

Case Note:
ASP Ship Management Pty Ltd v Administrative Appeals Tribunal
[2006] FCAFC 23

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This case interprets the meaning of the phrase ‘operated by’ in s 10 of the *Navigation Act 1912* (Cth) (the Navigation Act). The Full Court of the Federal Court held that there is a tripartite division of the operations of a ship between commercial operations, technical operations and crewing operations. In interpreting the meaning of ‘operated by’ in s 10 of the Navigation Act it is necessary to determine whether the relevant person was responsible for one or more of these areas of operations.

Background

The proceedings concerned claims for compensation for personal injuries by Gert Bergvall and Shane Kelk. The claims were made pursuant to the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) (the Seafarers Act). Bergvall was employed by ASP Ship Management Pty Ltd as a crew member on the oil tanker the *MT Flinders*. The ship is owned by Mobil Shipping and Transportation Company but the ultimate management of the ship was with a United Kingdom company, Mobil Shipping Co Ltd. ASP had a ship management agreement with Mobil Shipping in relation to the *Flinders*. Kelk was employed by Mermaid Labour and Management Ltd as a crew member of the pipe laying vessel the *MV Lorelay*. The *Lorelay* is owned by a Swiss company and the ultimate management of the ship was with Allseas Marine Contractors SA. Allseas Marine had a labour and catering agreement with Mermaid.

Both Bergvall and Kelk claimed compensation under the Seafarers Act from their respective employers. Sections 73 and 79 of the Seafarers Act set out the procedure for the determination of claims. As both ASP and Mermaid failed to determine the claims within the prescribed time the effect of s 79 is that ASP and Mermaid are taken to have made a decision disallowing the claims provided that the relevant ships were prescribed ships under the Seafarers Act. Section 3 of the Seafarers Act provides that a prescribed ship is a ship to which Part II of the Navigation Act applies.

The AAT Decision

Bergvall and Kelk applied to the Administrative Appeals Tribunal for a review of the deemed disallowance of their claims. The immediate question before the Tribunal was whether the deemed decisions of ASP and Mermaid were reviewable decisions before the Tribunal. In *Bergvall v ASP Ship Management Pty Ltd*¹ the Tribunal held that they were reviewable decisions.

The critical question was whether the ships fell within the definition of s 10 of the Navigation Act. If they did then the applicants were entitled to pursue claims for compensation under the Seafarers Act. Section 10 of the Navigation Act extends the application of Part II of the Navigation Act to ships of which the majority of the crew are residents of Australia provided that the ship is operated by a company that is incorporated in Australia whether or not that company operates the ship in association with other persons. ASP and Mermaid are both Australian companies so the issue was whether they were operators of the respective ships.

The Tribunal noted two possible meanings of the verb ‘operate’ relevant to the interpretation of s 10 of the Navigation Act. The first is concerned with the physical operation of the ship while the second was concerned with the operation of the enterprise in which the ship is engaged.² The Tribunal concluded that ASP was an operator of the *Flinders* because of its management role in employing the master of the ship and all of its crew. The Tribunal also reached the conclusion that Mermaid was an operator of the *Lorelay* despite the fact that the master of the ship was employed by Allseas and Mermaid’s

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¹ (2005) 87 ALD 448.

² *Ibid*, 462.

contract was a labour and catering contract rather than a management contract. Both ASP and Mermaid appealed. In addition they each commenced proceedings in the Federal Court seeking to prohibit the Tribunal from dealing with the applications before it on the basis that the Tribunal had no jurisdiction to deal with the applications.

The Appeal

In *ASP Ship Management Pty Ltd v Administrative Appeals Tribunal*³ the Full Court of the Federal Court noted that amendments to the Navigation Act in 1979 introduced into the Act the concept of a ship being operated by someone other than the owner.⁴ The Court noted that the Explanatory Notes to the 1979 amendments referred to the intention of the legislation to apply to persons directly responsible for operating a ship so as to make them liable for breaches of the Act. This was particularly relevant where the actual owner of a ship was not within the jurisdiction.⁵

The Court noted that a ship is more than just a chattel; it is a working commercial enterprise.⁶ As such there are a number of aspects of operating a ship. The Court noted that those having management and control of a ship have responsibilities 'concerning the commercial deployment of the ship, the technical safety and adequacy of the ship as a complex integrated working entity, and the choice, supervision, care and discipline of the master and crew on board the ship'.⁷ The Court concluded that there is therefore a tripartite division of operations between commercial operations, technical operations and the crewing operations.⁸ The Court rejected the contention that the word 'operator' or the phrase 'to operate', relate 'only to the entity that has the commercial disposition of the ship or who has the final authority on operational matters'.⁹

The Court concluded that the Tribunal had erred because it had concluded that operating a ship meant either the operation of the ship itself or the operation of the ship as a commercial enterprise.¹⁰ The Court in recognising a tripartite division of operations had demonstrated that the relevant concept was wider than that envisaged by the Tribunal.¹¹

Because the Tribunal had not made findings of fact as to the extent to which ASP and Mermaid were in a position to exercise control over the identity and qualifications of the masters and crew of the *Flinders* and *Lorelay*, the Court held that 'the Tribunal should not enter upon a consideration of the merits of the applications unless and until it finds, according to law, that the respective ships were being operated by the respective employers'.¹²

Conclusion

The decision in *ASP Ship Management* highlights the difficulty in interpreting legislation that purports to apply to 'an operator' without any definition of who is considered an operator. Given that it is possible to allocate the tripartite operations of a ship amongst a large number of persons it is likely that future cases will arise where a person is responsible for only part of one of the tripartite responsibilities. The Tribunal may in fact determine that ASP and/or Mermaid are not operators of the respective ships because they are only responsible for part of the crewing operations. The tripartite classification is a useful tool in resolving these issues but it would assist interpretation of the Navigation Act if the legislation included a definition of what is required for a person to be considered an operator of a ship.

³ [2006] FCAFC 23 (Unreported, Black CJ, Emmett and Allsop JJ, 10 March 2006).

⁴ *Ibid.*, [15].

⁵ *Ibid.*, [27].

⁶ *Ibid.*, [98].

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*, [106].

¹⁰ *Ibid.*, [109].

¹¹ *Ibid.*

¹² *Ibid.*, [115].