

AUSTRALIAN MARITIME LAW UPDATE: 2009

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1 Introduction

The 2009 calendar year was one that had its issues in the Australian maritime jurisdiction. The number of illegal immigrants coming by sea, the number of illegal fisheries incidents and the usual annual confrontation in the Southern Ocean between the Japanese whaling fleet and those opposed to it all received considerable publicity. Also there has been some litigation of interest and a tiny amount of new legislation. These will all be dealt with in turn in this article. It should be mentioned that there is an enormous amount of activity going on off the Australian shores, including such activities as fisheries, tourism, oil and gas exploration and exploitation, marine environmental protection, shipping and navigation and native title claims, but this article will restrict itself to those main activities with legal consequences of note.

2 Fisheries and Other Offshore Issues

2.1 Fisheries

The Australian 'Update' last year was pleased to report that there was a steady decrease in the number of illegal fisheries cases in the northern waters, and that the illegal fisheries incursions in southern waters were almost eliminated. The manner in which the statistics are kept has been changed slightly but they are still sufficiently comparative to draw some indications. During the 2009 calendar year this downward trend has continued and the total number of foreign fishery vessel sightings by the Australian Border Protection Command in northern waters was down to 4863, from 6716 in the previous year. Also the total number of apprehensions was only 26, down from 91 the previous year. As well there was one 'legislative forfeiture' of the fishing gear, which is a forfeiture of the gear without detaining the actual vessel itself.¹

2.2 Whaling Issues

Previous 'Updates' have outlined the issues that the Australian government has had with the annual Japanese whaling fleet that takes whales in the Southern Ocean each southern summer. In short, the Australian legislation prohibits it in the Australian EEZ and this includes the EEZ claimed by Australia offshore from the Australian Antarctic Territory (AAT). However, very few countries recognise this EEZ claim offshore from the AAT and they include Japan, so the argument is not strong. Further, as is well known, Japan maintains the whaling is for scientific research, an argument that very few countries recognise as being valid.

During the 2009/2010 southern summer the Japanese fleet was in the Southern Ocean and, as usual, it was harassed by the Sea Shepherd Conservation Society's vessel *Steve Irwin* under Captain Paul Watson.² Their activities have resounded publicly and widely not least because from time to time the *Steve Irwin* and Captain Watson are based in Australia, at the Gold Coast, southern Queensland. This year the *Steve Irwin* was joined by the Sea Shepherd's *Bob Barker* and a further vessel the *Ady Gil*. Although it is slightly outside the 2009 'Update' period, much publicity was given in Australia, as it was world-wide, when the Japanese vessel the *Shonan Maru 2* came into collision with and sank the *Ady Gil* in the Southern Ocean on 6 January 2010. A number of the *Ady Gil* crew suffered personal injuries but fortunately no one was killed. There is much video evidence of the collision but without external evidence it is inconclusive as to the facts surrounding the collision.

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¹ The authors are indebted to Commander Penny Campbell RAN, Command Legal Officer with the Border Protection Command, for assistance with these statistics.

² The media reports concerning these incidents are legion and easily found and it is not necessary to list them. Much information can also be found on the web sites of the Sea Shepherd Conservation Society, the American Cetacean Society and the Japanese Institute of Cetacean Research.

The Australian government ordered the Australian Maritime Safety Authority (AMSA) to investigate and it published its report of 29 April 2010.³ However, AMSA had no jurisdiction as neither vessel was Australian flagged and the collision was not in Australian waters. AMSA summarised the international maritime law situation, accurately and succinctly, as follows:

The reported location of the collision is not in Australian waters. The location of the incident, as SSCS reported it to the RCC, is within Australia's search and rescue region but outside of Australia's territorial sea adjacent to Antarctica.

The relevant rules which govern a country's jurisdiction over a foreign vessel are the same under international law in a country's EEZ as they are on the high seas. As a general rule, Article 92 of the United Nations Convention on the Law of the Sea 1982 (UNCLOS) provides that a vessel is subject to the exclusive jurisdiction of its flag State on the high seas. Article 58 of UNCLOS provides that this general rule applies equally in a country's EEZ. Accordingly, New Zealand and Japan, as the flag States of the *Ady Gil* and the *Shonan Maru 2* respectively, have exclusive jurisdiction in relation to incidents of this kind.

Further, as a general rule, Article 97 of UNCLOS provides that, in the event of an incident of navigation concerning a ship on the high seas involving the penal or disciplinary responsibility of the master or any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except by the flag State or the State of which the person is a national.⁴

Although the captains of the *Ady Gil* and the *Bob Barker* cooperated and gave their versions, the Japanese officials and crew refused to cooperate with the investigation so the AMSA report was inconclusive.⁵ The Japanese government and its Institute of Cetacean Research denied any wrong-doing by the *Shonan Maru 2*. As the *Ady Gil* was New Zealand-flagged, NZ had jurisdiction, and Maritime New Zealand stated in a media release that it would investigate. Unfortunately, no report was available at time of writing⁶ and the Japanese government has not offered to publish any report at all.

In April 2010 Mr Ady Gil himself, the person after whom the vessel was named in thanks for his generous donation towards its cost, visited Australia. He met with one of the authors, Michael White, and indicated his passionate opposition to killing wild animals. He subsequently returned to his home and business in California. Although well out of the 2009 time period it is worth mentioning in this 'Update' that the Australian government has announced that it is finally taking its long-threatened step to initiate action against Japan in the International Court of Justice in the Hague.⁷ The 2010 'Update' will bring readers further detail about it.

2.3 Boat People

In previous years the incursion of refugees and others into Australian waters by boat, the 'boat people', had mainly fled from Iraq and then later from Afghanistan. During the 2009 calendar year those from Iraq gradually reduced, those from Afghanistan gradually increased and they were joined by many people escaping from the end of the civil war in Sri Lanka, mainly people of Tamil culture and background. In the 2009 calendar year the number of suspected irregular entry vessels (SIEVs) was 60 with a total number of people onboard of 2867.⁸ Of course far more irregular people arrive by air, but it is the boat people who are given nearly all of the publicity in the media.⁹ The Tamil people had good reason to flee from Sri Lanka as the detention camps established by the government forces were closed to outside media and humanitarian bodies and the evidence is that many unlawful murders and other crimes were being perpetuated against those detained.

³ Australian Maritime Safety Authority, 'Fact finding report into the reported collision involving the New Zealand registered craft Ady Gil and the Japan registered whaling ship Shonan Maru No. 2 in the Southern Ocean on 6 January 2010' (29 April 2010) <http://www.amsa.gov.au/Shipping_Safety/Incident_Reporting/documents/AMSA-Report-on-Ady-Gil-collision.pdf>.

⁴ Ibid 6.

⁵ Ibid 13-14.

⁶ Maritime New Zealand, 'Collision Under Investigation' (7 January 2010) <<http://www.maritimenz.govt.nz/news/media-releases-2010/20100107a.asp>>.

⁷ Peter Alford, 'Australia takes Japan to court on whaling', *The Australian* (Online), 28 May 2010 <<http://www.theaustralian.com.au/politics/australia-takes-japan-to-court-on-whaling/story-e6fgrczf-1225872445926>>.

⁸ The authors are indebted to Commander Penny Campbell RAN, above, for these statistics as well.

⁹ By way of illustration that the influx of boat people is not Australia's major immigration problem; it is estimated some 90 to 95 per cent of boat people are granted protection visas but only some 45 per cent of those who arrive by air are granted them; *The Australian*, 24 November 2009. Only about 1 per cent of the total of Australia's migration for 2009 arrived by boat; *The Courier Mail* 7 June 2010, reporting the opinion of Professor Nancy Vivianni, professor of international relations at Griffith University. The Australian Parliamentary web site has much information on the issue, particularly 'Background Note' – see Janet Phillips and Harry Sprinks, 'Boat arrivals in Australia since 1976' (23 September 2010) Parliament of Australia <<http://www.aph.gov.au/library/pubs/bn/sp/boatarrivals.htm>>.

One of the issues for the Australian and Indonesian governments during 2009 was the 78 Tamil boat people rescued at sea by an Australian naval vessel on 18 October 2009 and transferred onboard the Australian deep-water fisheries enforcement vessel, the *Oceanic Viking*. The nearest port was in Indonesia but once the *Oceanic Viking* anchored off the Indonesian port the rescued people refused to leave and then the Indonesian government refused to take them. After months of negotiations most of them left on the promise of an expedited hearing as to their status to become refugees in Australia. Of course the new influx, this time of Tamils, were reluctant to join the existing inmates of Indonesian detention centres where reports have it that towards the end of 2009 there were around 2000 asylum seekers and refugees in prisons and detention centres in Indonesia, which included children, babies and unaccompanied minors. As they had arrived in the earlier period, most of them were Iraqi or Afghan Hazaras. Their living conditions ranged from acceptable to 'appalling', there was some brutality in some centres and the United Nations Human Rights Centre (UNHCR) staff members were slow to manage interviews with so many people who were so widely separated in Indonesia.¹⁰

In the result Australia sent a special team to assess the *Ocean Viking* people's status and most of them were found to be genuine refugees and allowed into Australia, there to be dealt with as such.¹¹

Suffice to end this report about the boat people coming to Australia is to note the 2009 incidents included one or more boats on their way to Australia from Sri Lanka sinking at sea with loss of life; the Indonesian navy intercepting boats and shooting and wounding some asylum seekers who resisted arrest and the facilities at Christmas Island, the centre for processing the boat people as they arrived in Australian waters became overcrowded with people. More about these developments will be included in the 'Update' for next year.

3 Marine Pollution and Oil Spills

3.1 Pacific Adventurer Oil Spill

At approximately 0300 on Wednesday 11 March 2009 the M.V. *Pacific Adventurer*, an 18391 GRT 1123 TEU geared multi-purpose containership, was voyaging northwards from Newcastle to Brisbane off the Australian east coast in the heavy seas caused by Cyclone Hamish, which lay about 200 miles to the north. When about seven nautical miles off the northern part of Moreton Island some containers broke loose and went over the side on a heavy roll to port and then more went on the roll back to starboard. Once in the water the containers struck against the ship's hull penetrating it on both the port and starboard sides thereby releasing bunker oil later estimated at about 230 tonnes. Some 31 containers were lost over the side, all of which contained ammonium nitrate (a fertiliser). The *Pacific Adventurer* is owned by the Swire Group and flagged in Hong Kong.

The spilt oil washed on to the beaches of Moreton Island, one of the sand islands to the east of Brisbane making up Moreton Bay, and some of the oil also carried north to beaches on Bribie Island and some beaches still further north. The Australian National Plan to Combat Pollution of the Sea by Oil and Other Hazardous and Noxious Substances (the National Plan) was put into action and the clean up proceeded by the various government and volunteer agencies over the next several weeks. The smaller spills on the northern beaches were more easily dealt with but the main spill, on the ocean beach of Moreton Island, required huge quantities of sand to be removed.¹²

There was enormous public indignation and much ignorant commentary in the popular media and some grandstanding by some politicians. One of the results was that, after some cooling down period, the Premier of Queensland, the Commonwealth government and Swires came to an arrangement. Swires would constitute its

¹⁰ Jesse Taylor, 'Behind Australian Doors; Examining the Conditions of Detention of Asylum Seekers in Indonesia' (Press Release, 3 November 2009) 4- 18, 38.

¹¹ *The Australian* over numerous editions, including 18 November 2009 and 24 November 2009.

¹² See e.g., There are many sources setting out the facts but the most reliable are the web sites of Maritime Safety Queensland <<http://www.msq.qld.gov.au>>, the Australian Maritime Safety Authority <<http://www.amsa.gov.au>> and the Australian Transport Safety Bureau, 'Marine Occurrence Investigation No. 263; Preliminary; Loss of containers from Pacific Adventurer off Cape Moreton, Queensland' (Report, 11 March 2009) <<http://www.atsb.gov.au>> and ATSB 'Independent investigation into the loss of containers from the Hong Kong registered container ship Pacific Adventurer off Cape Moreton, Queensland' (Final Report, January 2011) <www.atsb.gov.au>. See also Maritime Safety Queensland, 'Response to the Pacific Adventurer Incident: Report of the Incident Analysis Team – February 2010' (Report, AMSA 43 3/10, February 2010) established under the National Plan and the further reports about the cleanup commissioned by the Queensland Department of Transport (MSQ); namely the 'Pacific Adventurer Oil Spill: Independent review of responsiveness of the Disaster Management System support' (Report, 9 December 2009), 'Independent Evaluation: Potential Use of oil spill dispersants for the SEQ Oil Spill Response – March 2009' (Report, March 2009) and 'Independent Evaluation: Environmental Effectiveness of SEQ Oil Spill Response – March 2009' (Report, March 2009). The Australian Transport Safety Bureau had not presented its final report on the incident at the time of writing <<http://www.atsb.gov.au>>.

limitation fund and also pay about A\$7 million into a trust fund for repayment of some losses, which was over and above its limitation legal obligation, with the payment results to be mentioned shortly.

On 3 April the master of the *Pacific Adventurer* was charged on indictment in the Magistrates Court, Brisbane, with a breach of s 26 of the *Transport Operations (Marine Pollution) Act 1995* (TOMPA 1995)¹³ of which Part 4 gives effect to MARPOL Annex 1 (oil). Although there is Commonwealth legislation on marine pollution from ships, the oil came into the coastal waters and from there it washed up on the beaches themselves, especially Moreton Island ocean beaches. In this case the Queensland legislation applies and it is only on this legislation that the prosecution was brought.

A discharge of oil into coastal waters is a strict offence, for which it is strict liability as the defences of 'accident' and 'mistake of fact' are excluded, although there are some defences available such as 'damage to the ship', as to which see shortly. A discharge outside coastal waters that subsequently enters those waters is taken to be a discharge into the coastal waters.¹⁴

The main relevant provision in TOMPA 1995 is in s 26 as follows:

26 Discharge of oil into coastal waters prohibited

(1) If oil is discharged from a ship into coastal waters, the following persons each commit an offence— (a) the ship's owner; (b) the ship's master; (c) another member of the ship's crew whose act caused or contributed to the discharge, unless the member was complying with an instruction from the master or of someone authorised by the master to give the instruction.

Maximum penalty—3500 penalty units.

(2) Subsection (1) applies despite the Criminal Code, sections 23 and 24.¹⁵

A penalty unit is currently \$100¹⁶ which, at 3500 maximum penalty points, makes the maximum penalty \$350 000. The maximum fine for a corporation is five times the maximum fine for a natural person, which makes it, for this charge, A\$1.75 million. A ship owner of a vessel over 15 metres in length is required to have an insurance policy that, to the limits set out by a regulation, is sufficient to pay for the cleanup costs and the costs of salvage or removal if the ship is abandoned or wrecked.¹⁷ As required by international conventions and enforced in Australia by Commonwealth and Queensland laws, the *Pacific Adventurer* would have had appropriate insurance through its Protection and Indemnity Club.

As to defences, the Act gives effect to the defences in MARPOL and under TOMPA 1995 and the relevant defence here is if the discharge resulted from damage, other than intentional damage, to the ship or its equipment and all reasonable precautions were taken after the damage happened or the discharge was discovered to prevent or minimise the discharge of the oil.¹⁸

The costs associated with the spill fall basically into two parts. The first part is the cost of the cleanup of the oil spill itself, which cleanup is undertaken by the government, semi-government, city and regional councils and similar entities. They are entitled to recover the 'discharge expenses', as they are referred to in TOMPA.¹⁹

The second part is for recovery for loss or damage caused by the spill to property and associated interests. The Act provides that a person who suffers loss or damage to property or incurs costs or expenses in dealing with protecting or mitigating the spill in relation to their property or anyone else's property is entitled to recover from the owner and master the amount of the loss, damage, costs or expenses.²⁰ This provision covers loss and damage to fishery, tourism and other private sector industries.

¹³ *Transport Operations (Marine Pollution) Act 1995* s 23. For most environmental offences the relevant Act is the *Environmental Protection Act 1994* (Qld), but that Act provides that it does not apply if TOMPA applies; s 23.

¹⁴ *Transport Operations (Marine Pollution) Act 1995* s 9.

¹⁵ The *Criminal Code*, s 23 deals with a person's criminal responsibility for an act or omission that happens independently of the person's will or for an event which is accidental. The *Criminal Code*, s 24 deals with a person's criminal responsibility for an act or omission done under an honest and reasonable, but mistaken, belief in the state of things.

¹⁶ *Penalties and Sentences Act 1992* (Qld) s 5.

¹⁷ *Ibid* s 67A.

¹⁸ *Ibid* s 28(1)(b).

¹⁹ See Part 13 of the Act, especially ss 111, 112 and 115.

²⁰ *Transport Operations (Marine Pollution) Act 1995* s 132F.

As mentioned above, to enliven jurisdiction under TOMPA 1995 the spill needs to occur in or subsequently enter coastal waters.²¹ It basically comprises the first three miles offshore, which was the agreement made between the Commonwealth and the States in the *Offshore Constitutional Settlement 1979*, which was subsequently given legislative effect.²²

Before moving to subsequent events, it is worth noting that the relevant IMO International Convention, the *International Convention on Civil Liability for Bunker Oil Pollution Damage 2001* (Bunkers Convention 2001) came into force internationally on 21 November 2008 but Australia only became a party to this convention in June 2009. This is after the *Pacific Adventurer* spill on 11 March so the Bunkers Convention 2001 did not apply, but if a similar spill should now occur then both the Commonwealth legislation giving effect to the Bunkers Convention and the Queensland state legislation would apply.²³ Of course, only one of the parties should proceed with the prosecution as this has been the case in the past as the two relevant agencies work fairly well together.

3.1.1 Establishing and Administering the Limitation Fund

Five companies associated with the Swire Shipping Company, and in particular Swire Navigation Co Ltd and Bluewind Shipping Ltd, as First Applicants, brought an application before the Federal Court, Brisbane, seeking a declaration of the right to limit and orders for the procedures for administering the limitation fund. The respondents were the State of Queensland and the 'Owners of the Cargo lately laden Aboard the Ship 'Pacific Adventurer' and all other Persons Claiming to be Entitled to Claim Damages ...'. The application was not opposed and, on 15 September 2009, Dowsett J, the nominated Admiralty judge in Brisbane, made declarations and orders.²⁴

They included that the applicants were entitled to limit their liability under the *Convention on the Limitation of Liability for Maritime Claims 1976* arising from the incident and that the limit of liability was \$16 891 198.74 plus interest at 7.25 percent from 11 March 2009, the date of the incident, to the date when the fund was actually constituted. The orders included that the fund be constituted by 29 September, the Applicants advertise the fund in the newspapers nominated in the order and other administrative matters, including that the Fund be administered 'by order of the court or as agreed between the Applicants and the First Respondent'. The Applicants were ordered to pay the First Respondent's costs of and incidental to the Application.²⁵ All of these orders are fairly usual ones for the constitution of a fund and the steps to let possible claimants know that they have to make contact and lodge their claims or they will be shut out from doing so.

Swires subsequently paid the sum into court to constitute the fund, approximately \$17.5 million, and the advertisements were placed in suitable newspapers and other known interested parties served with the court papers. Swires nominated an agent to assist the processing of the claims and Queensland government officers also assisted the claimants. Maritime Safety Queensland (MSQ) was the main controller of the oil spill as it was in their jurisdiction under the National Plan, thus it was logical that MSQ should assist local government and state government departments to make their cleanup claims. Some of the private sector claimants retained solicitors, with a well known firm that acted regularly for the fishing industry in the region being the main firm.

Although these events run well into 2010, it is convenient to mention that all of the councils and other government departments were paid their cleanup costs out of the trust fund monies paid by Swires together with an initial payment from Australian Maritime Safety Authority (AMSA) under the National Plan. This came to about A\$13.5 million in total. The Queensland government, having stated that it would stand last in the line for payment from these monies, is still owed about A\$19 million out of a total of cleanup costs of about A\$32 million.²⁶ It will see if there are sufficient funds available from the limitation fund in the Federal Court and any further sums will be repaid from the shipping levy mentioned above.

²¹ The phrase 'coastal waters' is defined partly in the TOMPA Dictionary and partly in the *Acts Interpretation Act 1954* as — '(a) the parts of the territorial sea of Australia that are within the adjacent area in respect of the State, other than any part mentioned in the *Coastal Waters (State Powers) Act 1980* (Cth), s 4(2); or (b) any sea that is on the landward side of any part of the territorial sea of Australia and within the adjacent area in respect of the State, but is not within the limits of the State' s 36.

²² See Michael White, *Australian Offshore Laws* (Federation Press, 2009) ch 2.

²³ See Nicolas Gaskell and Craig Forrest, 'Marine Pollution Damage in Australia: Implementing the Bunker Oil Convention 2001 and the Supplementary Fund Protocol 2003' (2008) 27 *University of Queensland Law Journal* 103, and Nicolas Gaskell, 'The Bunker Pollution Convention 2001 and Limitation of Liability' (2009) *The Journal of International Maritime Law* 477-494.

²⁴ The Court Order of 15 September 2009, File No. 214 of 2009, Brisbane Registry of the Federal Court of Australia.

²⁵ *Ibid.*

²⁶ The Department of Main Roads and Transport is the Queensland government entity still seeking further repayment for its cleanup costs.

As to the limitation fund in the Federal Court, there were about 68 applicants for compensation comprised of numerous fisheries claims, some tourist claims and Orica claimed for the value of their cargo lost in the containers that went over the side. A sensible cooperative arrangement amongst the Queensland government (MSQ), the Commonwealth government (AMSA) and resources provided by the ship owner was formed to scrutinise all claims and, if possible, agree on the claims in a joint recommendation to the court.²⁷ This process is still continuing.

3.1.2 Prosecution of the Master and Owners

The claims mentioned immediately above related to cleanup costs and loss and damage caused by the oil spill and, to some extent, for the lost containers spoiling some prawning ground area. However, the prosecution under TOMPA 1995 already mentioned was a different matter and for this the Queensland Government brought charges on indictment against the Master and Owner. For a charge on indictment to proceed to trial a committal in the Magistrates Court is held in at the end of which the magistrate decides if there is a case to answer; the test basically being whether a jury properly directed could find the accused guilty of the charge. It seems likely that the charge will be defended, apparently on the ground mentioned above that the oil discharge resulted from damage to the ship and all reasonable precautions were taken after the damage happened or the discharge was discovered to prevent or minimise the discharge of the oil.²⁸ It is common ground that the containers that went over the side did damage the ship's hull, which resulted in the oil being spilled. A great deal of expert evidence is likely to be called and the legal issues have no precedent in Australian law. The outcome will be reported in the 2010 'Update'.

3.1.3 Pollution Levy to Recover the Costs of the Spill

An agreement was made between the Commonwealth and the Queensland governments whereby if the costs and damages of the *Pacific Adventurer* spill exceeded those in the limitation fund then the Queensland government's claim would come last and any costs not recovered would subsequently be recovered from the shipping industry.²⁹ This was to be done as part of the Protection of the Sea Levy which is administered by AMSA. A fairly small initial levy was set for 1 April 2010, which then came to 14.25 cents per net registered tonne, payable by shipping liable to the existing levy and the Minister confirmed that the policy was for this to remain in place until the costs were recovered. Also and on another point, the Minister announced that Australia would initiate steps in the IMO for the limitation amount under the Limitation Convention to be raised as the current cap had been too low to cover this spill and it was likely it would occur with other spills as well.³⁰

The various issues about the containers and oil spill from the *Pacific Adventurer* are still continuing although it has been decided that the containers lost overboard are to remain on the bottom in the deep water where they came to rest. The 'Update' next year will inform readers of further developments.

3.2 Montara Oil Rig Spill (West Atlas Platform)

During 2009 there was also a spill from an offshore oil rig as on 21 August 2009 the West Atlas oil rig began leaking oil and gas, which rig was situated in the Montara oil field off the Kimberley coast, off the north-west of Australia, in the Indian Ocean. The rig was owned by Seadrill, and operated by PTTEP Australasia, a subsidiary of PTT Exploration and Production which in turn was a subsidiary of PTT, the Thai state-owned oil and gas company. The 69 workers on the rig were evacuated and attempts commenced to plug the leak and on 1 November, during one such attempt, a fire broke out on the rig destroying most of it as the escaped oil and gas burned on and around it. The fire was largely extinguished when, on 3 November 2009, the leak was finally stopped by pumping mud into a relief well that had been drilled under the sea bed and intersected the West Atlas pipeline by the West Triton mobile drilling rig.

Over the approximate 11 weeks of the spill it is not known how much oil escaped but at its height the surface oil slick was estimated at 180 kilometres (110 miles) long and covering some 6000 square kilometres sea surface. It extended towards the Australian west coast and into Indonesian waters but did not get ashore in any area.

²⁷ The authors are indebted to Mr John Kavanagh, Acting Director (Maritime Services), Maritime Safety Queensland, for assistance with these facts.

²⁸ *Transport Operations (Marine Pollution) Act 1995* s 28(1)(b).

²⁹ *Australian Maritime Digest*, 1 September 2009.

³⁰ *Ibid.*

Chemical dispersants were sprayed regularly, organised by the owners and AMSA under the National Plan.³¹ Some marine animals, fish birds and other wild life were definitely harmed but the amount of it is unknown as most of it occurred well offshore. A characteristic of an offshore spill is that the marine life can escape from the contaminated area by swimming or flying clear or away from it. Oil, being a natural product, gradually breaks down into its natural constituents over time when left alone.³²

On 5 November 2009 the Minister announced the appointment of a commission of inquiry into the spill.³³ The commissioner was Mr David Borthwick, who was given the powers of a royal commission, and he is well into the evidence but he had not handed in his report at time of writing. The independence of the inquiry was slightly clouded by Mr Borthwick being a former head of the relevant regulating department as the conduct of the department as well as of the companies concerned with the operations were to be under scrutiny.

The evidence given to the commission included that from the operations manager from Seadrill Ltd that a larger pressure cap that should have been installed had not been installed and that this left the smaller cap vulnerable to corrosion and the well vulnerable to blow out. The situation was that the only mechanical preventer to blow out was the casing 'shoe' and this did not conform to good oil field practice.³⁴ Subsequent evidence from the onshore manager of the West Atlas rig was that the cement 'shoe' for the rig was not properly poured and that he had insufficient experience to recognise what had happened in the pour was problematic.³⁵

The main legislation covering offshore oil rigs is the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) but most of the Act is devoted to operational issues. It is respectfully suggested that there are insufficient international conventions and subsequent laws governing the safety and marine environmental protection aspects of offshore oil rigs. If there was in place a system such as the IMO conventions for compulsory insurance and safety controls for oil spills from ships in place for offshore oil rigs the system would be much improved.³⁶

The consequences from the Montara oil rig spill are still being worked out and they will be addressed in the 2010 'Update'.

4 Overview of Maritime Cases

4.1 Marshall's Costs: Liability if both Parties Give Guarantees

In *EMAS Offshore Pty Ltd v The Ship "APC Aussie 1" (No 2)*³⁷, Rares J in the Federal Court of Australia, was called on to consider the interaction between r 41 and r 53 of the Australian *Admiralty Rules 1988* (Cth), where two parties gave undertakings to pay the Marshall's costs and expenses in relation to the arrest of a ship. The plaintiff, EMAS Offshore Pty Ltd (EMAS), was the arresting party and paid A\$100,000 into court towards Marshall's costs and expenses under a r 41 undertaking. Then APC Marine Pty Ltd (APC), the owner of the arrested ship, also paid an amount towards those same costs to the Marshall under r 53 for the release of the arrested ship, the *APC Aussie 1*. Both parties sought that the other party should actually pay and they have their money back.

EMAS argued that the undertaking given by APC was to secure the ship's release and so all of the costs should come out of its fund. In contrast, APC claimed that the undertaking provided by the arresting party, EMAS, should stand and that the application for arrest constitutes an undertaking to the Court to pay the costs and expenses for the arrest.

³¹ Ibid.

³² The International Tankers Owners Pollution Federation Ltd, 'About Marine Oil Spills' <<http://www.itopf.com>>.

³³ Martin Ferguson, 'Minister Announces Details of Montara Commission of Inquiry' (Media Release, 5 November 2009).

³⁴ 'Good oilfield practice not followed, inquiry told' *West Australian News* (online), 16 March 2010 <<http://www.businessday.com.au/wa-news/good-oilfield-practice>>.

³⁵ Andrew Tillett, 'Oil rig valve flaw did not cause alarm: inquiry', *West Australian News*, (online) 18 March 2010 <<http://au.news.yahoo.com/thewest/a/-/wa/6947823/oil-rig-valve-flaw-did-not-cause-alarm-inquiry/>>.

³⁶ For a book on the IMO conventions and the Australian laws relating to oil spills from ships see White, *Australasian Marine Pollution Laws* (The Federation Press, 2nd ed, 2007).

³⁷ [2009] FCA 1583. Note that this case relates to a number of motions also heard in the Federal Court in the 2009 period. *APC Marine Pty Ltd (ACN 119 763 012) v The Ship 'APC Aussie 1'* [2009] FCA 690 concerned the successful application of APC Marine Pty Ltd for arrest of the 'APC Aussie 1'. *EMAS Offshore Pty Ltd v The Ship 'APC Aussie 1'* [2009] FCA 872 concerned an application by APC Marine Pty Ltd to amend their writ to name the bareboat charterer, Trident Darwin Joint Venture Pty Ltd, as the only relevant person in their proceeding against the 'APC Aussie 1'. The application was rejected.

In coming to his decision Rares J considered the case of *Patrick Stevedores No 2 Pty Limited v Ship MV "Turakina" (No 2)*,³⁸ where Tamberlin J stated that it was neither necessary nor appropriate to approach the undertakings, as then provided for in the Rules, on the basis that they were mutually exclusive. He also said that the undertakings did not have to be read down so as not to cover costs or expenses encompassed by other undertakings given by other persons. He also observed that, of course, the Marshal could not claim double reimbursement in respect of the same costs or expenses.

In his reasons for judgment Rares J distinguished between the expenses covered by a rule 41 undertaking, and a rule 53 undertaking, based on a literal reading of the Rules. The r 41 undertaking is for costs and expenses first, in relation to the *actual* arrest, and secondly, in relation to preserving or maintaining the ship while under arrest. The r 53 undertaking covers those expenses in relation to maintenance of the ship while under arrest, and costs and expenses associated with its release from arrest.

His Honour held that giving effect to APC's argument requiring the arresting plaintiff to cover all of the expenses in relation to an arrest could result in a serious inhibition on the exercise by a plaintiff of its rights to arrest. Rares J also held that this construction of the rules did not lie easily with the requirements of r 52(1), r 53, and form 19, which establish the prima facie position that the person seeking release of the ship is liable to pay all of the costs of and in connection with the custody and release.

In the result, Rares J held that EMAS would pay the costs and expenses relating to the actual arrest itself, and that APC should pay the costs of maintenance under arrest and the release, with any remainder being held as a security against further liability. His Honour held that this allocation of responsibility reflected the prima facie distribution of the burden of the undertakings in r 41 and r 53 which EMAS and APC assumed. So His Honour held that it was the chronology that decided the matter so the initial arrest was paid by the arresting party and the costs thereafter of maintenance and release were to be paid by the party seeking the release of the vessel. Of course if no party sought release then the arresting party would need to pay all costs and hope that it recovered those from the sale of the vessel in due course if it succeeded in its claim.

4.2 Fisheries Arrest

In *Australian Fisheries Management Authority v Su*³⁹ the Full Court of the Federal Court (Black CJ, Mansfield and Bennett JJ) had to consider an appeal on whether an arrest of a foreign fisheries vessel was lawful. *The Mitra*, a Taiwanese flagged fishing vessel was boarded by a Royal Australian Navy patrol boat some seven nautical miles inside the 200 nautical miles Australian Fishing Zone (the AFZ).⁴⁰ The Respondent was prosecuted for the offence of having a foreign boat equipped for fishing in the AFZ under ss 101(1) and 101(2) of the *Fisheries Management Act 1991* Cth (the Fisheries Act). Strict liability applies to the offence, although the defence of mistake of fact is available under s 9.2 of the *Criminal Code* (Cth).

The primary judge found that the defence of mistake of fact applied so the charge should be dismissed. He was convinced that the master, having placed his vessel 11.6 nautical miles north of the 'red line' marked as the outer limit of the AFZ on his Geographical Positioning System (GPS), believed he was outside the AFZ. On appeal the appellant argued that the primary judge erred in finding that it was a mistake of fact and he should have found that it was a mistake of law, which was no defence. The content of this submission was that the respondent master was aware of his own position in absolute terms, but was unaware of the position of the AFZ according to law. This would constitute a mistake of law and would not provide the respondent with a defence.

The three judges of the appellate court found that the trial judge had not fallen into error, that the mistake was one of fact and that the appeal should be dismissed with costs.⁴¹ Particularly, the court noted that the respondent's mistake was not a mistaken belief about the position of the AFZ boundary, but was a mistake about the *position of his vessel in relation to the AFZ boundary*. The court distinguished the case of *Ostrowski v Palmer*,⁴² where Mr Palmer believed that it was legal for him to fish for rock lobster in the area in which he was fishing but in fact it was not legal at all. In that case, Mr Palmer held no mistake about any of the *factual elements* of the charge, but was mistaken in believing that the laws of Western Australia did not prohibit that activity in that place. On this appeal the key element as put by Mansfield and Bennett JJ was: '[a] mistake as to

³⁸ (1998) 84 FCR 506 at 509E-F.

³⁹ [2009] FCAFC 56 (21 May 2009).

⁴⁰ The outer limit of the Australian AFZ is the same as that for the EEZ.

⁴¹ Black CJ gave his own separate judgment but essentially agreed with the reasons of Mansfield and Bennett JJ, who gave a joint judgment.

⁴² (2004) 218 CLR 493.

the location of, or boundary of, the AFZ would be a mistake of law'.⁴³ However, the court held that the master was mistaken as to his vessel's position in relation to the boundary, so it was a mistake of fact.

A second ground of appeal challenged the primary judge's finding that the master was actually mistaken in his belief as to the vessel's position. Particularly, the appellant challenged the credibility of the evidence given by the master and the vessel's chief engineer, submitting that the primary judge failed to take into account several inconsistencies in the evidence before the court.

The court on appeal stressed that it would only be in a clear case that an appellate court would overturn a finding of credit by a judge who had the benefit of hearing evidence first-hand, referring to the High Court decision of *Paterson v Paterson*.⁴⁴ The court was convinced from the reasoning in the judgment at first instance that His Honour had turned his mind to each of the inconsistencies referred to in the appellant's case, even though that judgment did not refer to each and every inconsistency specifically.⁴⁵

The final ground of appeal challenged the primary judge's construction of the requirement that the mistaken belief be 'reasonable' under s 9.2 of the *Criminal Code* (Cth). The appellant submitted that the primary judge erred in considering whether it was reasonable for the master to proceed on his mistaken belief, rather than considering whether the mistaken belief was reasonable in the first place.

This ground of appeal was also rejected. The court held that, even though the phrasing noted above may have been an incorrect construction of the law, the judge at first instance applied the correct formulation of the law in coming to his conclusion that the appellant's submission should fail.⁴⁶ Accordingly, the appellant could not prove an error of law on the part of the primary judge so the arrest was not lawful and the appeal was dismissed with costs.

4.3 Pollutions Laws Relating to a Livestock Carrier

In *Australian Maritime Safety Authority v Livestock Transport & Trading*⁴⁷ another panel of the Federal Full Court (Dowsett, Rares and Gilmour JJ) heard the appeal from the decision of a single judge of the Federal Court of Australia, of which the decision at first instance was summarised in the 2008 'Update'. The case concerns the order of a surveyor of AMSA preventing a Kuwaiti registered vessel, the *MV Al Messilah*, from loading livestock in Victoria until she complied with the AMSA's requirement that it be fitted with a holding tank or treatment plant to deal with livestock sewage. The order was made in accordance with Australian Marine Orders Part 43 par 12.2 and appendix 4, cl 6.6. Those orders applied the standards for equipping ships set by the Regulations for the Prevention of Pollution by Sewage from Ships contained in Annex IV to the *International Convention for the Prevention of Pollution from Ships 1973*, as modified by the Protocol of 1978 (MARPOL 73/78).⁴⁸

Livestock Transport challenged the validity of those orders as being beyond the AMSA's power to make regulations under the *Navigation Act 1912* (Cth) (the Act). The primary judge found for Livestock Transport on the grounds that a foreign ship's compliance with Annex IV could be secured only by its flag state and that an Australian authority could not order its compliance.

The appellate court gave a joint judgment of all three judges and the decision turned on an analysis of the wording of the relevant statutes, and the parliamentary intention that they evinced, as well as consideration of the rules of international law governing the interaction between a state and a foreign-flagged vessel. The court recognised that comity among trading nations has allowed the law of the flag of the ship to govern the internal administration of the ship, so long as the ship's internal affairs do not impact on the peace or dignity of the port state (sometimes known as the 'internal economy rule'). The court found that the interests of Australia are engaged by ships which seek to load cargo here and sail in Australian waters when those ships are not equipped to an appropriate standard. The court noted that the fact that this standard was internationally recognised had particular weight in engaging the port state's interests.

⁴³ *Australian Fisheries Management Authority v Su* [2009] FCAFC 56 (21 May 2009) at [18].

⁴⁴ (1953) 89 CLR 212.

⁴⁵ *Australian Fisheries Management Authority v Su* [2009] FCAFC 56 (21 May 2009) [38]-[39].

⁴⁶ *Ibid* [52]-[56].

⁴⁷ [2009] FCAFC 10 (10 February 2009).

⁴⁸ [2004] ATS 9.

On the decisive issue of statutory interpretation, the court found that the limited recognition of Annex IV in Division 12C of the Act did not evince a legislative intention to withdraw the subject matter of Annex IV from the regulation-making powers of the Authority under ss 190B(1) and 257(1) of the same Act. These sections empower the Authority to create a range of regulations governing the construction and environmental standards of foreign-flagged vessels. The court considered that leaving regulation of sewage treatment (and similar matters under Annex IV) to the flag state could result in unregulated ships sailing in Australian waters where the flag state of those ships had not given effect to Annex IV (even though the vessel may have a certificate of compliance from its flag state).

The court noted the trend towards unilateral action by port states in enforcing environmental standards against foreign-flagged vessels, citing provisions of the British *Merchant Shipping Act 1854* (Imp) for historical context.

Further, the court observed that the *United Nations Convention on the Law of the Sea 1982*⁴⁹ provides that port states may establish particular requirements for the prevention, reduction, and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports (Art 211 r 3). Accordingly, the court was of the opinion that international law did not support Livestock Trading's position that only the flag state was intended to have jurisdiction over the compliance of its vessels with Annex IV. The court made these observations recognising that the case did not turn on their resolution, and despite the fact that neither party had made submissions on this issue.⁵⁰

The argument by Livestock Trading that ss 190B(1) and 257(1) were impliedly repealed by the addition of Division 12C was rejected and the court found that, while division 12C gave the Authority the power to enforce compliance of Australian-flagged vessels, these powers were not inconsistent with enforcing compliance of foreign-flagged vessels under another section of the Act.⁵¹

The appeal was allowed and the original decision by AMSA to enforce compliance was upheld as a valid exercise of legislative power. This case stands strongly for the proposition that the AMSA has broad powers of port state control under the *Navigation Act 1902* (Cth) and other legislation to control the standards of foreign vessel's that use Australian ports.

4.4 APL Sydney Ship Breaks Gas Pipe Line in Port Phillip Bay, Melbourne

On 13 December 2008 in Port Phillip Bay, near the port of Melbourne, the container vessel *APL Sydney* was anchored whilst awaiting a berth in the port. Heavy weather set in and the ship dragged her anchor and hooked up a submarine ethane gas pipeline jointly owned by BHP Billiton Petroleum (Bass Strait) Pty Ltd and Esso Australia Resources Pty Ltd which was laid across the bottom of the bay. In attempting to clear the anchor and weigh it, the ship broke the pipeline. On 23 January 2009 the shipowner established a limitation fund in the Federal Court (in the sum of A\$32 112 540). Multiple litigation ensued and during 2009 one aspect was decided by the court and in 2010 there were more.⁵² This Update will just deal with the 2009 case and future 'Updates' will deal with subsequent cases, including the likely appeals.

*Qenos Pty Ltd v Ship "APL Sydney"*⁵³ (Finkelstein J of the Federal Court) was an action to decide a preliminary point of law. There were four actions in negligence commenced against Strong Wise Ltd, the owner of the *APL Sydney*, and in each action Strong Wise Ltd claimed that its liability was limited by the *Limitation of Liability for Maritime Claims Act 1989* (Cth) ('the Act'), which brings into Australian domestic law the terms of the *Convention on Limitation of Liability for Maritime Claims 1976* (the Convention).

Two of the four plaintiffs, Huntsman Chemical Co (Huntsman) and Qenos Pty Ltd (Qenos) suffered no direct damage to property as they did not own the pipeline or lose gas directly in it. Their claims were damages for negligence for pure economic loss because the disruption of the flow of ethane gas through the pipeline to their chemical factories caused them to lose production for a time and then incurred higher costs as they had limited

⁴⁹ [1994] ATS 31.

⁵⁰ Ibid [37]-[38].

⁵¹ Ibid [60].

⁵² One 2010 decision was *Strong Wise Ltd v Esso Australia Pty Ltd* [2010] FCA 240 (18 March 2010) by Rares J. Strong Wise sought to create just one limitation fund in relation to the *APL Sydney* events. Esso Australia submitted that the claims against Strong Wise arose out of two distinct acts of negligence, and that accordingly, a separate limitation fund should be created for each occasion of negligence. The court considered in depth the legal requirement for 'distinct occasions' under the Convention, coming to the conclusion that the claims against Strong Wise did indeed arise from two distinct acts on the part of the '*APL Sydney*'.

⁵³ [2009] FCA 1090.

further supply and had to pay for alternative means to produce their products. These particular 2009 proceedings concerned whether these two claims could be brought outside the Convention despite the Convention's terms precluding any claim being made outside of its framework and, if the claim came under the Convention, whether the pure economic loss claimed by Huntsman and Qenos was recoverable.

The facts of the *APL Sydney* incident are remarkably similar to the rupture of the gas pipeline laid under Botany Bay, near Sydney, in 1971 when the dredge *Willemstad* broke an oil pipeline. Certain companies claimed for pure economic loss due to having to truck their product around Botany Bay rather than sending it through the pipeline at much less cost. The Australian High Court held that there could be an exception to the general common law rule that pure economic loss did not sound in damages when the majority held that damages are recoverable where the defendant has knowledge, or the means of knowledge, that a particular person, not merely a member of an unascertained class, would be likely to suffer economic loss from the negligent act or omission.⁵⁴

Returning then to the instant case arising from the Port Phillip incident, one notes that this was an argument, not about the common law of negligence, but about the interpretation of the terms of the *1976 Limitation Convention*. Article 2 sets out the claims which are subject to limitation of liability, including:

- claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom (Article 2(1)(a));
- claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage (Article 2(1)(b)); and
- claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations (Article 2(1)(c)).

The plaintiffs in these proceedings submitted that Article 2(1)(a) does not apply to their claims for pure economic loss. The substance of their argument was that the 'consequential loss' referred to in Article 2(1)(a) must flow from concrete damage to people or property suffered by the same party. The effect of this argument is that any consequential damage suffered by a party that does not also suffer property or personal damage will be outside the limitation of liability provided for in the Convention.

Finkelstein J put the question he had to decide as whether in a 'claim for economic loss is covered by the 1976 Convention'.⁵⁵ His Honour held that the words of the convention should be read according to their plain and ordinary meaning, and that the plain meaning of Article 2(1)(a) was to limit liability in respect of claims for third-party consequential damage arising from direct damage to a second party. His Honour considered this conclusion was consistent with the English positions in *The Breydon Merchant*⁵⁶ and *Aegean Sea Traders Corporation v Repsol Petroleo SA*.⁵⁷

Having found that the plaintiff's claims would be limited under Article 2(1)(a), Finkelstein J proceeded to consider whether the claims would also fall under Article 2(1)(c). This required a consideration of what 'rights' Qenos and Huntsman had in relation to the pipeline, and if the conduct of the *APL Sydney* could constitute and 'infringement' of those rights. His Honour considered that the word 'rights' in the expression 'infringement of rights' includes a legally enforceable claim which results from the act or omission of another person. Thus if a system of law provides that an act or omission by A which causes damage to B gives rise to a cause of action by B, that system confers a right on B and a correlative duty on A. Accordingly, His Honour found that a claim in tort, negligence in this case, for pure economic loss would fall within the purview of Article 2(1)(c) provided the other criteria were satisfied.⁵⁸ He then invited argument as to what orders should follow from his findings. However, the outcome was that these two actions could not be brought separately and the claims these

⁵⁴ *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529.

⁵⁵ *Qenos Pty Ltd v Ship 'APL Sydney'* [2009] FCA 1090 [7].

⁵⁶ [1992] 1 Lloyd's Rep 373.

⁵⁷ [1998] 2 Lloyd's Rep 39.

⁵⁸ *Qenos Pty Ltd v Ship 'APL Sydney'* [2009] FCA 1090 [37]. Finkelstein J made the point that although the Australian jurisdiction was a common law one the 1976 Convention also covered civil law countries and that in most civil law countries it is permissible to bring a claim for pure economic loss; [38].

companies had would need to be brought under the Convention and the total amount available for distribution to all claimants would be the amount paid into court.

4.5 Action by Ship Owner Against Brokers Relating to a Charter Party

In *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 3)*⁵⁹ (Finkelstein J) BHPB was the disponent owner by charter of a bulk carrier named *Global Hawk* which BHPB had available for sub-charter and, having had an offer through its brokers, intended to sub-charter the vessel to New Century International Leasing Co (NCI). However, by arrangement between brokers and through some of their staff not paying care to the parties involved in the hire the charterer was changed and the vessel was delivered into the service of Nera Shipping Co Ltd (Nera), who defaulted on the hire. BHPB won an arbitration award against Nera for over US\$1 million but this was not able to be enforced. So, BHPB brought a claim against its own shipbroker, Seascope, and Nera's shipbroker, Cosco, to recover its loss.

4.5.1 The Claim Against Cosco

BHPB's alleged that Cosco breached s 52 of the *Trade Practices Act 1974* (Cth) (the Act) by engaging in misleading and deceptive conduct, breached s 53B(bb) by falsely representing that a particular person had agreed to acquire services from BHPB, breached s 53(d) by representing that it had an approval or affiliation with NCI that it did not, was negligent, and wrongly warranted that it had the authority of NCI to conclude a charterparty.

His Honour dealt first with the breach of warranty of authority. This required proof that Cosco represented that it had authority to act on behalf of NCI, and that Cosco's representation caused BHPB to engage in conduct which, but for the representation, it would not have engaged in.

His Honour held that both of these requirements were clearly met. Cosco had stated in correspondence between the two shipbrokers that it was acting on behalf of NCI. Regarding the second requirement, BHPB had convinced itself that NCI was a reliable company to do business with. The identity of NCI – and therefore, Cosco's authority to represent NCI – was important to BHPB in its decision to enter into the charterparty. His Honour considered that the cause of action was established once the plaintiff, relying on a false representation, entered into the transaction with an entirely different party.⁶⁰

The Court proceeded to find that the statutory actions (with the exception of s 53(d)) and the action in negligence against Cosco were also successful. Cosco had not strongly disputed these allegations, instead submitting that damages awarded for negligence and breach of s 52 of the Act should be reduced due to the contributory fault of BHPB in negligently delivering the vessel to Nera. The defence submitted that BHPB should have been alerted to the fact that they were not delivering the vessel to NCI upon receiving Nera's voyage plan. However, Finkelstein J was unconvinced that the content of the voyage plans would have alerted BHPB that anything was amiss, and found against Cosco on the issue of contributory fault. In the result, Finkelstein J found for BHPB in every claim against Cosco, except the alleged breach of s 53(d).

4.5.2 The Claim Against Seascope

The claim of BHPB against their own shipbroker, Seascope, included an allegation that Seascope breach of contract in relation to their retainer with BHPB and were also negligent. In proving breach of retainer, BHPB alleged a breach of three possible terms that would be implied into Seascope's retainer. The first two implied terms involved a duty to pass on information relevant to the negotiation, performance, and operation of the charterparty. The third implied term was that Seascope would act with due care and skill in carrying out the services provided for in the retainer.

Finkelstein J rejected the first two implied terms as having no basis in law. His Honour agreed that Seascope was bound by the third obligation of due care and skill, and further considered that this contractual duty held no more or less content than the duty of care owed by Seascope under the alternative cause of action in negligence.

⁵⁹ [2009] FCA 1087; a preliminary issue between these parties was discussed in the 2008 'Update' by Michael White and Peter Glover. *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd and Braemar Seascope Pty (No 2)* [2008] FCA 1656. That case concerned an application by Cosco to bring a cross-claim seeking apportionment of liability. That application was successful, allowing Cosco to bring a claim against Seascope for contribution.

⁶⁰ *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd and Braemar Seascope Pty (No 3)* [2009] FCA 1087 [48]-[51].

His Honour rejected the submission that Seascope had failed to act with due skill and care. Even though Nera was referred to in the correspondence between the Seascope and Cosco, the court was convinced that Seascope could reasonably have believed Nera to be a related company to NCI or a sub-charterer. Further, a detailed examination of the voyage plan for the vessel was beyond the duty of Seascope. The voyage plan was to be passed on to a third party, and Seascope was not obliged to consider the plan in any detail.

His Honour held that there was no fault on the part of Seascope, and that accordingly there was no separate basis upon which Cosco might seek to apportion liability between the two defendants. In the result he held that BHPB was in the delightful position of being able to elect which of the successful causes of action it would take to judgment and in what currency and amount.⁶¹

In an action of the same name⁶² Finkelstein J gave judgment for BHPB in December 2009. He held that BHPB should have judgment for the unpaid hire and ballast bonus in US dollars and the balance of its claim in Australian dollars. As to the US dollar portion, the judgment for the specific amount of US dollars or the Australian equivalent at the time of payment or execution. As regards the balance, the conversion should be determined on the rates existing when each debt fell due which the judge took to be the day on which the relevant invoice was sent.⁶³ He also made orders about interest payable on the judgment and as to who should pay the costs.

4.6 Disputed Lawful Arrest of Vessel

Euroceania (UK) Ltd (Euroceania) was the disponent owner of the *JBU Onyx* and the *JBU Opal*; two vessels which it had time chartered to WAM Singapore Pty Ltd (WAMS), a subsidiary of West Asia Maritime Ltd (West Asia). The parties expressly agreed that West Asia, as the parent company for WAMS, would be ultimately responsible for fulfilment of the charterer's obligations. WAMS defaulted on payment of hire for the two vessels. In response, Euroceania arrested the *Gem of Safaga* in Port Kembla, Australia as a surrogate for the two chartered vessels, acting under s 19 of the *Admiralty Act 1988* (Cth); in the action *Euroceania (UK) Ltd v The Ship "Gem of Safaga"* (Rares J).⁶⁴ Section 19 requires that to arrest a surrogate ship the same person (company) must have some ownership, charter, possession or control of the defaulting ship when the cause of action arose and also be the owner of the surrogate ship when the court proceedings for arrest are commenced.⁶⁵

West Asia applied for the writ against the *Gem of Safaga* to be set aside for failure to meet the requirements of s 19. In the evidence on the point, Euroceania sought to prove that West Asia was both in control of the *JBU Onyx* and the *JBU Opal* and also was the owner of the *Gem of Safaga* at the time of arrest. West Asia contested both points.

West Asia claimed that the arrest was not valid because, when the proceedings for arrest of the *Gem of Safaga* commenced, West Asia held only 9 of 10 shares in ownership of the vessel, the remaining share being held by Four M Maritime Private Ltd (Four M). They contended that arrest of a surrogate ship can only occur where the surrogate ship is wholly owned.

Rares J agreed with the submission of the West Asia, considering that an arrest should not occur where that arrest would interfere with the proprietary rights of a third party, in this case Four M. Particularly, His Honour stated that the statutory right to proceed *in rem* should be construed, where possible, harmoniously with concepts of the maritime law forming part of the general law of nations. The court heard evidence on a memorandum of agreement that proposed the ownership split submitted by West Asia, and this joint ownership was registered on the Indian ship register. However, Four M contributed no capital in purchasing the ship or paying for its running expenses, and had received no income from its one-tenth share in the vessel. While Rares J was not prepared to accept the submission that the registration of joint-ownership was a sham, His Honour did find that Four M's relationship to the vessel was not one of ownership. His Honour found that the memorandum of agreement created a contract capable of specific performance, and that accordingly, West Asia, as sole

⁶¹ Ibid [80].

⁶² *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd* (No 4) [2009] FCA 1448 (7 December 2009).

⁶³ Ibid [7].

⁶⁴ [2009] FCA 1467 (9 December 2009).

⁶⁵ Section 19 provides: 'Right to proceed *in rem* against surrogate ship: A proceeding on a general maritime claim concerning a ship may be commenced as an action *in rem* against some other ship if: (a) a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first-mentioned ship; and (b) that person is, when the proceeding is commenced, the owner of the second-mentioned ship'.

owners, held one share in the ship on trust for Four M. There had been no evidence that West Asia disposed to Four M its property obtainable under that agreement.

As a result the Court held that West Asia was the owner of the *Gem of Safaga* and that the arrest could not be challenged on this ground. Rares J rejected the Euroceania's alternative submission that Indian law would recognise West Asia as the sole owner, and that therefore, in accordance with the principles of private international law, Australia should accept West Asia as the sole owner. In coming to his conclusion his Honour considered the decision of the *MV "Sea Success I"*⁶⁶ and held that it was unlikely Indian law would recognise West Asia as the sole owner of the *Gem of Safaga*. On the facts Rares J found persuasive that West Asia had appointed master and crew, entered the ship with the P&I Club and otherwise acted as the owner; so he found it was the owner of the *Gem of Safaga* for the purposes of s 19 of the Act.⁶⁷

In relation to the second issue; whether West Asia had Control of the *JBU Onyx* and the *JBU Opal* at the time of the cause of action arising, Euroceania submitted that West Asia was the 'relevant person' under s 19 as it was in control of the two chartered vessels at all times, and because the charterparty established that West Asia would act as charterer.

Rares J accepted that West Asia was in control of the *JBU Onyx* and the *JBU Opal* being influenced by the evidence that West Asia decided the ports of call and the cargoes the ships were to carry. The fact that WAMS had authorities under the charterparty, and exercised authorities, did not detract from West Asia's control of the vessels. His Honour referred to the High Court decision of *Project Blue Sky Inc v Australian Broadcasting Authority*⁶⁸ in distinguishing between possession and control. In particular, His Honour highlighted the fact that s 19(a) required the relevant person to be the charterer, *or* in possession, *or* in control, of the vessel. The legislation expressly recognised the possibility that the party in effective control of the ship may not be the party who chartered, or was in possession of the ship.

Having found that West Asia was in control of the *JBU Onyx* and the *JBU Opal*, and was the owner of the arrested vessel, the court rejected the challenge to jurisdiction so the arrest was valid and the motion was dismissed.

4.7 Appeal and Cross Appeal on Liability for Injury to a Stevedore Onboard Ship

*CSL Australia Pty Limited v Formosa*⁶⁹ (Allsop P, Basten JA, and Handley AJA) was a case before the New South Wales Court of Appeal. The President of the Court, Allsop P, was formerly the Admiralty judge in the Federal Court based in Sydney, NSW, so he brought much maritime experience to the matter. Mr Formosa, a stevedore, was working on the *MV Iron Chieftain*, a vessel owned by the first appellant, CSL, and operated by the second appellant. The respondent had slipped while working on the vessel and damaged his knee. His fall was attributed to slurry which had developed on the deck as a result of the water spray dust suppression system used in the process of unloading iron fines from the ship.

Formosa sued the appellant for negligence in the District Court and was successful. The primary judge concluded that the appellant had breached its duty by not sweeping a safe path on the deck and warning the respondent not to walk in areas that might be wet. Reductions in damages were made for contributory negligence by the stevedore under s 151Z of the *Workers Compensation Act 1987* (NSW).

This appeal concerned the question of whether the primary judge erred in finding that the appellant owed a duty of care to the respondent in circumstances where the respondent was the person in charge of the system for loading and unloading the ship and the injury occurred in circumstances intrinsic to the respondent's work as a stevedore. The respondent stevedore cross-appealed as to the finding of contributory negligence and the apportionment of liability to his employer.

The Court of Appeal held that there was ample evidence for the court below to find that the appellant had breached the duty of care owed by shipowners and operators to stevedores working on their vessels. The court found evidence that the appellant could have warned the respondent only to walk on the starboard side of the ship (which was largely free from the slurry) compelling, and rejected submissions that the slurry was an

⁶⁶ AIR 2002 Bombay, 184.

⁶⁷ *Euroceania (UK) Ltd v The Ship 'Gem of Safaga'* [2009] FCA 1467 (9 December 2009) [60].

⁶⁸ (1998) 194 CLR 355.

⁶⁹ [2009] NSWCA 363 (11 November 2009).

'obvious risk' for the purposes of s 5H of the *Civil Liability Act 2002* (NSW). The restriction of access to the starboard deck was a precaution known to the appellant, but not to the respondent, and the failure to make the respondent aware of this precaution constituted a breach of the appellant's duty of care.

The court also rejected the cross-appeal on contributory negligence and apportionment. The court noted that the decision to reduce damages for contributory negligence was harsh. The respondent had complained of the danger to his employer, and suggestions that he should have ceased work on the vessel until the slurry was removed were deemed unrealistic. Their Honours considered that it was open for the judge at first instance to find no fault on the part of the Respondent. However, they were unwilling to disturb his ultimate finding on the grounds that the respondent held a position of responsibility in determining the system of loading and unloading, and was in a position to reduce the danger.

The second cross-appeal of apportionment between the respondent's employer and the appellant was also rejected. The court found no error in the primary judge's reasoning in holding the employer responsible for 40 percent of the damages and the appellant responsible for 60 percent. While the employer should have taken steps to prevent the danger through correspondence with the appellant, safety of the vessel was always the primary responsibility of the appellant. The result was that the appeal and cross appeal were dismissed and the primary judgment upheld. Orders were made as to costs but in a later application to the court these were varied.⁷⁰

4.8 Appropriate Penalty for Marine Pollution from a Ship

There are many cases heard each year in various Australian courts relating to marine pollution from ships, most of them in the state courts. One example of this is the case of *Filipowski v Hemina Holdings S.A.; Filipowski v Rajagopalan (No 2)*⁷¹ (Pain J) heard in Sydney, NSW.

The case was against the owner and the master of MSC *Carla* for the discharge of oil into Brotherton Dock, Botany Bay in contravention of s 8 of the *Marine Pollution Act 1987* (NSW). Both defendants pleaded guilty to the charge. Pain J in her conclusions on the lengthy evidence, found the ship was about 21 years old, was in class and in survey, that the leak came from a hull fracture about amidships on the starboard side and that the master had transferred oil out of it appropriately when the full facts were known to him. The master and crew assisted in every way with booms and cleaning up the oil that had leaked.⁷²

The court applied s 3A of the *Crimes (Sentencing Procedure) Act 1999* (Cth), which sets out the purposes involved in sentencing, including retribution, deterrence, community protection, and rehabilitation. Her Honour identified three major issues in dispute between the parties that would bear heavily on the sentence imposed:

1. The extent of the oil spill;
2. Whether the defendants took all necessary measures to prevent, abate and mitigate the extent of the oil spill; and
3. The maintenance of the *Carla* prior to the offence.

On the first issue, Pain J applied a conservative estimate to the amount of oil spilled, making a finding in the range of 112 to 148 litres. In answering the second issue Her Honour placed the onus of proof on the prosecutor, requiring counsel to show beyond reasonable doubt that the master acted negligently or recklessly in relation to the spill to take all necessary measures to prevent, abate or mitigate it. While the prosecution submitted evidence that the master and the owner ignored indications of a spill in favour of expediting their cargo operations, Pain J was unconvinced that the prosecutor had proved negligence or recklessness beyond a reasonable doubt, and refused to find that the conduct of the master and owner aggravated the offence.

The final issue, about the *Carla's* maintenance, was decided by reference to evidence tendered by the current technical manager of the *Carla*. This evidence disclosed that because of the age of the vessel some additional hull maintenance was required. Dry dock class inspections do not test the thickness of the hull and every fuel

⁷⁰ *CSL Australia Pty Ltd v Formosa (No.2)* [2009] NSWCA 425 (23 December 2009).

⁷¹ [2009] NSWLEC 104 (1 September 2009).

⁷² *Ibid* [110].

tank and a prudent owner is required to be more proactive in hull maintenance. While Her Honour found that the poor maintenance of the *Carla* was a factor in her sentencing decision, she noted that the sub-standard conduct of the owner in this respect was not as serious as in other cases. The court also heard expert evidence on the likely environmental impacts of the spill, which were held to be very small given its position, range, and magnitude.

Pain J found that \$150 000 was an appropriate penalty for the owner corporation, noting that the maximum penalty allowable for a corporate body was \$10 million. As to the master, Her Honour found he could not have foreseen the fatigue crack that led to the spill and as the owner was fined then there was no public benefit in dealing heavily with the master as he could not have done anything to ensure the offence did not occur.⁷³ She ordered that the master be discharged on the basis that he enter into a good behaviour bond for two years.

5 Legislative Developments

There were only small changes to the legislative and regulatory provisions passed by the Commonwealth Parliament during 2009. As in previous years, this article will mention only the federal legislation as that will be of more interest to readers than setting out the numerous new acts and amendments passed by the State and the Northern Territory Parliaments.

5.1 Border Protection and Migratory Control Amending Acts

There are only three amending Acts worthy of note and they all relate to migration, mainly driven by the ‘boat people’, and customs control.

In the *Migration Legislation Amendment Act (No.1) 2009* a number of restrictions on reviews on the merits of those claiming to be refugees or having some other lawful claim to remain in Australia after arriving illegally were ameliorated. They related to review of the applications on the merits, review relating to judicial review in the courts, mainly on questions of law, and then appeals in the court system. These amendments all repealed restrictions on the general access to the courts and the rule of law which had been legislated by the previous Howard government.

The *Migration Amendment (Abolishing Detention Debt) Act 2009* abolished the legislation put in place under the Howard government, whereby those non-citizens forcibly detained in detention centres and prisons were charged for some of the costs of their detention.

Finally as to legislation, the *Customs Amendment (Enhanced Border Controls and Other Measures) Act 2009*, was concerned in part with removal of the formerly ridiculous fiction that the commander of an Australian vessel that considered there was good reason to board a foreign vessel in the Australian zone, had to ‘request’ the other vessel to board. If the other vessel did not agree, did not respond, or even did not hear it, then the ‘request’ was deemed valid and the boarding with some sort of deemed consent was lawful. Under the amendments, the Australian law is brought more directly into line with international law and, in particular, the *United Nations Convention on the Law of the Sea* 1982, to which Australia is a party. The amendments give the boarding commander direct power to board the other vessel under certain conditions, all of which are consistent with UNCLOS or other relevant international conventions relating to the law of the sea. The substantive law is not altered, but the fiction is removed about requesting permission. Of course permission may still be requested if the commander of the boarding vessel thinks that is appropriate.

5.2 Regulations

There are three Regulations passed under their appropriate Acts during 2009 that are worthy of mention. The first, the 2009 Maritime Transport and Offshore Facilities Security Regulations, seek to establish a framework against unlawful interference with maritime transport and offshore facilities and are made under the *Maritime Transport and Offshore Facilities Security Act 2003* (Cth). The driving force behind the new regulations was the findings of a task force established in 2007 by the Office of Transport Security (OTS). The task force was charged with considering ways in which the maritime security system could be augmented to deliver more effective security outcomes.

⁷³ Ibid [143].

The first significant change was reinstatement of the requirement that 24 hour contact details be provided for all security officers. This requirement was inadvertently removed in the previous regulations. Secondly, the regulations allow for offshore facility operators to request the declaration of ship security zones around ships when in the vicinity of an offshore facility. Unauthorised entry into the declared security zone of a ship or offshore facility is an offence. Similarly, failure of an offshore facility operator to monitor access to the security zone of a ship in the facility's vicinity is an offence of strict liability.

Requirements that all ship security officers on Australian security regulated vessels carry certificates of proficiency were also provided for in the regulations. These changes were made in light of amendments to the *International Convention on Standards of Training Certification and Watchkeeping for Seafarers 1978* and the *Seafarers' Training, Certification and Watchkeeping Code*, enacted by the International Maritime Organisation. The certification process and eligibility requirements are governed by AMSA. Finally, the regulations corrected anomalies in the previous legislation, particularly in reference to the penalties provided for in the Act.

The second of the relevant Regulations related to the governance of the Great Barrier Reef Marine Park pursuant to the *Great Barrier Reef Marine Park Amendment Regulations*. These amendments include diverse minor changes contained in over one hundred pages of amendments. They relate to the laws governing a range of activities in the Great Barrier Reef and the interaction of Commonwealth law with Queensland fisheries law.

A major focus was updating the definitions of protected species in the Barrier Reef and changing catch limits on a number of species of fish. An example is Regulation 47, which aims to provide greater protection to the dugong in and around headland areas by restricting the use of set mesh nets in certain circumstances prescribed in the legislation.

The regulations also significantly change the provisions that govern permissions under the *Great Barrier Reef Marine Park Act 1975* (the Act), the principal regulations, and the Zoning Plan. These provisions are consolidated into the new Part 2A inserted into the regulations, which set out the law and process governing the creation, maintenance, and expiry of the regulated activities in the Barrier Reef. The regulations also set out provisions on the Traditional Use of Marine Resources Agreements (TUMRAs) in Part 2B. There were also a number of other minor changes.

Last year's Australian 'Update' considered the new and significant changes made to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (the Act). That legislation sought to create a regulatory framework for a wide range of activities relating to exploration and exploitation of offshore petroleum. The purpose of the *Offshore Petroleum (Safety) Regulations 2009* was to update and consolidate the *safety* regulations under the Act into one instrument. This consolidation includes the *Petroleum (Submerged lands) (Management of Safety on Offshore Facilities) Regulations 1996* (Cth), *Petroleum (Submerged Lands) (Occupational Health and Safety) Regulations 1993* (Cth), and the *Petroleum (Submerged Lands) (Diving Safety) Regulations 2002* (Cth).

In addition to this, the safety regulations were amended to allow for offshore pipelines to be regulated as 'facilities' under the regime. Other amendments include specification of offshore structures that are exempt from the definition of a 'facility' or 'associated offshore place'. These definitions and exemptions are important as they determine the regulatory regime which governs safety standards for the structure. Another minor amendment to the safety regime includes the circumstances under which revision of a safety case is possible. This is updated to include circumstances where a series of small operational changes amount to a significant or major change to the risk to health or safety at or near the facility. In this sense these changes broaden the scope of safety aspects in the offshore petroleum industry. These offshore petroleum regulations can be seen as a significant consolidation of the laws regarding safety regimes for offshore facilities although they make only a few changes to the substantive law.

6 Other Issues

6.1 Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

One of the major Commonwealth Acts that regulate marine environmental and other related offshore matters is the *Environment Protection and Biodiversity Conservation Act 1999* (the Act) and it was subjected to a review

during 2008 and 2009, with the report being released by the Minister for the Environment on 21 December 2009 (the Hawke Report).⁷⁴ It is a thoughtful and thorough report of some 373 pages with 71 recommendations.

From the maritime point of view the main recommendations include:

- (a) That the Act be thoroughly revised and renamed to more accurately reflect its objectives and called the 'Australian Environment Act' which would, of course, operate offshore as well as onshore;
- (b) It noted that in Canada there was a statutorily established Environment Damages Fund which provides a fund to guarantee that money from pollution penalties and settlements is invested to repair the damage done by the pollution. It recommends that a similar arrangement in Australia would be beneficial and recommends that the Act provide for establishment and administration of an Environment Reparation Fund. Consideration should also be given to linking the financial arrangements associated with biobanking to the fund;
- (c) That the Council of Australian Governments (the Council is comprised of the heads of the Commonwealth and the States), develop a national biodiversity banking (biobanking) system and the Act be amended to promote its use and facilitate its operation.⁷⁵

It seems likely that the government will accept most of the recommendations and if it does so then the Act as amended will be a major environmental piece of regulatory legislation, both onshore and offshore. The recommendation about an Environment Damages Fund which, no doubt, would apply to offshore oil and similar spills, would be useful but not ground-breaking. Certainly the Canadian one works well and the USA one does too. Australia achieves the same end at the moment, but not so neatly, by the agencies doing the clean-up bearing the costs until they are recoverable under the compulsory insurance regime for oil spills from ships. The scheme does not, however, extend to spills from oil rigs and no doubt the recommendation would cover that deficiency.

6.2 AHS Centaur Found at Last

The Australian Hospital Ship *Centaur* was fully lit, boldly marked with red crosses to indicate a hospital ship, not zigzagging and just steaming north off the Australian east coast near Brisbane when it was torpedoed and sunk by the Japanese submarine I-177 in a cowardly attack⁷⁶ on 14 May 1943. On 20 December 2009, after many searches and false alarms of findings, the professional search team led by Mr David Mearns found the vessel some 30 miles offshore. This was the same Mr Mearns as had found the wreck of the Australian cruiser, HMAS *Sydney*, in the Indian Ocean, as mentioned also in the 2008 Australian 'Update'. The costs had jointly been funded by the Commonwealth and Queensland governments and there was much quiet satisfaction that, at last, the families, friends, and others who cared about the tragedy finally knew that the resting place of the 268 people, mostly nurses and other carers, whose lives were lost in the sinking. The Minister for the Environment announced that the site would be protected under the *Historic Shipwrecks Act 1976* (Cth).⁷⁷

In January 2010 Mr Mearns' team returned to take numerous photographs and a bronze plaque donated by the Centaur Association, and a CD with messages from family members of the victims was placed on the *Centaur*⁷⁸ on the forward deck near No. 1 hatch. One of the survivors, Mr Martin Pash, called on the Japanese government to make an express apology for the sinking, stating that it 'would be the decent thing to do.'⁷⁹ Numerous church services and other commemoration ceremonies have been held since its resting place has been established. Now that *Centaur* has finally been found the only major mystery in this category is the resting place of the Australian submarine *AEI* that was lost with all hands on 14 September 1914 when in the waters of what is now Papua New Guinea. It lies somewhere off Rabaul and was lost, presumably by some navigational accident, when searching for the German Pacific battle fleet at the outbreak of World War I.

⁷⁴ *The Courier Mail*, 22 December 09; see Minister for Environment (Media Release, 21 December 2009)

<<http://www.environment.gov.au>> and follow prompts. It was a review and report by Dr Alan Hawke, a former senior public servant, hence 'the Hawke Report'. See <<http://www.environment.gov.au/epbc/review/publications/final-report.html>>.

⁷⁵ *Hawke Report*, Recommendation 7.

⁷⁶ One of the authors, White, had been a submariner in an earlier career and has some knowledge of the conduct and laws of submarine attacks.

⁷⁷ Peter Garrett, 'Centaur protected as an Historic Shipwreck' (Media Release, PG/408, 22 December 2009).

⁷⁸ *The Courier Mail*, 16-17 January 2010.

⁷⁹ *The Courier Mail*, 22 December 2009.

7 Conclusion

As mentioned in the Introduction, the Australian scene offshore is a busy one. It may be seen that with the increased activity in all of the main maritime activities that there is an increase in the number of incidents that occur. The Australian ports are expanding to cope with the increasing demand from the Asian countries for increased goods, especially metals, coal and gas, and the number of ships operating off the Australian coasts are steadily increasing. Tourism is expanding, from the smaller vessels operating in the pristine waters such as the Great Barrier Reef, now to include the larger cruise liners regularly visiting Australian waters and some now being home-ported in Australian ports. All-in-all there is an increasing alertness and activity and some of the more important aspects will be reported to readers in the next 'Update'.