

SHIPPING LAW[†]

STEPHEN GIRVIN^{*}

The publication of the third edition of *Shipping Law* will be deservedly and widely welcomed by the maritime legal community in Australia and elsewhere. First published in 1990, this book has become the classic Australian work¹ in the field and, as a single volume work, it joins a library of similarly distinguished titles in other jurisdictions, including Canada,² South Africa,³ the United Kingdom,⁴ and the United States.⁵

The new edition of *Shipping Law* contains 21 chapters, one more than in the second edition.⁶ The division of the labour between the two authors is broadly similar to the previous editions, with Mr Dickey⁷ responsible for the first ten chapters, as well as those on salvage and wreck, and Professor Davies⁸ responsible for those on carriage of goods, marine insurance, general average, collisions and limitation of liability.

As the authors themselves remark,⁹ the nine years since the appearance of the previous edition have necessitated considerable updating of the text, such is the volume of international maritime law developments, new legislation, and case law in the intervening years.¹⁰ Australian readers of this new edition (and those outside Australia seeking to understand Australian law) will certainly be well served by it. The coverage, as in previous editions, is comprehensive and ranges over most of the areas which would be encountered in practice and also those which traditionally form part of the content of academic courses in the shipping law field.

^{*} Associate Professor, National University of Singapore.

[†] Martin Davies and Anthony Dickey, *Shipping Law*, Lawbook Co (3rd ed, 2004).

¹ Other Australian titles include Michael White, *Australian Maritime Law* (2nd ed, 2000) and D A Butler & W D Duncan, *Maritime Law in Australia* (1992), although the latter is now seriously out of date.

² See Edgar Gold, Hugh Kindred & Aldo Chircop, *Maritime Law* (2003) and William Tetley, *International Maritime and Admiralty Law* (2002) (reviewed, D Rhidian Thomas (2003) 9 *Journal of International Maritime Law* 583).

³ See John Hare, *Shipping Law and Admiralty Jurisdiction in South Africa* (1999) (reviewed, Nigel Meeson [1999] *Lloyd's Maritime & Commercial Law Quarterly* 577).

⁴ See Christopher Hill, *Maritime Law* (6th ed, 2003); Aleka Mandaraka-Sheppard, *Modern Admiralty Law* (2001) (reviewed, Stephen Girvin [2003] *Lloyd's Maritime & Commercial Law Quarterly* 292).

⁵ See Thomas Schoenbaum, *Admiralty and Maritime Law* (4th ed, 2004).

⁶ 1995. This edition contained three new chapters, on Maritime Liens, Marine Pollution, and Possessory Liens.

⁷ Mr Dickey remains associated with the University of Western Australia, as an Associate Professorial Fellow.

⁸ Professor Davies is the Admiralty Law Institute Professor of Maritime Law at Tulane University Law School and the Director of the Tulane Maritime Law Center. He continues as a Professorial Fellow at the University of Melbourne.

⁹ Davies and Dickey, above n †, v.

¹⁰ And some of the discussion, even in this new edition, is already out of date. For example, the 1996 Protocol to the 1976 Limitation Convention came into force on 13 May 2004 (see 455–456) as has the 1993 Convention on Maritime Liens and Mortgages (see 123), which came into force on 5 September 2004.

The first chapter in the book introduces the reader to the ‘Characteristics of a Ship’ and, in particular, the usage and definitions of the terms ‘ship’, ‘boat’, and ‘vessel’ in Commonwealth statutes and the various state and territorial statutes. Coverage of the constitutional aspects of shipping jurisdiction in Australia is dealt with in Chapter 2 (‘Division of Shipping Law Powers in Australia’) and this is followed by two chapters on the registration of ships. Chapter 3 (‘Registration’) sets out in some detail the requirements for registration under the Australian ship register, as laid down in the *Shipping Registration Act 1981* (Cth). The new material here includes a short discussion of proposals for reform which were canvassed in 1997 but which have not yet produced any substantial revision to the existing legislation.¹¹ A new chapter, Chapter 4, covers the ‘Consequences of Registration’ and is an expanded version of material which appeared in Chapter 3 of earlier editions of the book.

Continuing the ‘ship’ theme, the following few chapters focus on issues of ownership and title. Chapter 5 considers ‘Property, Ownership and Title’ and Chapter 6 ‘Acquisition of Property in Ships’. The shortest chapter in the book,¹² an ‘Introduction to Charges over Ships’ (Chapter 7), is next. Then there is a very complete chapter on the subject of ‘Maritime Liens’ (Chapter 8). As useful as this chapter is, it seems to me that it exposes the only real gap in the book — namely, a full consideration of the arrest of ships regime in Australia.¹³ There is some discussion of claims which do not support a maritime lien¹⁴ and of statutory rights of action *in rem*.¹⁵ However, this should be expanded in a separate chapter, especially because of the treatment of ‘Possessory Liens and Bottomry’ in Chapter 9. Given that bottomry bonds are now practically obsolete¹⁶ it seems a little indulgent to devote three pages of the text to a detailed discussion of it (fascinating as that may be). The final chapter in this part of the book — Chapter 10 — is concerned with the ‘Mortgage of Ships’ which is very important in practice.

The second part of the book, which accounts for almost one third of its pages, contains a serious treatment of the law on the carriage of goods by sea. There are four chapters: ‘Introduction to Carriage of Goods by Sea’ (Chapter 11); ‘Bills of Lading, Sea Waybills and Other Sea-Carriage Documents’ (Chapter 12);¹⁷ ‘Voyage Charterparties’ (Chapter 13); and ‘Time Charterparties’ (Chapter 14). A feature of this part of the book is the increased number of references to authorities on the US *Carriage of Goods by Sea Act 1936*.¹⁸ This is a helpful

¹¹ Cf a similar exercise undertaken in South Africa which resulted in the Ship Registration Act 1998, No 58 (and which only came into force five years later, on 25 April 2003). For discussion, see Hare, above n 3, §3–4.

¹² At just four pages.

¹³ Such coverage is, however, provided in Damien Cremean, *Admiralty Jurisdiction: Law and Practice in Australia and New Zealand* (2nd ed, 2003).

¹⁴ Davies and Dickey, above n †, 113–114.

¹⁵ *Ibid* 124–126.

¹⁶ A leading English commentator says merely that ‘bottomry bonds are no longer in use today’: Nigel Meeson, *Admiralty Jurisdiction and Practice* (3rd ed, 2003) [2.145].

¹⁷ Which might, perhaps, be made shorter still as ‘Bills of Lading and Other Sea Carriage Documents’.

¹⁸ 46 USCA §1304.

development, given the ready availability of such judgments on databases such as WESTLAW and LEXIS.

The first of the carriage chapters provides a helpful overview of the background to trading by sea and will be of invaluable assistance to the student or the new practitioner.¹⁹ The two scenarios provide a particularly helpful illustration of the 'bewildering cast of characters' to be encountered in this area of law.²⁰ The new chapter heading for transport documents is a reflection of the growing importance of documents other than the traditional bill of lading in the carriage of goods by sea. Much of the material discussed in this chapter is new, particularly in relation to the *Carriage of Goods by Sea Act 1991 (Cth)*²¹ and the various state and territory Sea-Carriage Documents Acts²² enacted following the coming into force of the *Carriage of Goods by Sea Act 1992*²³ in the United Kingdom.²⁴ This chapter otherwise analyses four topics: (1) the three traditional functions of the bill of lading, i.e. as a receipt,²⁵ as the contract of carriage,²⁶ and as a document of title;²⁷ (2) the carrier's principal obligations and immunities under the Hague,²⁸ Hague-Visby,²⁹ and 'amended'³⁰ Hague-Visby Rules;³¹ (3) the shipper's obligations;³² and (4) contracts of carriage on chartered ships.³³ Besides these matters, the attention of readers should be drawn to the discussion on the role of the freight forwarder.³⁴

The chapters on voyage and time charterparties follow a predictable and logical order. Thus, the chapter on voyage charterparties follows the traditional four stages suggested by Lord Diplock in *The Johanna Oldendorff* case.³⁵ Additional topics analysed include the question of arbitration, choice of law and issues as to

¹⁹ See also Hare, above n 3, §12–1.1.

²⁰ Davies and Dickey, above n †, 163–164.

²¹ As amended by the *Carriage of Goods by Sea Amendment Act 1997 (Cth)* and the *Carriage of Goods by Sea Regulations 1998 (Cth)*.

²² *Sea Carriage Documents Act 1996 (Qld)*; *Sea Carriage Documents Act 1997 (Tas)*; *Sea Carriage Documents Act 1997 (WA)*; *Sea Carriage Documents Act 1997 (NSW)*; *Sea Carriage Documents Act 1998 (Vic)*; *Sea Carriage Documents Act 1998 (SA)*; *Sea Carriage Documents Act 1998 (NT)*.

²³ c 50. The short title of this Act is inappropriate given the confusion that it causes with the *Carriage of Goods by Sea Act 1971 (UK)*, c 19, which gives the force of law to the Hague-Visby Rules. For the reasons, see *Hansard*, HL Debates, 15 June 1992, vol 538, col 78 (Lord Goff).

²⁴ For comparative treatment, in the context of similar amendments in South Africa, see Stephen Girvin, 'Carriage by Sea: The Sea Transport Documents Act 2000 in Historical and Comparative Perspective' (2002) 119 *South African Law Journal* 317.

²⁵ Davies and Dickey, above n †, 179–195.

²⁶ Or rather the 'best evidence' of it: *Ibid* 195–196.

²⁷ *Ibid* 261–265.

²⁸ *The International Convention for the Unification of Certain Rules relating to Bills of Lading 1924*, opened for signature 25 August 1924, [1956] ATS 2 (entered into force 2 June 1931).

²⁹ *The Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924*, opened for signature 23 February 1968, [1977] UKTS 83 (entered into force 23 June 1977).

³⁰ i.e. as amended in Australia. The amended rules may be found in Schedule 1A of the *Carriage of Goods by Sea Act 1991 (Cth)*.

³¹ For the carrier's obligations see Davies and Dickey, above n †, 196–211. For the carrier's immunities: *Ibid* 211–244.

³² *Ibid* 244–247.

³³ *Ibid* 251–258, 265–272.

³⁴ *Ibid* 272–277.

³⁵ *E L Oldendorff & Co GmbH v Tradax Export SA* [1974] AC 479; [1973] 2 Lloyd's Rep 285.

formation of contract.³⁶ There is also a short discussion of contracts of affreightment.³⁷ The chapter contains references throughout the discussion to clauses in the Gencon (1994) charterparty, which is reproduced in full at Appendix 7. I particularly like the worked examples for 'weather working days' and 'working hatches' in the context of laytime.³⁸

The chapter on time charterparties breaks down into eleven substantive sections, covering the description of the ship, delivery, duration, trading limits, hire, off-hire, employment,³⁹ withdrawal, frustration,⁴⁰ redelivery, and liens. As was the case in the chapter on voyage charterparties, there are many references to the leading general standard form, NYPE 93, which is also reproduced in full at Appendix 8.

The remaining chapters in the book concern marine casualties. Chapter 15, on 'Collisions and Liability for Damage', looks at the subject through the lens of vicarious liability (including pilotage), duty of care, breach of duty, causation, division of loss, remoteness of damage, the problem of purely economic loss, and limitation of time. Careful attention is drawn in this chapter to the differing statutory regimes which apply by virtue of Commonwealth, state, and territory legislation, particularly in relation to breaches of the Collision Regulations,⁴¹ division of loss and limitation of time. In relation to the latter, a very helpful comparative table is provided.⁴² I have one small criticism of this chapter, which concerns the discussion of the Collision Regulations. In my view this is unduly compressed and should be expanded, particularly in relation to those provisions of the rules which often become material in real collision scenarios.⁴³

Chapter 16 covers the important subject of 'Limitation of Liability', described by Sheppard J as having the 'effect, for practical purposes, of either overriding, or substantially, reducing, the effect of the principle that an employer is liable for the wrongful acts of his employees'.⁴⁴ Much of the discussion in this chapter is of the provisions of the 1976 Limitation Convention,⁴⁵ which came into force in Australia in 1991.⁴⁶ Again, there are a number of helpful worked examples which will assist the novice (and even the more experienced) in understanding how a limitation fund might be distributed.⁴⁷

³⁶ Davies and Dickey, above n †, 280–282.

³⁷ Ibid 342–343.

³⁸ Ibid 306 and 310 respectively.

³⁹ Including the Inter-club Agreement: Ibid 389–391. See also Stephen Girvin, 'The NYPE Interclub Agreement' (1999) *Il Diritto Marittimo* 1096.

⁴⁰ And this part includes discussion of the special legislative scheme in New South Wales, Victoria, and South Australia.

⁴¹ *Convention on the International Regulations for Preventing Collisions at Sea 1972*, opened for signature 20 October 1972, [1980] ATS 5 (entered into force 15 July 1977).

⁴² Davies and Dickey, above n †, 449.

⁴³ Eg, rr 5, 6, 8, 10, 13, 14–17.

⁴⁴ *Schleederer v The Ship Red Fin* [1979] 1 NSWLR 258, 272–273.

⁴⁵ *Convention on Limitation of Liability for Maritime Claims 1976*, opened for signature 19 November 1976, [1991] ATS 12 (entered into force 1 December 1986).

⁴⁶ By way of the *Limitation of Liability for Maritime Claims Act 1989* (Cth).

⁴⁷ Davies and Dickey, above n †, 474–476.

Chapter 17, which is on 'Marine Insurance', is a model of concise analysis of a very complex subject. It follows a fairly traditional discussion of such concepts as parties to the contract, formation, form of contract, peril and risk, proximate cause, loss, measure of indemnity, warranties, utmost good faith, premium, and subrogation. A number of examples help in explaining such concepts as loss⁴⁸ and the measure of indemnity.⁴⁹

Chapter 18 contains a succinct account of 'General Average', with short analyses of both the York-Antwerp Rules of 1974, as amended in 1990, and also the York-Antwerp Rules of 1994.

Chapters 19 and 20 of the book deal with two very large subjects — namely, 'Marine Pollution from Ships' and 'Salvage'. It is clear that both these chapters required very substantial rewriting since the previous edition. The pollution chapter contains an analysis of both the relevant statutory provisions applying under Commonwealth, state, and territory legislation, as well as the regime for compensation under the 1992 CLC⁵⁰ and under the 1992 Fund Convention.⁵¹ The chapter on salvage contains a discussion of the common law of salvage, the *International Convention on Salvage 1989*,⁵² and the position under salvage contracts. The final chapter, Chapter 21, covers the subject of 'Wrecks' (including historic shipwrecks) from the perspective of Australian law.

Enough has been said in this review to show that the treatment of the various topics in this new edition of *Shipping Law* is comprehensive. The writing and the analysis throughout is of the very highest standard; the authors are not afraid of critical reflection on recent developments.⁵³ Indeed, the reader will find much to assist his or her understanding of the subject as a whole. While from a teaching perspective some of the chapters are too superficial to support a full course (for example, marine insurance), they would support the survey-type course very well.

There is very little which could be added by way of criticism, but a couple of final minor points might be made. The first concerns references to other writing in the area, where there does not seem to be any consistent authorial policy. Thus, on general average, we are alerted to the leading practitioner text, *Lowndes and Rudolf*,⁵⁴ but other references to the leading works, used by

⁴⁸ Ibid 519–520.

⁴⁹ Ibid 523–526.

⁵⁰ *International Convention on Civil Liability for Oil Pollution Damage 1969*, opened for signature 29 November 1969, [1984] ATS 3 (entered into force 19 June 1975).

⁵¹ *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971*, opened for signature 18 December 1971, [1995] ATS 2 (entered into force 16 October 1978).

⁵² Opened for signature 28 April 1989, [1998] ATS 2 (entered into force 14 July 1996). In force in Australia since 1998. See *Navigation Act 1912* (Cth) ss 315–329C.

⁵³ For example, the analysis of *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad (The Bunga Seroja)* (1998) 196 CLR 161, foreshadowed in the preface (at v) and in Professor Davies' short article in (1999) 23 *Tulane Maritime Law Journal* 449.

⁵⁴ Davies and Dickey, above n †, 537, fn 1.

practitioners everywhere,⁵⁵ are either buried in the detail of the footnotes or altogether absent. A pointer to these, perhaps in the first footnote of each chapter, would be of invaluable help to the newcomer to the field and a reminder to the more experienced. One or two references to rather outdated sources⁵⁶ should be updated with more recent literature, of which there is now a very great deal in the maritime field. On the other hand, the many website references are very helpful indeed.

A second point concerns the appendices to the book. Although in the past there may have been a case for including standard charterparty forms which were not readily available, I wonder whether this is still necessary, at least in the case of the BIMCO forms, which are easily downloadable from that organisation's website. It may be useful to retain forms which are not so easily obtainable (such as Austwheat Bill and Austwheat 1990), but the rest might be dispensed with. This would also save some pages which might be devoted to expansion of some of the material, as suggested.

It will, I hope, be obvious that I have a good deal of admiration for the new edition of this textbook. The writing aside, the book has been produced to a very high standard by the publishers. There is a comprehensive and accurate table of contents and the usual tables of cases and legislation. I could find very few printing errors.

Although described as a 'textbook',⁵⁷ it is clear that this new edition is intended as much for the practitioner market as for the student market.⁵⁸ It should find a place on the shelves of every Australian shipping law practitioner and, while the volume of maritime work has contracted as much in Australia as elsewhere, the new edition of *Shipping Law* is testimony to an enduring and continuing fascination in the subject.

⁵⁵ Such as those published by LLP in its 'Lloyd's Shipping Law Library' and by Sweet & Maxwell in its 'British Shipping Law' imprint.

⁵⁶ For example, to the older editions of *Kennedy's Law of Salvage*: Davies and Dickey, above n †, 600, fn 4. See now Francis D Rose, *Kennedy and Rose's Law of Salvage* (6th ed 2002).

⁵⁷ Davies and Dickey, above n †, vi.

⁵⁸ Indeed, such a narrow focus would not be financially viable given the relatively small number of shipping courses currently taught in Australian universities.