MARINE INQUIRIES

by

Michael White QC*

Introduction

After any shipping casualty has occurred (eg., a sinking, collision, grounding, death or personal injury due to accident at sea) it has been the custom for an inquiry to be made into its circumstances to see if steps could be taken to improve safety procedures to avoid the recurrence of a similar casualty and to investigate whether any of the mariners involved has fallen below the requisite level of expertise or conduct. Marine inquiries in Australia take several different forms, which form is determined by the Act under which they are held. There have been a number of them over the years of which two of the better known ones arose out of the collision between HMAS *Melbourne* and HMAS *Voyager* off the NSW coast on 10 February 1964.[1] These inquiries were by Royal Commission under the *Royal Commissions Act* 1902 (Cth).[2] Most inquiries, however, come under specific provision made for them by Commonwealth and State legislation which will be mentioned shortly. Like most of the maritime customs and regulations in Australia, the source of such inquires comes from English (Imperial) legislation, in this case the various versions of the *Merchant Shipping Acts*.

It is the purpose of this article to discuss some of the authorities and the legislative provisions in relation to marine inquiries. It is impracticable to discuss all of the legislation in each State so the article will concentrate on the provisions under the English legislation, then look at the Commonwealth legislation, in the *Navigation Act* 1912 (Cth), and finally the Queensland State legislation. This is followed by discussion of the principles which are generally called into play in marine inquiries. It is convenient to look at the English provisions first.

The English Provisions

The purpose and function of marine inquiries was well stated in the introduction to McMillan's 1929 book entitled *Shipping Inquiries and Courts*.[3] In England the Board of Trade then performed the functions now performed in Australia by the Departments of Transport for the States or the AMSA[4] for the Commonwealth. McMillan wrote:

> "The shipping courts are, therefore, administrative courts, which on occasion require to take (sic) judicial decisions which intimately affect the private rights of individuals. As an administrative court, the particular tribunal which is to conduct the proceedings is

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* BCom, LLB, PhD, Queensland Bar.

1 The litigation to which it gave rise was *Parker v The Commonwealth* (1965) 112 CLR 295. Justice Windeyer, in deciding for recovery for the death and injured among the civilian persons onboard (dockyard workers) observed, at 301-302, that members of the armed forces could not recover damages for the negligence of another member of the armed forces as no duty of care was owed, which law was overturned, except in circumstances of active war, in *Groves v The Commonwealth (1982)* 150 CLR 113 at 118-119,133-134,136,137. The other litigation was *The Commonwealth v Verwayen* (1990) 170 CLR 394, which turned on whether the Commonwealth was estopped or had waived its right to take the points of the expiry of the time limit and that there was no duty of care owed by one serviceman to the other; as to which see the Note by MWD White "Aftermath of the Voyager/Melbourne Collision" (1990) 20 *QLSJ* 455. Since that time, the almost immoral stand of the Commonwealth has been reversed and it is negotiating with those persons who were injured in the collision and the dependents of those killed.

2 There were two inquiries, the second one being established to look into certain aspects of the first one.

3 ARG McMillan *Shipping Inquires and Courts* Stevens & Sons Ltd London 1929.

4 Australian Maritime Safety Authority, which was established under the *Australian Maritime Safety Authority Act* 1990, and took over many maritime functions from the Commonwealth Department of Transport from 1 January 1991.

> nominated by the Board of Trade, and is thereby at once vested with a special jurisdiction, which is entirely distinct from its ordinary jurisdiction. As representing the public interest the Board of Trade prepares the case and conducts the proceedings in court, and the court therefore has at its disposal the expert knowledge of the government department which is directly concerned. In all the cases the court is required to make a formal report of its decision, and of the reasons therefore, to the Board of Trade, together with such recommendation as it thinks fit. As the same time, except in certain special circumstances, the judges of the court are judges of the ordinary courts of justice, and as such, persons of trained judicial habits and accustomed to proceed in correct legal form. The absolute independence and impartiality of the court is thus assured, as is also the independence and impartiality of its assessors, who are appointed by the independent authority of a Secretary of State. The court is, therefore, entirely distinct from the government department for whose assistance it was created."[5]

Under the *Merchant Shipping Act* 1894 (UK), for instance, Part VI provided for "Special Shipping Inquiries and Courts". There were two levels of inquiry under the Act, with the first being made by departmental personnel and the second, if the seriousness of the circumstances warranted it, on a quasi-judicial level. In relation to any shipping casualty Part VI, therefore, made provision for a preliminary inquiry[6] and after this was completed and the report submitted, the person who made the inquiry and the Board of Trade were given power to require a court of summary jurisdiction (or a Wreck Commissioner) to hold a formal investigation, assisted by one or two assessors.[7] The subject of the formal investigation depended on the findings in the report from the preliminary investigation. It was usually into the circumstances of the casualty or into the conduct of the master, mate, engineer, or pilot whose licences or certificates were at risk as the court had power to cancel or suspend them. Many of the remaining provisions of this Part in the *Merchant Shipping Act* 1894 (UK) are to be found in the Queensland legislation on marine inquiries, so discussion of it will be postponed until those provisions are considered. Suffice to say, the *Merchant Shipping Act* 1894 (UK) was the foundation for most of the Australian legislation concerning marine inquiries, Commonwealth and State, but much of it is not consistent with modern concepts of administrative law, particularly because the investigation aspect was mixed in with the disciplinary/penal aspect. No doubt it was for this reason that the Commonwealth legislation in recent years has moved from this style of inquiry into one where these two aspects are completely separated.

The Commonwealth Provisions

For many years the provisions for inquiries were contained in Part IX of the *Navigation Act* 1912 (Cth), "Courts of Marine Inquiry". Part IX made provision for the Governor-General to establish Courts of Marine Inquiry,[8] which were to be constituted by one or more judges assisted

5 *Supra* n.3 at 3-4

6 s.465 *Merchant Shipping Act* 1894 (UK). The importance and extent of the British *Merchant Shipping Acts* are hard to underestimate. It operated world wide and, speaking of the 1854 Act, Dr Lushington said that "It would be impossible to construe this Act without supposing it extended to our colonies...", *The Shah of Cochin* (1859) Sw Ad Rep 473. The Act covered all aspects of British shipping but there was power for the colonies to regulate their own coasting trade and repeal certain sections of the Act in so doing, ss.735 and 736, provided the Australian provisions were not repugnant to other provisions of the English Act and so came under the operation of s.2 of *the Colonial Laws Validity Act* 1865 (repugnancy), *The Union Steamship Co of NZ. Ltd v The Commonwealth* (1925) 36 CLR 130. In that case Isaacs J summarised the wide ranging effect of the *Merchant Shipping Acts* when he said at 142: "The *Merchant Shipping Acts* 1894 to 1906 treat merchant shipping as an Imperial subject. They indicate an endeavour to provide on a national basis for all contingencies of British mercantile navigation throughout the empire, partly by direct enactment and partly by optional local enactment imperially sanctioned (ss.711, 735, and 736). But the Acts in one way or another cover the whole subject."

7 s.466 *Merchant Shipping Act* 1894 (UK).

8 s.356(1) *Navigation Act* 1912 (Cth) [hereafter *NA* (Cth)]. The Court had jurisdiction to hear and determine "appeals, charges, complaints, inquiries and references under the Act" s.356(2) NA (Cth).

by two assessors.[9] The assessors were to have the skills which were appropriate to the subject matter of the inquiry,[10] so the judge had the advantage of experts who sat with the judge and heard all of the evidence. What passed between the judge and the assessors was not known to the parties or their legal representatives. This is a slight bending of one of the rules of natural justice but was the English system which had stood the test of time and was kept on in Australia. The jurisdiction of the court included jurisdiction in relation to all "casualties affecting ships, or entailing loss of life on or from ships, and as to charges of incompetency or misconduct, or of failure of duty in regard to any collision or in any matter relating to the navigation, management or working of a ship, on the part of masters, mates or engineers", where a shipwreck or casualty occurred "on or near the coast of Australia, or in the course of a voyage to a port within Australia" or to a ship (over which the Commonwealth had jurisdiction[11]).[12] The Act provided for the procedure and gave power to compel the attendance of witnesses and to order payment of costs.[13] There was power in the Minister to order a re-hearing by the court in appropriate circumstances, such as in the case of fresh evidence or apparent miscarriage of justice.[14] A court could also sit on any appeal or reference in respect of detention of a ship alleged to be unseaworthy.[15] Such an inquiry was normally preceded by a preliminary inquiry by a person appointed by the Minister and the inquirer was given wide powers.[16] Part X of the Act also made provision in relation to jurisdiction, power to detain a foreign ship that had occasioned damage, and matters relating to offences and procedures.

However, Part IX was repealed in 1990[17] and its provisions, somewhat altered, were replaced by the *Navigation (Marine Casualty) Regulations*.[18] Under these *Regulations* the preliminary inquiry is made by an "Inspector of Marine Accidents", who is given wide powers, by himself or herself or by a suitably appointed investigator, to identify the circumstances in which any incident occurred and to determine its cause.[19] The Inspector is not bound to act formally and may inform himself or herself on any matter in any way he or she thinks fit, and has wide powers to enter on ships or premises and to compel attendance of witnesses to give evidence and produce documents.[20] The evidence from such an investigation is confidential except to the Secretary or the Minister and any subsequent Board of Inquiry and the inspector is to make a full report of the investigation to the Secretary.[21] The Minister then has power to appoint a Board of Marine Inquiry, comprised of a judge of almost any court, to investigate the incident and identify the circumstances in which it occurred and to determine its cause.[22] The Minister is also to appoint a Secretary and two "technical advisors", who replace the former assessors, and the Board is given wide powers eg., for entry onto ships and premises and compulsion of witnesses. It is not required

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9 ss.358-359 *NA* (Cth). The judges there authorized could be from almost any court. The assessors were to "advise the Court but shall not adjudicate" s.359 *NA* (Cth) (as to which see later).

10 s.360 *NA* (Cth).

11 This is defined in s.10 NA (Cth) as a ship registered in Australia, or one engaged in the coasting trade, or of which the majority of the crew were Australian residents and which is operated by a person, firm or company which is resident, has its principal place of business or was incorporated in Australia.

12 s.364(1) NA (Cth). Both the court and the preliminary inquiry were not limited in jurisdiction to the constitutional limits otherwise imposed on the provisions of the *Navigation Act* 1912 (Cth) ss.364(3) and 377A(3).

13 ss.367-371 *NA* (Cth).

14 s.366 *NA* (Cth).

15 s.377 *NA* (Cth) described in the heading of the section as a "Court of Survey".

16 s.377A.

17 By s.45 of the *Transport and Communications Legislation Amendment (No 2) Act* 1990 (Act No. 23 of 1990) Part IX was repealed and power given to make suitable Regulations and by s.38 of the *Transport and Communications Legislation Amendment Act* 1991 (Act No. 173 of 1991) the repeal took affect from 3 September 1990.

18 Statutory Rules 1990, No 257, under the *Navigation Act* 1912 (Cth) dated 2 August 1990.

19 *Ibid* Reg 8.

20 *Ibid* Regs 10-14.

21 *Ibid* Regs 15-17.

22 *Ibid* Regs 18-19.

to act formally or to apply the rules of evidence and may inform itself "in any way it thinks fit".[23] On conclusion of the inquiry the Board is to prepare a report and provide a copy to the Minister.[24]

It can be seen that the *Regulations* differ from the previous provisions in that they only provide for an *inquiry* to be made by an investigator and, in serious cases, subsequently also by a judge. Further that the results of it are directed to the Minister (who may make it public or not as the Minister sees fit) and there is no power to deal in any way with persons by way of disciplinary procedure (except for failing to comply with the directions given by the investigator or the judge). This provision is more in line with modern concepts of administrative law than was the former procedure of having an inquiry into circumstances surrounding the incident combined with allegations concerning the conduct of persons concerned with it.

Under the new Commonwealth procedure, allegations concerning the conduct of persons, such as the master or engineer, are dealt with under the *Navigation (Orders) Regulations,* in particular *Marine Orders Part 3 (Seagoing Qualifications),*[25] which deal with seagoing qualifications, including the issue and cancellation of certificates. Order No 19 deals with the cancellation or suspension of certificates and includes that a certificate may be cancelled or suspended on the grounds that the holder has "demonstrated incompetence or misconduct", or is "unable from any cause to perform properly the duties appropriate to the certificate".[26] If the authorized officer, after considering a report of an investigation (by investigator or judge), decides that a prima facie case exists for cancellation or suspension the holder is to be given notice and has 28 days in which to make submissions, after which the authorized officer is empowered to make a decision on the matter. If the certificate is suspended or cancelled the holder is obliged to surrender it. Suspension may be for a period during which the authorized officer considers that the holder is not a "fit and proper person". This appears to encompass a period of illness or some other temporary incapacity, and if there be cancellation, the holder is entitled to reasons for the decision and notice of the rights of appeal.[27] There is a right of appeal to the Administrative Appeals Tribunal from a decision to refuse to issue, renew or endorse a certificate.[28]

Overall these provisions seem very sensible and meet the requirements of natural justice. The only remarkable aspect is that so much substantive law is contained in regulations. The actual regulations themselves, however, appear to provide an effective structure for inquiry into the circumstances of a marine casualty and any allegations of misconduct or incompetence.

The Queensland Provisions

The first Queensland legislation on marine inquiries was the *Navigation Act of 1876* (Qld),[29] which provided for a preliminary inquiry and also for an investigation by the Marine Board of Queensland or two justices (assisted by one assessor if the cancellation of a certificate or licence was an issue). This Act closely followed the terms of the *Merchant Shipping Act* 1854, the predecessor to the 1894 Act. This latter Act, apart from the provisions discussed above, also granted jurisdiction to any legislature of a British possession to authorise a court or tribunal to make inquiries as to shipwrecks, or other casualties affecting ships, or as to charges of incompetency or misconduct,[30] but this seems not to have been exercised in Queensland.

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23 *Ibid* Reg 22.
24 *Ibid* Reg 21.
25 Order No 3 of 1988 dated 25 August 1988, which came into force on 1 September 1988.
26 *Ibid* Order No 10.2.
27 *Ibid* Orders 10.5,10.6.
28 Order II and the *Navigation (Orders) Regulations.* There is a current proposal for Order 10 to be amended to give power to the authorized officer to impose conditions and/or restrictions on the purposes for which the certificate or licence is valid.
29 Reproduced in the *Public Acts of Queensland* 1828-1936, Vol. 8 (The White Series of Reprints) at 435.
30 s.478 *Merchant Shipping Act* 1894 (UK).

The *Navigation Act of 1876,* together with a number of other acts, was repealed and replaced by the *Queensland Marine Act* 1958 ("the Act") which is comprised of 14 parts and a number of schedules, of which Part IX deals with "Inquiries and Investigations into Shipping Casualties, Incompetency, and Misconduct". In this part, Division I deals with the jurisdiction, Division II with the requirement to give notice of shipping casualties and Division III with preliminary inquiries and formal investigations. By and large the Queensland Act follows the provisions of the English *Merchant Shipping Act* 1894 (UK) but there are some changes. The detailed provisions of the Queensland Act are better discussed in the context of a general discussion and to this attention will now be directed.

Initial Procedure

Whenever the Marine Board of Queensland ("the Board") has reason to believe that a "shipping casualty"[31] has occurred, or that there has been any incompetence or misconduct[32] on the part of any master, mate, engineer, or other person holding a relevant certificate or licence of competency or of service, it may cause a preliminary inquiry to be held.[33] After the preliminary inquiry has been completed, which is usually done by one of the experienced marine captains in the Department of Transport, and the report is submitted to the Marine Board, the Board must decide what further action, if any, it is to take concerning the casualty. The Board has power to caution or reprimand the holder of a licence or certificate on the strength of the preliminary inquiry report but if this is not accepted by the holder concerned, then the matter must go to a formal investigation.[34] If a formal investigation is called for, or if the Board decides that one is requisite or expedient anyway, it must decide who should conduct it. The Board itself may do so or, with the approval of the Minister, it may direct that it be conducted before a Stipendiary Magistrate ("SM").[35] If the investigation is likely to be lengthy, or if the circumstances are of a serious nature, or if the Board members wish to put themselves at arm's length from sitting in judgment on the matter, then the appointment of an SM to conduct the investigation is more appropriate. Whichever Tribunal (which word is here used to denote an investigation whether it be by members of the Board or an SM) is to conduct the investigation, its only powers are statutory as it is not a court and the powers of a court may not be invoked without express or implied statutory provision to that effect. As members of the public now have the power to have access to some public documents,[36] the documents which encompass the reports of the preliminary inquiry, the resolutions of the Board, the approval of the Minister, the request to the Chief Stipendiary Magistrate to allocate a magistrate to conduct the investigation, the details of any charges which are to be laid and the like, are all available to the parties and they may be used to challenge the jurisdiction of the Tribunal.[37] Care needs to be taken by the Board in drawing up the documents to ensure that they conform with the requirements of the Act and the corresponding *Queensland Marine (Formal Investigations) Rules* 1987 ("the *Rules*")[38], or a challenge to the jurisdiction may succeed. If an SM is appointed by the Marine Board to hold the investigation the Governor-in-Council may appoint one or more assessors of appropriate skill to assist the SM.[39]

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31 Defined in s 8(1) *Queensland Marine Act* 1958 (Qld) [hereafter *QMA* (Qld)] as including the "loss, abandonment, collision, or grounding of, and any mishap, accident, injury, or damage, whether by fire or otherwise howsoever, to any ship".

32 Both words have particular defined meanings, as to which see later.

33 s.185(1) *QMA* (Qld).

34 s.185(4) *QMA* (Qld).

35 ss.185 and 195 *QMA* (Qld).

36 *Freedom of Information Act* 1992 (Qld). It is possible that some documents would not be available under Part 3 Division 2 of the Act (Exempt Matter) but this would normally not be the case.

37 The challenge would usually be made under the *Judicial Review Act* 1991 (Qld).

38 Statutory Instruments 1987 under the *Queensland Marine Act* 1958 (Qld) s.264 dated 30 May 1987.

39 s.195(3) *QMA* (Qld).

The appointment of at least two assessors is mandatory if any question of suspension or cancellation of a certificate or licence is involved and at least one of the assessors should have experience in the calling of the person charged.[40]

If the Board decides that the investigation is to be one into the circumstances of the casualty only, it must draw up a Notice setting out the circumstances of the case, or the report on which the inquiry is based, and settle on the questions which are to be answered by the Tribunal in its final decision. This Notice is to follow the outline of Form 1 in the *Rules*. Whether or not a Form 1 investigation is launched, any charges, which must be set out in Form 2 of the *Rules,* should be served on the person against whom they are laid. All parties who may have an interest in the proceedings, including ship owners, the wharf owners, operating authorities and agents should be notified of the investigation so they can seek leave to appear if they so wish. Under the *Rules* the Board is required to serve a Form 1 or Form 2 on the persons likely to be affected by the investigation.

Jurisdiction

In the usual way in a federal system of law the question of jurisdiction often arises. The jurisdiction of the Commonwealth legislation under the former provisions, Part IX of the *Navigation Act* 1912 (Cth), has been mentioned above, which followed the provisions of the English Act. But under the new provisions, the *Regulations*, the wording is different. The jurisdiction which is granted to the inspector and to the judge is to investigate an "incident".[41] An incident is defined in a complex manner, involving an "event", which is not defined, and the result of an event. To fall within the definition of an incident, the event has to result in the loss, abandonment, collision or stranding of a ship or damage to it or be caused by it in its operations; or there be death, personal injury or loss of a person from or in the operations of a ship; or serious damage to the environment.[42] (The reference to the environment is entirely new in legislation relating to marine inquiries). Alternatively the event has to result in a situation where serious damage to a ship, a structure or the environment, "might reasonably have occurred" or, finally, to repeat the most convoluted of the phrases in a convoluted definition, where as a result of the event "it is reasonably suspected that the safety of a person was imperilled by, or in connection with, the operations of a ship."[43]

However there is more in relation to jurisdiction under the Commonwealth provisions. The abovementioned aspects only relate to the circumstances in which the *Regulations* allow an inquiry. The *Regulations* also have to deal with the constitutional law aspects to enliven the jurisdiction. The geographical aspect of the jurisdiction is approached by the *Regulations* stating that a "reference to an incident is a reference to an incident that involves, or involves the operations of, a ship ... in the territorial sea of Australia or in waters on the landward side [of it]", or if evidence involving a ship or its operations is found in Australia, or to which Part II of the *Navigation Act* 1912 (Cth) applies (which Part provides for a claim for jurisdiction wherever the constitution allows).[44]

Under the Queensland Act, jurisdiction is conferred in that a "shipping casualty" is deemed to occur whenever a ship sustains any casualty or damage, causes the loss of or damage to another vessel or fouls or damages any lightship, buoy, beacon or wharf; or where there is loss of life or serious injury to any person onboard a vessel in the jurisdiction. The geographical limits of jurisdiction are where the casualty occurs within the limits of a port in circumstances where the master has pilotage exemption or in or near the Queensland jurisdiction where the vessel is under

40 s.195(3)(a) *QMA* (Qld).
41 *Supra* n.18 Regs 8(1); 18(1).
42 *Ibid* Reg 3(1).
43 *Ibid.*
44 *Ibid* Reg 3(2).

pilotage.[45] It may be seen that the drafting in relation to the Queensland jurisdiction could also benefit from attention, although space precludes discussion of this aspect in this article.

If the incident with which the Investigation is concerned occurred within State waters, the State has jurisdiction. If outside those waters it falls to the Commonwealth. In *R v Turner; Ex Parte Marine Board of Hobart* [46] it was held that the Commonwealth had no jurisdiction under the *Navigation Act* 1912 (Cth) to appoint a Court of Marine Inquiry into a collision between two local vessels in the River Derwent, Tasmania, as the incident did not occur within the geographical limits of Commonwealth jurisdiction.

The question of whether a Tribunal has jurisdiction is often challenged at its outset by one or more of the parties called for investigation where there are significant stakes at issue in the inquiry. A successful challenge can halt the inquiry before it even gets started. In deciding whether a Tribunal has jurisdiction, a distinction is made between jurisdictional issues and nonjurisdictional issues; *Sankey v Whitlam*[47], *Public Service Association v Federated Clerks' Union*[48]. Where a challenge is made to an inferior tribunal's jurisdiction or a jurisdictional issue is raised, the tribunal must first decide the issue for itself; *R v Pugh,*[49] *Sankey v Whitlam,*[50] *R v Hickman,*[51] *Anisminic v Foreign Compensation Commission*[52] and the matter may be later tested elsewhere. If it refuses to do so, it is wrongfully declining jurisdiction and it will be ordered to decide the issue of jurisdiction; *Ex parte Ozone Theatres,*[53] *Re Coldham.*[54]

The Board has power to conduct a formal investigation into any shipping casualty, or any incompetency or misconduct (of the kind into which s.185 QMA (Qld) grants power to hold a preliminary inquiry) provided it is of the opinion that it is "requisite or expedient" so to do.[55] This is a wide power and gives the Board a wide discretion, which is as it should be. On the one hand, it is desirable that the Board and the parties not be put to the anxiety and expense of a formal investigation unless occasion demands it. On the other hand, circumstances may arise where what otherwise may appear to be a minor incident gives rise to much public concern and only a full and formal investigation is likely to restore the confidence of the public in the system. Owing to the variety of situations that may arise, it is necessary to vest a wide discretion in a body experienced in maritime matters, and the Marine Board, or its equivalent, is such a body.

Powers of the Tribunal

The Board has power to suspend a certificate or licence for a period, but this is by way of an interim situation as it depends on the Board being of the opinion that the holder of the certificate or licence is "incapable of discharging his duties" by reason of his being incompetent or because of his misconduct.[56] It is appropriate to use it pending a formal investigation or during a temporary period of incapability, such as temporary loss of sight or hearing. The holder then has the right of appeal to a judge of the District Court who has power to uphold or reverse the order of

45 s.183 *QMA* (Qld). The jurisdiction under this section is also attracted where any of the circumstances apply to any other prescribed vessel.
46 (1927) 39 CLR 411.
47 [1977] 1 NSWLR 333 at 345.
48 (1991) 65 ALJR 610 at 613.
49 [1951] 2 KB 623.
50 *Supra* n.47 at 345.
51 [1945] 70 CLR 598 at 618.
52 (1969) 2 AC 147 at 174.
53 (1949) 78 CLR 389 at 398.
54 (1985) 159 CLR 522 at 530. See generally *Halsbury's Laws of England*, vol 1, paras 55 and 59 and *Halsbury's Australian Commentary*, ch 1, paras C55 and C59. Other cases where a Court of Marine Inquiry decided whether it had jurisdiction are *Re Bewley, Re M V Tatana* [1967] 10 FLR 413; *The W D Atlas* [1967] 12 FLR 230 and *Re M V Northhead* (1969) 90 WN (NSW) 166.
55 s.186 *QMA* (Qld).
56 s.185A *QMA* (Qld).

suspension.[57] No power of interim suspension is granted to the SM.

If the investigation is to be conducted by an SM, the SM has all the powers given to the Chairman of the Board (to conduct an investigation) under Part IX Division III of the Queensland Act and the provisions of Division III apply with all necessary adaptions.[58] The relevant powers given to the Chairman are those given to a shipping inspector, and also the powers to compel persons to attend the inquiry, to give evidence under oath, to produce documents and to deal with contempt in the same manner as by the powers given to an SM under *The Justices Act* 1886 (Qld).[59] The powers given to a shipping inspector include the power to compel attendance and of inspection and production of documents, examination of persons under oath or affirmation and all other powers to carry into effect the provisions of the Act.[60] If the summons to a witness is to appear before the Board then its secretary signs it,[61] but there is no express provision if the hearing is before an SM. By inference it can be argued that a summons may be issued under the hand of the SM as he has the powers of the Chairman of the Board who has the powers of a shipping inspector.[62]

If the Board conducts the investigation, it has power to suspend or cancel a relevant licence or certificate if it finds the holder guilty of causing or contributing to a shipping casualty by the holder's default or wrongful act; or to be incompetent or guilty of any gross act of misconduct, drunkenness or tyranny; or failing to render assistance after a collision.[63] The SM has the same powers on making any of the findings referred to above,[64] provided at least one of the assessors concurs.[65]

Conduct of the Formal Investigation

Pursuant to s.188(1) of the Act, the formal investigation is subject to and conducted in accordance with, such practice and procedures as may be prescribed. Apart from minor aspects, which are set out in s.188, the only practice or procedures which are prescribed are in the *Queensland Marine (Formal Investigation) Rules* 1987 (Qld) ("the *Rules*"), which have already been mentioned. Where the *Rules* do not cover any particular situation, the person presiding over the Tribunal may give directions and they shall have the force and effect of rules.[66] The terms of the *Rules* only refer to the Board itself and make no mention of an investigation by an SM and assessors, which is a drafting deficiency. By giving weight to s.195(2) it can be argued that the SM has the powers granted by the *Rules* to the Board. Every formal investigation shall be made in a room or place to which the public has access although the Tribunal has a discretion to order out any witnesses,[67] which would be the normal procedure until they had given their evidence (so they may not be influenced in their evidence by what witnesses before them may have said). A copy of the report or a statement of the case on which the formal investigation has been ordered is to be furnished before the commencement of the investigation to the holder of any certificate or licence where cancellation or suspension thereof may be ordered.[68]

Because the Tribunal is not a court, express powers have to be granted to it to conduct the investigation and some of them have already been mentioned. In relation to witnesses, they are

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57 s.185A(5) *QMA* (Qld).
58 s.195(2) *QMA* (Qld).
59 s.188(4) *QMA* (Qld).
60 s.18(1) *QMA* (Qld).
61 s.188(16) *QMA* (Qld).
62 See above, and particularly s.18(2)(c)(iv) *QMA* (Qld). Summonses are to be issued in Form 4 Rule 8.
63 s.190(1) *QMA* (Qld).
64 s.190(1) - s.195(2) *QMA* (Qld).
65 s.195(4) *QMA* (Qld).
66 s.189(2) *QMA* (Qld).
67 s.188(9) *QMA* (Qld).
68 s.188(11) *QMA* (Qld).

entitled to such expenses as are payable to a Crown witness attending on subpoena to give evidence in criminal proceedings before the Supreme Court.[69] The *Rules* also provide for summonses to witnesses, notices to produce documents and notices to admit documents.[70] Rule 16 has provisions for the person assisting the Board to call witnesses, including the person charged, who shall be examined by him, cross-examined by the other parties and re-examined by him.[71] On conclusion of the case, presented by the person assisting the Tribunal the other parties have power to call their witnesses for examination and cross-examination and then, at the conclusion of those cases, the person assisting has power to call further witnesses for the purpose of examination and cross-examination. The rule further provides that the questions asked of the Tribunal and documents and writings tendered as evidence are not open to objection merely on the ground that they raise questions which are not contained in, or vary from, the statement of case or the questions (the charges). However, this provision has to be subject to the general rules of relevance and of natural justice. Rule 16(6) also provides for final addresses by the parties concerned, which would normally be by their counsel, to the Tribunal upon the conclusion of all of the evidence.

Where the holder of a certificate or licence has been charged, it is appropriate that all relevant material available to the person assisting the Tribunal should be made available to the other parties who have any interest in it. Where a person is charged, there is a duty to disclose all of the evidence, whether the person assisting intends to call that evidence or not. However the person assisting should not be obliged to call all witnesses but has a discretion in the matter. The discretion should be exercised so that reliable, relevant material which is likely to assist the Tribunal to be fully and fairly informed on the matter is laid before it. In the circumstances where the person assisting the Tribunal is of the view that the evidence is unreliable, or not sufficiently relevant, or that the expense involved in adducing the evidence before the Tribunal is not compensated by the weight of the evidence, that witness or document need not be adduced. This does not prevent the representatives of the other parties adducing such evidence if they so decide. Where there is only an investigation, without any charges, it is debatable whether there is a similar duty on the person assisting to make material known to all of the other parties. It depends on the circumstances. This is one reason why it is highly desirable to have experienced, dependable counsel assisting in such matters. Such counsel would ensure that the requirements of procedural fairness are met and the effectiveness of the inquiry is not compromised by revealing evidence or potential evidence which would best be kept confidential.

A party who has been charged has a right to make his or her defence and a party may appear at an investigation personally or through a solicitor or barrister.[72] The Tribunal has power to adjourn the proceedings from time to time[73] and to conduct a view if it is of the opinion that a view is necessary or desirable.[74]

The dual nature of proceedings that arises where there is an investigation into the circumstances of a casualty generally and where there are also charges laid is an anomaly in the light of modern views of administrative law. This anomaly was raised in an article by one of the counsel in the inquiry after the SS *Lake Illawarra* collided with the Tasman Bridge, Hobart in 1975,[75] and it is undesirable that it should continue. The Commonwealth has altered its procedure, as discussed above, and the States should follow.

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69 s.188(15)-(16) *QMA* (Qld).
70 Rules 8-11 *Queensland Marine (Formal Investigation) Rules* 1987 (Qld) [hereafter *QMR* (Qld)].
71 The phrases "person assisting" and "counsel assisting" will both be used as the occasion demands, but the former phrase is the one used in the *Rules*.
72 Rule 15 *QMR* (Qld).
73 Rule 17 *QMR* (Qld).
74 Rule 21 *QMR* (Qld).
75 AG Ogilvie 'Courts of Marine Inquiry in Australia' (1979) 53 *ALJ* 129 at 139.

Procedure during the Inquiry

The procedure to be adopted is at the discretion of the Tribunal to a large extent, circumscribed by statute, rules and the requirements of natural justice. The Tribunal has power to give directions to counsel assisting it, although this would normally be done after submissions from parties. The relationship and amount of contact between the Tribunal and counsel assisting it varies according to the directions of the Tribunal and the circumstances of the investigation. In some cases, counsel assisting has frequent meetings with the chairman of the Tribunal to discuss matters including evidence, arrangements and proceedings. In other circumstances, the Tribunal insists on having no contact with counsel assisting except in open court or, if not in open court, in the presence of representatives of other parties with an interest in the outcome of the matter.[76] The amount of contact depends on the degree to which the inquiry is an inquisitorial investigation, in which case the contact should be frequent, and the degree to which it is adversarial and the requirements of natural justice apply, in which case contact should be quite formal and confined to open court or circumstances where the other party or parties are fully appraised of what is said and done. Where a formal investigation is held into charges, the outcome of which may be the suspension or cancellation of a certificate or licence, the procedure is adversarial and the appropriate relationship is more formal than in other inquiries. An exception to the requirement of only formal contact between Tribunal and counsel is in relation to procedural matters, such as the establishment of the court and times of sittings, in which circumstances it is appropriate for officers of the Crown Law office to be in touch with the clerk to the Tribunal or, if necessary, with the Tribunal itself.

Role of Counsel Assisting and Instructing Solicitor

Counsel assisting in investigations where there are charges laid are in a particular situation. On the one hand, counsel has a duty to present the case *against* the person charged forcefully and firmly. In this regard counsel represents the public interest in that the government, ship and cargo owners, wharf owners and operators and others have an interest in maintaining an efficient, safe and effective maritime service and so have an interest in incompetence and misconduct being exposed and dealt with. On the other hand, counsel has a duty to *assist* the person charged by laying all relevant material before the Tribunal so that no unfairness arises. The situation was well summarised by Bargrave Dean J in *The Carlisle*[77] where he said, in relation to the UK Board of Trade, which occupied a similar position to that of the Queensland Marine Board:

> "I think it is clear that the Board of Trade are not in the position of a prosecutor, nor in the position of a neutral, but are in the position of a body having special opportunities of knowing what is right and what is wrong, whose duty it is to assist the Court, after the evidence, in coming to a right conclusion."

In the case of *In re Emmerson*,[78] in hearing an appeal from an investigation into the conduct of a marine pilot, the court made the analogy between counsel assisting in such investigations and counsel conducting a civil case in that the order of witnesses is in that counsel's discretion. Hallet[79] makes the point that it is desirable that counsel present the evidence and the Tribunal decide upon it rather than the Tribunal enter into the arena actively itself, even though it is the Tribunal which is charged with making the investigation.

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76 See discussions in the *Report of Committee of Inquiry into the Enforcement of Criminal Law in Queensland* dated 29 April 1977 *(The Lucas Inquiry), First Report of the Parliamentary Judges Commission of Inquiry before the Right Honourable Sir Harry Talbot Gibbs, the Honourable Sir George Hermann Lush and the Honourable Michael Manifold Helsham (The Gibbs Inquiry into Justice Vasta)* and the *Second Report (The Gibbs Inquiry into His Honour Judge Pratt)* and the *Report of a Commission of Inquiry pursuant to Orders in Council dated 3 July 1989 (The Fitzgerald Inquiry),* and see generally Forbes *Disciplinary Tribunals* The Law Book Company Sydney 1990.

77 [1906] P 301 at 315-316.

78 (1901) 27 VLR 56 at 65 per Holroyd J.

79 LA Hallet *Royal Commissions and Boards of Inquiry* Law Book Co Sydney 1982 Chapter XII.

As counsel assisting is appointed by the Queensland Marine Board (which comes under the shield of the Crown) and instructed by the Crown Solicitor, the possibility for conflict can arise if there is any Crown entity likely to be the subject of inquiry or criticism. This can happen if the Harbours Corporation, the Department of Transport, or even the Marine Board itself, is involved in the circumstances of the shipping casualty. The role of the counsel assisting the Tribunal, and that of the Crown Solicitor, seem not to have ever been fully decided. The question which differentiates that role from the ordinary position of counsel and solicitor when they act for a client in litigation is a subtle one. It is discussed by Hallett as follows:

> "The foregoing considerations raise a question of fundamental importance and that is the identity of the Crown Solicitor's client when he is instructed to brief counsel and generally assist a Commission or a Board. Whether he is acting for the executive government or for the Commission or the Board is not clear. Whilst his initial instructions come from the (Under-Secretary), it would seem that the services of the Crown Solicitor have been made available to the inquiry. In other words, it might be that his "client" is the particular Commission or Board he has been asked to assist."[80]

The author goes on to state that it was the view of the English Treasury Solicitor that he was acting for the Tribunal and not for the executive government when assisting a Tribunal or Inquiry. This was reflected in Edwards' *The Law Officers of the Crown*[81] when he noted that it is generally recognised that the Attorney-General should have as his first duty in a public inquiry an obligation to consider the public interest and this comes before any consideration of loyalty to the government or a ministerial colleague. It seems that this was also the view of the Victorian Crown Solicitor in the *Salmon Royal Commission* (1966), because a memorandum he wrote to the Commission stated that the appointment was to assist it, and it is from the Commission that the instructions are received and if these conflict with other interests it is a direction by the Commission which takes precedence. Apparently no conflict arose in that case.[82] It is normal for counsel assisting to have an instructing solicitor, although in Victoria this was not done in the *Kaye Police Inquiry* (1970) and this led to the Solicitor-General approaching the Victorian Bar Council on the point. The Council passed a resolution that counsel appointed to assist a Royal Commission should be briefed in the usual way by the Crown Solicitor.[83] There is a general assumption that counsel assisting will represent the public interest.[84] The function of counsel assisting has been described in various ways. In the *Sunshine Council Inquiry* (1976) it was described as one of "assembly and presentation" of the evidence; in relation to which function the situation varies with the nature of the inquiry but it has also been described as being "completely independent".[85]

The potential for conflict is dealt with in a comment by Ogilvie, in his article on the *Lake Illawarra Inquiry*, where he points out how the two roles of assisting the inquiry and representing the interests of government were separated in that inquiry,

> "By an amendment to the Regulations provision was made for the first time for counsel to appear to assist the Court. Prior to this amendment counsel representing the Department of Transport had assumed the sometimes difficult dual role of counsel assisting and counsel for the Department of Transport. Following criticism of this procedure by Tasmania's Crown Advocate the new procedure was introduced."[86]

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80 *Ibid* at 212.
81 LJL Edwards *The Law Officers of the Crown* Sweet & Maxwell London 1964 at 297.
82 *Supra* n.79 at 213-214.
83 *Ibid* at 211.
84 *Ibid* at 216. In the inquiry in *The Carlisle* [1906] P 301 at 314 Sir Gorell Barnes, President, stated that the Board of Trade "represents the public in this matter".
85 *Ibid* at 216.
86 Ogilvie *Courts of Marine Inquiry in Australia* (1979) 53 *ALJ* 129 at 131.

If a conflict of interest should arise it would be solved in the usual way by having a firm of solicitors and other counsel represent the other interest or interests which, in the case of the *Jenkinson Pentridge Inquiry* (1972), was solved by the appointment of a firm of private solicitors to assist that inquiry.[87]

The Queensland provisions make express mention of the position of the person assisting the Tribunal. Under the Act "the management of the formal investigation shall be had by such person as the Board may appoint, and he shall render to the Board such assistance as is in his power".[88] In the instant case the "Person assisting the [Tribunal] "means the person "appointed to have the management of the formal investigation".[89] The "person assisting the [Tribunal]" is mentioned in relation to that person's duties and rights in the *Rules*.[90]

It can be seen, therefore, that the duty laid on the counsel and solicitor assisting an inquiry is different from that of representing any particular interest of the Crown. There can be occasions where no conflict occurs and there can be occasions where a serious conflict can occur. It all depends on the circumstances surrounding the inquiry and an early recognition of the potential for conflict may well avert circumstances which otherwise could give rise to a problem.

The Assessors

The two assessors have a particular position in that they are appointed for their expertise in order to advise the SM. Such advice is usually given in private, but there is a discretion to canvass aspects of that advice during the investigation if the SM so wishes. Tribunals composed of an SM and assessors, because the assessors are not legally trained, usually adopt the course that all statements and questions from the Tribunal are channelled through the SM in order to avoid the risk of any statement or question being so inappropriate as to vitiate the proceedings. Where the Board makes the investigation there is usually expertise amongst its members so no assessors are usually required but there is power to appoint one or more assessors "as may appear to possess the special qualifications necessary for the particular case".[91] In this case what is often lacking, however, is a chairman who is legally trained and experienced in conducting an investigation in the requisite manner.

Evidence

(a) General

The Queensland Act has no express stipulation about evidence. Whether the *Evidence Act* 1977 (Qld), the relevant act in Queensland, is to apply or not is a moot point. For a start the members of the Board are not lawyers and are untrained in the laws of evidence. The *Rules* have some provisions as to the more technical aspects of evidence. Rule 13 addresses certain evidential provisions, including that evidence may be presented in a formal investigation with the permission of the Tribunal by affidavit or statutory declaration, and otherwise orally on oath. Where an affidavit or statutory declaration is intended to be used, notice thereof twenty-one days before the date of the hearing is required, although the Board has a discretion to admit it without such time period, and a notice of objection to the use of such affidavit or statutory declaration should be given to the secretary of the Board not later than fourteen days before the date of the hearing - Rule 13(1).[92] By Rule 13(3) evidence of a statement by a person indicating, or tending to indicate, whether a vessel was a prescribed vessel or was on or near the jurisdiction is admissible even though it offends the rule of hearsay. This rule may be taken as an indication that, other than

87 *Supra* n.79 at 213-214.
88 s.188(7) *QMA* (Qld).
89 Rule 4 *QMR* (Qld).
90 Rules 13 and 16 *QMR* (Qld).
91 s.188(5) *QMA* (Qld).
92 In relation to affidavits the provisions of Part XIX of the Magistrates Court Rules apply - Rule 13.

under its provisions, there is a rule against hearsay, although this is somewhat weak evidence on the point as it is not in the Act but only in a rule.

When the Tribunal is an administrative one (and not a judicial one) the rules of evidence which bind a court do not necessarily bind the Tribunal. Sometimes an Act which establishes the Tribunal expressly provides that the rules of evidence are or are not applicable and sometimes it is silent on the point.[93] It is strictly a question of interpretation of the Act and any Rules. Even if a Tribunal is not bound by the *Evidence Act* 1977 (Qld) itself it still needs to give directions as to what type of evidence it will accept and it must operate within a framework of justice and only come to its conclusion on evidence which is relevant to the question in issue.[94] However, it is preferable that the Tribunal should act so that the "best evidence" rule applies, except where there is good reason to act otherwise, and cognizance can be taken of the provisions of the *Evidence Act* 1977 (Qld) in guiding the Tribunal in making a ruling. The Tribunal should decide the matters in which it has particularly been asked to decide only on the evidence which has been placed before it by the parties during the hearing. It should take no account of any knowledge which has been gained from any other source, except the common knowledge or notorious facts or matters which a jury is allowed to take into account.

(b) Expert Witnesses

The English position appears to be that expert evidence is not allowable in such investigations,[95] but in the SS *Lake Illawarra Inquiry* the two judges there held that this was not the Australian practice.[96] This accords with the Queensland position in that the usual rules and procedures about expert evidence apply even though there may be expert assessors who have been appointed. In the *Anro Asia Investigation*, in which the pilot was charged in relation to the vessel grounding on Bribie Island, counsel for the parties agreed that expert evidence was not precluded.[97]

(c) Privilege Against Self-Incrimination

The right not to answer questions which may incriminate the witness is a privilege which is only to be taken away by clear words.[98] It is a question of construction of the statute whether the right has been abrogated.[99] The privilege is against self-incrimination of a criminal offence and does not extend to the proceedings where what is in issue is the suspension or cancellation of a license even though this is penal in nature. Under the Queensland Act the person assisting has the right to call witnesses who are bound to answer questions put to them and such witnesses can include any persons charged. The Act and the *Rules* are silent on the issue of self-incrimination, so the right to claim it exists.

The situation is different in the Commonwealth provisions as the *Regulations*, as amended in 1991, provide that a person must not refuse or fail to appear, take an oath or affirmation, answer a question or produce a document without reasonable excuse.[100] It is further provided that self-incrimination, or fear of it, is not a reasonable excuse,[101] but the information is not admissible

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93 The terms of Commonwealth Regulation No 22, noted above, makes it clear that the investigator and the Board are not bound by the rules of evidence so there is no question of the Commonwealth *Evidence Act* 1905 (Cth) being binding.

94 See generally *Cross on Evidence* Butterworths Australia 1991 para [105] and Mr Justice Giles *Dispensing with the Rules of Evidence* (1991) 3 Australian Bar Review 233.

95 *Supra* n.86 at 137 and cases there collected.

96 *Ibid.*

97 Transcript of Proceedings, at 518. The *Anro Asia* went aground on Bribie Island, Moreton Bay, in 1982 under charge of a pilot when entering the Bay from sea heading for the Port of Brisbane.

98 *The Royal Commission Re A Brisbane Hotel (No 2)* [1964] QWN 28 per Gibbs J as he then was.

99 In *Sorby v The Commonwealth* (1983) 152 CLR 281 the issue was ventilated. It was there held that a witness was bound to answer even though the answers may be self-incriminating in a Royal Commission established jointly by the *Royal Commissions Act* 1902 (Cth) and the *Commissions of Inquiry Act of* 1950 (Qld).

100 *Supra* n.18 Reg 33(l).

101 *Ibid* Regs 33(l); 33(IA).

in evidence against the person in any criminal proceedings.[102] The effect is that a person charged in relation to incompetency or misconduct is bound to answer etc as the proceedings in such a charge are not categorized as criminal in character.

Tribunal Acting Judicially

Although the Tribunal is not acting as a court but is a specially constituted administrative body, it has a duty to act judicially, including compliance with the rules of natural justice.[103] Where charges have been laid, it is not appropriate that the Tribunal conduct an inquisitorial investigation as it has counsel assisting and it is appropriate for the person assisting the Tribunal to adduce evidence before it and for the Tribunal to make its decision thereon. This does not prevent the Tribunal making a request to counsel assisting to call further or other evidence or even to give directions, provided it is done in open court or, if not in open court, in the presence of representatives of the other parties.

Duty to Keep Records

Where the Board conducts the investigation its secretary is to have custody of all records, minutes and proceedings and keep and maintain records in Form 6.[104] The Tribunal is to cause the evidence to be written out and the depositions of each witness are to be read over and signed by the witness and by the chairman. As has been mentioned, the *Rules* only refer to an investigation being held by the Board, so where the investigation is held by an SM and assessors probably the SM should appoint someone from the Magistrate's Court staff to perform these functions.

Meaning of Key Words

The power to suspend or cancel a certificate or licence is to be found in s.190(1), which provides that the Board[105] can exercise that power against any person whom it finds:

> "(i) Guilty of causing or contributing to by his default or wrongful act any shipping casualty ... ; or
> (ii) To be incompetent; or
> (iii) Guilty of any gross act of misconduct, drunkenness or tyranny; or
> (iv) That, in the case of collision or of any vessel or any aircraft or any person in distress, he has failed to render such assistance or to give such information as is required under Part VII."[106]

It is appropriate to look carefully at the meaning of these key words and phrases as their meaning and effect are critical in relation to any charges.

(a) Default or Wrongful Act

In the *Merchant Shipping Acts* this phrase appears as "wrongful act or default" but the transposition of the words into "default or wrongful act" in the Queensland legislation would not appear to alter the meaning. Of course it is always a question of fact whether the acts or omissions alleged against the person charged fall within the phrase but the English phrase was considered in *The Princess Victoria*[107] and held to mean "a breach of legal duty of any degree which causes or contributes to the casualty under investigation". In *The Famenoth*[108] the main question on

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102 *Ibid* Reg 33A(2).
103 *Supra* n.86 at 132-133; *Supra* n.76; *Re Grounding of MV "TNT Alltrans"* (1986) 67 ALR 107; 83 FLR 416 Sheppard J.
104 Rule 20 *QMR* (Qld).
105 The SM is given the same powers - s.195(2) *QMA* (Qld).
106 Part VII of the Act addresses *Safety and Prevention of Accidents*.
107 [1953] 2 Lloyd's Rep 619 at 627-629.
108 (1882) 7 P D 207.

appeal from an inquiry was whether the master was guilty of a "wrongful act or default" in failing to send a tug after a boat which had been launched from his stranded vessel in a howling gale. (The occupants subsequently perished.) At the time *the Famenoth* was steadily becoming embedded in the sand, the women and children had been transferred to another tug, and the crew were not in immediate danger so one of the other tugs could have been sent in search of the boat. The court held, however, that "the utmost that could be said against the behaviour of the captain ... is that he manifested an error of judgment at a moment of great difficulty and danger ... ".[109] This distinction, between a wrongful act, a default, negligence, culpable recklessness and the like on the one hand, and an error of judgment on the other, is an important one which is sometimes overlooked. It is always a question of impression, even though the courts attempt to articulate some phrase which appears to give certainty (but which is often only an exercise in semantics). The common law recognises the distinction between negligence and an error of judgment which falls short of negligence. Usually the maritime law recognises this distinction as well, but there is the prevailing opinion amongst some mariners that if the ship collides or goes aground then, ipso facto, those in charge are guilty (usually the captain and the deck officer on watch). The maritime cases need to keep the distinction alive if it is to stay in the main stream of the law.

(b) Incompetent

In the Queensland Act "incompetent" is defined as "unable, from any cause whatever, to perform efficiently the duty of the person in relation to whom the term is used" - s.8. Under the *Navigation Act* 1912 (Cth) the definition of "incompetent" is, "an officer is incompetent if he is inefficient in the performance of any of his duties as an officer."[110] The definition of incompetence in terms of inefficiency is hardly appropriate as, for example, a ship's master may be highly efficient but quite incompetent in the manner in which he navigates the ship. In the ruling by the judges in the *Lake Illawarra* incident,[111] in which the Commonwealth legislation was operative, their honours held that the expression "is incompetent" clearly referred to a state or condition of incompetency, and not to acts on a particular occasion which might be said to display incompetence. In so deciding they followed the English cases of *The Empire Anteloupe, The Radchurch*[112] and *Tair v Snewin*[113] to that effect. In the former case Lord Merriman P said, speaking for the court, that incompetency is to be interpreted in the dictionary sense "as the quality or condition of not having 'adequate ability or fitness' or 'the requisite capacity or qualifications'". He pointed to the wording of the section for the conclusion that the incompetency would not usually arise from an isolated incident.[114]

(c) Misconduct

In the Queensland Act "misconduct" is defined as including "reckless or careless navigation, drunkenness, tyranny, any failure of duty or want of skill, or any improper conduct".[115] Under the *Navigation Act* 1912 (Cth) "misconduct" is defined as, "an officer is guilty of misconduct if he is guilty of careless navigation, drunkenness, tyranny, improper conduct or, without reasonable cause or excuse, failure of duty."[116] In the SS *Lake Illawarra Incident* the judges also held that "careless navigation" connoted a failure to navigate with such care and skill as a competent master or officer would reasonably be expected to exercise in the circumstances, and that there is little, if any, difference between "careless navigation" and "negligent navigation", relying on *Spain v The Union Steamship Co of New Zealand Ltd.*[117] Serious default in navigation may amount to

109 *Ibid* at 215.
110 s.6C *NA* (Cth).
111 *Supra* n.86 at 140.
112 [1946] P 79.
113 (1879) 5 VLR 374.
114 *Supra* n.112 at 85.
115 s.8 *QMA* (Qld).
116 s.6C *NA* (Cth).
117 (1923) 33 CLR 555 at 569.

gross misconduct.[118] If a person is intoxicated but not drunk he may be guilty of "improper conduct" if the totality of the circumstances warrant such a conclusion.[119]

Onus and Degree of Proof

There is no provision in the Act or the *Rules* in relation to the onus or degree of proof. Where there are charges relating to incompetency or misconduct the Tribunal is not called upon to determine any criminality of any behaviour but the proceedings are penal having regard to the potentially grave consequences in that the certificate or licence may be suspended or cancelled. The standard of proof beyond reasonable doubt is applicable only in criminal proceedings.[120] It follows that the civil standard, on the balance of probabilities, applies to charges laid in marine inquiries. However, the degree of persuasion necessary to establish facts on the balance of probabilities varies according to the seriousness of the issues involved. As the issues when charges are laid are serious, the degree of persuasion is quite high.[121] Where there are facts in relation to an investigation, the question of the standard of proof probably does not arise as it is an investigation making a report and not a court making a finding whether a fact has actually been established on the evidence or not.

The Decision of the Tribunal

Counsel assisting is required to make a closing address to the inquiry. One aspect which is not completely settled is whether counsel should submit to the Tribunal what findings should follow from the evidence and what penalty, if any, should be imposed. This has been resolved in England in the Tribunal there coming to expect that there will be such a submission and that counsel has a duty to make submissions as to what is an appropriate finding and penalty.[122] In the *TNT Alltrans Inquiry* Sheppard J expressed concern as to whether he should make any recommendations in his report to the Minister as to penalty, which recommendations were to perform a similar function as recommendations of counsel assisting to a Tribunal. In the result in that inquiry His Honour did make recommendations.[123] In such cases, there has sometimes been a conflict between the opinion of the body which established the inquiry and counsel assisting it. The better view seems to be that the body has no authority to give binding instructions to counsel. Counsel will take note of the wishes of the body but as counsel represents the public interest and has some independence he may not necessarily be strictly bound, in the usual way, as by instructions from an ordinary client. It seems that it was this point that led the Crown Solicitor in Victoria to approach the Bar Council, as mentioned above, as there was considered to be a close relationship between actual instructions from solicitor to counsel if the latter was "briefed" but not so close a relationship if counsel was "appointed" to assist the inquiry. On balance it appears to be the duty of counsel to assist the Tribunal by making a suggestion as to the appropriate penalty.[124] Counsel is probably in a similar situation to that of a crown prosecutor when addressing on sentence in that the prosecutor should place all relevant material before the Tribunal but not press for any particular sentence.[125]

The Tribunal must give its decision in a room or place to which the public has access -s.188(8). The adjudication lies only with the SM - s.195(3)(b) *Queensland Marine Act* 1958 (Qld), but the

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118 *Re Bell* (1892) 18 VLR 55 per Hood J.
119 *Re Grounding of MV "TNT Alltrans"* (1986) 67 ALR 107 at 109.
120 *Helton v. Allen* (1940) 63 CLR 691 affirmed *Rejfek v. McElroy* (1965) 112 CLR 517 at 520.
121 *Briginshaw v. Briginshaw* (1938) 60 CLR 336 per Dixon J at 362. Subsequently approved in *Rejfek v. McElroy supra* n.120 at 521.
122 Macmillan *Shipping Inquiries and Courts* Stevens & Sons London 1929 at 29; 107 and the authority there cited of *The Carlisle* [1906] P 301 at 314-316.
123 *Re Grounding of MV "TNT Alltrans"* (1986) 67 ALR 107 at 113.
124 *Supra* n.86 at 140.
125 For a Note setting out the principles see Justice JH Phillips *Practical Advocacy* (1993) 67 *ALJ* 374.

penalty of suspension or cancellation must have the concurrence of at least one assessor to be valid - s.195(4) *Queensland Marine Act* 1958 (Qld). The SM is to send a full report on the case, together with the evidence, to the Board. Each Assessor shall either sign the report or state in writing to the Board his dissent therefrom and the reasons for that dissent - s.195(5) *Queensland Marine Act* 1958 (Qld). In *Re MV 'TNT Alltrans"* Sheppard J discussed the anomaly of having assessors who are not to adjudicate but who are to decide on whether there should be a suspension or cancellation of the licence. It is an anomaly and it should be clarified.

The gravity of the offence does not depend on the extent of the damages that flow from it, but the consequences of the fault are a factor which ought to be taken into account. Decisions in relation to penalty are difficult to equate one with the other and, in many cases, are not easily discovered. In the case of the charges against the pilot of the *Anro Asia,* the vessel which went aground on the northern part of Bribie Island when entering the Moreton Bay area, the pilot was suspended from duty for three months. If the Tribunal decides on suspension or cancellation, the holder is to deliver up possession of the license to the Tribunal.[126]

Costs

There is a discretion in the Tribunal as to what costs order it should make at the end of the inquiry. The Marine Board itself has power to pay all or any part of the costs if it thinks fit to do so.[127]

Rehearing of Inquiries and Appeals

There was always power in the Secretary of State or Board of Trade under the English *Merchant Shipping Act* 1894 (UK) to order a rehearing after a formal investigation into a shipping casualty or an inquiry into the conduct of a master, mate or engineer.[128] The legislation restricted the grounds to "new and important evidence" which could not reasonably have been found before the hearing and to any other reason where there was ground for suspecting that a miscarriage of justice had occurred. Under the Commonwealth provisions the *Navigation (Marine Casualty) Regulations* provision is made for a rehearing by the Minister having power to direct the Board to make further investigations after it has made its report - Reg.32. For penal provisions there is a right of appeal on the facts to the Administrative Appeals Tribunal ("the AAT") so if one is needed, it can be done at the AAT level. The Queensland Act follows the English provisions almost precisely. The Minister and the Board have power to order a rehearing if new and important evidence is discovered or if a miscarriage of justice has occurred - s.191(1) *Queensland Marine Act* 1958 (Qld). If the investigation is before an SM and assessors it may be that on the true construction of the section the SM and the assessors have the same power because the SM is given the powers of the Chairman of the Board - s.195(2) *Queensland Marine Act* 1958 (Qld).

As has been noted above, the Commonwealth has an appellate system from decisions concerning certificates and licences to the AAT. (There was formerly a right of appeal under Part IX of the *Navigation Act* 1912 (Cth) before Part IX was repealed).[129] Under the English *Merchant Shipping Act* 1894 (UK) there was also an appellate system from a refusal of the Secretary of State to have a rehearing in relation to the cancellation or suspension of the certificate of a master, mate

126 s.195(4a) *QMA* (Qld).
127 *Queensland Marine Act* 1958 s.188(12), (13), (14).
128 s.475(1)-(2) *Merchant Shipping Act* 1894 (UK).
129 For a discussion of the power to suspend a master's certificate see *Robbie v Director of Navigation* (1944) 44 (NSW) SR 407; 61 (NSW) WN 192; and of the nature and procedure of an appeal see *Firth v Director of Navigation* (1948) 67 (NSW) WN 4.

or engineer.[130] Under the Queensland Act this provision as to appeals was omitted, so it is the most restrictive of the Acts in this regard. In this case, a person aggrieved is left to the tender mercies of the prerogative orders or the *Judicial Review Act* 1991 (Qld), neither of which allow an appeal on the facts.

Conclusions

The marine inquiry procedures in Australia are derived from the English *Merchant Shipping Acts* which provided for an inquiry into the circumstance of a shipping casualty combined with an inquiry into the possible suspension or cancellation of the certificates or licences of those mariners who were concerned in the incident. This system was an important part of the administration of the English mercantile marine structure and, because of the high quality of the people concerned in it, worked well. Most of the provisions of this system were incorporated into the Australian structure, at both Commonwealth and State levels.

The system was deficient, from the modern point of view of administrative law, in that the inquiry into the circumstances of the casualty was mixed with any charges laid against the mariners concerned and whether their certificates or licences should be suspended or cancelled. This deficiency has been corrected by the Commonwealth in its system, which separates the inquiry into the circumstances of the incident from the charges as to incompetency or misconduct. The present Queensland legislation, however, still follows the provisions of the *Merchant Shipping Acts* and needs amendment.

The Queensland system is also deficient in that it does not provide for a right of appeal from decisions as to suspension or cancellation of certificates or licences arising from misconduct or incompetency. If a Tribunal does decide to suspend or cancel a certificate, which is clearly penal in nature as the certificates are the means of livelihood of the holders, there is no means by which the matter can be taken on appeal on the facts. (The *Judicial Review Act* 1991 (Qld) is available but it does not allow appeals on the facts). This lack of appeal procedure does not sit comfortably with present concepts of administrative law and it too should be addressed.

But reform is in the air in the Queensland Department of Transport with the newly passed *Marine Safety Act* 1994 (Qld) which repeals some or all of the *Queensland Marine Act* 1958 (Qld). The *Marine Safety Act* has quite modest pretensions in the area of marine inquiries, as its terms merely empower the minister to set up a marine inquiry at his discretion. The Act has no constraints as to the circumstances in which the minister must set up an inquiry, nor as to who should conduct it, nor as to the procedure which it should follow. Such a wide provision gives great flexibility which, provided it is exercised by knowledgeable and temperate persons, has many advantages. However, if such powers come to be exercised by persons who lack those qualities, they may well become a source of abuse, as the act contains no constraints on how they are to be used. It is to be hoped that some restraint on such powers may be contained in the Regulations, which will follow the Act. The *Marine Safety Act* 1994 (Qld) does, however, address the deficiencies that investigations for purposes of safety and the preferring of charges of incompetency or misconduct are to be kept quite separate. It also provides for a system of administrative appeals on the facts.

In summary, marine inquiries are an important aspect of the administration of a safe and efficient sea transport system. They establish the facts and circumstances of marine casualties and this in turn enables appropriate steps to be taken to avert any such similar incidents, or at least

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130 s.475. The appeal is to the High Court, but it is not a rehearing - *The Princess Victoria* [1953] 2 Lloyd's Rep 619 at 624. An example of the court ordering a rehearing of the inquiry is *The Seistan* [1959] 2 Lloyd's Rep 607. Under s.66 of the *Merchant Shipping Act* 1894 (UK) an owner, as well as a master, mate, engineer or pilot, who has been affected by a decision from an inquiry may also appeal; redressing the injustice pointed out by the court in *The Golden Seal* (1882) 7 P D 194 where the owner was visited with some costs at the end of an investigation but the Court held that the owner had no right of appeal as the statute failed to grant one.

lessen their incidence. The inquiries may also investigate allegations as to incompetency or misconduct by relevant mariners and there is power to deal with those persons whose competence or conduct is found to be lacking. This is in the public interest as it ensures the, usually high, standard of Australian mariners is maintained. It is important that lawyers engaged in such inquiries have the expertise to run such inquiries fairly, briskly and effectively.