

SURVEY OF VESSELS

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A survey is undertaken for one or two purposes. Either to comply with some mandatory statutory obligation or to obtain an appraisal of a vessel for private purposes — insurance or sale. In either case the survey is undertaken by a specialist surveyor who expresses an opinion of the condition and efficiency of the vessel. Often, the opinion is expressed by reference to some published specification. On other occasions it is the mere expression of opinion of a man who is a specialist in his field. Sometimes the standards have statutory force and effect. Other times they constitute recommendations only.

A system fundamentally structured on personal opinion and the exercise of an unfettered discretion is not satisfactory. To the lawyer it is uncertain and untidy. The shipowner is often faced with the imposition in an arbitrary way of structural or other conditions in order to obtain a certificate of survey from the relevant government authority. When the problems of a federated society are overlaid on such a system there results a lack of uniformity or consistency in the standards applied and the obligations imposed on shipowners. The papers today show how the system is made to work, despite itself, and most importantly show that real advances towards uniformity are underway with the development and implementation of the Uniform Shipping Laws Code drawn up by the Marine and Ports Council of Australia. The fact that it is proposed to rapidly introduce the Code by statutory enactment has removed the need to do the compare and contrast approach to the relevant systems of survey administered in the various jurisdictions. It is therefore intended in this paper to draw attention to the main areas of statutory control and to some aspects of the use of private surveys. Having said this, it should be noted that there is no law of the survey of vessels as such. There has been surprisingly little reported litigation on the subject; that which has occurred has, in the main, concerned the obligation to have a survey undertaken for some statutory purpose. Again there is little reported law directly dealing with private surveys which of themselves have no legal consequence or effect being merely a tool in the hand of the practitioner.

Statutory Surveys

The system of statutory survey which operates in Australia and New Zealand has its genesis in the *Merchant Shipping Acts* of the United Kingdom. In addition international conventions have from time to time been developed, in particular under the auspices of the Intergovernmental

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Maritime Consultative Organisation (IMCO) in London and these have found their way into the domestic law as national governments have become signatories to the conventions. As a consequence statutory survey of vessels operates at both the Commonwealth and the State level in Australia.

The Commonwealth Survey requirements are contained in the *Navigation Act* 1912 as amended. The power of the Commonwealth to deal with shipping and navigation is to be found in the first instance in ss. 98 and 51 (i) of the Constitution. Until recent times the Commonwealth has taken a limited view of its role as a surveying body in line with the view that the power was limited to shipping as an incident of overseas and interstate trade and commerce.¹ In more recent times the Commonwealth has tended to push its powers to their furthest limits and use has been made of the external affairs power to support legislation in areas which were previously regarded as a state matter. The use of international treaty obligations to control transport services and set survey standards is most strikingly seen in the air transport industry. The use of this mechanism to control intra-state airline operations has been consistently held to be a valid exercise of power.² One may be pardoned for thinking that the *Navigation Act Amendment Act* 1979, by expanding the operation of the *Navigation Act* to give general effect to three international conventions,³ reflects an actual or potential expansion of Commonwealth activity in respect of ship surveys.⁴

The *Navigation Act*, subject to the limitations on s. 2 thereof, in so far as it makes provision for the survey of ships in Pt. IV, applies to all ships whether British or foreign.⁵ In so far as the provisions of the Act give effect to the Safety Convention they apply to intra state vessels unless there is a law of the State or Territory giving effect to the Convention in respect of that vessel.⁶ Once subject to the operation of the Part all ships are liable to inspection and survey.⁷ The task of undertaking the survey is vested in surveyors appointed to the following categories:

- (a) wooden hulls and equipment;
- (b) metal hulls and equipment;
- (c) engines, boilers and machinery;
- (d) radio installations;
- (e) radio navigation aids.⁸

1. *Newcastle and Hunter River S.S. Co. Ltd. v. Attorney-General (Cth)* (1921) 29 C.L.R. 357; s. 2 of the *Navigation Act* 1912.
2. *R. v. Burgess; Ex parte Goya Henry* (1936) 55 C.L.R. 608; *R. v. Poole; Ex parte Henry* [No. 2] (1939) 61 C.L.R. 634; *Airlines of New South Wales Pty. Ltd. v. N.S.W.* [No. 2] (1965) 113 C.L.R. 54.
3. The International Convention for the Safety of Life at Sea 1974 and the 1978 Protocol; the International Convention on Load Lines 1966 and proces verbal 1969; the International Convention for Safe Containers and proces verbal 1976.
4. Sections 4, 31, 37 of the *Navigation Act Amendment Act* 1979.
5. Section 187.
6. Sections 187 (3); 191 (4).
7. Section 189.
8. Section 190.

An appointed surveyor has significant powers of entry onto ships and rights of inspection of the ship and its certification.⁹

The Act provides for liability to survey to attach by making specific provision for certain types of vessel, e.g., steamships,¹⁰ nuclear ships, sailing ships and particular trades, e.g., passenger ships¹¹ or otherwise by making provision for survey in the regulations. Exemption from survey is granted to foreign vessels holding the relevant Safety Convention certificates or ships under 500 tons with a current classification certificate.¹² The work specification of the surveyor common to all surveys is that he must satisfy himself having regard to the construction, equipment and machinery of the ship that she is fit to ply and in so far as passenger ships are concerned fit to ply on international voyages.¹³ The surveyor must report his findings to the Minister and if satisfied as to the above matters make a declaration to that effect. The Minister may, after receiving a satisfactory report, issue a certificate of survey in the prescribed form.¹⁴ The certificate remains valid for the period specified therein and may be extended by the Minister for a period of up to 5 months.¹⁵

As one would expect the Minister is given a power of cancellation if he has reason to believe that the report of the surveyor was fraudulently or erroneously made or that vessel has been so altered or damaged since the issue of the certificate so as to affect her efficiency or seaworthiness.¹⁶ Any alteration or damage to a ship which effects her efficiency or seaworthiness is to be reported to the Minister in default of a penalty of \$100.¹⁷ Unfortunately the size of the penalty does not encourage a master or owner to report alterations or damage and, notwithstanding that such may have occurred, until cancellation, the certificate remains valid and effective.

Once a vessel ceases to be an Australian registered vessel any certificate of survey relating to the vessel ceases to have any effect.¹⁸

Whenever the issue of a certificate under Pt. IV is refused the owner of the ship may appeal to a Court of Marine Inquiry which may make such order as it thinks fit.¹⁹ The Court when sitting as a Court of Survey has all the powers and functions of the Minister and may therefore issue the certificate itself.²⁰

As part of fulfilling its obligations under the relevant international treaties the Commonwealth has made provision for the issue of certain

9. Section 190AA.

10. "Steamships" includes all vessels propelled by electricity or mechanical means.

11. See Divs. 2, 2A, 2B, 2C of Pt. IV and the *Navigation (Survey) Regulations* 1968-1979.

12. Regulation 7 of the Survey Regs.

13. Section 194 (1).

14. Section 194 (5).

15. Section 195.

16. Section 190A (2).

17. Section 190A (1).

18. Sections 195A; 206PA.

19. Section 192.

20. Section 377 (2).

safety certificates.²¹ This process of certification is closely intertwined with the system of survey. Upon receipt of a satisfactory survey declaration of an Australian vessel the minister, if satisfied that the requirements of the Act as to construction equipment and machinery of vessel engaged on international voyages have been fulfilled, may issue:

- (a) a passenger ship safety certificate;
- (b) a passenger ship short voyage certificate;
- (c) a cargo ship safety onstruction certificate;
- (d) a cargo ship safety equipment certificate;
- (e) a cargo ship safety radio telephony certificate;
- (f) a cargo ship safety radio telegraphy certificate;
- (g) a nuclear passenger safety certificate;
- (h) a nuclear cargo ship safety certificate.²²

Certificates are valid for the period stated therein and require periodic renewal.

The certification process is important because the detailed construction and equipment specifications are contained in the regulations to the SOLAS convention being Sch. VI to the Act. The Schedule is to be read as part of the Act and surveys of vessels engaged or likely to be engaged in international voyages are carried out in accordance with the requirements of the Act. Also, the regulations to the convention have been reproduced in the *Navigation (Construction) Regulations 1968-1977* so that other vessels subject to Commonwealth survey, but not engaged in international voyages have also been surveyed by reference to the Schedule subject to the exemptions provided in the regulations themselves.

The system of certification is enforced by making it an offence to take an Australian Registered ship to sea or permit a ship to be taken to sea on an international voyage without the prescribed certificates.²³ In addition the Minister has jurisdiction over foreign ships with respect to certificates issued by other convention countries, or if from non-convention countries, to require the obtaining of certificates of survey appropriate to the voyage to be undertaken.²⁴

Provisions dealing with radio equipment load lines and other safety matters are dealt with in the remaining divisions in Pt. IV.

In recent years the Marine and Ports Council of Australia (a federal/state governmental consultative body) has produced a Uniform Shipping Laws Code. It is not proposed to deal with the Code in this paper (it being the subject of another speaker), however, it would appear that the Commonwealth intends to give the code statutory validity and apply it consistently with its obligations under the relevant international conventions.²⁵

21. See Div. 2B, ss. 206C-206Q.

22. See ss. 206D-206K.

23. Sections 206S, 206T, 206U.

24. Section 206V.

25. Sections 425, 427.

The introduction of the uniform code has rendered any study of the separate State survey requirements unprofitable. The present Acts are substantially structured and in similar terms to the Commonwealth Act. They provide for the appointment of shipwright and engineer surveyors with extensive powers of entry and inspection. Surveys, generally speaking, are required annually and recognition is given to U.K. Board of Trade and British Commonwealth Country certificates of survey. Additionally the states are themselves giving effect to some parts of the International Convention for the Safety of Life at Sea 1974; for example the *Navigation (SOLAS) Regulations* 1980 (Qld).

The state legislation, like the Commonwealth legislation, applies to vessels by reference to their use as a "passenger" ship. The State Acts also use as a test that the vessel "ply on any voyage or excursion". It has been held that to ply means in the most general sense the act of navigation and a single voyage is sufficient.²⁶ It is probable that the notion of plying involves a hire or reward. The divisional Court in *Hedges v. Hooker* (1889) 60 L.T. 822 was clearly of the view that hire or reward was required and more recently the same Court did not disapprove of the approach taken in *Hedges v. Hooker* although deciding the matter on other grounds.²⁷ Whether a ship is a passenger steamer depends on whether or not the vessel was constructed or used for the purpose of carrying more than twelve passengers. It is insufficient that it merely carries more than 12 passengers on a particular occasion.²⁸ A vessel used for business promotional work is none the less "used solely for pleasure and not for profit or reward".²⁹

The consequence of failing to undertake a survey, to display the relevant certificates or to put to sea without these being a current survey certificate in respect of the vessel is that either the owner or the master will be liable to prosecution. If the vessel puts to sea or carries passengers in contravention of the relevant legislation with the knowledge of the owner there is a real possibility that any marine insurance will be vitiated, the voyage being illegal.³⁰

Private Surveys

As indicated earlier in this paper private surveys are essentially tools in the hands of the shipping and insurance industries. In carrying out surveys, in obtaining information, in making representations, the normal rules as to agency, skill and care and estoppel apply. As such each case must be looked at to decide on its own facts what the relationship between the parties has been. However it must be realised that in certain circumstances

26. *Deary v. Wilkins* (1903) 28 V.L.R. 560; *Ex parte Edwards* (1914) 31 W.N. (N.S.W.) 157.

27. *Duncan v. Graham* [1951] 1 K.B. 68.

28. *Ibid.*; see also *Weeks v. Ross* [1913] 2 K.B. 229.

29. *Ex parte Nutt & Muddle & Sons Pty. Ltd.*; *Re Penn* (1969) 89 W.N. (Pt. 1) (N.S.W.) 631.

30. *Wilson v. Rankin* (1865) L.R. 1 Q.B. 162; *Dudgeon v. Pembroke* (1874) L.R. 9 Q.B. 581.

surveyors can be acting as the agent of either an owner or an underwriter and bind his principal by his conduct or fix the principal with knowledge because of information he receives.

The preparation of surveys by surveyors as part of their business and which other people, other than their clients rely on in the ordinary course of business may bring a surveyor within that class of persons who owe a duty of care to exercise skill and competence in preparing the report. The use of such reports in the marine insurance industry and in the financing of vessels probably places the surveyor within the narrower category of persons owing the duty as held by the majority of the Privy Council in *Mutual Life & Citizens Assurance Co. Ltd. v. Evatt*.³¹ They certainly fall within the wider category of persons which the High Court majority in that case regarded as being under a duty of care.³²

A survey is usually undertaken before a vessel is insured or the insurance is renewed. Often a surveyor will be called in to advise on questions of salvage and necessary repairs after a casualty. Where the underwriter arranges the survey and it is acted upon by the shipowner the underwriter cannot later claim the ship was unseaworthy.³³ Likewise where the underwriter by its surveyor actively participates in decisions as to the existence of damage to a vessel and allows it to return to sea, he may by such conduct be deemed to have waived any breach of warranty as to seaworthiness that would otherwise apply.³⁴

Conclusions

The production of comprehensive construction and equipment codes against which surveys are to be performed, and the incorporation of them into statutory instruments is desirable. It is also important that there be uniformity in the standards required in the various jurisdictions. The major advances in this area will enable lawyers to more easily advise clients of their obligations under the statutes. It will also enable shipowners to know precisely the standards they are required to meet and thus remove the animosity that sometimes arises when an owner feels that work that is demanded to be undertaken before a certificate issues is both unwarranted and oppressive.

31. (1970) 122 C.L.R. 628.

32. (1970) 122 C.L.R. 556.

33. *Daneau v. Laurent Gendron Ltee* [1964] 1 Lloyd's Rep. 220.

34. *Ibid.*, at p. 224.