Marine Pilotage in Australia: Sydney Ports Case Study

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1. Introduction – A brief historical background

This article seeks to introduce the legal framework of the pilotage service in Sydney Ports (Port Jackson and Botany Bay) and examine some legal issues particularly with respect to the responsibilities and liabilities of pilots and their employer. It will outline the statutory law governing the whole pilotage regime in Sydney Ports. It will then discuss issues relating to negligent liability with reference to statute law and common law. It argues that there are good reasons to preclude a pilot's personal pecuniary liability for his negligent service but that the commercially oriented pilot companies and port authorities ought not to have the same immunity for their vicarious liability resulting from a pilot's negligence.

Since 30 June 1995 Sydney Harbour (Port Jackson) and Botany Bay have been under the management of the Sydney Ports Corporation (SPC) which is a State-owned Corporation.[1] One of the key responsibilities of the SPC is the provision and management of port facilities and services in Sydney Harbour and Botany Bay.[2]

Until October 2002 Sydney Ports' pilotage services were provided by pilots employed by the Sydney Sea Pilots Pty Ltd (SSP) which was under contract with the SPC to supply pilots for a pilotage service.[3] Since 26th October 1995 the SSP has provided more than 4000 pilotage services every year to Sydney ports.[4] This high level activity in part resulted from the requirement of compulsory pilotage in Sydney Harbour and Botany Bay.[5]

The first Sydney harbour master was appointed to control the port of Sydney in 1811. In 1901 the Sydney Harbour Trust was established to take over and develop the privately owned wharfs in Sydney. Other NSW ports were managed by the Department of Navigation until 1936. In that year the Maritime Services Board (MSB) was formed with the intention that it be the sole port authority for NSW. The MSB continued to be

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[1] The establishment of the SPC was by virtue of the *Ports Corporatisation and Waterways Management Act 1995* (NSW). (*Ports Corporatisation Act*)

[2] Sydney Harbour and Botany Bay together form Sydney Ports. SPC and SSP websites, <www.sydneyports.com.au>, <http://members.ozemail.com.au/~seapilot/ssp.html> visited on 27th May 2002

[3] SSP's website, above.

[4] Note 3.

[5] All pilotage ports in NSW, namely, Sydney Harbour, Botany Bay, Newcastle, Port Kembla, Yamba and Eden, require compulsory pilotage: *Ports Corporatisation Act* 1995 (NSW) s78, see further discussion below.

the Sydney Ports' authority until 30 June 1995 when it was abolished under the *Ports Corporatisation and Waterways Management Act* 1995 (NSW) (the *Ports Corporatisation Act*).[6] Consequently a State-owned Corporation, the Sydney Ports Corporation (SPC) was established, and it, among other things, took control of the pilotage service in the Sydney Ports.

2. The Legal Framework

2.1 The State's competence to legislate relating to its coastal waters

The High Court of Australia on various occasions decided that the territory of the States ended at low-water mark so that they had no sovereign or proprietary rights in respect of the territorial sea.[7] Until 1990 the territorial sea was the area between the low-water mark and three miles seaward. Thereafter Australia extended the limit of its territorial sea from three miles to twelve nautical miles by a proclamation pursuant to s7 of the *Sea and Submerged Lands Act 1973.* Case law, however, has recognized individual State's competence to legislate on matters concerning territorial sea provided that they were thereby legislating for the peace, order and good government of their territory.[8] This common law legal basis for States to legislate beyond the low-water mark created some problems. The nexus between the State and its legislation on matters concerning its adjacent territorial sea is a matter of degree. There were conflicting authorities.[9] They created uncertainty as to the validity of some States' legislation, particularly when it was inconsistent with the Commonwealth's legislation.

This uncertainty was resolved by the Premiers' Conference of 1979. As a result of that conference what is commonly known as the "Offshore Constitutional Settlement" was established.[10] One of the significant agreements in the Offshore Constitutional Settlement was to give the States a general legislative power in respect to their coastal waters. This agreement was put into effect by the *Coastal Waters (State Powers) Act 1980*.[11] The Act provides that the States are given a general power to legislate with respect to their coastal waters but limiting it to three nautical miles.[12] States are also given specific powers to legislate beyond the three-mile limit with respect to subterranean mining from land within the limits of the State, and with respect to ports, harbours and other shipping facilities.[13] The latter power is significant because, as will

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[6] SPC's website,< http://www.sydneyports.com.au/aboutUs/main.asp?pageid=222> visited on 24th May 2002.

[7] *New South Wales v Commonwealth* (1975) 135 CLR 337; *Bonser v La Macchia* (1969) 122 CLR 177; *R v Bull* (1974) 131 CLR 203; *Robinson v Western Australian Museum* (1977) 138 CLR 283. Davies, M., & Dickey, A., *Shipping Law*, (2nd ed.) LBC Information Services, 1995 at pp15-42. The point has been reiterated again in *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582

[8] *Pearce v Florenca* (1976) 135 CLR 507. The meaning of the expression "peace, order and good government" in relation to State legislation was discussed in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR at 8-10, 12-13. Also see *Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 383-385.

[9] Compare Gibbs J's liberal interpretation in *Pearce v Florenca* (1976) 135 CLR 507 and the stricter view expressed by Barwick CJ in *Robinson v Western Australian Museum* (1977) 138 CLR 283.

[10] Cullen, R., *Australian Federalism Offshore,* Parkville,Vic., Law School of Melbourne, (2nd ed) 1988, ch5

[11] The legislation is a valid exercise of the power in s51(xxxviii) of the Constitution at the request of the State: *Port MacDonnell Professional Fishermen's Association Inc. v. South Australia* (1989) 168 CLR 340; Butler, D., & Duncan, W., *Maritime Law In Australia,* Legal Books, 1992, pp 19-28.

[12] *Coastal Waters (State Powers) Act 1980* (Cth) ss 4 & 5.

[13] Above, s 5(b)(ii)

be seen, the Sydney Ports' boundaries under NSW legislation extend out four nautical miles seaward.[14]

2.2 The Commonwealth's competence to legislate over the territorial sea

The legislative power for shipping law under the Commonwealth Constitution can be found under the trade and commerce power of s51(i) which is specifically extended to navigation and shipping by s98. It has been said that 'the combination of s51(i) with s98 gives the widest power to deal with the whole subject matter of navigation and shipping in relation to trade and commerce with other countries and among the States.'[15] Section 51(xxix) of the Commonwealth's external affairs power also gives the Commonwealth apparently unrestricted legislative power over the region.

Prior to 1932 common law principles prohibited British colonies from enacting legislation that operated beyond their territorial seas. The decision of the Privy Council in *Croft v Dunphy*[16] in 1932 abolished this old doctrine. It was then decided that a Dominion Parliament had power to legislate extra-territorially for the peace, order and good government of its State territory. One year before this decision, the *Statute of Westminster 1931 (Imp)* had made provision empowering the Commonwealth Parliament to make laws having extra-territorial operation but this Imperial Act was not adopted in Australia until 1942.[17] Technically, prior to 1942 the source of the Commonwealth's power to legislate extra-territorially had to be in accordance with common law principles but the 1942 adopting Act formalized Australia's full power to legislate extra-territorially. Therefore there was some doubt as to the validity of legislation regarding extra-territorial operation that was passed prior to the decision of *Croft v Dunphy* in 1932.[18] The technical difficulty was however removed when the *Admiralty Act* 1988 (Cth) was passed in that year. Section 48 retrospectively confirmed the validity of any previously invalid provisions of the *Navigation Act* 1912 (Cth).[19]

Having stated the source of legislative power for both the Commonwealth and the States we can now examine the substantive law governing Sydney Ports' pilotage.

2.3 What is a pilot?

Section 6 of the *Navigation Act* 1912 (Cth) provides that **pilot** means a person who does not belong to, but has the conduct of, a ship. This definition has its origin in the *Merchant Shipping Act* (Imp) which dates back to 1854.[20]

The *Marine Pilotage Licensing Act* 1971 (NSW)[21] (the *Pilotage Act*) provides that 'pilot means a person licensed under s7 to conduct ships to which the person does not belong.'[22] The definition is similar to, albeit narrower than, that contained in the *Navigation Act* 1912 (Cth).

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[14] See the discussion below for compulsory pilotage. See n 52 below.
[15] *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46, per Dixon CJ at 54.
[16] [1933] AC 156
[17] *Statute of Westminster Adoption Act* 1942 (Cth), Davies, M., & Dickey, A., n 7 at p26.
[18] *Navigation Act* 1912 (Cth), for example.
[19] See also Butler, D., & Duncan, W., n 11 above.
[20] Section 2 of that Act provides that *"pilot" shall mean any Person not belonging to a Ship who has the Conduct thereof.*
[21] Formerly known as the *Pilotage Act* 1971 (NSW). By virtue of s112 and Sch 4.19(2) of the *Ports Corporatisation Act* (NSW) the title changed accordingly with effect on 1 July 1995.
[22] *Pilotage Act* 1971 (NSW) s4.

In 1995, the NSW Parliament enacted the *Ports Corporatisation Act* Part 6 of which was dedicated to pilotage. Pilot is defined there in the same manner as that adopted in the *Navigation Act* 1912 (Cth).[23]

In 1998, the *Marine Safety Act* 1998 (NSW) was enacted. One of the objects of the Act was to consolidate marine safety legislation.[24] It was intended that the Act should encompass and supersede many Acts.[25] It made provisions for matters relating to pilotage and purported to repeal the *Pilotage Act*, amongst others. It also made provision to amend the *Ports Corporatisation* Act by omitting the part relating to pilotage. The intention was to consolidate pilotage matters into one Act. Although the Act was assented to in 1998, the sections effecting these amendments have not commenced as yet.[26] The sections concerning pilotage in the *Marine Safety Act* are essentially similar to that which appears in Part 6 of the *Ports Corporatisation Act*.[27] It adopts the term 'marine pilot' but the definition is effectively the same as the definition of 'pilot' in the *Navigation Act* 1912 (Cth) and other NSW legislation.[28]

In effect, in the context of Sydney ports, the term pilot means a licensed marine pilot who has the conduct of a vessel but who does not belong to the vessel.

The expression "has the conduct of the ship" is not defined and, thus it should be understood in accordance with established judicial interpretation. It was said that, "to be a pilot as defined in the Act is not a question of qualification, profession, certificate or licence; it is the fact of actually navigating a vessel (and not of being capable or authorized to navigate a vessel)".[29] The conduct referred to is confined to the process of navigation. In an English case where an issue was raised whether the vessel was being piloted the Court concurred with the argument that when the vessel was not navigating, no question of her being piloted could arise.[30]

The pilot is in charge of a vessel only to the extent that he is in sole control of the navigation. This control and conduct of the ship is very different from having command of the ship. The command of the ship is for the master.[31] However, the pilot in charge of navigation is not acting as an adviser. He is in sole charge of the navigation of the ship and all directions as to speed, course, stopping and reversing and everything of that kind are for him.[32] Therefore, a pilot will cease to be a 'pilot' when he is superseded by the Master or when he is merely used as an adviser. A person can only be legally

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[23] *Ports Corporatisation Act* (NSW) s3(1).

[24] *Marine Safety Act* 1998 (NSW) s3(d).

[25] They are the *Commercial Vessels Act* 1979, *Marine (Boating Safety – Alcohol and Drugs) Act* 1991, *Marine Pilotage Licensing Act* 1971, *Marine Services Act* 1935, *Maritime Services (Amendment) Acts* 1981 and 1984, and the *Navigation Act* 1901; Schedule 2 of the Act. See also the NSW Parliamentary Debate (The Hansard), Legislative Council, 11 Nov 1998.

[26] Sections 141 & 142 of the *Marine Safety Act* 1998 (NSW) are the sections effecting the repeal and amendment.

[27] *Marine Safety Act* 1998 (NSW) ss 71 to 83, cf *Ports Corporatisation Act* (NSW) ss 77 to 89.

[28] Section 4 *Marine Safety Act* (NSW) provides that the marine pilot of a vessel means the person who has the conduct of the vessel but who does not belong to the vessel.

[29] CANADA. *Report of Royal Commission on Pilotage*, Ottowa, 1968, Part 1 pp 23,24. The definition contained in the *Canada Shipping Act* 1952 is expressed in words almost identical to the definition contained in both the UK Act and Australian Acts. Geen, G., & Douglas, R., *The Law of Pilotage* (2nd ed), Lloyds of London Press Ltd, 1983 at pp 15-17.

[30] *Babbs v Press* [1971] 2 Lloyd's Rep 383.

[31] *Navigation Act* 1912 (Cth) s6. In NSW, the *Ports Corporatisation Act*, the *Pilotage Act* and the *Marine Safety Act* have the similar definition for master in that it specifically excluded pilot.

[32] *The Mickleham* (1918) P. 166 C.A. at p169; *The Tactician* (1907) 10 Asp MLC 534, 537; *The Nord* (1916) 13 Asp. M.L.C. 606 at p 60;, *The Andoni* (1918) 14 Asp. M.L.C. 326 at 328; Geen, G., & Douglas, R., n 29; Hill, C., n 20 at pp 485-499. See also the discussion in "acting as a marine pilot" below.

acting as a pilot when he is in actual charge of the navigation. In other circumstances the legislative provisions regarding pilots do not apply to him. As far back as 1887, an Admiralty Court judge expressed the view that "*the pilot is not in charge when he does not……supersede the master, and where the pilot is only an adviser, and where the captain is free to obey the pilot or not*."[33] As we shall see, the concept of pilot is especially important in interpreting the statutory provisions relating to immunity while a person is *acting as a pilot* and when dealing with the master-pilot relationship. .

2.4 Pilot licensing

The Commonwealth *Navigation Act* makes provision with respect to the pilot's qualification and licensing but that Part of the Act specifies that *'this part is not intended to affect the operation of any law of a State or Territory governing pilots or pilotage in relation to a port in the State or Territory.'*[34] Sydney Ports pilot licensing regime therefore is primarily under NSW legislation.

The *Marine Safety Act* 1998 (NSW) makes provision for the pilot's licence as a type of Marine Safety Licence.[35] The Act also empowers the minister to make regulations for the details of a pilot's qualifications and licensing requirements.[36] Understandably when the existing *Pilotage Act* is repealed the corresponding regulations under the *Marine Safety Act* would of necessity adopt the relevant regulation and be published. Until then the *Pilotage Act* and its regulations will continue to be the governing law of pilot licensing in NSW.

Part 2 of the *Pilotage Act* deals with licences, pilotage exemption certificates and the certificate of local knowledge.[37] Section 52 authorizes the Governor to make regulations relating to pilots' qualifications, examinations and the fees for pilot licensing.[38] The *Marine Pilotage Licensing Regulations* were made as a result.

A pilot is required to be in good health including good eyesight, be physically capable of navigating a ship in the prescribed port and suitably qualified and experienced as a ship's master at sea. Having satisfied these pre-conditions an applicant for a pilot licence is required to pass competence tests both in practical ship handling and local knowledge following a training period when s/he is accompanied by an experienced pilot. A pilot once licensed is subject to regular re-examination for fitness.[39] Considering that a master's qualification and experience is the pre-requisite for a pilot's licence, an unrestricted qualified marine pilot in Sydney Ports must necessarily have had over 20 years' sea experience. The licensing authority can suspend or revoke a pilot's licence upon certain grounds. Legislation also provides a mechanism for a licensing dispute to be heard.[40]

A pilot's licence should not be confused with an **operating licence** to provide pilotage services. The latter is for the Sydney Ports Corporation to obtain under the

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[33] *The Augusta* (1887) 6 Asp. M.L.C. 161; per Fry, L.J., at p 163; See also CANADA, n 29; Geen, G., & Douglas, R., n 29 at p 17 and p 83-86.

[34] *Navigation Act* 1912 (Cth) s186A(5). Note that s410B which deals with pilotage responsibility and liability issues is not contained in this Part of the Act. The language used in s410B and its location within the Act suggest that s410B applies also to pilotage in relation to a port in a State or Territory. See discussion below.

[35] Section 29(f).

[36] Section 37(1) & (2).

[37] Sections 7-14.

[38] Section 52(1)(c),(d) & (f).

[39] *Marine Pilotage Licensing Regulations* 1971 s21(1),(2),(3) & (4).

[40] *Marine Safety Act* 1998 (NSW) ss 38-43.

Ports Corporatisation Act.[41] Under this Act, Port Corporations are required to obtain from the Governor, on the recommendation of the minister, an operating licence to exercise port safety functions. These functions include the provision of pilotage services by the Port Corporation.[42] The operating licence is to be issued for a maximum period of five years.[43] The *Ports Corporatisation Act* also makes provision governing the compulsory pilotage regime in NSW.

2.5 The requirement of compulsory pilotage

The *Marine Safety Act* 1998 (NSW) copied almost all of the relevant sections from the *Ports Corporatisation Act* that deal with pilotage. In view of the fact that the amendment to the *Ports Corporatisation Act* deleting the pilotage provision has not yet commenced, reference will be made to the *Ports Corporatisation Act* in the following discussion. However, whenever appropriate the corresponding sections contained in the *Marine Safety Act* will be footnoted.

Pilotage is compulsory in every **pilotage port**.[44] Vessels should not enter, leave or move within a pilotage port before taking onboard a pilot provided by a pilotage service provider.[45]

Pilotage means the conduct of a vessel by a pilot in entering, leaving and moving within a pilotage port.[46] A **Pilotage port** is defined to mean Sydney Harbour, Botany Bay, Newcastle, Port Kembla, Yamba and Eden.[47] A **Port** includes any of its harbour, estuary, channel, river and any navigable waters.[48] **Navigable waters** means all waters capable of navigation and are open to or used by the public for navigation.[49] The Act also allows regulations to be made providing for the boundaries of ports[50] and to specify when inward, outward and harbour pilotage begins and ends.[51]

Both Sydney Harbour and Botany Bay have port boundaries drawn by the arc of a circle of a radius of four nautical miles from their respective reference points.[52] The Regulations however do not specify when pilotage begins and ends. Presumably, since

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[41] *Ports Corporatisation Act* (NSW) s12(2).
[42] Section 11(a).
[43] Section 15.
[44] *Ports Corporatisation Act* (NSW) s78. An identically worded section is found in s74 of the *Marine Safety Act* (NSW).
[45] Above
[46] *Ports Corporatisation Act* (NSW) s77, *Marine Safety Act* (NSW) s71.
[47] Above, the same definition was repeated in s71 of the *Marine Safety Act* (NSW). Regulations can add or delete a port as a pilotage port – s77(2) and s71(2) of the respective Acts.
[48] *Ports Corporatisation Act* (NSW) s3.
[49] Above, the *Ports Corporatisation Act* (NSW) excludes flood water but the *Marine Safety Act* (NSW) makes no reference to flood water. The change was deliberate and was intended to include flood water as part of navigable water. It was argued that it was not uncommon to see people operating watercraft on flood waters; Hansard, n 25 above.
[50] *Ports Corporatisation Act* (NSW) s105.
[51] Above, s89(b).
[52] Section 4 of the Ports Corporatisation Regulations provides these boundaries under schedule 1 of the Regulations. Thus, Sydney Harbour is "the waters of Sydney Harbour and of all tidal bays, rivers and their tributaries connected or leading thereto bounded by mean high water mark together with that part of the South Pacific ocean below mean high water mark enclosed by the arc of circle of radius 4 sea miles having as its centre the navigation light at Hornby Lighthouse" and, Botany Bay is "the waters of Botany Bay and of all bays, rivers and their tributaries connected or leading thereto bounded by mean high water mark and by, as upstream boundaries, the eastern side of the Endeavour Bridge in Cooks River and the eastern side of the Captain Cook Bridge in Georges River together with that part of the South Pacific Ocean below mean high water mark enclosed by the arc of a circle of a radius 4 sea miles having as its centre the navigation light at Henry Head."

vessels are not allowed to enter, leave or move within a pilotage port without *taking onboard* a pilot,[53] the time the pilot boards the vessel and later disembarks should correspond to the beginning and the end of pilotage.[54]

Since the Act requires that a vessel must take onboard a pilot prior to entering a port and that port boundaries are specified by regulations, it follows that an inbound vessel must take on a pilot at the outer limit of the port. According to the operational requirement the pilot boarding ground for Sydney Harbour is four nautical miles due east of the Hornby Lighthouse whilst for Botany Bay it is four nautical miles due east of Cape Solander.[55] Arguably, the 'taking onboard' requirement tends to suggest that if a pilot for some reason assisted a vessel only from a pilot boat, a tug boat or a helicopter, the vessel would have failed to comply with compulsory pilotage because the pilot was not taken onboard. Likewise if an inbound vessel was requested by the pilot to come within the port boundary in order to make his boarding easier or if s/he left an outbound vessel before the end of the port boundary, it would allow the vessel to either enter or move within a pilotage port without taking onboard a pilot.

The fact that compulsory pilotage has become part of the *Marine Safety Act* leaves little doubt that safety is the paramount concern of compulsory pilotage in pilotage ports.[56] Therefore the purpose would be defeated if a pilot was taken onboard and then not used. It would be illogical to allow a compulsory pilot to be taken onboard and not to take charge of the navigation of the vessel. Generally the master and crew of the vessel have no right to take the control of the navigation out of the hands of the compulsory pilot unless they can justify so doing.[57] When the master hands over the conduct of the vessel to the pilot, the latter is legally responsible for his own actions. The master's right to interfere is restricted to circumstances where there is clear evidence of the pilot's incapability or incompetence. Unwarranted interference by the master would be treated as the ship not being piloted. The position regarding the division of control between master and pilot remains unaltered despite the abolition of the defence of compulsory pilotage.[58]

Understandably certain vessels[59] are exempted from compulsory pilotage. They include vessels whose master is certified to have local knowledge, non-commercial vessels and small vessels.[60] Pilotage service in pilotage ports can only be provided by a Pilotage Service Provider whether the service is compulsory pilotage or voluntarily requested.[61] **Pilotage Service Provider** means a Port Corporation and, in limited situations, a contractor or the minister.[62] In the case of Sydney Ports, pilotage services

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[53] *Ports Corporatisation Act* (NSW) s78(2), *Marine Safety Act* (NSW) s74(2).

[54] The *Pilotage Act* (NSW) in its original 1971 form however did specify that pilotage "shall commence when a pilot first gives assistance to the ship ….", *Pilotage Act* 1971 (NSW) s 17 & 19. See further discussion in "acting as a marine pilot" below.

[55] The former pilotage supplier Sydney Sea Pilot Pty Ltd's website, <http://members.ozemail.com.au/~seapilot/arrive.html> , visited on 29 May 2002.

[56] National security and indeed a means of raising revenue were argued as reasons for compulsory pilotage in other countries; Hill, C., n 20 above.

[57] *The Prinses Juliana* (1936) 18 Asp MLC 614 at p 619.

[58] *Tower Field (Owners) v Workington Harbour and Dock Board* (H.L.) (1950) 84 Ll.L.Rep. 233, at p 259.

[59] "Vessel" is defined as any water craft capable of being used for transportation on water – *Ports Corporatisation Act* s4.

[60] P*orts Corporatisation Act* s79, *Marine Safety Act* (NSW) s75.

[61] Above, s88 & s82 respectively.

[62] *Ports Corporatisation Act* (NSW) s77. Similar but not identical provision at s71 of the *Marine Safety Act* (NSW).

were provided by the SPC via its pilot supplier, the SSP from October 1995 to October 2002, and via an SPC's wholly owned subsidiary since October 2002.

The pilotage supplier SSP was a separate commercial entity which apparently had involvement in fixing the pilotage charge. Due to the compulsory nature of pilotage in Sydney Ports and the proximity of competing ports such as Brisbane and Melbourne, pilotage charges are an important factor in defining Sydney Ports' competitiveness. The *Ports Corporatisation Act* has made provisions for pilotage charges and these sections will continue to be within the ambit of this Act and will not be consolidated under the *Marine Safety Act*.[63]

2.6 Pilotage charges

The **relevant port authority** may fix pilotage charges but the charges may only be fixed with the approval of the Minister either in accordance with the operating licence, in the case of the Ports Corporation, or in accordance with the contract with the Minister, in the case of a contractor service provider.[64] The relevant port authority in relation to pilotage is the Pilotage Service Provider.[65] Seemingly, if the pilotage service provider is the port corporation then the port corporation can set the charges in accordance with the terms of the operating licence which must be approved by the Minister. Alternatively if the pilotage service provider is a contractor then the proposal would be initiated by the contractor in accordance with the contract between the contractor and the Minister.

Exactly how the SSP and pilots got involved in determining the pilotage charge is unclear. It is evident that the SSP was contracted by the SPC and not by the Minister.[66] Presumably the contract stipulated a mechanism for pilots' input in fixing charges. However, the contract between the SPC and the SSP was not per se a contract that enabled the SSP to be the Pilotage Service Provider. Thus, the contractor SSP was not the relevant port authority with respect to the pilotage charges. A contractor is the port authority for the purpose of pilotage charges only if s/he is a contractor under s81 of the *Ports Corporatisation Act*. Section 81 only permits the minister to enter into contracts with pilots for pilotage services when the services are not provided by a Port Corporation. [67] Therefore when the SPC was the Pilotage Service Provider the SSP was not, and thus could not be the relevant port authority in relation to fixing pilotage charges. In any event whether the SPC or the contractor is the relevant port authority the minister's approval is required.

The current pilotage rates are fixed with reference to a vessel's Gross Tonnage (GT) with minimum and maximum caps. Inbound and outbound pilotage are both fixed at AUD 0.0875 per GRT with a maximum charge of AUD 2,560. Harbour movement is set at a rate of AUD 0.0438 per GRT with a maximum charge of AUD 1,280. There is a minimum charge of AUD 350 except for deferral outwards service which is fixed at AUD 145. When a pilot stays onboard at the request of the master or the SPC the charge will be at a rate of AUD 95 per hour. [68]

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[63] Part 5 of the *Ports Corporatisation Act* (NSW) deals with port charges.
[64] *Ports Corporatisation Act* (NSW) ss 52-54.
[65] Above, s47.
[66] Both the SSP's website and the SPC's press release confirm this point.
[67] *Ports Corporatisation Act* s 81(1) & (2). The use of the expression 'pilot supplier' referring to the SSP in the SPC's press release tends to support this analysis.
[68] Deferral of pilotage service is when a vessel is unable/unsafe or in the opinion of the pilot the vessel is unable/unsafe to proceed – *Ports Corporatisation Act* ss 82 & 83, *Marine Safety Act* ss 76 & 77. The rates do

Seven years into the corporatisation of Sydney Ports, pilotage services appear not to have been as competitive as the government would have wished. It has been suggested that due to the rigorous and lengthy licensing requirements for qualified masters to become fully licensed to serve in Sydney Ports, the pilot market in Sydney has not been truly contestable.[69] This view appears to be confirmed by experience as shown by the SPC's tender invitation for pilotage services over a period of twelve months between 2001 and 2002.

The Sydney Ports Corporation decided to establish a new wholly owned subsidiary company, staffed by the SSP pilots and cutter crew, to provide pilotage services in Port Botany and Sydney Harbour. The new company has been named Sydney Pilot Service Pty Ltd (SPS) and will buy the SSP assets.[70] This move aims to remove the non-contestable pilot market and to ensure that pilotage services be competitive particularly when compared to Brisbane and Melbourne.[71] It is hoped that this new arrangement will enable pilots to focus on their key role of delivering a first class pilot service to the shipping industry. The new company SPS replaced the SSP on 26 October 2002. Simply put, the apparent monopoly pilotage market is now under the complete control of the State-owned Corporation SPC. It should mean that now the government, as opposed to the pilots themselves, will decide how many pilots enter the industry.

Thus far we have looked at the legal regime governing the meaning of pilot, pilot licensing, compulsory pilotage and pilotage charges. To recapitulate, Pilotage in Sydney Ports is compulsory and operates in an area extending beyond the traditional three nautical mile territorial sea limit. The extra-territorial operation of the State's legislation is valid by virtue of the power under section 5 of the *Coastal Waters (State Powers) Act* 1980 (Cth). The *Navigation Act* 1912 (Cth) is an Act of general application and indeed the backbone of most of the States' pilotage legislation. However it does not provide specific details and is not intended to affect the operation the States' legislation in relation to specific port operations. The *Marine Safety Act* (1998) (NSW) will eventually be the governing Act in relation to Sydney Ports pilotage with the exception of charges. The *Ports Corporatisation Act* 1995 (NSW) will continue to govern pilotage charges and until the *Marine Safety Act* fully commences, this Act, together with the *Pilotage Act* 1971 (NSW) will continue to form the legal framework of Sydney Ports' pilotage.

3. Responsibility and liability issues for the pilot, the port authority, the master and the shipowner.

3.1 Sydney Ports Pilot – commercial structure and legal relationship between various parties

The SPC's intention to form a wholly owned subsidiary company for the purpose of the administration of pilot supply is a commercial decision. It may alter the number of pilots available and thus make pilotage charges more competitive. It should not change the legal relation between the pilots and their employer (formerly the SSP and currently the SPS).

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not include GST which has to be taken into account now. See <*www.sydneypilotservice.com.au/*> visited on 27 March 2003.

[69] Greg Martin, CEO of Sydney Ports Corporation, Sydney Ports Corporation press release, 29th May 2002.< http://www.sydports.com.au/MediaRoom/story.asp?pageid=185&pageversionid=336>

[70] Martin G., above.

[71] Martin G., above.

Sydney pilots were employed by the SSP which contracted with the SPC to supply pilots. The SPC then provided pilotage services to the shipping industry. However it appears that the provision of compulsory pilotage services by the SPC to a shipowner is not based upon contract despite the commercial persona of all parties. In a modern case in the UK, a shipowner unsuccessfully argued that the port authority, being the employer of the pilot, was liable to the shipowners in contract. It argued that the contract was subject to common law implied terms that the pilotage service would be performed with reasonable skill and care. The Court rejected that argument and held that the arrangement made between the port authority and the shipowner was no more than an arrangement to discharge the shipowner's statutory obligation by taking a compulsory pilot onboard and paying for his services. There was no basis for holding a contract to exist between the parties.[72] So it seems, the compulsory nature of the Sydney Ports pilotage displaces any supposed contractual relationship between a ship owner and the SPC. If there is no contractual relationship between a ship and the pilotage services provider the SPC, *a fortiori*, there would be no contractual relationship between a shipowner and the pilot supplier in relation to pilotage services in Sydney. Any claim of negligence by the shipowner against the SPC or the SPS (previously the SSP) must necessarily be dependent on statute law and/or the law of torts.

3.2 A pilot's negligence: statutory immunity and the abolition of the compulsory pilotage defence

The *Marine Safety Act* specifically makes provision to protect the State, the Minister and the Pilotage Service Provider from liability arising out of a pilot's negligence.[73] The Act also protects the individual pilot from pecuniary liabilities due to his negligent performance.[74] If the analysis above about the legal role of the SSP is correct, that is, that the SSP was not a pilotage service provider, then, its liability as the general employer of individual pilots would not come under the statutory immunity and thus come under the common law. However, from 29 November 2002 the definition of the Pilotage Service Provider was expanded to include a subsidiary of a port corporation, in effect, the SPS.[75]

With respect to a shipowner's liabilities under pilotage the NSW legislation is similar to that contained in the *Navigation Act* 1912 (Cth).[76] The latter was inserted into

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[72] *Oceangas (Gibraltar) Ltd v Port of London authority, (The Cavendish)* (1993) 2 Lloyd's Rep 292 at 299 col 2. Clarke J of the Queen's Bench Division (Admiralty Court) applied the dissenting judge Brennan J's analysis in *Oceanic Crest Shipping co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626, 656.

[73] Section 80(1) of the *Marine Safety Act* (NSW) provides that, "*Neither the State, nor the Minister, nor a pilotage service provider is liable for any loss or damage that is attributable to the negligence of any person made available as a marine pilot by the pilotage service provider while the person is acting as a marine pilot*."

[74] Section 80(2) of the *Marine Safety Act* (NSW) provides that, "*A person made available as a marine pilot by the pilotage service provider is not personally liable in pecuniary damages for any loss or damage attributable to the person's negligence while the person is acting as a marine pilot*."

[75] By virtue of s3 of the *Statute Law (Miscellaneous Provisions) Act* (No2) 2002 No112 the *Ports Corporatisation Act* was amended. Section 77 provides additionally that *a reference in this Part to pilotage services provided by a Port Corporation includes a reference to pilotage services provided by a subsidiary of the Port Corporation, and a reference to a pilotage service provider is to be construed as including a reference to any such subsidiary providing pilotage services*. See ss 3 & 77(3) of the *Ports Corporatisation Act.* This new amendment came into force on 29 Nov 2002.

[76] Section 79 of the *Marine Safety Act* (NSW) is identical to s84 of the *Ports Corporatisation Act* (NSW) which provides that:

the principal Act in 1958.[77] The insertion was made consequent to the UK abolition of the common law defence of compulsory pilotage through the enactment of the *Pilotage Act* 1913 (UK) and the relevant UK provision took effect in January 1918.[78] Apparently the defence of compulsory pilotage was still available in New South Wales after 1918.[79] During that time the law drew a distinction between the situation where the pilot was voluntarily engaged and where pilotage was compulsory. The shipowner would not be vicariously liable for the negligence of the pilot in the latter case on the ground that the owner had no choice and that no contractual relationship of master and servant arose with the pilot.[80] The distinction was removed by s410B(2) of the *Navigation Act* (Cth).[81]

As we shall see a pilot's employer, be it a trading company or a government instrumentality, will not be vicariously liable for the employee pilot's negligence in common law. The abolition of the defence of compulsory pilotage would seem to have been a practical necessity to avoid a situation where no party, other than the pilot himself, would be liable for his negligent pilotage.

3.3 A pilot's common law liability

The wording of the NSW and the Commonwealth legislation in relation to negligent pilot damage is not the same.[82] However they both require that, regardless of whether pilotage is compulsory or not, the allocation of liability be the same as if pilotage was

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(1) A person who is made available as a marine pilot by the pilotage service provider and who has the conduct of a vessel is subject to the authority of the master of the vessel. The master is not relieved from responsibility for the conduct and navigation of the vessel merely because the vessel is under pilotage.

(2) The master and the owner of a vessel being navigated under circumstances in which pilotage is compulsory are jointly and severally liable for any loss or damage caused by the vessel or by any fault of navigation of the vessel in the same manner as if pilotage were not compulsory.

Compare the sections with s410B of the *Navigation Act* (Cth) which provides that:

(1) A pilot who has the conduct of a ship is subject to the authority of the master of the ship and the master is not relieved from responsibility for the conduct and navigation of the ship by reason only of the ship being under pilotage.

(2) Notwithstanding anything contained in a law of the Commonwealth or of a State or Territory, the owner or master of a ship navigation under circumstances in which pilotage is compulsory under a law of a State or Territory is answerable for any loss or damage caused by the ship, or by a fault of the navigation of the ship, in the same manner as the master or owner would if pilotage were not compulsory.

[77] *Navigation (Amendment) Act* 1958 (Cth) s195 (No36, 1958). Subsequently amended by No216, 1973, No87, 1980 and No95, 1995 (Cth).

[78] *Pilotage Act* 1913 (UK) s15(1), subsequently s35 of the *Pilotage Act* 1983. It reflected the UK's intention to harmonize with an international convention: Article 5 of the Brussels Collisions Convention (The International Convention for the Unification of certain Rules of law with respect to Collisions between vessels) provided that the liability imposed by the convention should attach in cases where a collision was caused by the fault of a pilot, even when the pilot was carried by compulsion of law; Brussels, Sept 23 1910; Rose, F., *The Modern Law of Pilotage*, Sweet & Maxwell, London, 1984.

The latest version of this section is enshrined in s16 of the *Pilotage Act* 1987 (UK) which reads: "*The fact that a ship is being navigated in an area and in circumstances in which pilotage is compulsory for it shall not affect any liability of the owner or Master of the ship for any loss or damage caused by the ship or by the manner in which it is navigated*".

[79] *Sydney Ferries Ltd v The Ship Tahiti* (1930) S.R. (N.S.W.) 360 at 380. The case involved an accident in Port Jackson between a ferry and the ship "Tahiti" which occurred on 3rd Nov 1927. The judgment was given on 3rd March 1930. Halse Rogers J of the Supreme Court of NSW ruled that both ships were to apportion the damages. The ship "Tahiti" sought to claim the benefit of compulsory pilotage but was declined by the judge on the facts.

[80] *The Eden* (1880) 6 V.L.R. 8 at 15; *Hubble & Co v Thomas* (1890) 24 S.A.L.R. 102 at 103; *Townsville Harbour Board v. Scottish Shire Line Ltd.* (1914) 18 C.L.R. 306 at 326-7; *Sydney Ferries Ltd v The Ship Tahiti* (1930) 30 S.R. (N.S.W.) 360 at 380; See also Butler, D., & Duncan, W., n 11, at p214.

[81] See n 76 above.

[82] See also n 34 above.

requested voluntarily. Statutory immunity aside, the person who is in charge of navigation, namely the pilot, should ordinarily be responsible. Therefore, it was once held that a pilot was personally liable for damage caused by a vessel grounding on some oyster beds,[83] and a pilot who had given an incorrect helm order that caused the loss was ordered to pay damages.[84] This is of little use if the pilot cannot meet the claim. Shipping casualties often involve substantial financial loss. Therefore suits against pilots are relatively rare because of the low statutory limits of an individual pilot's liability, a statutory immunity or the fact that the pilot is usually without sufficient financial resources to meet the claim. Third party claimants often look elsewhere for a source of recovery.

If pilotage was non-compulsory the shipowner (*in personam*) and the vessel (*in rem*) are liable for loss and damage resulting from the negligence of the pilot. As to the shipowner, the theory appears to be that the master (as the agent of the shipowner) or the shipowner himself, of his own volition, chose the pilot; and having thus chosen, the relation of master and servant arises. Therefore the maxim *respondeat superior* applies.[85] This means that in addition to the individual pilot's liability the shipowner is also vicariously liable. It has been suggested that the shipowner's liability for his pilot preceded the modern law of vicarious liability and was probably based on the notion of the identification of the shipowner with the vessel itself. Therefore when the defence of compulsory pilotage was abolished, there was no difficulty in holding shipowners liable for the negligence of pilots in all circumstances. [86]

The ship itself, being considered a legal entity under admiralty law, is chargeable with fault and is subject to a suit *in rem* for recovery for the wrong of the pilot whether such pilotage is compulsory or not.[87]

In jurisdictions where pilots do not have statutory immunity from civil liabilities, an insurance policy will be a way of protecting the pilot's liability. Shipowners or third party litigants often have sued the involved pilot in the hope that his underwriter could be persuaded to contribute something toward a settlement.[88] Pilots who do not carry insurance are potentially exposed to ruinous liability in the event of a major casualty. It is argued that burdening the individual pilot with his pecuniary liability would gain little. The fees that are charged for pilotage services, while not insignificant in the ordinary sense, are insignificant in comparison to the value of the vessel, the cargo and the public property that the vessel passes by in a port. The imposition of liability on the pilot, even to the point of bankruptcy, is unlikely to have any significant impact on the payment for the damage suffered by the various parties. It is argued that the vessel's P & I insurance already covers the liability of masters, crew and pilot. The vessel has

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[83] *The Octavia Stella* (1887) 6 Asp. M.L.C. 182.

[84] *London School Board v Lardner.* The Times 20th February 1884.

[85] *Steamship "Beechgrove" Co Ltd v Aktieselskabet" Fjord" of Kristainia* (1916) 1 AC 364; See also White, M., ed., *Australia Maritime Law*, (2nd ed.) The Federation Press, 2000 at p290; Parks, A., & Cattell, Jr. E., *The Law of Tug, Tow, and Pilotage*, (3rd ed.) London Sweet & Maxwell, 1994 pp 981- 1085.

[86] Atiyah P., *Vicarious Liability*, Butterworths London, 1976 at p 92; Francis, R., *The Modern Law of Pilotage*, London Sweet & Maxwell, 1984, at p35.

[87] *The Chyebassa* (1919) P. 201; Francis, R., n 86; Parks, A., & Cattell, Jr. E., n 85 above.

[88] In the United States insurance policies have usually been procured through the pilot associations. Coverage is limited to the individual pilot members and no coverage is provided with respect to the pilot association per se. The pro-rata premium applicable to each individual pilot is deducted from his or her share of income from the association's pooled income derived from pilotage fees. Recognition of the fact that frequent litigation from owners and third party litigants in the hope to get settlement from the underwriter led some pilot associations and individual pilots in the United States to abandon liability insurance altogether; Parts, A., & Cattell, Jr. E., n 85 above at pp 1010-1013, 1021-1023.

therefore already paid for insurance to cover the possibility of the pilot's negligence. Little is added to the protection of public interest by placing the pilot at risk of bankruptcy. The assurance of proper performance of a pilot's duties would be more adequately and efficiently protected by disciplinary action of the licensing authority and the provision of statutory offences. A suspension or revocation of a pilot's licence perhaps better serves the purpose.[89]

Whatever might have been the rationale of the pilot's immunity, Sydney Ports pilots enjoy statutory immunity from any pecuniary loss. There has been hardly any litigation attempting to challenge this immunity. However, the situation with the pilot's general employer has been different. Shipowners have not altogether given up pursuing the general employer of pilots for its vicarious liability despite the abolition of the defence of compulsory pilotage.

3.4 The pilot's general employer and the port authority: the case of *Oceanic Crest Shipping*

The statutory immunity in Sydney Ports now extends to include the SPC's subsidiary the SPS. However, the following discussion is relevant to the SSP when it was operational and the SPS for the short period between 26 October and 29 November 2002.

Litigation involving liability against a pilot's employer or the port authority did not seek to deny a shipowner's liability, rather, owners frequently refrained from contesting their liability but sought contributory liability from the pilot's general employer on the basis of direct or vicarious liability. Such was the case unsuccessfully argued in the High Court decision of O*ceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (the Oceanic Crest Shipping case).[90]

There are long standing authorities pointing to the relationship between the ship owner and the pilot being one of service, not agent.[91] It follows, so it seems, that if a pilot is the servant of the shipowner who is vicariously liable for his negligent act then there cannot co-exist a vicarious liability upon his general employer for the identical fault.[92] The reason was said to be that the service and control of a servant has been transferred from a general employer to a particular employer. A pilot, as a servant, cannot serve two masters at the same time. Consequently the shipowner is vicariously liable for the servant's negligence. The common law origin identifying the shipowner to be the master of the pilot was decided at a time when pilots were running the business as individuals. It was important to ensure that those who suffered damage from the faulty navigation of a ship had recourse against the owners of the ship.[93] One of the majority judges, Gibbs C.J. in the *Oceanic Crest Shipping* case conceded that if the vicarious liability issue 'arose for decision for the first time it might have been thought convenient to cast responsibility for the negligence of the pilot on to the pilot's employer.'[94]

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[89] Parks, A., & Cattel, Jr. E., op cit., at pp 1011-1013. See also *Ports Corporatisation Act* s87 for pilot's offence.
[90] (1986) 160 CLR 626.
[91] Above, per Wilson J; *Thom v Owners of S.S."Smerd"* (1925) SLT 239; *The "Maria"* 1 W.Rob 95 per Dr Lushington at pp 107, 108; *Prowse v European and American Steam Shipping Co*. 13 Moo PC 484.
[92] *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* (1947) AC 1; *McDonald v The Commonwealth* (1945) 46 S.R.(NSW) 129. The rule to be derived from these two cases was further discussed by Brennan J in *Oceanic Crest Shipping*. See discussion below.
[93] A remark made by Wilson J in *Oceanic Crest Shipping*.
[94] (1986) 160 CLR 626 at p 632.

In Australia, as well as in many other common law countries, pilotage services have become a highly efficient and organized business run by the local government, a government instrumentality or a trading company under government licence. The rationale behind holding shipowners liable vicariously would not be as convincing as it once was. The question in the *Oceanic Crest Shipping* case was narrowed down to the issue whether the pilot's general employer, Pilbara, which was a private company incorporated for commercial purposes, was vicariously liable for the loss caused by negligent pilotage. It is a case that would, statutory immunity aside, be relevant to Sydney ports because of its similar commercial structure of pilotage services.

The Court ruled, by a three to two majority,[95] that the commercial company which was the general employer of pilots was not vicariously liable for the pilot's negligent act. The majority declined to disturb the Privy Council's decision in *Fowles v Eastern and Australian Steamship Company Ltd*[96] (*Fowles*) where the Queensland Government was held not liable when a ship, under compulsory pilotage by a civil servant pilot in the port of Brisbane, was stranded by the negligence of the pilot. The shipowner brought an action against the nominal defendant representing the government. A government department was the licensing authority and the pilot was employed as a public servant. The relevant question posed by the Privy Council was whether or not the Government was bound to navigate the ship and was the principal in the piloting of ships. Their lordships answered the question in the negative and reasoned that the legislation empowering the government to license and provide pilotage services did not alter the pilot's legal status as an independent professional man in discharging his skilled duties.[97] This is the commonly known "independent discretion rule" that operates to exclude the vicarious liability of a public employer. The rule is founded on the basis that a public employer would not be vicariously liable if the tortfeasor employee was executing an independent duty that the law cast directly upon him.[98] The rule attracted criticism from judges and academics and it has been abrogated by statute in some jurisdictions.[99]

Nevertheless, the majority in *Oceanic Crest Shipping* upheld the independent discretion rule as part of the common law of Australia and took the view that the decision in *Fowles* should not be disturbed. So long as the pilot was carrying out an independent duty under statute law or common law his general employer was not vicariously liable for his negligence notwithstanding that the employer was a commercial entity. The majority examined the statutory provision and found that Pilbara had not done something that the Government could not have done.

According to the majority of the Court the significant factor in *Fowles* in avoiding the general employer's vicarious liability was the absence of control in how the pilot exercised his legal duty. However this lack of control was seen to be in a different or fundamental sense. In the words of Dawson J: "*there is a difference between absence of control which, in the case of the pilot, arises from the fact that his status does not permit*

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[95] Gibbs C.J., Wilson and Dawson JJ, Brennan and Deane JJ in dissent.

[96] (1916) 2 AC 556. Lord Buckmaster L.C., Earl Loreburn, Viscount Mersey, and Lord Shaw of Dunfermline were present at the Judicial Committee and the judgment was delivered by Earl Loreburn.

[97] Above, at 562.

[98] *Field v Nott* (1939) 62 CLR 660; *Little v the Commonwealth* (1974) 75 CLR 94; *Attorney-General for N.S.W. v Perpetual Trustee Co Ltd* (1952) 85 CLR 237.

[99] *Middleton v Western Australia* (1992) 8 WAR 256; *Konrad v Victoria Police* [1999] 91 FCR 95;Finn, P., & Smith, K., *The Citizen, the Government and "reasonable expectations",* (1992) 66 ALJR 139 at 145; Fleming, J., *The Law of Torts*, 9th ed, Sydney LBC, 1998 at 418-419; Finn, P., *Claims Against Government Legislation*, Essays on Law and Government, vol 2 (1996) at 35-7.

it and absence of control which, in the case of other employees, stems from the fact that the employer lacks the skill or training necessary to exercise control…… in the case of a pilot in the general employ of the Crown or a harbour authority or its equivalent, it is the very nature of the relationship and of the status conferred upon the pilot which is inconsistent with the exercise of control by his general employer over the manner in which he carries out his actual duties as a pilot."[100] Simply put, the law accepts only the competence of the onboard pilot to pilot a ship. This wide application of the independent discretion rule seems to weaken if not altogether sweep away the master-servant argument that attaches vicarious liability to the shipowner.

If the general employer was not vicariously liable only by virtue of the pilot's independent legal duty to pilot, why should the shipowner be vicariously liable? It is very difficult to reconcile this with the shipowner's vicarious liability. Gibbs C.J. attempted to resolve the difficulty. His honour reasoned that it was reconcilable because the pilot's power in part derived from the authority given by the shipowner. His honour drew on the fact that the master had the power to take the control of navigation out of the hands of the pilot, albeit in exceptional circumstances. With respect, it is submitted that such reasoning has a problem too. No doubt the master can take the control of navigation out of the hands of the pilot but the shipowner does not have the legal right to do so. Likewise, if the independent rule applies to a pilot so far as navigating a ship is concerned, logically it should be applicable to the master so that matters relating to navigation would not fall within the shipowner's vicarious liability. If the duty of navigation is ultimately conferred upon the master, the exercise of control by the shipowner over the manner in which the master carries out his duty in navigation would equally be inconsistent with the very nature of the master's duty. This independent discretion rule thus should be restrictedly applicable to the public officer employed by the Government, not on legal logic but upon policy grounds.

Alternatively, if the independent discretion rule applying to pilots were worth upholding the shipowner's vicarious liability should be better viewed as grounded on the notion of identification as opposed to the maxim *respondeat superior*.[101]

Understandably law does not always follow strict logic. Policy considerations at times could be paramount. It might have been a good policy to hold the ship or its owner vicariously liable for the less resourceful individual pilot's negligence. It is less convincing when pilotage services nowadays are run by commercial entities for profit. Particularly when government control has placed these entities in a quasi monopoly position. The dissenting judges in *Oceanic Crest Shipping* took the view that the independent discretion rule did not apply where the employer was a private trading corporation having a commercial interest in the employee's exercise of a statutory responsibility.[102]

Brennan J sought to distinguish the applicability of the independent discretion rule based upon the nature of the general employer. Where the Crown or a public authority was the general employer it could escape vicarious liability. The reason is that the discharge of an independent statutory responsibility by the public officer was not a function that the employer was authorised to perform. This narrow application of the independent discretion rule was seen by his honour as the foundation on which *Fowles* rested. Therefore, it is only when the functions of an employer are so limited by statute

[100] *Oceanic Crest Shipping*, n 90 at p 683.
[101] See discussion above n 85-87.
[102] Per Brennan and Deane JJ.

as to exclude the function performed by an employee in discharging his statutory responsibility that the employer is not vicariously liable for the employee's negligence.[103] A trading corporation whose objects are advanced by the employment of servants to discharge independent statutory responsibilities would be liable to the extent to which its servant and agent is liable.[104]

Pilbara argued that s410B of the *Navigation Act* went further than imposing liability for the pilot's negligence to the owner or master of the ship. It was submitted that the section excluded the vicarious liability of any other person. The majority accepted that s410B had created a statutory master-servant relationship between the pilot and the shipowner and that this relationship was an added reason to exclude liability from Pilbara.[105]

As to the interpretation of s410B, Brennan J rejected the view that it created a relationship of master and servant between the shipowner and the pilot. Nor did his honour consider it needed to. Brennan J also declined to hold that two persons cannot be vicariously liable for the same damage or that an employee cannot be the servant of two masters. However he accepted that two employers of the same servant who negligently causes damage will not both be liable for the damage if one, rather than the other, has "the relevant control" as enunciated in *McDonald v The Commonwealth*.[106] His honour reasoned that s410B went directly to the imposition of liability and the imposition was **not** on the footing that the relevant control was vested in the shipowner to the exclusion of the pilot's general employer. The pilot's authority might be limited, in situations where the master could show justification to intervene, but the section did not purport to vest in the master of the ship any control over the pilot in the exercise of his authority.[107] According to Brennan J s410B merely created a parallel, statutory liability in the owner or master. Both the shipowner and the general employer of the compulsory pilot are liable to a plaintiff whose damage is caused by the negligence of the pilot in the conduct of the ship.[108]

Another dissenting judge Deane J went further and doubted that *Fowles* remained good law in its contemporary context. His honour noted that the specialist employee had become almost as much the rule as the exception be he an airline pilot or a taxicab driver. The law is now clear that a general employer will ordinarily be vicariously liable for such an employee's negligence in the course of the ordinary discharge of the duties of his employment notwithstanding that the employer has satisfied himself about the qualifications, experience, competence and legal requirement of his employee. More importantly his honour was concerned with the practical injustice that might flow from applying *Fowles*. Those who have neither the opportunity nor the economic standing to negotiate with the general employer of the pilot and who are not insured against personal injury or property loss as a result of a pilot's negligence, would suffer. If the commercial general employer were not liable under Australian common law these people would be left to pursue the pilot personally, the ship or the shipowner. Pursuing the ship or the shipowner may depend on the fate of the ship or the law of the country

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[103] Per Brennan J at p 664.

[104] Above, in support his honour cited the English Court of Appeal's decision in *Lambert v Great Eastern Railway* (1909) 2 KB 776 where a railway company which employed constables was held liable for the constable's negligent act.

[105] *Workington Harbour & Dock Board v Towerfield* (Owners) [1951] AC 112 which dealt with a materially equivalent English statutory provision of s410B of the Navigation Act was cited in support.

[106] (1945) 46 S.R. (NSW) 129 at p132. See n 92 above.

[107] (1986) 160 CLR 626 at p 669.

[108] Above, at p 670.

where the shipowner resides. His honour proposed to confine the application of *Fowles* only to situations where the employer of a licensed pilot was either the Crown or some government instrumentality. A trading corporation providing pilotage services for reward such as Pilbara should not come under the protection of the reasoning of *Fowles*.[109]

In so far as the majority in the *Oceanic Crest Shipping* case sought to rely on *Fowles*, a few words outlining the background of *Fowles* will help understanding the highest Australian Court's attitude to the whole matter. The ship owner took action against the Queensland Government for its liability for damage done to the ship allegedly due to the negligence of a pilot in compulsory pilotage. The case proceeded on the question: Would the Government, being the general employer of the pilot, be liable, if the negligence of the pilot was established? The Full Court of the Supreme Court of Queensland answered in the affirmative.[110] The Government appealed to the High Court. By majority the High Court set aside (but didn't reverse) the order made by the Full Court and the case was sent back for trial. The High Court gave no decisive answer to the question appealed. The minority[111] answered the question in favour of the shipowner but only one of the three majority judges decided the point. Isaac J answered the question in the negative but the other two judges[112] declined to decide the point as they were of the opinion that the facts were not sufficiently stated to enable them to determine whether the Government was carrying on a pilotage business.[113] Subsequently the trial took place before a judge and a jury who found the pilot negligent. The trial judge considered that he was bound by the decision of the Full Court, there being no new facts before him. By agreement the judgment was affirmed by the Full Court without prejudice to the Government's right of appeal to the Privy Council.[114]

The Privy Council's judgment was delivered by Earl Loreburn. In his Lordship's relatively brief judgment he endorsed Isaac J's decision. The Privy Council has been criticised for being inconsistent with the mainstream of authorities and with the general policy of recognising an employer's vicarious liability. It is said that the Privy Council's reasoning is as unsatisfactory as it is obscure. It is a case where a public officer is employed to exercise his special powers and functions on behalf of his master. Even if the duty of careful piloting only be owed by the pilot and not the defendant employer as well, vicarious liability is, after all, based on a breach of duty by the servant, not the master. A commentator noted that the Board deciding *Fowles* did not include an experienced maritime lawyer. [115]

The common law position in Australia as it stands at the moment appears to be, that, a pilot's general employer, be it the Crown or a commercial corporation, is not vicariously liable for the pilot's negligence. The employer or the port authority only has a duty, subject to statutory provision, to provide pilotage services and to supply qualified and competent pilots. The issue of liability has been considered by ten judges of the High Court in two cases over a period of ninety years. Despite the majority

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[109] Above, per Deane J at p 678.
[110] *Eastern and Australian Steamship Co Ltd v Fowles* (1913) S. R. (Qd) 64.
[111] Barton A.C.J. and Powers J.
[112] Gavan Duffy and Rich JJ.
[113] *Fowles v The Eastern and Australian Steamship Company Ltd* (1913) 17 C.L.R. 149.
[114] *Fowles v The Eastern and Australian Steamship Company Ltd* (1916) 2 AC 556 at p 558.
[115] Rose, F., n 86 at p 37. See also Atiyah, n 86, pp 80-81, 92-93; cf. *East London Harbour board v Caledonian Landing Shipping and Salvage Co. Ltd* [1908] A.C. 271 (P.C.).

rulings in both cases, the arguments for and against the general employer's liability were fairly balanced if one disallowed the two judges who did not decide the point.

In *Oceanic Crest Shipping* the issue was litigated between the shipowner and the pilot's employer and was decided nearly twenty years ago.[116] We have yet to see a case involving innocent third party claimants. Extra-judicially, a judge commented on the decision of the *Oceanic Crest Shipping* case saying that an opportunity was lost to bring the law relating to pilotage into the twentieth century.[117] Given the changing commercial structure of pilotage services in Sydney Ports since the enactment of the *Ports Corporatisation Act* in 1995 and the recent rearrangement of the pilot company, it will not be surprising if the issue is raised and revisited again when a suitable opportunity arises.

3.5 Other issues of concern

i) Provision of a pilotage service

The port authority, which is the SPC in the case of Sydney Ports, is responsible for providing pilotage services. Implicit in the case law is the fact that failure to provide an adequate pilotage service may attract liability.[118] It is the SPC's responsibility to ensure that pilots are competent. Competence perhaps should extend beyond qualification and experience to include also the assurance of the pilot's physical fitness at the time of performing. Researches commissioned by the Australian Maritime Safety Authority (AMSA) identified that decreased performance and increased accident risk were associated with a pilot's fatigue.[119] The report also revealed that there were inadequacies in the current system used by the AMSA and pilot companies to monitor fatigue and that there is the lack of a fatigue management program. As a result, groups responsible for the delivery of pilotage services are highly vulnerable to the consequences of fatigue, including decreased performance and increased accident risk. In a highly commercialised pilotage services situation the issue of fatigue might become an area of concern with respect to a pilot's competence.

The provision of an adequate pilotage service should also include the fact that the services should be supplied punctually. The port authority may be held liable for damage caused by reason of a failure to provide a timely pilotage service. The House of Lords ruled that a port authority, which was responsible for the provision of a pilotage service, was negligent in causing damage to a vessel when the vessel attempted to enter a river port after waiting in vain for pilots to tender their services.[120]

ii) "Acting as a marine pilot"

The position in Sydney Ports is that NSW legislation specifically provides for the immunity from civil liability of pilots and *Pilotage Service Providers* of a pilot's

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[116] It was decided at a time when Australia had just abolished the right of appeal to the Privy Council.

[117] Malcolm D., then Chief Justice of Western Australia, 'The Negligent Pilot and the Himalaya Clause: A Saga of Disagreement', 67 *ALJ* (1993) 14 at p 17. The author was a counsel for the unsuccessful appellant in *Oceanic Crest Shipping*. See also Kneebone, S., 'The Independent Discretionary function Principle and Public Officers', *Monash University Law Review*, 16 (2) 1990, 184-210.

[118] *Fowles; Oceanic Crest Shipping,* above.

[119] Parker, A., & Hubinger, L., School of Human Movement Studies, Queensland University of Technology, *On Tour analyses of the work and rest pattern of Great Barrier Reef Pilots: Implications for fatigue management*, Sept 1998, <www.amsa.gov.au/sp/fatigue/index.htm>, visited on 18 June 2002.

[120] *Anchor Line (Henderson Bros.) Ltd v Dundee Harbour Trustees, Ellerman Lines Ltd v Same* (1922) 38 T.L.R. 299, 10 Ll.L. Rep 47 HL. See also Parks, A., & Cattel, Jr. E., n 85., at 1029-1030.

negligent conduct while he is "acting as a marine pilot".[121] Parties may be excluded from claiming immunity if the negligence was not as a result of acting as a marine pilot. Both State and Federal legislation treat compulsory pilotage in the same way as voluntary pilotage when it comes to deciding liability arising out of negligent pilotage.[122] In the discussion of "What is a pilot?" and in the context of "compulsory pilotage" it has been highlighted that a pilot is not an adviser and that the master's right to intervene is limited. Due to the fact that statutory immunity depends greatly on whether or not the pilot is acting as a pilot, knowledge of the division of control between master and pilot, as an aid to statutory interpretation, will help in the analysis of whether the immunity provision is applicable.

Legislation provides for the duties of the master in connection with pilotage.[123] It requires the master to test all navigational aids and record the result of the tests, and, such information must be provided to the pilot before pilotage begins. When a vessel is under pilotage the statute requires the master and his crew to follow the pilot's instruction and to inform the pilot of anything relevant to the safe navigation of the vessel. When a pilot asks for information relevant to the safe navigation of the vessel the master must not give knowingly false or misleading information. The statutory and common law duties imposed on the master and crew must be understood in the light of the provision effecting the abolition of the defence of compulsory pilotage. It requires that a pilot is *subject to the authority of the master of a vessel.*[124] Therefore, the understanding of the division of control between pilot and master is equally important. The master-pilot relationship has not been altered since the abolition of the defence of compulsory pilotage.[125]

The master-pilot relationship was succinctly stated by Dr Lushington in the case of the *Peerless*[126] more than a century ago:

> "There may be occasions on which the master of a ship is justified in interfering with the pilot in charge, but they are very rare. If we encourage such interfering, we should have a double authority on board, a divisum imperium, the parent of all confusion, from which many accidents and much mischief would probably ensue. If the pilot is intoxicated, or is steering a course to the certain destruction of the vessel, the master no doubt may interfere and ought to interfere, but it is only in urgent cases".[127]

A person who "has the conduct of a ship" must not to be confused with a person "in command of a ship". The first expression refers to an action whilst the second refers to a power. The fact that a pilot has the charge of navigation does not mean that he has superseded the master. The question of whether a pilot has control of navigation is a question of fact and not of law.[128] Some case law may illustrate the master-pilot relationship.

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[121] *Marine Safety Act* 1998 (NSW) s80(1) & (2).
[122] *Marine Safety Act* 1998 (NSW) s79(1) & (2); *Navigation Act* 1912 (Cth) s410B(1) (2).
[123] *Marine Safety Act* 1998 (NSW) s78.
[124] *Ports Corporatisation Act* 1995 (NSW) s84(1); *Marine Safety Act* 1998 (NSW) s79(1); *Navigation Act* 1912 (Cth) s410B(1).
[125] *Tower Field (Owners) v Workington Harbour and Dock Board* (H.L.) (1950) 84 Ll.L.Rep 233; *The Prinses Juliana* (1936) 18 Asp. M.L.C. 614; *The Hans Hoth* [1952] 2 Lloyd's Rep 341; *The Saltaro* [1959] 2 Lloyd's Rep 232; See also Geen, G., & Douglas, R., n29 at pp 83-85.
[126] *The Peerless* (1860) 167 E.R. 16.
[127] Above at p 17.
[128] CANADA, n29, at pp 26-27; Geen, G., & Douglas, R., n29, at p 87.

The law imposes a duty upon the master to ensure that a proper look-out is maintained and to inform the pilot of any sighting relevant to safe navigation.[129] The master, under pilotage, would equally be liable if he failed to observe the collision prevention regulations including the display of appropriate lights and the use of a sound signal.[130] However, at what speed[131] the vessel should proceed, where to drop anchor[132] and whether or not to proceed in adverse weather conditions are within the province of the pilot.[133]

The division of control between a master and pilot perhaps indicates when the master ought to interfere. "Interference" has a legal meaning in the context of the master-pilot relationship. Interference by the master must be in a positive manner. It must either be a direct order where the pilot fails to give an appropriate order or a direct revocation of an order given by the pilot. It has been held that when a master expressed an opinion, albeit strongly, which was adopted by the pilot and the pilot accordingly gave an order to that effect, a collision as a result would not transfer the pilot's liability to the master.[134] Similarly, in a case where a master who repeated the pilot's instruction for the benefit of the crew, it was held that the pilot was responsible for the manoeuvre carried out as a result, even though the actual order proceeded from the master's lips.[135]

A master would be negligent if he failed to carry out his legal duty despite the vessel being under compulsory pilotage. Almost invariably the reported cases involving the master-pilot relationship have been under compulsory pilotage. At the time when the defence of compulsory pilotage was available and contributory negligence was a complete defence it was crucial whether the master was also negligent when an accident resulted from the pilot's negligent act.

In Sydney Ports, so long as *Fowles* and *Oceanic Crest Shipping* continue to be good law in Australia, whether the master or the pilot is to be blamed is of little significance because ultimately the shipowner is responsible. One point perhaps worth noting is that when parties intend to invoke the statutory immunity provision they must show that the pilot was acting as a pilot at the time of the accident. In the rare event that the master had intervened and had taken navigation out of the hands of the pilot, the latter's subsequent act might arguably fall outside the ambit of "acting as a marine pilot".

4. Conclusion

Sydney Ports pilotage is primarily governed by NSW legislation. In relation to liability issues s410B of the *Navigation Act* 1912 (Cth), however, seems to have effect notwithstanding States' legislation.[136] Therefore, a sound understanding of common law development is crucial. Statutes relating to pilotage do not define nor require reference to some common law concept.

The operation of the Sydney Ports pilotage has swung back to government control despite the ongoing process of corporatisation. The State Minister has an influential control over its administration and pricing. The NSW Government was not overly

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[129] *The Batavier* (1854) 164 E.R. 218; *The Alexander Shukoff* (1920) 15 Asp. M.L.C. 122.
[130] *The Ripon* (1885) 10 P.D. 65; *The Elysia* (1912) 12 Asp. M.L.C. 198.
[131] *The Maria* (1839) 166 E.R. 508; *The Batavier* (1854) 164 E.R. 218; *The Calabar* (1868) L.R. 2 P.C. 238.
[132] *The Octavia Stella* (1887) 6 Asp. M.L.C. 182; *The George* (1845) 166 E.R. 800; *The Agricola* (1843) 2 Wm.Rob.10.
[133] *Pollock v M'Alpin (*1851) 13 E.R. 945, per Lord Kingsdown, at p 946; *The Oakfield* (1886) 5 Asp. M.L.C. 575; See also Geen, G., & Douglas, R., n29 at pp 93-100.
[134] *The Oakfield* (1886) 5 Asp. M.L.C. 575.
[135] *The Admiral Boxer* (1857) 166 E.R. 1090.
[136] See n 34 & 82 above.

content with the competitiveness of the service. Restructuring of the pilotage company would tend to ensure the adequate supply of suitably qualified pilots so that pilotage charges could be maintained at a commercially viable level. The statutory immunity of pilots and the authority's civil liability would seem consistent with the desire to maintain commercial competitiveness. Gibb C. J. in the *Oceanic Crest Shipping* case remarked that the current understanding of the law of vicarious liability was the foundation of how the pilotage business was organised.[137] The justification seems to be circular. However, it is conceivable that it is not in the interest of the Government to change the current position in relation to the allocation of liability for the pilot, the port authority, the master and the shipowner. The SPS (formerly the SSP) appears to have common law immunity from vicarious liability, at least vis-à-vis a shipowner. Now that public liability has become a nationwide issue the marine pilot employers' common law immunity seems somewhat anomalous. It is submitted that this anomaly is not based on sound legal reasoning.

[137] (1986) 160 CLR 626 at p 631.