

TO LIMIT OR NOT TO LIMIT: LIMITATION OF LIABILITY ON WEST AUSTRALIAN WATERS – A CALL FOR REFORM

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1 Introduction

The Australian ice-skating community lost three of its ‘leading lights’ when the motor cruiser they were travelling on collided with a Sydney HarbourCat late at night in Sydney Harbour in March 2007. Just this year in May, nine people were injured after their high speed tour boat was swamped by a giant wave when the boat motored through rough seas at The Heads, near Darling Harbour. These recent marine accidents on the Sydney Harbour have been tragic. It is important, however, to acknowledge that these tragedies could happen anywhere in our river and lake systems. For example, every day in Western Australia, many ferries leave the Barrack Street jetty filled with passengers on a wine cruise, a day trip to Rottnest Island or a visit to South Perth. Whilst no other state in Australia has a statutory limitation of liability regime for their inland waters, Western Australia currently has a provision to allow ‘sheltered water passenger vessels’¹ to limit their liability to the low amount of \$45 000 per passenger.² What if a Western Australian ferry never made its destination – their passengers injured or even killed? This paper addresses the existing provisions to limit liability within Western Australian waters and questions why the provisions exist at all.

Although nothing can fully compensate a victim’s loss in a marine accident, their tragic circumstances and the potential liability to a claim for negligence must be given full recognition. If a marine casualty occurred in Western Australian inland waters, the *Western Australian Marine Act 1982* (WA) (*‘WA Marine Act’*) sets a \$45 000 limit for each passenger permitted on the vessel’s certificate of survey for non-seagoing ferries and a ‘sheltered water passenger vessel’. This low figure was set in 1982 and has remained unchanged since then. It could potentially lend itself to an injustice for claimants.

The provisions for limitation of liability in the *WA Marine Act* need to be reformed. The provisions are redundant and outdated; there is a lack of purpose or reason for specifying limitation for non-seagoing ferries; and the clumsy provision for calculating limitation refers to an obsolete currency rarely used. A fresher, contemporary *WA Marine Act* is required that completely removes all Western Australian limitation provisions, including limitation provisions for non-seagoing vessels, ensuring consistency Australia wide.

This paper is in four parts. First it outlines the current regime that exists to limit liability on Western Australian waters; secondly it questions why the dichotomy exists between Western Australia and the rest of Australia regarding inland waters; thirdly this paper argues for removing the current limitation provisions; and finally some recommendations are proposed for both a clearer and more precise *WA Marine Act* and for a consistent Australia-wide limitation of liability regime for inland waters.

2 Doctrine of limitation of liability - an overview

Limitation of liability is recognised by most shipping nations and is intended to encourage maritime investment by limiting the liability for large commercial shipping ventures.³ The liability for shipowners, charterers and salvors for a maritime incident is potentially much larger than the cost of the ship and could involve crippling pecuniary damage.⁴ Limitation of liability is designed to offer some protection against the shipowner bearing the full impact of negligent navigation of their ships, particularly as they have no way to appropriately supervise their crew.⁵

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¹ Defined in the *Western Australian Marine Act 1982* (WA) s 76.

² *Western Australian Marine Act 1982* (WA) s 85.

³ Limitation of Liability started in 1733 in England and was said to be triggered by the case of *Boucher v Lawson* (1733) 95 Eng Rep 53.

⁴ In this paper, the term ‘shipowner’ will refer to all those able to claim limitation such as shipowners, salvors, and charterers.

⁵ *British Columbia Telephone Co v Marpole Towing Ltd* [1971] SCR 321, 338.

In the event of a maritime incident, an owner is entitled to limit their liability to a maximum sum for each incident.⁶ By initiating limitation proceedings and establishing a limitation fund, the shipowner ensures a bar to further action and can choose their own jurisdiction to hear the claims, as long as there is some connection with that jurisdiction.⁷ The general limit amounts and amounts for passenger claims are clearly spelt out in both the Conventions and in the *Limitation of Liability for Maritime Claims Act 1989* (Cth) ('LLMCA') which has implemented both the *1957 International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships* ('1957 Convention') and the *1976 Convention on Limitation of Liability* ('1976 Convention') and, more recently, the *1996 Protocol*.⁸

Claims that are subject to limitation must relate to 'loss of life or personal injury' or 'loss of or damage to property ... occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting'.⁹

3 Limitation of liability in Western Australia

Both the *1957 Convention* and the *1976 Convention* allow countries to establish their own system of limitation for inland waterways vessels, whether seagoing or not, including pleasure craft.¹⁰ Western Australia was the only state in Australia to implement the *1957 Convention* in legislation, which it retains today, and only expressly makes a limitation provision for a specific type of inland waterways vessel: non-seagoing ferries.¹¹

The *WA Marine Act* s 84 purports to apply the *1957 Convention* to occurrences involving: trading ships on intrastate WA voyages, WA fishing vessels not on overseas voyages, WA inland waterways vessels, and WA pleasure craft.¹² However, due to s 109 of the Australian Constitution, which provides that Commonwealth law shall prevail over State law where there is inconsistency, the *WA Marine Act* provisions for 'seagoing ships' are usurped by the terms of the *LLMCA*. Sections 3(1) and 5 of the *LLMCA* define 'the Convention' as the *1976 Limitation Convention* as affected by the *1996 Protocol*.¹³ Therefore, the 1957 limitation provisions in the *WA Marine Act* will have no effect in relation to any seagoing ship - seagoing WA trading ships on intrastate WA voyages, seagoing WA fishing vessels not on overseas voyages, or seagoing pleasure craft.

4 Limitation for non-seagoing ferries

Non-seagoing ships fall outside the terms of both the *1976 Convention* and *1957 Convention*. The Western Australian government did make a special provision for one type of non-seagoing vessel: the non-seagoing ferry. Under s 85, a 'non-seagoing ferry' is able to limit its liability to an aggregate amount of \$45 000 for each passenger permitted by the vessel's certificate of survey. As this provision currently stands, the only advantageous way it would operate is if there were only a handful of passengers injured on board when a casualty occurs. They would then be able to share in the \$45 000 amount for each passenger allowable by the vessel's certificate of survey. The Transperth ferries that currently operate between the Perth foreshore and the South Perth foreshore can limit their liability to \$6.6 million as they are certificated for 148 passengers. If only a small number of passengers were injured

⁶ William Tetley, *International Maritime and Admiralty Law* (Yvon Blais, 2002) 271.

⁷ *Limitation of Liability for Maritime Claims Act 1989* (Cth) sch 1 arts 13-14 (an example being that one of the claimants lives there). See also some discussion in George E Duncan, 'Limitation of Shipowners' Liability: Parties Entitled to Limit; The Vessel; The Fund Admiralty Law Institute: Symposium on Limitation of Liability' (1979) 53 *Tulane Law Review* 1046.

⁸ *International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships* ('1957 Convention'), opened for signature 10 October 1957, [1981] ATS 2 (entered into force 31 May 1968); *Convention on Limitation of Liability of Maritime Claims* ('1976 Convention'), opened for signature 19 November 1976, [1991] ATS 12 (entered into force 1 December 1986); *1976 Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims* ('1996 Protocol'), opened for signature 2 May 1996, [2004] ATS 16 (entered into force 13 May 2004).

⁹ *Limitation of Liability for Maritime Claims Act 1989* (Cth) sch 1 art 2 ('LLMCA'). Art 2 of the *1976 Convention* is enacted by sch 1 of the *LLMCA*.

¹⁰ *1957 Convention* art 8; *1976 Convention* art 15(2). Also discussed in Tetley, above n 6, 281. Section 5 of the *LLMCA* states that the Act does not apply to the extent to which a law of a State or the Northern Territory makes provision giving effect to the *1976 Convention* in relation to that ship.

¹¹ *Western Australian Marine Act 1982* (WA) s 85.

¹² *Western Australian Marine Act 1982* (WA) s 84.

¹³ Martin Davies and Anthony Dickey, *Shipping Law* (Lawbook, 3rd ed, 2004) 455.

on board, then they would be able to share in this amount. There would be a considerably lower amount available to each claimant, however, if there was a large amount of claims or total loss of passengers.

Section 85 also refers to a 'sheltered water passenger vessel' and the disparity between the wording of the section heading and the section itself is discussed below. A 'sheltered water passenger vessel' is defined in s 76 as a 'passenger vessel permitted to operate in partially smooth and smooth waters only'. Section 3 defines partially smooth waters as 'waters within such geographical limits as are prescribed for the purposes of this definition' and smooth waters are defined as 'waters within the geographical limits prescribed for the purposes of this definition'. Section 85 also contains the low limitation amount of \$45 000, which has not changed since the inception of the *WA Marine Act*.

Judging by the second reading speeches for the *WA Marine Act*, the Western Australian government clearly knew that the 1957 limitation provisions were only aimed at seagoing vessels, which is why it made a particular provision for ferries.¹⁴ Other non-seagoing vessels would be unable to use the provisions of the *1957 Convention* as it is only aimed at 'seagoing' vessels. Therefore, non-seagoing vessels (apart from ferries and 'sheltered water passenger vessels') would be left with no right to statutory limitation provisions at all under the *WA Marine Act*.¹⁵ It would consequently be beneficial for a non-seagoing vessel to be classed as a ferry or 'sheltered water passenger vessel' and the wide class of non-seagoing ferries now certificated in Western Australia makes this easier than it should be.

5 Why did Western Australia make this distinction for inland waters? Why does this dichotomy exist?

The Western Australian Minister for Transport, Mr Rushton, stated in the second reading speech for the *WA Marine Act* that: 'the international convention for limitation of liability did not apply to non-seagoing ships ... therefore a special section was to be included to limit the liability of owners of ferries – which are not seagoing ships'.¹⁶ Further:

A person suffering injury or loss aboard a ferry will have a common law remedy in negligence against the owner of the vessel ... To keep insurance needs within realistic bounds it is proposed that the owner should be allowed to set a limit to the extent of his liability.¹⁷

The motivations for including this provision therefore seem to be driven by the need to keep the quantum of claims against ferries for the common law remedy in negligence low.

By implementing a limitation of liability regime for inland waters for ferries and 'sheltered water passenger vessels', the Western Australian government appears to have made an effort to provide some sort of ceiling on the amount a claimant is able to recover for acts of negligence. This concern at the time by the Western Australian government to keep insurance needs low for non-seagoing vessels seems overly advantageous to the shipowner and was not a concern shared by other States within Australia.

There is no need to have this anomalous provision for inland water ferries or 'sheltered water passenger vessels' as this section was inserted with no real basis or justification. In addition, the liability limit of \$45 000 per passenger has remained unchanged since its insertion 28 years ago. This provision is unfair, unreasonable and unnecessary and below I will outline an argument for removing it in its current form completely from the *WA Marine Act*.

6 The current limitation provisions within the *WA Marine Act* should be removed because:

1. The *LLMCA* overrides *1957 Convention*;
2. Currency conversions of limitation amounts for seagoing vessels within the *WA Marine Act* are redundant;
3. No clear definitions exist for seagoing, inland waters, or sheltered waters;
4. There is unclear wording in s 85 – aimed at non-seagoing ferries or sheltered water passenger vessels;

¹⁴ Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 May 1982, 1301-4 (Edgar Cyril Rushton, Minister for Transport) 1303.

¹⁵ Davies and Dickey, above n 13.

¹⁶ Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 May 1982, 1301-4 (Edgar Cyril Rushton, Minister for Transport) 1303.

¹⁷ *Ibid*.

5. There is a low maximum amount for claims (encourages vessels to try to use limitation provisions within the *WA Marine Act* instead of the provisions in the *LLMCA*);
6. There is a large/broad number of ferries/sheltered water passenger vessels that could potentially claim;
7. Most commercial vessels currently contractually use the *Trade Practices Act* (TPA) to limit/exclude liability;
8. *Civil Liability Act (CLA)* could be used to potentially exclude liability if captured under dangerous recreational activity or risk warning used;
9. Whilst other jurisdictions allow for limitation for inland waters, their waters have different navigational qualities to Australia; and
10. As a matter of policy, should limitation even be allowed on inland waters?

I will now deal with each of these in turn.

6.1 LLMCA overrides the 1957 Convention

As it appears that the *LLMCA* limitation provisions for seagoing vessels override the provisions in the *WA Marine Act* s 84, there seems to be no requirement for Western Australia to keep the *1957 Convention* within the *WA Marine Act*. Updating the 'Convention' to the *1976 Convention* as affected by the *1996 Protocol* would also be superfluous as the *LLMCA* already contains this convention.

6.2 Calculations of limitation amounts are redundant

Even if the *LLMCA* did not override the limitation provisions within the *WA Marine Act* for seagoing ships, there will be a further problem: calculating the limitation amount.

Article 3(6) of the *1957 Convention* provides for the use of the Poincare franc mentioned in art 3. However, the Poincare franc was replaced by the Special Drawing Right ('SDR') in the *1979 Brussels Protocol*.¹⁸

The use of the Poincare franc to calculate limitation of liability in an airline context was discussed in *S.S Pharmaceutical Co Ltd v Qantas Airways Ltd* where it was held that using the gold market was closest to the intention of the convention's framers. Whilst the Commonwealth and other countries have adopted legislation that authorised statutory orders to prescribe the equivalent of the Poincare franc to the local currency, this has not occurred in Western Australia.¹⁹

6.3 No clear definitions of 'seagoing', 'inland waters', 'sheltered waters'

Currently, there are no clear definitions within any Australian legislation for 'seagoing' and there are no definitions for 'sheltered waters' within Western Australian legislation. It is necessary to have a clear definition of 'seagoing' to clarify where the *LLMCA* provisions apply. It is necessary to determine what constitutes 'inland waters' within the State to recognise whether Western Australian jurisdiction applies with the *WA Marine Act*. By not having these clearly defined, there is ambiguity as to the type of vessels that could potentially claim under s 85 as 'non-seagoing ferries'.

6.3.1 'Seagoing'

The *WA Marine Act* defines the Limitation Convention as the *International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships*. Therefore, it is crucial to define what 'seagoing' means for the purposes of

¹⁸ Protocol amending the *International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships* done at Brussels on 21 December 1979 ('*1979 Brussels Protocol*'), opened for signature 21 December 1979, [1984] ATS 24 (entered into force 6 October 1984. The SDR rate relative to the Australian dollar can be ascertained from the Reserve Bank daily.

¹⁹ The *WA Marine Act* s 86(5) states that the conversion for the franc was in the manner provided for by the *Navigation (Limitation of Shipowners Liability) Regulations* which was repealed by the *Navigation (Miscellaneous Repeal) Regulations 2006* (Cth). However, in a Commonwealth context, the *1979 Brussels Protocol* that amended the *1957 Convention* provides for the SDR. This is included in the *LLMCA*.

ascertaining those vessels covered by the limitation provisions,²⁰ and to ensure certainty for shipowners and potential claimants.²¹

The WA *Marine Act* does not define ‘seagoing’. However, a ‘seagoing vessel’ is defined in the *Marine (Certificates of Competency and Safety Manning) Regulations 1983* (WA) as a vessel ‘other than a vessel that plies exclusively in inland waters or in waters within or closely adjacent to sheltered waters or areas where port regulations apply’. This broad legal definition makes it unclear which vessels are entitled to limit their liability. For example, is a vessel seagoing if it has only gone to sea once or twice? Does a vessel regularly have to go to sea? What constitutes ‘closely adjacent to sheltered waters’?

The meaning of ‘seagoing’ was explored in the case of *Kirmani v Captain Cook Cruises* in obiter,²² where it was stated that a ship is ‘seagoing’ if it actually goes to sea; it is not ‘seagoing’ if it could go to sea but does not.²³ This case also stated that the word ‘seagoing’ in the title of both the *1957 Convention* and *1976 Convention* is relevant. The definition of ‘seagoing’ was discussed in great depth in *Smith v Perese* where it was decided that ‘seagoing’ meant that the vessel goes to sea, or is capable of going to sea.²⁴ *Smith v Perese* also commented that the definitions of ‘seagoing’ and ‘ship’ found in legislation, cases and even dictionary definitions are broad.²⁵ The common element between these definitions, however, was that a ship means ‘any kind of vessel’ either capable of or actually used in navigation by water.²⁶

6.3.2 ‘Inland waters’

Vessels that may never have been to sea and are not certificated to go to sea are clearly not seagoing vessels and for their purposes there is no need to define ‘inland waters’. However, defining ‘inland waters’ helps to clarify the position of vessels which possess characteristics that might not be defined as clearly seagoing or non-seagoing.

Any waters inland of the baseline are likely to be inland waters. There is a myriad of definitions within legislation and case law to define ‘inland waters’.²⁷ Definitions exist such as ‘waters other than the sea’,²⁸ ‘waters not subject to tidal influence’,²⁹ ‘waters not directly navigable to the sea’,³⁰ ‘landlocked waters’³¹ and ‘inland waterways are waters within estuaries, enclosed bays, and inland waters’.³²

Unfortunately there are no definitions for ‘inland waters’ in Western Australian legislation or in the *Navigation Act 1912* (Cth) or the *Coastal Waters (State Powers) Act 1980* (Cth), so it is unclear which exact definition a court would use regarding ‘inland waters’. The coastal waters baseline extends around areas in Western Australia such as the waters off Kwinana, Rockingham, the various islands around Albany, and the bay in Busselton.³³ As this area is quite extensive, it is vital to define ‘inland waters’ within Western Australian legislation rather than inappropriately leaving it to the courts.

²⁰ *Western Australian Marine Act 1982* (WA) s 76.

²¹ *Qenos Pty Ltd v Ship APL Sydney* (2009) 260 ALR 692.

²² *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351.

²³ *Union Steamship Co of New Zealand Ltd v Commonwealth* (1925) 36 CLR 130, 145. This was also stated in *R v Goodwin* [2006] 1 LI Rep 432.

²⁴ *Smith v Perese* [2006] NSWSC 288 [159]-[160]. Capability of a vessel to go to sea is a controversial way of defining seagoing. It was held in *Salt Union Ltd v Wood* [1893] QB 370, 374 (Lord Colderidge) that ‘its capacity to go to sea was not the point ... no doubt she could go to sea; but she does not go’.

²⁵ *Smith v Perese* [2006] NSWSC 288 [167]. To date, there have been no other Australian cases that have explored the definition of seagoing in this context.

²⁶ *The Von Rocks* (1998) 2 LI Rep 198.

²⁷ Geoscience Australia National Mapping Division, *Australia’s Maritime Zones - The Australian Map Series Edition 2* (2002) <http://webmap.ga.gov.au/image_cache/GA3746.pdf>.

²⁸ *Maritime Transport and Offshore Facilities Securities Act 2003* (Cth) s 10; *Admiralty Act 1988* (Cth) s 3(1).

²⁹ *Fisheries Management (General) Regulation 2002* (NSW) cl 3.

³⁰ *Marine Act 1976* (Tas) s 4(1), as repealed by the *Marine and Safety Authority Act 1997* (Tas).

³¹ *Raptis (A) & Son v South Australia* (1977) 138 CLR 346, 376.

³² *Bonser v La Macchia* (1969) 122 CLR 177; Other definitions can be found in: *Inland Fisheries Act 1995* (Tas) s 3, *Child Employment Act 2003* (Vic) s 3, and *Fisheries Act 1995* (Vic) s 4.

³³ Geoscience Australia, *Australian Marine Information Spatial System (AMIS)* (2009) <<http://www.ga.gov.au/imf-amsis2/>>.

6.3.3 'Sheltered waters'

There are no definitions in Western Australian legislation for 'sheltered waters'. The only Australian legislation to define 'sheltered waters' are the *Marine (Hire and Drive Vessel) Regulations 1994* (NT) and the *Marine (Sheltered Water) Regulations 1986* (NT).³⁴ It would appear that the phrase 'sheltered waters' is commonly used at a regulation level in Australia and it is also defined in the Uniform Shipping Laws Code which was developed by the Australian Transport Council.³⁵ 'Sheltered waters' should be defined within Western Australian legislation, particularly as this phrase has such a relevant meaning within s 85 for 'sheltered water passenger vessels'.

6.4 Unclear wording in section 85 – aimed at ferries or sheltered water passenger vessels?

The unclear wording in s 85 of the *WA Marine Act* only adds to the ambiguity of this provision. The heading of the section is 'Limitation in Relation to Non-Seagoing Ferries'. However, the wording of the provision does not mention ferries again but instead defines the section as being applicable to 'sheltered water passenger vessels'. This allows commercial ferries and vessels in inland waters to attempt to come under this section to limit their liability to the amount of \$45 000 for each passenger. 'Ferries' is clearly the subject matter within the heading however the definition for 'sheltered water passenger vessel' could encapsulate many other potential vessels. Ferries are subject to the *Transport Coordination Act 1966* (WA). This Act defines a ferry as 'a vessel, including a hovercraft, used or intended to be used to carry passengers for hire or reward and includes any such vessel so used or intended to be used by or on behalf of the Crown, or an agency of the Crown'.³⁶ A 'sheltered water passenger vessel' is defined within section 76 of the *WA Marine Act* as 'a passenger vessel permitted to operate in partially smooth and smooth waters only'.

The wording in the second reading speech for the *WA Marine Act* shows that the section does not reveal whether it was meant to be restricted to ferries. It did not refer to 'sheltered water passenger vessels'.³⁷

6.5 Low amount for claims (encourages vessels to try to use *WA Marine Act* limitation provisions instead of *LLMCA*)

As discussed above, the current broad definition of seagoing within the marine context adds to the confusion as to which vessels can successfully limit their liability using the *WA Marine Act*. As a ferry and 'sheltered water passenger vessel' in the *WA Marine Act* have a very low limit for liability of \$45 000 per passenger in the aggregate, there is the temptation for a seagoing vessel to allege that whilst they are seagoing they also come under the definition of an inland waterways vessel, even potentially a 'sheltered water passenger vessel'. Vessels would be encouraged to come under the *WA Marine Act* as limitation amounts are less per passenger. The way the current regime sits, vessels may have to be assessed on a case by case basis as to where the maritime accident occurs and how often they went to sea.

The limitation amount of \$45 000 for 'sheltered water passenger vessels' was especially unusual as this figure was based on the limitation prescribed by the *Civil Aviation (Carriers Liability) Act*.³⁸ It is not clear why this figure was not based on the *1957 Convention*, which existed at the time in Commonwealth law as part of the *Navigation Act 1912* (Cth). There is no explanation on why the amount was used; and there was no debate on the matter.³⁹ It is interesting to note that the amount specified in the *Civil Aviation (Carriers Liability) Act* increased to \$100 000 per passenger for death or injury two months prior to the assent of the *WA Marine Bill*; so this figure was already outdated before royal assent was given.⁴⁰ The figure in the *Civil Liability Carriers Liability Act* now stands at

³⁴ *Marine (Hire and Drive Vessel) Regulations 1994* (NT) reg 3; *Marine (Sheltered Water) Regulations 1986* (NT) reg 2.

³⁵ National Marine Safety Committee, *Uniform Shipping Laws Code* (17 August 2010) s 1.

³⁶ *Transport Coordination Act 1936* (WA) s 4(1).

³⁷ The policy reason was likely to protect government run transportation ferries.

³⁸ *Civil Aviation (Carriers' Liability) Amendment Act 1976* (Cth) s 3.

³⁹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 May 1982, 1301-4 (Edgar Cyril Rushton, Minister for Transport) 1303.

⁴⁰ *Civil Aviation (Carriers' Liability) Amendment Act 1982* s 4, which increased the liability amount to \$100 000 for death or injury to a passenger resulting from an accident. This was assented to on 6 September 1982, which was prior to the assent of the *Western Australian Marine Act 1982* (WA) which was assented to on 5 November 1982.

\$500 000 – but the figure remaining in the *WA Marine Act* is \$45 000 per passenger in the aggregate in the event of a casualty.⁴¹

There is also a concern with regards to the fact that the provisions within s 85 operate in the aggregate. As discussed earlier this provision allows claimants to probably get full recovery when a small amount of passengers are injured. However, if a catastrophic event occurred, when compensation is required most, this method of calculation would let down claimants giving them close to the \$45 000 limit each, which would be advantageous to vessel operators.

6.6 Large/broad amount of ferries/sheltered water passenger vessels that could potentially claim

The State coastal waters of Western Australia extend out to three nautical miles and extend around Rottnest Island and any other islands that form part of Western Australia.⁴² This effectively means that the provisions for non-seagoing ferries to limit their liability could not only occur in inland waters such as the Swan River or Peel Inlet but also on the waters to Rottnest where larger passenger ferries make several trips every day. This broadens the scope of limitation of liability provisions in inland waters significantly and increases both the likelihood of a mishap and the likelihood of a larger quantity of victim claims.

As at 4 August 2010, there were 400 sheltered water passenger vessels certificated in Western Australia which were a combination of smooth waters and partially smooth waters vessels.⁴³ Of these vessels, 229 were confirmed Class 1 passenger carrying vessels (including charter, charter fishing, dive charter and ferries) and the remaining 171 vessels were Class 2 work vessels which may carry up to 12 passengers. There were also five ferry boats licensed under the *Transport Coordination Act 1966* (WA) to travel to Rottnest Island.

It was surprising to find that the Western Australian Department of Transport has 37 ferries certificated for inland waters in Western Australia. This list includes vessels that travel to Rottnest Island, within 30 miles off Albany and the port limits of Esperance and the vessels range from a passenger capacity of 34 to a passenger capacity of 503. This is concerning with regards to what potential maritime incidents may occur and how many claimants there may be. It is not hard to see that an operator of one of these vessels would be extremely keen to claim under the *WA Marine Act* due to the low limit of \$45 000 per passenger in the aggregate rather than the limits prescribed in the *LLMCA* that currently sit at approximately \$120 000 per passenger in the aggregate or have no liability limit at all if there was no limitation regime that applies to them.⁴⁴

6.7 Most commercial vessels contractually use *Trade Practices Act 1974* (Cth) ('TPA') to limit/exclude liability

As yet, there have been no cases of any ferries or vessels (private or commercial) being caught by the provisions in s 85. One possible explanation for this is the fact that many commercial operators rely on their own terms and conditions to exclude or limit their liability for passenger death or injury.⁴⁵ Another explanation could be the relatively new provisions within the *Civil Liability Act 2002* (WA) where establishing negligence is harder and the right to contractually exclude liability for recreational services is allowed.⁴⁶ This is explored in more detail below.

⁴¹ The amount in the *Civil Aviation (Carrier's Liability) Act No 71 of 1982* (Cth) which the *WA Marine Act 1982* (WA) based its \$45 000 figure on has increased to a total of \$500 000 since 1995 by the *Transport Legislation Amendment Act (No 2) No 89 of 1995* sch 1 s 31, as amended by the *Transport Legislation Amendment Act No 95 of 1995*. Liability was increased in from \$100 000 under s 31 of the former Act to \$500 000 in sch 1 of the latter Act.

⁴² Email from Grant Boyes, Senior Maritime Boundaries Officer, Law of the Sea and Maritime Boundary Advice Project (LOSAMBA) Geoscience Australia to Jacqui Allen, 12 July 2010.

⁴³ Email from Mark Johnson, Acting Manager, Commercial Vessel Safety Branch, Department of Transport to Jacqui Allen, 4 August 2010.

⁴⁴ A vessel that may go to sea occasionally will possibly come under *LLMCA* provisions depending on how often they went to sea, and where a maritime casualty occurred. An operator of one of these vessels would be tempted to try to come under the *WA Marine Act* instead of the *LLMCA* for the low limitation provisions.

⁴⁵ Captain Cook Cruises exclude liability for injury and death: see <<http://www.captaincookcruises.com.au/termsandconditions.html>>. Rottnest Express also excludes liability for injury and death: see <<http://www.rottnestexpress.com.au/downloads/travel-info.aspx#terms1>>. Subject to the provisions in the *Trade Practices Act 1974* (Cth) ss 68A and 74, the limitation will have to be subject to a 'fair and reasonable' provision – something that potential plaintiffs might not be aware of. Ferry/cruise operators may also try to rely on s 68B of the *Trade Practices Act 1974* (Cth) as a recreational service to exclude liability for death and injury.

⁴⁶ *Civil Liability Act 2002* (WA) s 5J.

Under the current legislative regime, it is possible for a ferry or cruise ship operator to completely exclude all liability for death or injury by utilising certain provisions in the *TPA*.⁴⁷ The most relevant to the provision of a cruise/ferry service within Western Australian inland waters is s 68B which allows a limitation of liability to supply of recreational services where a warranty under s 74 is breached. A 'recreational service' is defined in the *TPA* as an activity that involves a significant degree of physical exertion or physical risk and is undertaken for the purposes of recreation, enjoyment or leisure. A ferry service that was exclusively used as a method of transport only, may have trouble falling under the definition of a recreational service and would also find it hard to show that their service involved a significant degree of physical exertion or risk. However, there may be some operators that could successfully argue that their service could come under this definition. In this case, they could contractually exclude liability for death and injury to passengers, which would further render the limitation of liability provisions in the *WA Marine Act* redundant.

The current ability for vessel operators to exclude their liability is of concern. A potential solution - involving the ratification and broadening of the *Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea 1974* ('*Athens Convention*')⁴⁸ within Australia - is discussed in the recommendations below.

6.8 *Civil Liability Act 2002 (WA)* ('*CLA*') could be used to potentially exclude liability if captured under dangerous recreational activity or risk warning used

Prior to the creation of the *CLA*, finding negligence was much easier and liability existed for 'recreational activities' even with potential 'obvious risk'. However, the federal government was concerned that the award of damages for personal injury had become unaffordable and unsustainable.⁴⁹ After a report into the crisis,⁵⁰ the Western Australian government implemented civil liability legislation, which codified some aspects of a negligence cause of action.⁵¹ One of these areas is 'Recreational Activities',⁵² which is especially relevant with liability within inland waters in Western Australia. In this section, there is no liability for harm of obvious risks of 'dangerous recreational activities',⁵³ while in relation to other recreational activities, a risk warning or waiver will often be effective in certain circumstances to limit liability.⁵⁴

It is beyond the scope of this paper to explore the civil liability legislation in great detail. However, it should be noted that the provisions of the *CLA* do not exclude claims under the *WA Marine Act*, but does expressly exclude claims under the *Civil Aviation (Carriers' Liability) Act 1961* (WA). This was, of course, where the limitation amounts for non-seagoing ferries originated.⁵⁵ It is not clear why the Western Australian government did not exclude claims under the *WA Marine Act* from the *CLA*. One possible reason is that the Western Australian government did intend for the *CLA* limit to apply to claims in a marine context,⁵⁶ or that the *WA Marine Act* was overlooked as the *CLA* was implemented Australia wide and Western Australia is the only state that allows for claims on inland waters.

⁴⁷ *Trade Practices Act 1974* (Cth) ss 68 and 74. It should also be noted that s 5J of the *Civil Liability Act 2002* (WA) operates in a similar way to allow a provider of recreational services to exclude their liability. No liability for death or injury is available in the *Trade Practices Act 1974* (Cth) under s 52 for misleading and deceptive conduct.

⁴⁸ *Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea*, opened for signature 13 December 1974, 1463 UNTS 19 (entered into force 28 April 1987).

⁴⁹ Law Reform Committee, Commonwealth Parliament, *Review of the Law of Negligence Final Report* (2002) Terms of Reference <<http://revofneg.treasury.gov.au/content/Report2/PDF/ToR.pdf>>; Collapse of HIH Insurance Ltd and the imminent collapse of Australia's largest medical indemnity insurer, UMP, and the September 11 terrorist attacks also contributed to the rising price of insurance as it became increasingly expensive to lay off risk to insurers.

⁵⁰ *Ibid.*

⁵¹ *Civil Liability Act 2002* (WA) ss 5B and 5C.

⁵² *Civil Liability Act 2002* (WA) pt 1A div 4.

⁵³ *Civil Liability Act 2002* (WA) s 5H.

⁵⁴ *Civil Liability Act 2002* (WA) s 5I. No liability for recreational activity where there is a risk warning.

⁵⁵ It is worth noting that damages that arise under the *Civil Aviation (Carriers' Liability) Act 1961* (WA) are excluded from the *Civil Liability Act 2002* s 3A(1)(5). This is the same Act which the ferries limitation amount of \$45 000 was based on. The limitation for liability for vessels outlined in the *Western Australian Marine Act 1982* (WA) are not mentioned at all or expressly excluded from *Civil Liability Act 2002* (WA) provisions.

⁵⁶ It is beyond the scope of this paper to go into the calculations of liability under the *Civil Liability Act 2002* (WA) except to say that if non-pecuniary damage is less than \$12 000 then there is no payout. If damages are between \$12 001 and \$48 500 then the amount is reduced by up to \$12 000. If damages are above \$48 501 then the full amount can be awarded.

One area unlikely to be affected by *CLA* provisions is s 85 of the *WA Marine Act* in relation to non-seagoing ferries. It is unlikely that transportation on the ferry system could be taken as a ‘recreational activity’ as the ferries are a mode of transport and not a leisure activity. In relation to those ferries that are taken for pleasure and who may not go to sea, it could be argued that they are a ‘recreational activity’ but they are unlikely to be deemed as ‘dangerous’.

6.9 Whilst other jurisdictions allow for limitation for inland waters, their waters have different navigational qualities to Western Australia

Whilst limitation of liability in inland waters was extended in some jurisdictions, the waters in these jurisdictions possess different navigational qualities and therefore the doctrine is not necessary in Western Australia.⁵⁷ The United States,⁵⁸ Canada,⁵⁹ and the United Kingdom⁶⁰ all allow limitation of liability on their inland waters for non-seagoing vessels. However, no other Australian state allows for this. If Western Australia were to decide to implement limitation provisions for non-seagoing vessels on inland waters, the policy factors would need to be weighed up along with justifying whether having an exclusive limitation regime in Western Australian inland waters is really warranted. The characteristics of our waterways and the lack of significant maritime commercial activity as opposed to many of the inland waterways of other jurisdictions is something that needs to be considered.

Limitation of liability in the US is an extremely broad doctrine which covers most vessels in the sea and inland waters. Limitation did not originally apply to any ‘any vessel of any description whatsoever, used in rivers or inland navigation’.⁶¹ However, this soon changed to include ‘all seagoing vessels, and also to all vessels used on lakes or rivers or inland navigation’.⁶²

Canada has enacted the limitation of liability provisions of the *1976 Convention* and *1996 Protocol*, with some modifications, through its *Marine Liability Act*.⁶³ The *Marine Liability Act* further expands those who are entitled to limit their liability beyond what is specified in the Convention. Section 25(1)(b) of the *Marine Liability Act* extends the right to limit to owners, charterers, managers and operators of all ships. The right to limitation exists not just for ‘seagoing’ ships but further to any person with an interest in or possession of a ship. With these amendments, the right to limit applies to pleasure craft on lakes and rivers as well as ‘seagoing’ ships and liability to pay damages will not exceed \$1 million on any distinct occasion for loss of life or personal injury or \$500 000 for any other claims.⁶⁴

The United Kingdom has given effect to both the *1976 Convention* and the *1996 Protocol*.⁶⁵ The *Athens Convention* is also in force in the UK for passenger claims. To resolve any conflict when a case falls within both, the UK has exercised its right under art 15.3 of the *1996 Protocol* to apply national law to regulate the system of liability to be applied for claims for loss of life or personal injury to passengers of a ship.⁶⁶ If a ship is deemed as ‘seagoing’ then the *Athens Convention* will apply for passenger claims; if it is non-seagoing then art 7 of the *1976 Convention* will continue to apply.⁶⁷ Limitation is extended to not only sea-going ships but also to those that are ‘used in navigation’.⁶⁸

The navigable qualities of the inland waters of the US, UK, and Canada have similarities and differences to the inland waterways of Western Australia. The inland waterways of Western Australia include the Swan River, Peel Inlet, and Canning River, which form part of a seasonally forced estuarine system that is in permanent contact with the Indian Ocean.⁶⁹ They are reasonably navigable and are subject to tidal influences.⁷⁰ The marked difference is that

⁵⁷ There is much case law, legislation and history in other common law jurisdictions. The author wishes to clarify that due to word constraints these are only explored superficially in this research paper.

⁵⁸ *Limitation of Liability Act*, 46 USC § 188 (1886).

⁵⁹ *Marine Liability Act*, SC 2001, c 6, s 25(1)(b).

⁶⁰ *Merchant Shipping Act 1995* (UK) sch 7 c 21 [2].

⁶¹ *Limitation of Liability Act 1851* of Mar. 3 (1851).

⁶² *Limitation of Liability Act*, 46 USC § 188 (1886).

⁶³ *Marine Liability Act*, SC 2001, c 6, pt 3 and sch 1.

⁶⁴ *Marine Liability Act*, SC 2001, c 6, pt 3, s 29; *Isen v Simms* [2006] 2 SCR 349.

⁶⁵ *Merchant Shipping Act 1995* (UK) ss 185-6. Note that the *1976 Convention* is set out in sch 7 (sch 7 does not contain all provisions of the *1976 Convention* as the UK has not enacted all provisions – they are renumbered accordingly).

⁶⁶ Sarah C Derrington and James M Turner, *The Law and Practice of Admiralty Matters* (Oxford University Press, 2007) 236.

⁶⁷ *Ibid.*

⁶⁸ *Merchant Shipping Act 1995* (UK) s 313(1)(c).

⁶⁹ West Australian Government, *Swan Canning Estuary* <<http://www.connectedwater.gov.au/Case%20Studies/SwanCanningEstuary.doc>>.

⁷⁰ *Gibbs v Mercantile Marine Insurance (Australia) Ltd* (2003) 214 CLR 604.

the inland waterways of Western Australia are not subject to the same commercial use as the jurisdictions discussed above, particularly as they do not link ports and shipping lanes. The inland waterways are relatively protected and do not have the volume of traffic or in some cases, the huge expanse of water.

6.10 As a matter of policy – should limitation even be allowed on inland waters?

The policy goal behind retaining the limitation doctrine today, apart from encouraging maritime commerce,⁷¹ is keeping insurance costs within reasonable levels. If insurers believe that payouts to potential claimants are limited to a certain figure then they are more likely to set insurance premiums at a realistic level.⁷² It is a balancing act between encouraging maritime commerce and justice for injured claimants.

In order to ascertain whether limitation of liability is a good idea from a policy perspective, it can be helpful to look at what the intention was behind inserting the provision in the *WA Marine Act*, particularly from a policy perspective. Was it the intention that commercial vessels were even captured at all? At the time the *WA Marine Act* was implemented, the government did run a ferry service that transported passengers purely on the inland waters of the Swan River between the Perth foreshore and the South Perth foreshore. In the second reading speech for the *WA Marine Act*, the government made no express mention of government vessels so it seems unlikely that they considered the wide scope this provision could encompass and what possible policy reasons they would have for limiting a vessel's owner to such a low figure for negligence.

It is important to keep a balance between a provision that is beneficial commercially and one that provides fairer access to compensation for claimants. In its current form, with the low limitation amount and the ambiguity of the provision which potentially allows many vessels to try to claim under it, this balance is not in proportion. However, the current increasing practice of contractually excluding all liability through clever use of the *TPA* also does not bode well from a policy perspective. Therefore, another regime is needed that balances the requirement of certainty in commerce with the requirement for fair compensation by claimants and this is discussed below.

7 Recommendations

First of all, it is clear that the limitation provisions for **seagoing** vessels under s 84 within the *WA Marine Act* need to be removed as they are now redundant and would have no application for any vessels whatsoever due to the overriding provisions of the *LLMCA*.

So, what would happen if a maritime casualty occurred on **inland** Western Australian waters? For the reasons that have been explored – geographic and definitional difficulties, ambiguity with drafting, low amount for claims, large amount of vessels that could fall within the provision, conflicts with the *TPA* and *CLA*, navigational qualities of Western Australian inland waters not requiring the provisions, and lack of clear intention from the Western Australian government - the answer is far from clear.

A distinction can firstly be drawn between vessels travelling outside the river systems of Western Australia and beyond the mainland shoreline to outlying islands, such as beyond Albany, Esperance, and to Rottnest Island off the coast of Fremantle. In this regard, currently a claimant could argue that the waters outside the shoreline do constitute the sea and vessels on them are 'seagoing' therefore the *LLMCA* limits apply. However, vessel owners will argue that their vessels come under the current limitation provisions of the *WA Marine Act* as they are much lower than those in the *LLMCA*.

The current limitation provisions in s 85 for ferries or 'sheltered water passenger vessels' also need to be removed. These provisions are unclear and induce uncertainty for determining which vessels may fall under the provision. The unclear wording and large number of ferries that are certificated as 'sheltered water' vessels only contributes to the potential that a vessel could try to claim the low limitation amount of \$45 000 for each passenger death or injury under s 85. This is needless ambiguity and can be remedied without much difficulty.

⁷¹ *Victrawl Pty Ltd v Telstra Corp Ltd* (1995) 183 CLR 595, 600 (Brennan J).

⁷² Davies and Dickey, above n 13, 452; *Browner International Ltd v Monarch Shipping Co Ltd* ('*The European Enterprise*') [1989] 2 Ll Rep 185, 191 (Steyn J).

It is therefore recommended that all current provisions relating to limitation of liability be removed from the *WA Marine Act*.

Unfortunately, removing limitation provisions for inland waters does not completely clear up the perplexity. If the *LLMCA* is the overriding law and there is no law for inland waters it may only confuse things further and tie up lawyers arguing about whether particular vessels are 'seagoing' and what waters can constitute the 'sea'. It would also allow commercial operators to exclude their liability altogether which, in the interests of justice for claimants, would be flawed. Currently the Transperth ferries that operate between South Perth and Barrack Street Jetty are licensed to carry 148 passengers and will therefore have a total liability limitation for \$6.66 million regardless of how many passengers are on board – this is preferable to an exclusion of liability.

What is needed is a clearer regime for limitation of liability and passenger liability in inland waters; preferably as part of a big picture reform for marine liability in Australia reflective of the more widespread use of our inland waters.

One proposal is to implement an Australia wide limitation of liability regime for inland waters in a commercial context as it would make both what a claimant could expect and a commercial operator's liability clearer. It would also ensure that liability cannot not be contractually excluded completely as would potentially be the case where no regime was in place at all. One proposal is for the Commonwealth to ratify the *Athens Convention* for passenger claims.⁷³ Whilst this Convention only relates to international voyages, the Commonwealth could extend this to domestic interstate and intrastate voyages as well as inland waters in a similar fashion to Canada and the United Kingdom.⁷⁴ Whilst the inland waters of these jurisdictions are different in their navigational qualities there is still room for some sort of passenger regime for Australian inland waters. A new limitation regime on inland waters for passenger claims also needs to work along side the *TPA* and *CLA* provisions.

Following this, the Commonwealth and States need to work together to ensure that a consistent regime is implemented in inland waters that can provide adequate compensation to passengers for death or injury and clarity for vessel owners to ascertain their liability. Different legislative regimes create confusion and uncertainty about the governing law and limitation rights. The Western Australian government itself recognised this in the second reading speech and called for an end for disparity between jurisdictions.⁷⁵ It is disappointing that almost 30 years later this disparity continues.

8 Conclusion

Whilst it might be asked why a limitation regime should be incorporated into Australia's inland waters when Western Australia has been the only Australian State so far with any regime it must be remembered that having a regime with certainty is far preferable than no regime at all. Without a clear regime, passenger claims take up more time in the courts, and a commercial vessel operator has the opportunity to completely exclude their liability contractually. This is not an ideal outcome for passengers. Instead, a transparent liability regime for our inland waterways is absolutely critical and should not have to wait for a tragedy to be remedied. If the Commonwealth and States work together to implement a new regime based on the *Athens Convention*, there will be the opportunity to work with a Convention with a long established history in other jurisdictions, including the United Kingdom and Canada with regards to inland waters. It also allows clear guidelines to be inserted which make distinctions between the vessels that are covered by the new regime. Some of the more common regulatory terms such as 'sheltered waters' can then be defined in legislation throughout Australia. A clear and fair limitation regime for passengers on Australia's inland waters should be the aim of all those passionate about maritime law in our country.

⁷³ *Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea*, opened for signature 13 December 1974, 1463 UNTS 19 (entered into force 28 April 1987).

⁷⁴ *Marine Liability Act* SC 2001 c 6, pt 4, sch 2; *Merchant Shipping Act 1995* (UK) s 183. Note that the *Athens Convention* is set out in sch 6 of the *Merchant Shipping Act 1995* (UK). It is also worth mentioning that in 2009, Canada updated the *Athens Convention* to exclude Adventure Tourism activities, which would not be required in Australia due to the recreational activities provisions within the *Civil Liability Acts*, which exclude liability for these activities.

⁷⁵ Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 May 1982, 1301-4 (Edgar Cyril Rushton, Minister for Transport) 1302.