendant could start proceedings to have it returned, although the sum had to be paid into court as security.⁵⁹ The purpose of the provisions was to defeat the previous practice of head contractors running up large debts by their companies with their sub-contractors and then allowing their companies to be wound up, thus leaving the sub-contractors unpaid. This Act required them to pay the money and only then dispute if it was really owed.

All three judges gave reasons and the majority, Keane CJ and Buchanan J, held that the questions should be answered in the negative. Rares J, dissenting, held that the major questions should be answered in the affirmative.

Keane CJ reviewed the provisions of the relevant NSW and federal legislation and the Australian *Constitution*. He held, in effect, that there was nothing about the adjudication process and its enforcement that was at odds with the fundamentals of the judicial process, and that the statutory entitlement to the proceeds of the adjudication process was provisional and that the final determination lay with a court.⁶⁰ Buchanan J was of a similar view and made the point that the NSW *Building and Construction Act* established an administrative procedure for claiming, determining and recovering progress payments, and that this did not intrude upon the exercise of the jurisdiction of the federal judicial power.⁶¹

Rares J, dissenting, held that the NSW Act purports to exclude a court from exercising federal jurisdiction and that a State Parliament could not legislate to prevent a Federal Court invested with authority under Chapter III of the *Constitution* from exercising jurisdiction.⁶² The result was that the matter was decided with the major questions being decided in the negative, ie that there was no major constitutional point that made the NSW Act invalid, and that Birdon should pay the costs.

A week later Birdon was back before a single judge in the Federal Court, Rares J, seeking to amend the terms of its application for an interlocutory injunction against Houden Marine (while Birdon sought special leave to appeal to the High Court of Australia).⁶³ Leave to amend was granted on condition that Birdon pay indemnity costs of the application. Then a week after that Birdon was in the court to argue for the injunction itself while it sought special leave to appeal from the High Court.⁶⁴ This was granted on certain conditions,⁶⁵ but the matter subsequently settled, so there it ended.

7.3 *Visscher v Teekay Shipping (Australia) Pty Ltd [2011] FCAFC 137*

This was an appeal to the Full Court of the Federal Court⁶⁶ from a decision of Katzmann J⁶⁷ in which her Honour summarily dismissed a general maritime claim for wages under the *Navigation Act 1912* (Cth).

In March 2001 Timothy Visscher accepted an offer of employment with the defendant Teekay Shipping (Australia) Pty Ltd (Teekay) as a third mate. Shortly thereafter Mr Visscher was offered a temporary position on a tanker as chief officer which was followed by an offer of permanent promotion to that position. At the time of

⁵⁹ Section 3: Object of Act: '(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.'

⁶⁰ *Birdon Pty Ltd v Houben Marine Pty Ltd & Ors* [2011] FCAFC 12, [53, 56], Keane CJ.

⁶¹ *Ibid*, [161], Buchanan J.

⁶² *Ibid*, [101], Rares J.

⁶³ *Birdon Pty Ltd v Houben Marine Pty Ltd* [2011] FCA 1217 (20 October 2011).

⁶⁴ *Birdon Pty Ltd v Houben Marine Pty Ltd (No 2)* [2011] FCA 1313 (27 October 2011).

⁶⁵ *Ibid*, [44, 46].

⁶⁶ Greenwood, Rares and Foster JJ.

⁶⁷ *Visscher v Teekay Shipping (Australia) Pty Ltd* [2011] FCA 1.

Mr Visscher's promotion Teekay was embroiled in a workplace dispute with the Australian Maritime Officers Union. A key point of disagreement concerned Teekay's recent promotion of certain deck officers, including Mr Visscher. Owing to the workplace disagreement, on 20 September 2001 Teekay wrote to Mr Visscher and purported to rescind his promotion. Mr Visscher replied on 26 September 2001 refusing to accept rescission of his promotion and enquiring whether his employment had been terminated.

In early October 2001 a representative of Teekay indicated that, notwithstanding the letters, Mr Visscher would continue to be employed in the position of chief officer. From then until November 2003, Teekay paid Mr Visscher at the rate of a chief officer and he performed the duties of that rank. Notwithstanding this state of affairs, Teekay's official records maintained that Mr Visscher was employed as a third mate. In 2002, Teekay updated his status in its official records to second mate.

In November 2003, Mr Visscher had a personal disagreement with the master of the vessel and sought a transfer to another vessel owned by Teekay for his next tour. Teekay offered Mr Visscher a tour on another vessel as chief officer, but indicated that after that tour he would be employed as a second mate. Mr Visscher agreed to another tour in his present position but did not agree to further tours. On February 2004, towards the end of the tour, Mr Visscher wrote to Teekay that his demotion to second mate constituted constructive termination and he would consider his employment terminated upon arrival of his vessel in port. Teekay responded that Mr Visscher was officially graded as a second mate with Teekay, and that Teekay did not consider a demotion in rank to amount to constructive dismissal. Further, it indicated that Teekay considered Mr Visscher's email to amount to a resignation and sought confirmation of this position. Mr Visscher discussed Teekay's letter with the captain of the vessel and requested that the captain give him his discharge when they arrived in port, to which the captain agreed. On 3 March 2004, the vessel arrived in port and Mr Visscher was given his discharge but did not receive an account of wages or accrued leave entitlements at that time.

Further correspondence passed after which Visscher commenced proceedings against Teekay asserting a general maritime claim for wages under ss 75 and 78 of the *Navigation Act 1912* (Cth). Teekay brought a notice of motion seeking summary dismissal pursuant to s 31A of the *Federal Court of Australia Act 1976* (Cth) on the basis that he had no reasonable prospect of successfully prosecuting his claim. Teekay contended that it had a clear defence under s 78 of the Act that its delay in paying Mr Visscher was due to a reasonable dispute as to its liability to pay him wages.

The primary judge accepted Teekay's contention that, at the conclusion of Mr Visscher's tour on 3 March 2004, it had refused to accept either that his employment had been terminated or that he was entitled to termination pay. Her Honour held that he had no reasonable prospect of defeating Teekay's defence on this basis gave judgment for Teekay under s 31A(2) of the *Federal Court of Australia Act* (Cth).

On appeal, Visscher argued that her Honour erred in finding that a reasonable dispute had been established for the purposes of s 78. Specifically, Mr Visscher emphasised the words of s 78 required that the delay be due to 'a reasonable dispute as to liability for the wages'. Teekay had a notice of contention which sought to uphold the primary judge's decision.

In a joint judgment, the Full Court held that primary judge erred by summarily dismissing seafarer's proceedings for wages as, having regard to the evidence at first instance, there were sufficient prospects.⁶⁸ The Court observed that there was nothing in the evidence before the Court to suggest that there had been any dispute as to Teekay's liability for Mr Visscher's wages at the time that he was discharged. While the parties may have disagreed as to precisely whether Mr Visscher had resigned or his employment had been terminated, under either scenario he was entitled to wages up to 3 March 2004 and the dispute that subsequently arose concerned whether Visscher would be paid and hold a rank as second mate if he continued to accept further employment opportunities with Teekay.

Having regard to the terms of s 31A of the *Federal Court of Australia Act* (Cth), the Court considered that the necessary evidential threshold for granting summary judgment had not been met as it was far from self-evident that Teekay could establish its defence at trial.⁶⁹ The appeal was allowed.

⁶⁸ *Visscher v Teekay Shipping (Australia) Pty Ltd* [2011] FCAFC 137, [59].

⁶⁹ *Ibid*, [61].

7.4 **Walker v Government of the Republic of Vanuatu [2011] FCAFC 138**

This was an appeal to the Full Court of the Federal Court⁷⁰ from an earlier decision of Greenwood J⁷¹ to dismiss the plaintiff's claim against the Republic of Vanuatu. The appellant, Mr Walker, was the master of the ship *MV Retriever 1*. He alleged that his ship had been seized and detained in Vanuatu by the Government of the Republic of Vanuatu and that he, or a company he controlled, was the beneficial owner of the ship, and he commenced these proceedings in Australia for its release.

Greenwood J held that, pursuant to s 9 of the *Foreign States Immunities Act 1985* (Cth), Vanuatu was immune from the jurisdiction of the Court, dismissed Walker's claim and ordered that service of the application on Vanuatu be set aside. Vanuatu had relied upon s 9 of the *Foreign States Immunities Act 1985* (Cth), which afforded foreign States an extremely broad general immunity from the jurisdiction of Australia Courts, subject only to very limited exceptions.⁷² It also relied on s 38, which required the Court to set aside a process issued in a proceeding if, on the application of a foreign State, the Court was satisfied that the process was inconsistent with the immunity conferred by the Act.

On appeal Walker argued that the primary judge had erred in failing to find that the *Admiralty Act 1988* (Cth) gave the Court jurisdiction over Vanuatu. He argued that the proceedings related to a ship and that he had *in personam* claims under the Admiralty Act against Vanuatu, and also a proprietary maritime claim under ss 4(2)(a) and 16 of the Act based on Vanuatu's interference with his rights as owner or a person entitled to possession of the vessel or 'other property'. He also asserted a general maritime claim under s 4(3) of the Act.

In a joint judgment the court affirmed the decision below and dismissed the appeal holding that the primary Judge had correctly held that the effect of s 9 of the *Foreign States Immunities Act 1985* (Cth) was to grant Vanuatu a general immunity from the jurisdiction of Australia's Courts.⁷³ The relevant conduct of which the appellant complained clearly possessed the character of an act of a State, which had been taken in respect of a ship located in waters within its sovereign jurisdiction in its own territory. The immunity created or recognised in the *Foreign States Immunities Act 1985* (Cth) represented a legislative policy choice to refrain from asserting the sovereignty of Australia over a foreign State unless one of the very limited exceptions in the Act applied.⁷⁴ Accordingly, the Full Court considered that there was no error in his Honour's decision to set aside the application and its service and dismissed the appeal with costs.⁷⁵

7.5 **Chevron Australia Pty Ltd v The Registrar of the Australian Register of Ships [2011] FCA 265**

This was an application in the Federal Court⁷⁶ brought by Chevron Australia Pty Ltd to remove an erroneous entry from the Australian Register of Ships pursuant to the *Shipping Registration Act 1981* (Cth). The Register wrongly recorded Chevron Asiatic Limited as the current owner of a 10/64ths interest in the ship *Cossack Pioneer* in place of the rightful owner Chevron Australia Pty Ltd.

Pursuant to s 59(1)(c) of the Act, where an entry wrongly exists in the Australian Register, an aggrieved person can apply to the Supreme Court of a State or Territory for rectification of the Register, and the Court may make such order as it thinks fit. Chevron Asiatic Limited had sold all of its Australian assets to Chevron Australia Pty Ltd, and had further executed a deed of assignment and assumption assigning all of its rights, title and interests in any contractual agreements relating to the *Cossack Pioneer*.

However, no bill of sale had ever been lodged with the Registrar, as required by the Act. Nor had any transfer of the interest been registered. Nevertheless, Chevron Asiatic Limited had subsequently been deregistered as owner of the vessel. The Registrar made no objection to the proposed declarations or the making of a rectification order.

⁷⁰ Dowsett, Rares and Reeves JJ.

⁷¹ *Walker v Government of the Republic of Vanuatu* [2011] FCA 364.

⁷² Section 9 of the *Foreign States Immunities Act 1985* (Cth) is in the following terms: 'Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.'

⁷³ *Walker v Government of the Republic of Vanuatu* [2011] FCAFC 138, [10].

⁷⁴ *Ibid*, [15].

⁷⁵ *Ibid*, [17].

⁷⁶ Greenwood J.

Greenwood J was satisfied that the entry in the Register of Chevron Asiatic Limited as the owner of 10 of the 64 interests in the ship was wrongly entered and that the Register ought to be rectified,⁷⁷ and made orders to that effect.

7.6 Norddeutsche Landesbank Girozentrale v The Ship 'Beluga Notification' (No 2) [2011] FCA 665

This was an application in the Federal Court⁷⁸ brought by Norddeutsche Landesbank Girozentrale (the Bank) for judgment in default of appearance and valuation and sale of the ship *Beluga Notification* under r 69(1) of the *Admiralty Rules 1988* (Cth).

The Bank held a ship mortgage over the *Beluga Notification* given to it on 19 November 2010 in Germany by her owners, MS Dutch Katja Shipping GmbH & Co KG. The mortgage acknowledged that the owners owed the Bank €13.5 million and contained an agreed interest rate.

On 22 November 2010, the owners of the *Beluga Notification* entered into a further loan agreement with the Bank to borrow €11.2 million which was to be secured by the mortgage. The owners of the vessel also agreed to provide the bank a limited guarantee from Mr Stolberg for €4.8 million. The loan agreement noted the following details of the agreement:

- The new-built ship was to be delivered in late November 2010;
- The owners entered a 5 year time charter with Beluga Chartering GmbH; and
- A ship management agreement was created with Beluga Fleet Management GmbH & Co KG.

The loan agreement also provided that the Bank could demand the immediate repayment of any outstanding loan balance in certain circumstances.

The owners experienced financial difficulty shortly thereafter and did not pay the instalments. Beluga Chartering and Beluga Management were placed into administration. In 2011 Mr Stolberg became insolvent. The Bank demanded full payment but no payment was forthcoming, so it commenced proceedings *in rem* against the ship *Beluga Notification* by writ on 12 April 2011, seeking to enforce its mortgage over the vessel. The ship was arrested in Brisbane and moved to an anchorage in the port. No appearance was filed by the ship or any relevant person including the owners.

The bank applied for judgment in default of appearance and, under r 69(1) of the *Admiralty Rules 1988* (Cth), for an order for the valuation and sale of the vessel. It also sought orders that:

- The sale need not be by public auction;
- The Marshal engage a nominated shipbroker to conduct the valuation and advise as to the method of sale;
- Any valuation not be disclosed by the broker or the Marshal until further order; and
- The Marshal be entitled to retain a solicitor experienced in the judicial sale of ships to act for him.

Rares J gave judgment in favour of the bank and granted the bank's application for the vessel's valuation and sale.⁷⁹ Following the decision in *The Myrto*,⁸⁰ his Honour considered that such an order was appropriate in circumstances where there had been no appearance entered by the owners of the vessel. He emphasised that there was no apparent prospect that the owners would provide security to obtain the ship's release from arrest and the expenses of maintaining her arrest were mounting. Accordingly, his Honour considered that no useful purpose would be served by prolonging the period of the arrest. He was not, however, prepared to make an order

⁷⁷ *Chevron Australia Pty Ltd v The Registrar of the Australian Register of Ships* [2011] FCA 265, [12].

⁷⁸ Rares J.

⁷⁹ *Ibid*, [25]-[26].

⁸⁰ *The Myrto* [1977] 2 Lloyd's Rep 243, 260. This case was approved by Ryan J in *Marinis Ship Suppliers (Pty) Ltd v The Ship 'Ionian Mariner'* (1995) 59 FCR 245, 249B-C, 250C-D.

under r 70(2) directing the sale need not proceed by way of public auction, on the basis that such an order would pre-empt the advice that the shipbroker would give to the Marshal.⁸¹

7.7 *Navios International Inc v The Ship Huang Shan Hai* [2011] FCA 895

This case concerned four related proceedings commenced in the Federal Court⁸² in relation to the arrest of the ship *Huang Shan Hai*. On 13 July 2011 the plaintiffs, Navios International Inc and its related companies, each commenced separate proceedings in the Federal Court of Australia against the ship and applied for its arrest. Its related companies, Customised Development SA, Hyperion Enterprise Inc and Orbiter Shipping Corp, filed caveats against release of the vessel. Each of the plaintiffs had chartered vessels to Cosco Bulk Carrier Co Ltd (Cosco). Prior to bringing proceedings in the Federal Court, the plaintiffs had commenced arbitration proceedings in London under their respective charterparties with Cosco in relation to unpaid hire. It was not disputed that Cosco's total unpaid hire under the four charterparties amounted to US\$7,281,136.12. In addition to this sum, the plaintiffs sought further security in the event the vessel were to be released, compound interest at 5 per cent for two and a half years, and US\$500,000 for legal costs that would be incurred in conduct of the arbitrations in London.

The ship was arrested by the Marshal in Geraldton, Western Australia. On 14 July 2011 Cosco entered notices of appearance in each of the four proceedings and sought to post bail to secure her release. The substantial dispute between the parties concerned whether Cosco had provided sufficient security, under Part VII of the *Admiralty Rules 1988* (Cth).⁸³ Pursuant to r 54(2), bail could only be provided by the filing of a bail bond signed by two sureties, unless the Court ordered otherwise. Further, r 56(3A) required that Cosco's proposed sureties file and serve an affidavit regarding their financial circumstances and ability to meet their obligations under the bond.⁸⁴ The Rules gave the Court the power to direct that a further supplementary affidavit be filed and served where appropriate.⁸⁵

On 22 July Cosco served on the plaintiffs bail bonds from Au-sea Shipping Pty Ltd and the Bank of China in each proceeding. The bail bonds proffered by Bank of China and Au-sea were in identical amounts, but were offered separately, rather than as a joint and several bond, as contemplated by r 54. Cosco relied on affidavits by their solicitors in satisfaction of the requirement under r 56(3A) that the sureties provide an affidavit setting out their financial circumstances. The evidence was that Bank of China had significant property holdings in Sydney and its assets vastly exceeded the amount of approximately US\$8.8 million claimed as security by the plaintiffs. In contrast, Au-sea had less than A\$1 million in Australian assets and its income was less than \$100,000 per annum.

The plaintiffs served objections to each proposed bail bond given by the Bank of China and Au-sea on the grounds that the sureties themselves, not their solicitors, should file the affidavit, and that Au-sea did not, in any event, have sufficient assets in the jurisdiction to back up any default. Accordingly, an application was made by Cosco for dispensation from the requirement in r 54(2) that a bail bond be signed by two sureties so that it could rely solely on the bail proposed to be posted by Bank of China.⁸⁶ The plaintiffs objected to this application on the ground, amongst others, that the bank might, under foreign law, challenge the authority of any agent who signed the bail bond on its behalf.

Rares J rejected the plaintiff's argument that the sureties had to sign themselves rather than through their solicitors, holding that, having regard to the operation of the Rules as a whole, it was clear that r 56(3A) could not have been intended to operate so as to require a surety to personally swear and affirm an affidavit in all cases.⁸⁷ In any event, a corporation could not swear or affirm an affidavit and had to use some representative on

⁸¹ Rares J.

⁸² Rares J.

⁸³ *Norddeutsche Landesbank Girozentrale v The Ship 'Beluga Notification' (No 2)* [2011] FCA 665, [10]. While the issue of sufficiency of surety is normally determined before a Registrar, in this case Rares J ordered that the matter be returned before him given the importance of securing, if possible, the release of the fully laden ship on an expedited basis.

⁸⁴ Under rr 56(3A) and (3B) the proposed surety must file and serve on each other party to the proceeding an affidavit regarding its financial circumstances that sets out its current and non-current assets, actual and contingent liabilities, as well as any current proceedings in which the proposed surety is a party. The affidavit must state whether in the five years before its date the proposed surety has been the subject of any demand under a law relating to bankruptcy or insolvency, or has been made bankrupt, placed in administration or receivership or has been the subject of bankruptcy or winding up proceedings or of a garnishee order.

⁸⁵ *Admiralty Rules 1988* (Cth), r 56(3C).

⁸⁶ *Norddeutsche Landesbank Girozentrale v The Ship 'Beluga Notification' (No 2)* [2011] FCA 665, [35].

⁸⁷ *Ibid*, [18].

its behalf. However, his Honour indicated that the identity of the deponent of the surety's affidavit would be relevant to the weight that the Court would give to evidence as to a surety's financial circumstances.

Rares J also held that Bank of China ought to be allowed to act as sole surety for the bond,⁸⁸ as he was satisfied that Bank of China had more than sufficient assets to honour its consent to execution against it in the event that the plaintiffs secured judgment against Cosco.⁸⁹ Nor was it relevant that the Bank of China was a foreign corporation,⁹⁰ as the Admiralty Courts often accepted letters of undertaking or other security from foreign protection and indemnity (P&I) clubs and insurance companies to secure the release of ships. His Honour emphasised that the bank was subject to the terms of the *Banking Act 1959* (Cth),⁹¹ pursuant to which its assets in Australia would be available to satisfy an Australian judgment in priority to all foreign and other demands made upon it.⁹² He ordered release of the vessel and costs against Cosco.

7.8 Daebo Shipping Co Ltd v The Ship Go Star [2011] FCA 1015

This case in the Federal Court⁹³ concerned a dispute between the owner of the ship, the MV *Go Star* and the disponent charterer with respect to which party held ownership of the vessel's bunkers under the terms of a time charterparty. The facts and arguments will be set out in some detail as they are a good example of the complexities that can arise in admiralty cases.

The defendant, Go Star Maritime Co SA, was the owner of the *Go Star* and entered into a time charterparty with Breakbulk Marine Services Ltd (BMS). BMS then sub-chartered the ship to Bluefield Shipping Co Ltd (Bluefield). In July 2007, a further time sub-charterparty was created between Bluefield and the plaintiff, Daebo Shipping Co Ltd (Daebo).

In December 2008, Daebo entered into a time sub-charterparty with Nanyuan Shipping Co Ltd (Nanyuan), which provided that Daebo was to deliver the ship to Nanyuan in Chinese territorial waters at a port near Shanghai. On 3 January 2009, a certificate of delivery was executed, which recorded Daebo's delivery of the vessel to Nanyuan. The following day, Daebo issued an invoice to Nanyuan for the first hire payment and the bunkers.

Unknown to Daebo, the head charterer, BMS, had fallen into arrears with the payment of hire under the head charterparty. Before Nanyuan had paid Daebo's invoice, the defendant owner's agent advised Nanyuan that it intended to exercise its right to withdraw the ship under the head charterparty and urged Nanyuan to delay payment to Daebo. Accordingly, Nanyuan did not pay Daebo's invoice and instead arranged an alternative carrier for its cargo. On 15 January 2009, the defendant formally withdrew the vessel under the head charterparty on the grounds of non-payment of hire. It then proceeded to charter the ship to another company, directing the ship to sail to Albany, Western Australia.

Daebo commenced proceedings in the Federal Court claiming damages in conversion and detinue in relation to: (i) the defendant's use of the bunkers; and (ii) its failure to deliver the bunkers to Daebo in Albany on demand. Daebo also claimed damages on the ground that the defendant had unlawfully interfered in its contractual relationship with Nanyuan.

Daebo contended that property in the bunkers had vested in it as of 3 January 2009, the date that the previous sub-charterer had returned the vessel to Daebo's control in Chinese waters, and that it had credited that sub-charterer for the value of the bunkers on board. As Nanyuan had not paid for the bunkers, Daebo asserted that property in the bunkers had never passed to Nanyuan. Accordingly, the defendant owner of the vessel had effectively converted the bunkers by withdrawing the ship from Daebo's control and redirecting it to Western Australia. Daebo further contended that the owner was liable in detinue because it had not complied with Daebo's demand that it deliver up the bunkers in Western Australia. It argued that Australian law was the proper law to govern its claim.

The defendant contended that, even if Australian law was the appropriate governing law, Daebo's claims in conversion and detinue should be dismissed because Daebo had not demonstrated that it had property in the

⁸⁸ *Ibid*, [30].

⁸⁹ *Ibid*.

⁹⁰ *Ibid*, [32].

⁹¹ *Ibid*, [30].

⁹² *Ibid*.

⁹³ Siopsis J.

bunkers when the ship was withdrawn from its control on 15 January 2009. The defendant argued that Daebo had disposed of the property in the bunkers on 3 January 2009 when the ship was delivered to Nanyuan pursuant to the terms of the new sub-charterparty.

With respect to Daebo's claim for unlawful interference in contractual relations, the defendant owner denied liability on the basis that the alleged conduct had occurred in the People's Republic of China, which did not recognise the tort of unlawful interference in contractual relations. Accordingly, the defendant contended that the impugned conduct was not actionable in Australia because, applying the double actionability conflicts rule,⁹⁴ the impugned conduct was not actionable under the law of the place of the tort.

Siopis J found that Daebo had failed to establish an essential element of its claim for damages in conversion and detainee; namely, that it was the owner of the bunkers up until 15 January 2009, when the ship had been withdrawn by the defendant owner under the head charterparty.⁹⁵ His Honour held that the terms of cl 31 of the charterparty, which provided for the 'charterers to take over and pay ... bunkers upon vessel's delivery,' manifested the parties' intention that property in the bunkers would pass to the charterer on delivery of the ship, with the charterer incurring an obligation to pay for the bunkers at that time. Nothing in the wording of cl 31 delayed the passing of property in the bunkers to the sub-charterer until such time as payment was made. This was consistent with the interpretation of similarly worded provisions in *The Saint Anna*⁹⁶ and *The Span Terza (No 2)*.⁹⁷

Siopis J further held that at all material times the defendant was aware of the terms of Daebo's charterparty with Nanyuan,⁹⁸ and that it was the defendant's intention to dissuade Nanyuan from loading the cargo in Fangcheng as it was to its commercial advantage to withdraw the ship while it remained unloaded so that it could immediately be redeployed under a new charterparty.⁹⁹ Notwithstanding these findings, his Honour held that the place of the tort was China,¹⁰⁰ as the events relied upon by Daebo as constituting the tort of unlawful interference with contractual relations had occurred in China. However, on the evidence before the Court, Siopis J was satisfied that the tort of unlawful interference in contractual relations was not actionable in China.¹⁰¹ Accordingly, on the application of the double actionability rule, the defendant's impugned conduct was not actionable in Australia.

Siopis J therefore dismissed the application with costs.

7.9 *Laoulach v Ibrahim* [2011] NSWCA 402

This was an appeal to the New South Wales Court of Appeal¹⁰² from the first instance decision of Price J that the respondents were not liable in respect of a claim for negligence. On 30 November 2004 the appellant, Robert Laoulach, was a passenger on board a Mustang 2800 sports cruiser. The respondents, Danny Ibrahim and Mickey Beaini, were also passengers and had been driving the vessel in the period immediately prior to the appellant's accident. Whilst the vessel was moored in Botany Bay, the appellant dived from its bow and struck his head on the sandy bottom of the bay, rendering him a quadriplegic. The appellant alleged that the respondents had breached their duty of care by failing to anchor the vessel properly, thereby allowing the vessel to drift into shallow waters nearer the shore where it was not safe to dive. Alternatively, it was argued that they had breached their duty of care by failing to take steps to measure the depth of the water or to warn the appellant of the risk of injury if the water was too shallow.

The respondents pleaded that the risk of injury from diving from the vessel was obvious and, pursuant to s 5H(1) the *Civil Liability Act 2002* (NSW), they did not owe a duty to warn of such a risk. They further contended that the appellant had engaged in a dangerous recreational activity and that they were not liable for harm caused by the materialisation of an obvious risk of that activity under s 5L(1) of the Act. Finally, the respondents relied upon the provisions of the *Limitation of Liability for Maritime Claims Act 1989* (Cth) to reduce the damages to which the appellant would otherwise have been entitled if negligence was established.

⁹⁴ *Breavington v Godleman* (1988) 169 CLR 41, 110-111.

⁹⁵ *Daebo Shipping Co Ltd v The Ship Go Star* [2011] FCA 1015, [80].

⁹⁶ [1980] 1 Lloyd's Rep 180.

⁹⁷ [1983] 1 WLR 632.

⁹⁸ *Daebo Shipping Co Ltd v The Ship Go Star* [2011] FCA 1015, [91].

⁹⁹ *Ibid*, [92].

¹⁰⁰ *Ibid*, [96].

¹⁰¹ *Ibid*, [103].

¹⁰² Giles JA, Macfarlan JA and Tobias AJA.

At first instance, Price J held that the respondents were not liable for negligence, finding that the respondents had anchored the vessel adequately and there was insufficient evidence to demonstrate that the injury was caused by the vessel drifting into shallower waters. His Honour considered that it was more probable than not that the appellant had struck a shallow sandbank in waters that were otherwise of sufficient depth for diving. Further, the passengers on board had made multiple dives prior to the plaintiff's injury and there was no reason for the respondents to believe that there was insufficient water to dive safely. In any event, it was a 'dangerous recreational activity' within the meaning of the Act and any danger was an obvious risk. There was no need to consider the issue of limitation of liability.

On appeal, Tobias AJA (Giles and Macfarlan JJA concurring) upheld the decision of the primary judge that the respondents were not liable in negligence.¹⁰³ With respect to the finding that the vessel had not drifted into shallow waters and that the appellant's accident was the result of his hitting a sandbank, this was clearly open on the evidence before the Court and the appellant had not demonstrated an error in the trial judge's reasoning.¹⁰⁴ The Court of Appeal also considered that the trial judge was correct in his finding that the respondents had not breached their duty of care to the appellant.¹⁰⁵

The court also upheld the respondents' notice of contention to the effect that the respondents did not owe the appellant an ongoing duty of care once the vessel was safely anchored.¹⁰⁶ After anchoring the respondents were not in a superior position to other passengers in assessing the danger of diving. Interestingly, however, the court held that the primary judge had erred in concluding that the appellant had engaged in a 'dangerous recreational activity' for the purposes of the Act.¹⁰⁷ The primary judge had acknowledged that the potential risk of harm from diving off the boat was quite low, even though the magnitude of the harm caused could be great if that risk were to eventuate. It followed that it did not fall within the meaning of 'dangerous recreational activity' for the purposes of the Act.

The appeal was dismissed with costs.

7.10 Nicol v Whiteoak (No 2) [2011] NSWSC 1486

This case in the New South Wales Supreme Court¹⁰⁸ concerned an action in negligence with respect to a boating collision in the Georges River in 2006. Linda Nicol was a passenger on one of the boats and was severely injured when the two boats collided and the driver of her boat, Steven Whiteoak, was killed. Nicol claimed damages for negligence against the deceased, and commenced proceedings against the executor of his estate, as first defendant and also claimed against the second boat driver, Mohamed Mogharbel, as second defendant.

The two boats collided at dusk on the Georges River near Kangaroo Point. The boat driven by the deceased was not displaying navigation lights and its speed was approximately 80 km/h. The boat driven by the second defendant was displaying lights and was travelling at approximately 35 km/h.

The first defendant raised several grounds of defence, including that the deceased was not the driver of the boat at the time of the collision. Secondly, he contended that the plaintiff was not entitled to damages because she was engaging in a dangerous recreational activity within the meaning of s 5L of the *Civil Liability Act 2002* (NSW). This claim was made on the basis that the deceased was intoxicated at the time and his conduct of the vessel, which included driving at an excessive speed, not maintaining a proper lookout and driving without lights, was clearly not in compliance with the *Navigation (Collision) Regulations 1983* (NSW). Thirdly, the first defendant asserted the plaintiff was contributorily negligent as she had chosen to travel as a passenger in a boat driven by the deceased in circumstances where she knew or ought to have known that he was affected by the prior consumption of alcohol and/or drugs (ie the defence of *volenti non fit injuria*). The plaintiff's injuries were such that she had no memory of the circumstances concerning the accident.

Adamson J held that the deceased's conduct was clearly negligent in all the circumstances and that there was insufficient evidence to demonstrate that the plaintiff should be held responsible, in whole or in part, for the injuries she sustained.

¹⁰³ *Laoulach v Ibrahim* [2011] NSWCA 402, [136] (Giles AJA).

¹⁰⁴ *Ibid.*, [106].

¹⁰⁵ *Ibid.*, [73].

¹⁰⁶ *Ibid.*, [134].

¹⁰⁷ *Ibid.*, [124].

¹⁰⁸ Adamson J.

Adamson J considered that, on the balance of probabilities, the deceased was the driver of the boat.¹⁰⁹ The passengers had previously agreed that the deceased would be the driver for the purpose of their expedition. While the plaintiff had driven the boat on some previous occasions, the first defendant could not point to any evidence which suggested that the couple had deviated from their arrangement on the day of the accident.

Furthermore Adamson J held that the deceased's negligent driving was the cause of the plaintiff's injuries,¹¹⁰ and that the deceased drove at an excessive speed in circumstances where his line of sight did not permit him to see the second defendant's boat before it was too late for him to take evasive action. Given his extreme intoxication it was doubtful that the deceased could have responded effectively even had he been provided with more warning. Adamson J held that the second defendant's conduct was not negligent. On the balance of the evidence presented, it appeared that he had been travelling at a reasonable speed and his boat was illuminated. He did not cause the collision and could not have taken any evasive action which could reasonably have been expected to prevent the collision.¹¹¹

His Honour held that the first defendant had not discharged his burden of proof with respect to whether the plaintiff was engaged in a dangerous recreational activity.¹¹² The plaintiff had no recollection of the events and there had been no-one else on board other than the deceased. In these circumstances, it simply could not be determined whether the plaintiff was intoxicated at the time of the accident, whether she had realised that the deceased was intoxicated or whether she had made any attempt to object to the deceased's driving of the boat. The first defendant had neither discharged his burden of proof with respect to contributory negligence¹¹³ nor proved his defence of *volenti*.

Adamson J ordered that the first defendant pay damages in the amount of approximately \$950,000 to the plaintiff which included damages for loss of quality of life, future medical expenses and loss of earnings and superannuation.

7.11 Victorian WorkCover Authority v J Sarunic & Sons Pty Ltd [2011] VSC 562

This case in the Supreme Court of Victoria¹¹⁴ concerned an action brought by the Victorian WorkCover authority under the *Accident Compensation Act 1985* (Vic) in respect of a significant spinal injury sustained by an individual during the course of his employment. He slipped while working as a deckhand on a commercial fishing vessel.

The plaintiff, the Victorian WorkCover Authority (VWA), commenced proceedings under s 138(1) of the *Accident Compensation Act 1985* (Vic) for recovery of an indemnity in respect of compensation that it had paid under the Act. Mr Ian Stretton slipped and fell in October 2000 while working as a deckhand on the *Christina S* which was owned by J Sarunic & Sons Pty Ltd.

The VWA alleged that the deck of the vessel was hazardous or unsafe because it was unduly worn and the failure to properly maintain the deck in a safe condition was a breach of its duty of care. Sarunic argued that a reasonable person in its position would not have considered it necessary to replace the deck and, even if it were found to have breached its duty of care, the breach had not caused Stretton's injury as there was nothing to suggest that the injury would have been prevented if Sarunic had installed a new deck.

Cavanough J held that there was no breach of duty.¹¹⁵ Even though there was some risk of injury to a person in Mr Stretton's position,¹¹⁶ on the evidence, the VWA had failed to establish that a reasonable person in the position of Sarunic would have responded to this risk by replacing the deck. There was strong evidence to support this finding by the trial judge, as two independent surveyors who had inspected the vessel the year before had not been of the opinion that the deck required replacement, and the expert opinion was that decks were usually required to be replaced around 20 years after installation. In the present case, the vessel's deck had been installed only 13 years before. There was other evidence, but in the circumstances Cavanough J considered there was no breach of duty.

¹⁰⁹ *Nicol v Whiteoak (No 2)* [2011] NSWSC 1486, [26].

¹¹⁰ *Ibid.*, [33].

¹¹¹ *Ibid.*, [44].

¹¹² *Ibid.*, [73].

¹¹³ *Nicol v Whiteoak (No 2)* [2011] NSWSC 1486, [87].

¹¹⁴ Cavanough J.

¹¹⁵ *Victorian WorkCover Authority v J Sarunic & Sons Pty Ltd* [2011] VSC 562, [60].

¹¹⁶ *Ibid.*, [58].

The plaintiff also failed on causation, as Cavanough J held that the VWA had failed to demonstrate that any potential negligence on the part of Sarunic was a cause of Mr Stretton's injury.¹¹⁷ There was strong evidence to support this, as Stretton had clearly stated that there was no build-up of water at the place where he fell. He had also accepted in cross-examination that it was possible for an individual to simply slip on a wet deck, regardless of its quality and, further, he had not slipped in the area where the most significant wear and tear had occurred.¹¹⁸

7.12 *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* [2012] SASC 50

This case in the Supreme Court of South Australia¹¹⁹ concerned a breach of a voyage charterparty entered into between Jebsens International (Australia) Pty Ltd and Interfert Australia Pty Ltd. The parties referred a dispute to arbitration in London pursuant to the terms of their charterparty and the plaintiffs sought to enforce the arbitrator's award in Australia. Further facts regarding the case are scant, with the judgment providing no outline of the circumstances upon which the matter was decided.

Anderson J decided the questions before him in a summary judgment without reasons. He found that the voyage charterparty between the parties constituted an arbitration agreement within the meaning of s 3(1) of the *International Arbitration Act 1974* (Cth) and accordingly, the arbitrator's awards were enforceable in Australia pursuant to s 8 of that Act.¹²⁰

The importance of the decision, however, arose from a submission that the charterparty was a 'sea carriage document' under s11 and Schedule A of the *Carriage of Goods by Sea Act 1991* (Cth).¹²¹ Anderson J distinguished a charterparty from bills of lading and other similar documents, which are clearly covered by the terms of the *Carriage of Goods by Sea Act 1991* (Cth), noting that 'a charterparty is a document of a very different genus'.¹²² His Honour's decision spans a single page and no further reasoning on this point was provided. It is, however, the only decision in Australia on this point. Despite the absence of reasons for the judgment the decision would appear to be a correct interpretation of the Act.

8 Legislative Developments

During 2011 there was a great deal of legislative change due to the shipping reform program by the Commonwealth government so a number of relevant acts passed into law by the Commonwealth Parliament and their main aspects are mentioned under. (There are further developments in 2012 and these will be set out in the 2012 update.)

8.1 Response to Offshore Ship Oil Spills

The *Maritime Legislation Amendment Act 2011* (Cth) amends the *Navigation Act 1912* (Cth), the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) and the *Protection of the Sea (Prevention of Pollution from Ships) Amendment (Oils in the Antarctic Area) Act 2011* (Cth). These amendments constituted a legislative response to two significant oil spills off the coast of Queensland from the *Shen Neng 1* and *Pacific Adventurer* incidents.¹²³ They are aimed at providing a strong deterrent to shipping companies and their crews from engaging in unsafe or irresponsible conduct at sea, particularly near environmentally sensitive marine ecosystems.¹²⁴

The new subsections 267ZZI and 276ZZL of the *Navigation Act 1912* (Cth) make it an offence for a master to operate the ship in a negligent or reckless manner that causes pollution or damage to the marine environment in Australian waters and waters of the high seas outside Australia. In a similar vein, subsections 267ZZJ and 267ZZM provide that it is an offence for the master to fail to ensure that the ship is not operated in a negligent

¹¹⁷ *Ibid.*, [89].

¹¹⁸ *Ibid.*, [119].

¹¹⁹ Anderson J.

¹²⁰ *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* [2012] SASC 50, [2].

¹²¹ *Ibid.*, [5].

¹²² *Ibid.*, [7].

¹²³ Explanatory Memorandum, *Maritime Legislation Amendment Bill 2011* (Cth).

¹²⁴ *Ibid.*

or reckless manner that causes pollution or damage to the marine environment. The amendments provide for criminal and civil penalties and for a higher civil penalty in the case of serious damage.¹²⁵

Another amendment was to Division 14 of Part IV of the *Navigation Act 1912* (Cth), which provides for mandatory reporting by ships' masters in relation to the movement of ships in prescribed areas. The new section 269E makes it a strict liability offence. For a strict liability offence, there is no requirement that the prosecution demonstrate a necessary intention or state of mind on the part of the master.¹²⁶

With respect to the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth), the offence provisions of the Act impose liability for the discharge of oil, oily mixtures and oil residue from a ship into the sea near the coastline of Australia or one of the external territories, or into Australia's exclusive economic zone. They were substantially amended to make clear that they are applicable to a charterer of a ship as well as the owner and master.¹²⁷ The maximum penalty attaching to these offence provisions was also substantially increased from 500 penalty units to 20,000 penalty units.¹²⁸

8.2 Response to the Montara Offshore Oil Spill

In 2011, the Australian Government also began the task of undertaking legislative reform in response to the Montara Offshore Oil spill. The *Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Act 2011* (Cth) implements substantial changes to the regulatory framework under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth). The most fundamental of these is the establishment of two new regulatory bodies, the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) and the National Offshore Petroleum Titles Administrator (Titles Administrator), both of which have the task of administering and regulating petroleum and greenhouse gas storage operations in Commonwealth waters in the Australian offshore area.¹²⁹ These new bodies take on the roles previously fulfilled by National Offshore Petroleum Safety Authority (NOPSA) and the Designated Authorities. The Designated Authorities were, and still are, the State and Northern Territories Ministers in their performance of functions under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth).

The amendments significantly extend NOPSEM's range of functions from the NOPSA focus on occupational health and safety to include structural integrity of facilities, wells and well-related equipment; environmental management; and regulation of day-to-day petroleum operations. For its part the Titles Administrator takes on the general functions previously performed by the Designated Authorities, with the consolidation of each State and Territory's records under the control of a single Commonwealth body. The two bodies will act independently of each other in their decision-making and regulatory practices. However, both organisations are required to co-operate with the other in ensuring the administration and enforcement of the Act.¹³⁰

8.3 Other Amendments

Several other acts were passed to make minor amendments to the:

- *Seafarers Rehabilitation and Compensation Act 1992* (Cth);
- *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth);
- *Shipping Registration Act 1981* (Cth);
- *Stevedoring Levy (Collection) Act 1998* (Cth);
- *Australian Maritime Safety Authority Act 1990* (Cth);
- *Great Barrier Reef Marine Park Act 1975* (Cth);

¹²⁵ *Navigation Act 1912* (Cth), s 267ZZN.

¹²⁶ Explanatory Memorandum, *Maritime Legislation Amendment Bill 2011* (Cth).

¹²⁷ *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth), ss 9(1), 9(3) and 10(3).

¹²⁸ Explanatory Memorandum, *Maritime Legislation Amendment Bill 2011* (Cth).

¹²⁸ *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth), ss 9(1B) and 10(3). A penalty point is \$110; *Crimes Act 1914* (Cth), s 4AA.

¹²⁹ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), s7.

¹³⁰ Explanatory Memorandum, *Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Bill 2011* (Cth).

- *Historic Shipwrecks Act 1976* (Cth);
- *Fisheries Administration Act 1991* (Cth);
- *Fisheries Management Act 1991* (Cth);
- *Crimes at Sea Act 2000* (Cth); and
- *Maritime Transport and Offshore Facilities Security Act 2003* (Cth).

9 Piracy Patrol off Somalia

In February 2012 HMAS *Melbourne* sailed from Sydney for her third tour of duty in Middle East and East African waters as part of the US Navy-led Combined Maritime Force operating against piracy off the Somalian and nearby coasts. *Melbourne* will relieve on station the HMAS *Parramatta*, which will return home for some much needed leave and maintenance. This combined maritime force patrols some 2.5 million square miles of waters, which large area explains what the naval security forces cannot stamp out this piracy at sea. This requires the rule of law to be established ashore. The tour by *Melbourne* is the 28th rotation of the RAN fleet units to this work since September 2001.¹³¹

10 Conclusion

Readers may see that, after many years of steady decline of the Commonwealth government's interest in its offshore regulatory role, a significant amount of reform is occurring, mainly under the direction of the Hon Anthony Albanese, the Minister for Infrastructure and Transport. In the light of the increasing export tonnages by sea of bulk minerals, coal and other cargo reform was needed. It has, however, brought risks as the Australian industry, including the legal profession, is required to adapt its skills and interests to accommodate these changes. It remains to be seen how we achieve this goal well as a nation.

¹³¹ 'HMAS *Melbourne* to Assume Middle East Patrol' (1 March 2012) 210 *Australian Maritime Digest*, 3.