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THE LIABILITY OF A SHIP'S AGENT

by

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LIABILITY OF SHIP'S AGENTS IN AUSTRALIA

BY G.I. MACNISH

Question: What is a ship's agent?

In Blandy Bros & Co. Ltd. -v- Nello Samoni Ltd. (1963) 2 Lloyds Rep. 393, 404 Pearson L.J. stated:

> "The Ship's Agent is, in the normal case the Agent of the Shipowner at the particular port and the Ship's Agent, therefore at that port stands in the shoes of the Shipowner, and it is reasonable to suppose that he has the authority to do whatever the Shipowner has to do at that port."

This definition does not take into account the differences between a "general" and a "special" agent. However as one must investigate the express implied or usual authority of both to ascertain whether a special or general agency exists it is submitted that the distinction is of little practical importance.

An agent's authority is express when it is specifically created and limited by the terms of agreement between the principal and the agent. The authority may be implied from the nature of the business which the agent is employed to transact. The agent's usual authority is the authority which the agent in its trade business profession or place in which it is employed would usually normally or customarily possess unless something was expressly said by the Principal to contradict it.

Obviously the responsibilities of the Ship's Agent varies from State to State and from Country to Country however in general the ship's Agent assumes no liability as a principal unless:

(a) the agent either intentionally or unintentionally assumes the responsibility of a principal, or

(b) statute imposes upon the agent the responsibility of a principal.

As between the agent and the principal the rights and liabilities of each other will depend upon the express or implied terms of the agreement between them. Where these terms are absent the agent will as a matter of law owe certain duties to his principal. In general terms the agents duties in the case of agency for reward are:

1. To perform what the agent has undertaken to perform unless the undertaking is illegal or is null and void by Common Law or Statute.

2. To act within the agents express implied or customary authority for the benefit of the principal.

3. To perform the undertaking with due care and skill. The standard of care to be observed by the agent is to use that skill which the agent having regard to his position would usually possess and exercise.

4. To perform the undertaking personally and not to delegate the task.

5. Not to deny the title of the principal to goods money or land possessed by the agent on behalf uf the principal.

6. To account.

7. Not to let personal interest conflict with obligations owed to the principal.

The above duties are owed to the person instructing the agent and in the case of Ship's Agents this person is either the owner of the vessel, the charterer or both.

In general terms the Principals duties in the case of agency for reward are:

1. To remunerate the agent for services rendered.

2. To indemnify the agent against losses liabilities and expenses incurred in the performance of the undertaking.

In general the Ship's Agent in accordance with his instructions performs a number of tasks of which the following are a few examples:

1. Deals with administrative matters (reporting to customs, harbour authority, immigration).

2. Arranges for ship's berth and stores as well as fuel and repairs.

3. Arranges tugs pilots and stevedores.

4. Liases with Shippers and Receivers so as to have cargo delivered and collected.

5. Cares for crew requirements whilst the ship is in Port.

6. Attends to necessary documentation work (issuing or collecting Bills of Lading, Manifests, Delivery notes, ordering surveys of ships or cargo, collecting and remitting freight and demurrage etc.).

In carrying out these tasks the Ship's Agent can and sometimes does potentially expose himself to significant

liability. As mentioned earlier the agent may unintentionally assume the responsibility of a principal or may have the responsibility of a principal attached to him by statute.

I will firstly deal with specific statutes in force in Australia before turning to the question of the Ship's Agent who exposes himself to liability independently of Statute.

I should point out that I do not pretend to have necessarily considered all areas and/or all statutes and there are no doubt other statutes imposing liability on ship's agents not included in this paper. I have attempted to canvass those most commonly encountered.

Particular areas where ship's agents face potential exposure to statutory liability include:

- Damage to Port and Harbour installations
- Deserting Crews
- Wreck Removal
- Oil Pollution
- Port and Harbour charges
- Customs duties and other obligations
- Taxation

Damage to Port and Harbour Installations

Queensland

With respect to damage to Port and Harbour installations, in Queensland under the HARBOURS ACT 1955-1982 Section 76(1) provides that where an injury is done by a vessel or by any person employed about the same to any part of the works or property of a Harbour Board the owner and agent are liable to the Board in damages for the whole injury. (1) This liability is not dependant on proof of negligence.

In Section 8 "Agent" is defined as a person who performs the function of ships husbandry or who has made arrangements for the repair, berthing, loading and unloading of a vessel. (2) The two sections read together therefore impose strict liability.

In the same section "Harbour Works" receives a very extensive definition. (3)

Section 76 imposes civil liability in respect of damage to any part of the works or property of a Harbour Board. Section 151 imposes criminal liability in respect of damage to specific aspects of the works or property of the Harbour Board whether done intentionally or negligently. (4) An agent is not deemed to be a principal offender under Section 151. However by virtue of sub-paragraph (2) of Section 76 and of sub-section (3) of Section 151 if an agent is called upon to pay or in fact pays the damages payable under Section 76 or a fine payable under Section 151 he is entitled to recoup the amount thereof from, inter alia, the owner of the vessel. If an offence is committed under Section 151 and the conduct giving rise to the commission of that offence itself causes damage to the Harbour Works concerned then an agent can be made primarily liable for the cost of that damage.

With respect to Section 76 liability may be imposed upon the agent where damage is done by a person belonging to or employed in or about the vessel. Persons belonging to, presumably, are always employed about the vessel. However the converse is not always the case. For example a stevedore may be employed about the vessel and yet obviously not belong to the vessel. Thus a ship's agent may find himself liable for the neglect or default of a stevedore which causes damage to the property of the Harbour Board.

New South Wales

In New South Wales the MARITIME SERVICES ACT 1935 Section 13 YA imposes liability on the owner of a vessel for damage done by it or any person employed about the vessel to any property of the Board. (5)

Again liability extends not only to damage done by a vessel but also damage done by persons employed about the vessel such as stevedores.

In this Act "Owner" in relation to a vessel is defined in Section 2 as including the agent of the vessel. (6) That section provides that "owner" in relation to a vessel includes inter alia:

1. in relation to a vessel for which while it is in port or when it was last in a port there is or was an agent for the berthing or working of the vessel and where the vessel has left that port for which there was no other agent when it last left that port - that firstmentioned agent; and

2. in relation to a vessel for which when it last left a port there was an agent other than an agent for the berthing or working of that vessel when it was in that port - that firstmentioned agent.

Section 21A of this Act states that the Master and Owner (and therefore the agent) of a ship navigating under circumstances in which pilotage is compulsory shall jointly and severally be answerable for any loss or damage caused by the ship or by any fault of navigation of the ship in the same manner as if pilotage were not compulsory. (7)

In my opinion this does not impose strict liability on the master and owner but simply remits the question to be

decided as if the pilotage was voluntary although the contrary has, at first instance, been decided in my jurisdiction.

South Australia

In South Australia the HARBORS ACT 1936-1974 Section 124(1) imposes upon the owner or agent liability in damages to the Minister for any damage done by the vessel or by any person employed about the same to any works or property vested in the Minister. (8) By virtue of sub-section (1a) the liability is strict. Indeed the Minister need not even establish any causal connection between the injury and an act or omission on the part of any person. However under sub-section (1b) it is a defence in any proceedings brought by the Minister to prove that the injury is attributable to negligent or other tortious conduct for which the Minister or an officer of the Department of Marine & Harbours is responsible and in the event that such lastmentioned conduct contributes to the damage the Court is empowered to make an allowance for such contributory conduct.

In 1981 this section was amended by inserting after subsection (1b) a new subsection (1c) which provided that negligence on the part of a pilot did not constitute a ground for a defence or for making an allowance in the assessment of damages. (9)

I draw your attention to sub-section (2) which relates to the recovery of damages. In this sub-section the Minister is given power to recover damages in any court of competent jurisdiction or he may at his option detain the ship until the damages have been paid. Furthermore if the Minister has not ascertained the damages he may estimate the damages and detain the ship until a deposit equal to this estimate has been made by the master owner or agent. There is no compulsion within the section upon the agent to make any

such deposit and without adequate financial protection he should certainly not do so.

There does not appear to be any definition of "Agent" in this Act and Section 43 only defines "Owner" as including:

> "any person who is owner jointly or in common with any other person, and also includes a corporate body; and when used in relation to goods, includes any consignor, consignee, shipper, or agent for the sale or custody, importing or exporting, loading or unloading of goods."

Therefore when the word "owner" is used in the act by itself it does not include the agent in relation to the ship.

Under Section 125 of the Act if the owner or agent of any vessel pays any money as a result of an injury caused by the act or omission of the Master or other person the owner or agent can recover this money together with costs and expenses from the Master or other person. (10)

Tasmania

In Tasmania the MARINE ACT 1976 in Section 91(1) imposes a liability upon the owner of every vessel to pay to a Board the amount of any damage caused by such vessel to the property of the Board or to any wharf within the jurisdiction of the board; This is notwithstanding that no person or some other person is liable at common law or under any other enactment to the board in damages. (11)

This section appears to impose strict liability on the owner of every vessel.

Under Section 4 "Owner" is defined as, with respect to any vessel, including the charterer and any person having the possession of it and any agent for the vessel if such agent is the public or recognized agent for the vessel's owner. (12) "Agent" does not appear to be otherwise defined.

Therefore if a vessel causes damage the ship's agent is exposed to liability even if some other person would be liable at Common Law to the Board in damages.

Under sub-section (4) of Section 91 the damages may be determined upon complaint by the Board. Upon this complaint orders may be made for payment of damages and detention or sale of the vessel. An order may also be made for security to be given. Therefore it appears that the ship's agent if joined as a defendant could be ordered to give security although whilst the vessel remained in port detention would be a more appropriate remedy. Once again an agent should obviously not volunteer to give security which would in most cases be offered by the vessel's P. & I. Club.

Northern Territory

In the Northern Territory Section 42 of the DARWIN PORT AUTHORITY ACT 1983 (Assented to in November 1983) imposes liability upon the owner of a vessel with or without proof of negligence or intent for loss or damage caused by the vessel within the Port. (13)

In the same section the master of the vessel is with proof of negligence or intent with the owner jointly and severally liable.

You will see therefore that although proof of negligence or intent must exist for the Master to be liable the owner is under strict liability.

In Section 5 of the Act "Owner" is defined as:

> "in relation to a vessel, includes an owner, part owner and charterer and an agent of any of them.

Therefore the ship's agent is also under strict liability

for any such damage.

Victoria

In Victoria Section 20A of the MARINE ACT 1958 enables the Port Officer to recover damages from the ship's owner master or agent with respect to damage done by the vessel or by any person belonging to or employed in or about such vessel to property under his control. (14) There is no definition of agent contained in this Act.

Section 20A(2) enables the Port Officer to recover such damages notwithstanding that the damage was as a result of Act of God or inevitable accident and that there was no negligence involved. Liability on the owner master and agent therefore is strict.

I draw your attention to sub-section (4) which enables the agent to recover any moneys which he may have paid or which may have been recovered from him in respect of damage done by the vessel provided the agent's negligence did not cause such damage. The latter possibility would seem to be remote.

It appears to me arguable that if the Port Officer or a person for whom the Port Officer is responsible was guilty of negligence contributing to the damage then any moneys payable should be reduced proportionately. This would appear to be so because the Section speaks merely of damages and the right to recover damages and not in terms of damage done as do the other sections considered so far.

If this argument was correct it would have an effect similar to the HARBOURS ACT of South Australia Section 124(1b).

The PORT OF MELBOURNE AUTHORITY ACT 1958 (previously called the MELBOURNE HARBOUR TRUST ACT 1958) imposes liability on

agents for damage to Port works under Sections 150 and 151 which provide for recovery of damages by the Commissioners with respect to injuries caused by any vessel or by any boatman or other persons belonging to or employed in or about such vessel. (15)

You will see from sub-section (2) of Section 150 that strict liability is imposed, as the owner master and agent are deemed to be liable notwithstanding that the vessel was under compulsory pilotage or the injury was caused by Act of God, inevitable accident or otherwise without negligence of any person.

Although Sub-section (2) of Section 20A of the MARINE ACT has the same effect as Sub-section (2) of Section 150 of the PORT OF MELBOURNE AUTHORITY ACT the latter section does not contain any provisions similar to Sub-section (4) of Section 20A of the MARINE ACT. Therefore if damage was caused or contributed to by the negligence of the Commissioners or by a person for whom the Commissioners were responsible it could not be argued that any moneys payable as a result of the damage should be reduced proportionately.

In the Act "Owner" when used in relation to a vessel is deemed to include inter alia any person acting or purporting to act as agent of a ship whether generally or for any particular purpose. (16)

I draw your attention to section 142 of the Act which applies the provisions of the MARINE ACT 1958 to the Port in all cases except where the express provisions of this Act or any regulations made thereunder are inconsistent with the MARINE ACT. (17)

THE PORT OF GEELONG AUTHORITY ACT 1958 (previously called the GEELONG HARBOUR TRUST ACT 1958) Section 108 is in similar terms. (18)

Section 108 of this Act like Section 150 of the PORT OF MELBOURNE AUTHORITY ACT imposes strict liability and this liability similarly extends to the case where damage is caused by persons belonging to or employed in or about the vessel.

Your attention is drawn to Section 99 of this Act which provides for all rules and regulations made under the MARINE ACT 1958 at the date of commencement of this Act to remain in force in the Port of Geelong until repealed or unless inconsistent with this Act. (19)

In The Geelong Harbor Trust Commissioners -v- Gibbs Bright & Co. (1970) V.R. 513 the Supreme Court of Victoria considered Section 110 of the GEELONG HARBOR TRUST ACT 1928 as enacted by Section 10(1) of the GEELONG HARBOUR TRUST (AMENDMENT) ACT 1951 (20). The important difference between the then GEELONG HARBOUR TRUST ACT 1928 and the existing PORT OF GEELONG AUTHORITY ACT 1958 (previously the GEELONG HARBOR TRUST ACT) lies in sub-section (2) of Section 110 of the 1928 Act and Section 108 of the 1958 Act.

Previously Section 110 imposed liability on the owner master or agent of any vessel for any injury caused by a vessel or by any person belonging to or employed in or about the vessel. The section then provided that the owner master or agent were not to be relieved from liability by reason that the vessel was under compulsory pilotage.

On the other hand Section 108 of the 1958 Act goes further and enables the Authority to recover damages notwithstanding that the damage was caused by Act of God, inevitable accident or without negligence.

In the Geelong Harbor Trust Case the Court held that the Act did not impose liability in the absence of negligence or

other tortious act or omission on the part of somebody but merely extended the area where vicarious liability could exist. This decision was subsequently affirmed by the High Court (1970) 122 C.L.R. 504 and the Privy Council refused to interfere with this decision (1974) 129 C.L.R. 576.

At page 519 of the High Court decision Kitto J. stated:

> "a legislature whose intention is different may easily give effect to it by enacting a different provision."

It appears that the legislature paid heed to this comment and this is reflected in sub-section (2) of Section 108 of the PORT OF GEELONG AUTHORITY ACT 1958.

You can therefore see that the existing legislation imposes strict liability on the owner agent or master of a vessel with respect to any injury caused and that this liability is not qualified in any way. Therefore the arguments put forward in the Geelong Harbor Trust Case of inevitable accident, act of God or absence of negligence could no longer be expected to succeed. You will also see that the other Victorian Legislation has been similarly drafted so that one could not now rely on the Geelong Harbour Trust case arguments.

Originally the Victorian HARBOR BOARDS ACT 1958 was in similar terms to Section 110 of the GEELONG HARBOR TRUST ACT 1958 (21). Therefore it did not impose strict liability.

However it has also been amended and is now in terms similar to Section 108 of the PORT OF GEELONG AUTHORITY ACT 1958 and therefore imposes strict liability on the owner master and agent of a vessel for damage done by such vessel or by any person belonging to or employed in or about such vessel. (22)

By the PORT OF PORTLAND AUTHORITY ACT 1981 the PORTLAND

HARBOR TRUST ACT 1958 became known as the PORT OF PORTLAND AUTHORITY ACT 1958. Section 47 of this Act provides for the provisions of Sections 105 to 119 of the HARBOR BOARDS ACT to apply to this Act. The effect of this is of course to impose strict liability on the owner master and agent of a vessel for damage done by such vessel or by any person belonging to or employed in or about such vessel.

Section 4 of the MARINE ACT provides that nothing in this Act shall affect or in any manner alter or vary any of the provisions of any Acts relating to the Port of Melbourne Authority, the Geelong Harbour Trust Commissioners or the Portland Harbour Trust Commissioners.

Section 7 of this Act enables the Governor in Council to define limits and boundaries of ports in Victoria and to frame rules and regulations relating to those ports.

It appears therefore that the various PORT AUTHORITY ACTS apply geographically within their particular Ports. The limits of these Ports are set out in schedules to the Acts relating thereto.

Section 4 of the HARBOUR BOARDS ACT provides that it shall be read and construed as in aid and not in derogation of the MARINE ACT and that the latter Act shall apply to the port of any harbour board in all cases except where the express provisions of this Act are inconsistent therewith.

Western Australia

In Western Australia Section 2 of the HARBOURS AND JETTIES ACT 1928-1940 imposes liability on the owner and master of a vessel for loss or damage caused by the vessel notwithstanding that the vessel was in charge of a pilot and that pilotage was compulsory. However there does not appear to be any liability cast upon the Ship's agent. (23)

Section 2 provides for the owner and master of a vessel to be answerable under the provisions of the Acts set out in the Schedule to this Act. The Acts set out in the schedule are the FREMANTLE HARBOUR TRUST ACT 1902, Section 36 (FREMANTLE PORT AUTHORITY ACT), the BUNBURY HARBOUR BOARD ACT 1909 Section 33 (BUNBURY PORT AUTHORITY ACT), the ALBANY HARBOUR BOARD ACT 1926 Section 33 (ALBANY PORT AUTHORITY ACT) and the JETTIES ACT 1926 Section 12.

It appears that the purpose of the HARBOURS AND JETTIES ACT is to extend the area of liability of ships owners and masters under the Acts referred to in the schedule by providing for the owner and master of a vessel to be answerable for damage caused by a vessel notwithstanding that the vessel was in charge of a pilot and pilotage was compulsory. This however has no effect as regards the ship's agent.

You will see from this section and from the comments that I have made previously on the Victorian Statutes that the liability of the ship's owner is not strict.

Section 12 of the JETTIES ACT 1926-1976 also imposes liability on the owner and master for damage and omits any reference to Ship's Agents. (24)

This Act enables the Governor to make regulations for the management, use, maintenance and preservation of all jetties in Western Australia whereas the various PORT AUTHORITY ACTS are confined to the boundaries of the particular port the subject of the Act in question.

Under the PORT HEDLAND PORT AUTHORITY ACT 1970-1976 Section 33 imposes liability on the owner of a vessel for damage done by his vessel or by any person employed in or about the vessel to any Port Authority works. (25) Under Section 4

of that Act "Owner" only includes an agent when used in relation to goods. (26)

Section 33 of the BUNBURY PORT AUTHORITY ACT 1909-1976 similarly imposes liability on the owner and the definition of "owner" is similar to that contained in the PORT HEDLAND AUTHORITY ACT 1970-1976. (27)

The ESPERANCE PORT AUTHORITY ACT 1968-1976 equally does not appear to impose liability on the Ship's Agent for damage to Port Works by a vessel.

The GERALDTON PORT AUTHORITY ACT 1968-1979 follows suit by imposing liability on the owner pursuant to Section 35 but not on the Ship's Agent.

The same can be said concerning Section 36 of the FREMANTLE PORT AUTHORITY ACT 1902-1976.

Although liability for damage caused by a ship in general is not imposed on the Ship's agent, all of the WESTERN AUSTRALIAN PORT AUTHORITY ACTS impose liability for damage caused by a Ship to submarine cables on the owner or ship's agent. (FREMANTLE PORT AUTHORITY ACT Section 38, GERALDTON PORT AUTHORITY ACT Section 36, ESPERANCE PORT AUTHORITY ACT Section 36, BUNBURY PORT AUTHORITY ACT Section 35, PORT HEDLAND PORT AUTHORITY ACT Section 34).

Section 34 of the PORT HEDLAND PORT AUTHORITY ACT provides for damage to any submarine cable done by any ship to be made good by and at the expense of the master owner or agent of the ship. (28).

It appears to me however that this does not impose strict liability but merely extends the areas in which vicarious liability may exist.

This is because the section does not provide for the master owner or agent of the ship to be liable irrespective of negligence.

WRECK REMOVAL

Queensland

With respect to Wreck Removal, in Queensland under the HARBOURS ACT 1955-82 Section 75 empowers the Harbour Board to give notice to the ship's owner or agent to remove the wreck and enables the Board to recover from the owner or agent the expenses involved. (29)

Section 212 of the Queensland MARINE ACT also imposes liability on the Ship's Agent. Under subsections 1(a) and (b) the Board may give notice to the owner or agent to remove any wreck and may recover from the owner or agent or either of them the expenses with respect to the removal. (30)

The provisions of the HARBOURS ACT are confined to matters relating to Harbours whereas the MARINE ACT is concerned with Harbours, Seamen, Pilotage Safety and a number of other areas not covered by the HARBOURS ACT.

Section 197 of the QUEENSLAND MARINE ACT provides that the provisions of Part XIi of the Act (Sections 197 to 219) shall be in addition to and not in substitution for or diminution of the provisions of the HARBOURS ACTS. The Section also provides that where an act or omission constitutes an offence under Part XI of the QUEENSLAND MARINE ACT and under the HARBOURS ACTS the offender may be prosecuted and punished under either Act but not twice for the same offence.

I draw your attention to the fact that Section 212 of the

MARINE ACT refers to vessels left, sunk, stranded or abandoned in or on any port. Section 8 of this Act defines "Port" as including place and harbour. Section 8 defines "Harbour" as including any harbour the limits of which are defined under "THE HARBOURS ACTS 1955 to 1956" and any natural or artificial harbour haven, roadstead, estuary, navigable river, creek, channel, lake, dock wharf or other work in or at which ships do or can obtain shelter. (31)

Section 75 of the HARBOURS ACT refers to vessels left sunk, stranded or abandoned in or on any harbour and the definition of "Harbour" contained in Section 8 of this Act is almost identical to the definition contained in the MARINE ACT. However the HARBOURS ACT provides for the Governor in Council to declare any place not to be a harbour for the purposes of the Act. (32)

I am not aware that any such declaration has been made but if a declaration has been made then it will place restrictions on the Wreck Removal provisions of this Act. Such a declaration would not affect the provisions of the Marine Act.

New South Wales

In New South Wales the MARITIME SERVICES ACT 1935 Section 13 U(1), (2) and (3) impose liability on the owner to remove any wrecks in waters under the control of the Board.

Under sub-section 4 of this section if the Board assumes possession of or removes any wreck it is entitled to recover from the owner the expenses incurred in assuming possession removal custody repair and treatment of the wreck. (33)

I draw your attention to the fact that in addition to the cost of removal an owner can be liable to a penalty if the Board serves a notice to remove a wreck and this notice is

not complied within the time specified in the notice.

I also draw your attention to the definition of "Owner" contained in Section 2 of the Act which deems the owner in relation to a vessel to include the vessel's agent. (34)

South Australia

In South Australia the HARBORS ACT Section 122 sub-sections 1(I) and (II), enables the Minister to give notice to the owner of a vessel or to the agent of the owner of a vessel that is sunk stranded or abandoned within the limits of the Jurisdiction, that the owner or agent is required to remove the wreck or give an undertaking under security to remove the wreck. Under sub-section 1(II) if the owner or an agent cannot be found or if he fails within the time specified in the notice to remove the wreck the Minister may remove the wreck and recover the expenses incurred from the owner. Obviously the agent should neither give any security or take any steps to remove the wreck. The section does not appear to be very happily worded since it is not clear to me, at least, whether the word "he" is intended to refer only to the owner or as well to the agent.

Under sub-sections 1(III) and (IV) the Minister is given power to sell any wreck and may recover from the proceeds of sale the cost of removal. If the proceeds of the sale are insufficient to cover the removal costs the Minister may recover the balance from the owner if the vessel was sunk or stranded by the owners negligence. If not the Minister may recover from the person by whose fault or negligence the vessel was stranded or sunk. (35)

The definition of "owner" contained in Section 43 of the Act is not wide enough to include the ship's agent for the purposes of Wreck Removal. (36)

Therefore unless the ship's agent is responsible for a vessel being stranded or sunk (a most unlikely circumstance) the agent will not be liable for the costs of wreck removal.

Tasmania

In Tasmania under Section 93 of the MARINE ACT 1976 where a vessel is sunk stranded or on shore in any port the appropriate Marine Board may give notice to the owner or master or to the person responsible for the vessel to remove the vessel. If this notice is not complied with the vessel may be removed and disposed of at the expense of the owner. (37)

I draw your attention to the definition of "owner" contained in Section 4 which defines "owner" as including with respect to any vessel, inter alia, the public or recognized agent for the owner of the vessel. (38)

There is no definition of "agent", "public agent" or "recognized agent" contained in the Act. In my opinion an agent who carries out the tasks associated with ship's husbandry would fall within the definition of "owner" contained in this Act.

Northern Territory

In the Northern Territory Section 32 of the DARWIN PORT AUTHORITY ACT enables the Chairman of the Port Authority to serve on the owner master or occupier of a vessel notice to remove, repair, make safe or destroy a vessel, hulk or hull within the Port which in his opinion is unsafe, likely to cause damage or endanger or obstruct the use of the Port. (39)

Under sub-section (2) of this section if the owner master or

occupier fails to carry out the matters referred to in the notice the Chairman may authorize people to board the vessel to carry out the work referred to in the notice (other than destruction of the vessel). The costs associated with this work may be recovered as a debt by the Chairman from the owner master or occupier under sub-section (5).

Under sub-section (6), failure by an owner master or occupier to comply with a direction of the Chairman renders them liable to a heavy fine.

Under Section 33 failure to comply with a direction of the Chairman to remove a vessel from the Port renders the owner master or occupier liable to a fine the same as that provided for in Section 32(6). (40)

Any reference to "owner" in these sections should be read as including a reference to the owner's agent. (41)

I draw your attention to section 36 of this Act which provides for the Port Authority to remove disperse destroy or mitigate damage caused by an undesirable substance that is put, falls or flows into or on the port. (42)

Under sub-section (2) of this section the Port Authority may recover as a debt the costs incurred from the owner or master of the vessel, the occupier of the place on land or the person in charge of the apparatus from which the undesireable substance was put or fell or flowed into or on the Port.

It appears to me that the wording of this section is such that it cannot be referring to wrecks yet the definition of "undesirable substance' contained in Section 5 of the Act provides that "undesirable substance" means, inter alia, a wreck. (43)

In my opinion a wreck is not put and does not fall or flow into a Port and that therefore the provisions of Section 36 are, gramatically, unlikely, (if indeed possible) to relate to wreck removal.

However there is still section 32 and this would cover the situation in relation to wreck removal.

Whilst on the subject of "Undesirable Substances" I would point out that Section 34 of the Act imposes heavy penalties on the owner and master of a vessel that puts into or allows to fall or flow into a Port an "undesirable substance." (44)

Victoria

In Victoria under the MARINE ACT 1958 there are various provisions relating to "undesirable substances" which impose obligations on a ship's owner and master.

As with the definition of "undesirable substance" contained in the Darwin PORT AUTHORITY ACT, in Victoria under the MARINE ACT an "undesirable substance" includes, inter alia, a wreck. The definition of "undesirable substance" in this Act is almost identical to the definition in the DARWIN PORT AUTHORITY ACT.

The PORT OF MELBOURNE AUTHORITY ACT the PORT OF GEELONG AUTHORITY ACT and the HARBOR BOARDS ACT all contain provisions similar to those contained in the MARINE ACT. All of these provisions were incorporated into the various Acts by the HARBORS AND NAVIGABLE WATERS PROTECTION ACT 1975. By virtue of Section 26 of the PORT OF PORTLAND AUTHORITY ACT the provisions contained in the HARBOR BOARDS ACT relating to "undesirable substances" were incorporated into the PORT OF PORTLAND AUTHORITY ACT.

The only real difference between the various "undesirable substance" provisions contained in these Acts is that the MARINE ACT applies to "undesirable substances" put into or upon or allowed to fall flow into or upon coastal waters whereas the other Acts apply to ports. In the MARINE ACT "coastal waters" is defined as including any part of the seas adjacent to Victoria (including any internal waters which are tidal waters) not being within a proclaimed port.

In the MARINE ACT sections 10C and 238D provide that for the purposes of the relevant sections relating to undesirable substances", "owner" in relation to a ship has the meaning assigned to it by Section 4(1) of the NAVIGABLE WATERS (OIL POLLUTION) ACT 1960. Similar provisions exist in the various PORT AUTHORITY ACTS.

In the NAVIGABLE WATERS (OIL POLLUTION) ACT Section 4 defines an "owner" in relation to a ship to include the charterer and any person having possession of the ship. There is no reference to an "owner" including an agent and in fact "agent" is separately defined in Section 4.

Under Section 13 of the MARINE ACT 1958 where any vessel or hull within any port in Victoria is unseaworthy, is for any reason likely to cause damage to property, is likely to become a daer to other vessel's or an obstruction to the Port or is sunk stranded or abandoned the Port Officer may serve notice on the vessel's owner master or agent requiring the owner to remove or destroy the vessel. The Port Officer may also serve on the vessel's owner master or agent a notice requiring the owner to give security to the satisfaction of the Port Officer.

Under Sub-section (4), if security is not given or the wreck is not removed the Port Officer may seize the vessel or hull and at the owner's expense perform the acts which the Port Officer may have required the owner master or agent to

perform.

In my opinion there is no obligation on the agent to remove a wreck or give security and the agent should take no steps to do so.

The PORT OF GEELONG AUTHORITY ACT defines "Wreck" as including jetsam, flotsam lagan and derelict. The same definition is contained in the PORT OF PORTLAND AUTHORITY ACT and the PORT OF MELBOURNE AUTHORITY ACT.

Section 64 of the PORT OF GEELONG AUTHORITY ACT, Section 87 of the PORT OF MELBOURNE AUTHORITY ACT and Section 54 of the HARBOR BOARDS ACT which is incorporated in the PORT OF PORTLAND AUTHORITY ACT are all in similar terms to Section 13 of the MARINE ACT. However the MARINE ACT refers to vessels or hulls within "any Port in Victoria" whereas the HARBOR BOARDS ACT refers to "a port" and the various PORT AUTHORITY ACTS refer to "the port".

Western Australia

In Western Australia the PORT HEDLAND PORT AUTHORITY ACT, the BUNBURY PORT AUTHORITY ACT, the ESPERANCE PORT AUTHORITY ACT, the GERALDTON PORT AUTHORITY ACT and the FREMANTLE PORT AUTHORITY ACT all enable the relevant authority to serve notice upon the owner or its agent to remove any wreck. However there does not appear to be any liability on the agent for failure to do so even if the agent enters into an undertaking with the relevant authority and fails to comply with that undertaking provided that the agent did not give any security contemplated by the relevant section. Prudence would dictate that in any event an agent should never give such an undertaking.

To take one example I refer to Section 32 of the PORT HEDLAND PORT AUTHORITY ACT (45)

This section provides that where a vessel is sunk stranded or abandoned within the Port the Port Authority shall give notice to the owner or agent of the owner to remove the wreck.

Under Sub-section (1)(b) if the owner or agent cannot be found or fails to remove the wreck the Port Authority may remove the wreck and recover expenses incurred from the owner.

You will see the reference to an "undertaking" in sub-sections 1(a) and 1(b). If an agent gave a personal undertaking he may be held liable for the costs of removing the wreck although the section appears to contemplate recovery only against the owner.

I also draw your attention to Sections 3 and 71 of the WESTERN AUSTRALIAN MARINE ACT 1982.

Under Section 71 where a vessel in navigable waters is in the opinion of an inspector a hazard or obstruction or likely to constitute a hazard or obstruction the General Manager of the Department of Marine & Harbours may serve notice on the owner to remove the vessel. If the vessel is not removed the General Manager may remove the vessel and recover the cost as a debt by selling the vessel or by an action in a court of competent jurisdiction against the owner.

Under Sub-section 5 of Section 71 "waters" is defined as including the territorial sea adjacent to the State, the sea on the landward side of the territorial sea adjacent to the State that is not within the limits of the State and the waters within the limits of the State. (46)

Under Section 3 of the Act "owner" is defined as including

in relation to a vessel, inter alia, any person exercising or discharging or claiming the right or accepting the obligation to exercise or discharge any of the powers or duties of an owner whether on his own behalf or on behalf of another. In my opinion a ship's agent would not fall within that definition.

PORT AND HARBOUR DUES

With respect to Port and Harbour charges it appears that in Australia Ships Agents are in all States except Victoria liable to a greater or lesser degree for harbour dues payable in respect of a vessel and the goods discharged from or loaded on that vessel.

Queensland

In Queensland Sections 125 and 126 of the HARBOURS ACT 1955-1980 provides that the owner master and agent of a vessel are jointly and severally liable for payment of harbour dues. (48)

As previously mentioned in this paper "agent" is defined in Section 8.

You will see that Section 125 relates to payment of harbour dues payable in relation to a vessel whereas Section 126 relates to payment of harbour dues payable in respect of goods discharged from, loaded on, transhipped from or to or carried in any vessel.

Under Section 126 (1a) in relation to goods the owner of the goods, any consignor, consignee, shipper or agent for the sale or custody of the goods or any person entitled to possession of the goods either as owner or agent of the owner are liable to pay harbour dues. However under Section 126(2) the vessel's agent may also it appears be required to

pay the dues and then left to recover the amount from the person primarily liable to pay them.

Under Sub-section 2(b) any owner, agent of the owner or master of a vessel who pays harbour dues with respect to goods has a lien upon and may retain these goods until the harbour dues are repaid to him by the person liable to pay them.

If the harbour dues are not recovered or repaid within the periods set out in Sub-section 2(c) the goods may be sold and the person who has paid the harbour dues may recover them from the proceeds.

Under Section 129 of the Act penalties are provided for attempted evasion or evasion of harbour dues and Section 130 provides that the Harbour Board may recover harbour dues as a debt from any person liable to pay them. (49)

Under Part XI Division II of the QUEENSLAND MARINE ACT 1958 as amended all ships unless expressly exempted are liable for "conservancy dues". These "conservancy dues" are calculated on the gross register tonnage of a ship as prescribed by regulations. (50) Section 219 Subsections 5(a) and (b) imposes joint and several liability for the payment of any conservancy dues upon the owner master and any consignee or agent as may have paid or made himself liable to pay any other charge on account of the ship in the Port at which the conservancy dues are payable. (51) Failure to pay renders such person liable to a penalty in addition to the amount of unpaid dues.

It appears to me that if a ship's agent is liable to pay any charges in respect of the ship under any other statute such as the HARBOURS ACT or if the agent is not necessarily liable for the charges but nevertheless attends to payment of them, then, under Section 219(5)(a) of the Queensland

MARINE ACT the agent will be liable to pay conservancy dues and failure forthwith to pay them amounts to an offence.

However under Section 219(5)(c) it is further provided that any consignee or agent made liable for the payment of conservancy dues may out of the monies received by him on account of the vessel in question or any other vessel belonging to the owner of the vessel in question, retain the amount of all conservancy dues paid by him.

New South Wales

In New South Wales under Sections 6 and 7 of the PORT RATES ACT 1975 inward and outward harbour rates and transhipment rates are payable by the owner of the goods and tonnage rates, berthing charges and moorage rates are payable by the shipowner. (52)

Section 5 of this Act defines "owner" as including the agent for the berthing and working of the vessel. (53)

Western Australia

In Western Australia under the BUNBURY PORT AUTORITY ACT the ESPERANCE PORT AUTHORITY ACT, the PORT HEDLAND PORT AUTHORITY ACT, the FREMANTLE PORT AUTHORITY ACT, the ALBANY PORT AUTHORITY ACT and the GERALDTON PORT AUTHORITY ACT liability for the payment of dues is imposed, inter alia, on the agent:

(a) in respect of a ship where the agent has paid or made himself liable to pay any other charge on account of the ship in the port.

(b) in respect of any goods carried on a ship where he is the agent for sale or custody of the goods or is entitled to the possession of the goods as agent for the

owner.

The term "agent" is not otherwise defined in the various PORT AUTHORITY ACTS.

An agent made liable for the payment of any dues in respect of that ship or those goods may, retain the amount of dues so paid by him out of any monies in his hands received on account of the ship or goods or belonging to the owner thereof, together with any reasonable expenses he may have incurred by reason of payment and liability.

The ship and tackle thereof or any goods in respect of which dues are payable may be destrained by any person authorised to collect dues until the dues are paid. Further, if the dues are not paid within seven (7) days of the distress the property distrained or any part thereof may be sold and the dues and expenses paid out the proceeds thereof.

To take one example I have set out the relevant provisions of the BUNBURY PORT AUTHORITY ACT in the Schedule to this paper. (54)

You will see that in the case of the Bunbury Port Authority if any evasion or attempted evasion of dues is made by the owner, master, consignor, consignee shipper or agent that person incurs a penalty not exceeding $200 or if the dues evaded exceed $200 a penalty not exceeding the amount of the dues evaded in addition to the dues payable. It should also be noted that Regulation 12 of the JETTIES ACT REGULATIONS 1940 as amended deals with the payment of wharfage dues and handling and other charges payable in respect of cargo discharged or shipped. It provides that it shall be competent, but not compulsory (in the case of outward cargo) for the officer in charge to accept from the agent or the master a guarantee in writing that such dues shall be paid to him within 24 hours of the clearance of the

vessel. (55)

I am not aware as to whether or not it is common practice for agents to give guarantees concerning payment of dues under this regulation. It appears to me that it adds little to the provisions of the various PORT AUTHORITY ACTS where liability is imposed on the agent without the agent signing any form of guarantee.

However should such a guarantee be signed the agent should ensure that in any event it is signed by the agent as agent and the name of the agent's principal should be disclosed.

South Australia

Provisions almost identical in terms to those in force under the various Western Australian Port Authority Acts also apply in South Australia pursuant to the Part III Division VII of the HARBOURS ACT, 1936 as amended. (56)

The Authority also has power to distrain any ship or goods until the dues charges or rates are paid and it may sell such property in the event of non-payment. Evasion of payment attracts a penalty of $500 in addition to the amount of rates dues and charges owing. (57)

Tasmania

There does not appear to be any specific provision under the Tasmanian MARINE ACT 1976 as amended regarding liability for payment of port and harbour charges and the like. However provision is made under Section 96 for the detention of any vessel in respect of which any fee, due or charge is owing until the payment thereof. (58) There is also a daily penalty in addition to the prescribed fine in the case of a continuing offence.

Under Section 104 the owner and the master of the vessel are jointly and severally liable for all pilotage charges. (59) As previously mentioned in this paper "Owner" in this Act is defined in Section 3 as including with respect to any vessel the public or recognized agent of the owner of such vessel.

Northern Territory

In the Northern Territory under Section 185 of the MARINE ACT 1981 as amended an agent is liable to pay charges for pilotage services provided to the vessel. (60)

Section 46 of the DARWIN PORT AUTHORITY ACT 1983 as amended sets out the powers of the Port Authority relating to recovery of fees which includes the seizure, attachment and detention of the vessel or goods until payment. (61)

In the Port By-Laws Section 3 "Owner" is defined as including in relation to goods the owner consignor, consignee or agent having the control or disposition of the goods and in relation to a vessel the owner, part owner, charterer and an agent of any of them. (62)

By virtue this definition and Chapter VI Sections 50 to 53 thereof an agent is made liable for berthage fees, wharfage fees, pilotage fees and port dues. (63)

Under by-laws 67 and 68 the agent is also liable for storage charges on inward cargo and storage charges for outward cargo in certain instances. (64)

I draw your attention to Section 51 which relates to Wharfage Fees. You can see from this Section that the owner of the goods is liable for the fees and by virtue of the definitions of "owner" contained in Section 3 the ship's agent has no liability unless that agent has the control or disposition of the goods.

I also draw your attention to Section 68(2) which provides that where goods are left on a wharf for shipment on a vessel longer than two days before the arrival of the vessel or such other period fixed by the Harbourmaster the owner of the vessel must pay storage charges on a daily basis.

Victoria

In Victoria there do not appear to be provisions imposing liability for the payment of port rates and other charges on any specified parties under the MARINE ACT the MELBOURNE HARBOUR TRUST ACT, The GEELONG HARBOUR TRUST ACT, the PORTLAND HARBOUR TRUST ACT, the PORTS AND HARBOURS ACT, the HARBOUR CHARGES ACT, the PORT OF GEELONG AUTHORITY ACT, the PORT OF MELBOURNE AUTHORITY ACT the PORT OF GEELONG AUTHORITY ACT or the various regulations made under those Acts.

There are of course provisions granting the various Authorities the power to demand, collect, receive and recover port rates and other charges. Where default is made in payment of charges in respect of a vessel, under the PORT OF MELBOURNE AUTHORITY ACT Section 113 the Authorities may detain the vessel until payment is made or satisfactory security given. If the default relates to payment of charges in respect of goods, under Section 114 the goods may be retained and sold by the Authorities. (65)

In all cases monies due and owing to the various Authorities and Board may be recovered in the Courts as a debt.

If an agent of a ship attends to payment of port and harbour charges or indeed disburses other monies on behalf of his principal he is of course entitled to be reimbursed by the principal.

A problem then arises if the principal is insolvent and the ship's agent may be left with no choice but to attempt to have the vessel arrested.

TAXATION

Under Division 12 of the COMMONWEALTH INCOME TAX ASSESSMENT ACT 1936 where a ship belonging to or chartered by an overseas owner or charterer carries goods shipped in Australia 5% of the amount payable in respect of such carriage is deemed to be taxable income derived in Australia. (66) This is of course with the exception of owners and charterers in countries that have double tax agreements with Australia. See INCOME TAX (INTERNATIONAL AGREEMENTS) ACT 1953 as amended.

Under Section 132 of the INCOME TAX ASSESSMENT ACT the master or agent of the vessel may be assessed and shall be liable to pay the tax.

Under Section 135 customs officers may refuse clearance for a ship where arrangements satisfactory to the Commissioner have not been made. This is becoming a comparatively frequent occurrence in these recessionary times.

I understand that in some cases ship's agents are requested to guarantee that tax under this division will be paid in respect of all ships handled by the individual agent. But in any event agents may be held liable under Section 132.

Obviously if the ship's agent does guarantee payment and also under Section 132 the agent risks having to meet the tax liabilities of unscrupulous or insolvent principals.

I understand that the Australian Chamber of Shipping has approached the Treasury Department with a view to having Division 12 repealed or alternatively having the Taxation

Department issue assessments prior to the vessel's departure from Australia and to strictly enforce Section 135. However the view of the Treasurer is that Division 12 should not be repealed as a good deal of cargo is carried from Australia on ships registered in countries with which it is unlikely that double tax agreements will be reached. It is further the view of the Treasurer that a system of issuing provisional certificates would for the time being be difficult to justify on the grounds of costs.

As you are all no doubt aware neither the ship owner nor the agent are aware of the amount payable for the purpose of Section 129 until loading has been completed and despatch and demurrage charges have been calculated. Therefore the Taxation Department's view is that insisting on payment of tax before departure would result in increases to the turnaround times of ships.

I understand that the Treasurer has pointed out to the Chamber that ship's agents are not obliged to act for or to give guarantees in relation to any operators who may be regarded as unscrupulous or poor business risks.

It therefore appears that for the time being at least ship's agents will continue to face liability for taxation under Division 12.

Having said this I draw your attention to Section 254 of the INCOME TAX ASSESSMENT ACT 1936. Sub-section 1(d) provides that every agent is authorised and required to retain from time to time out of any money which comes to him in his representative capacity so much as is sufficient to pay tax which is or will become due in respect of the income.

Sub-section 1(e) provides for the agent to be personally liable for the tax payable in respect of the income to the extent of any amount that the agent has retained or should

have retained under paragraph (d) but that the agent shall not otherwise be personally liable for the tax.

CUSTOMS

Under the COMMONWEALTH CUSTOMS ACT 1901 there are numerous duties and obligations imposed upon the owners of vessels.

In Section 4 of the Act "Owner" in respect of a ship is defined as including every person acting as agent for the owner or to receive freight or other charges payable in respect of the ship.

Section 64 of the Act requires for the owner to deliver to the Collector an inward manifest and to answer questions relating to the ship. (67) Similar provisions under Section 119 relate to outward manifests. (68)

Section 228 of the Act provides for forfeiture of a ship to the Crown in certain circumstances and provides for penalties on the owner of a ship. (69). As previously mentioned "Owner" in respect of a ship includes every person acting as agent for the owner.

OIL POLLUTION

Queensland

With respect to Oil Pollution the relevant legislation in Queensland is the POLLUTION OF WATERS BY OIL ACT 1973.

Section 9 of this Act imposes penalties on the owner and master of the ship. (70)

The subsequent sections deal with the power of the prescribed authorities to remove the oil and to prevent further pollution.

This Act does not appear to impose any direct liability on the ship's agent for oil pollution since "owner" as defined in Section 7 does not include the owner's agent. (71)

New South Wales

In New South Wales the relevant legislation is the PREVENTION OF OIL POLLUTION OF NAVIGABLE WATERS ACT 1960. This Act also does not appear to impose liability on the ship's agent for oil pollution.

South Australia

In South Australia the relevant legislation is the PREVENTION OF POLLUTION OF WATERS BY OIL ACT 1961-1982.

In 1979 this Act was amended to include a new Section 5 which made the ship's agent liable for the discharge of oil from a ship and also made the agent guilty of an offence and consequently liable to a heavy penalty. (72). You will see that section 5(1) imposes Civil liability whereas section 5(2) imposes Criminal liability.

However in 1982 this Section was amended by deleting the words "the agent" from sub-section (2) paragraph (a). (73)

In Dalgety Australia Ltd. -v- Griffith (1980) 24 S.A.S.R. 249 decided in April, 1980 Mitchell J. reversed the decision of a Special Magistrate who had imposed a penalty of $10,000 on a ship's agent under Section 5 and imposed instead a penalty of $4,500.00. Although The penalty provisions of this section relating to agents (Criminal liability) have been repealed the agent still remains liable jointly and severally with the owner and master for any discharge of oil (Civil liability). The effect of this is that although Agents are no longer liable to be fined for discharge of oil

from a ship they are still liable for the cost of cleaning up the discharge.

I draw your attention to Section 7d of the Act which was incorporated by the PREVENTION OF POLLUTION OF WATERS BY OIL ACT AMENDMENT ACT 1979 No. 24 of 1979.

That Section provides that a person is not liable to pay costs and expenses incurred by the Minister in the removal of any substance from the waters or land affected by the discharge or for the prevention of the discharge where the act or omission resulted:

1. from the need to save life;

2. from war, civil war, hostilities, insurrection or a nautral phenomenon of an exceptional inevitable and irresistible nature.

3. was wholly caused by the malicious act or omission of some other person not the servant or agent of the first mentioned person; or

4. was wholly caused by the negligence or failure of any government or other authority in carrying out its functions. (74)

This section was amended in 1982 by the PREVENTION OF POLLUTION OF WATERS BY OIL ACT AMENDMENT ACT 1982 No. 35 of 1982 which provided that the exemption from liability in Section 7d(1)(c) was not available to:

1. an agent in respect of an act or omission of the owner, the master or a member of the crew;

2. the owner in respect of an act or omission of the agent the master or a member of the crew; or

3. the master in respect of an act or omission of a member of the crew. (75)

Northern Territory

In the Northern Territory the relevant legislation is the PREVENTION OF POLLUTION OF WATERS BY OIL ACT. However this legislation does not impose any liability on the ship's agent.

Victoria

In Victoria the relevant legislation is the NAVIGABLE WATERS (OIL POLLUTION) ACT 1960 Section 6 of which provides, inter alia, that if any discharge of oil into waters within the jurisdiction occurs from a ship the owner and the master of the ship severally shall be guilty of an indictable offence. (76)

In Goodes -v- James Patrick & Co. Pty. Ltd. (1963) V.R. 334 the Defendant was prosecuted under the then section 6(a) which provided:

> "if the discharge is from a ship the owner the agent and the master of the ship severally shall be guilty of an offence against this Act and liable to a penalty of not more than one thousand pounds."

However the Supreme Court of Victoria held that the words "agent of the ship" in the absence of any technical meaning should be construed as meaning a person having similar authority to the master or owner in the control, discharge and management of the ship in relevant aspects.

As in this case the agent had no authority which extended to the ship itself or the conduct of the ship in any way relevant to the discharging of oil from the ship the charge was dismissed.

It appears that the Victorian Act was amended as a result of this decision by deleting the reference to "agent".

There does not now appear to be any provision imposing liability on an agent.

Tasmania

The OIL POLLUTION ACT 1961 of Tasmania imposes penalties upon the owner or master of a vessel where discharge of oil occurs. In the definition section of this Act "owner" is defined as having the same meaning as in the MARINE ACT. In the MARINE ACT "owner" is defined as including the agent of a vessel.

Western Australia

In Western Australia the PREVENTION OF POLLUTION OF WATERS BY OIL ACT does not impose any liability for oil spills on the ship's agent.

Commonwealth of Australia

It appears that the same can be said for the COMMONWEALTH PROTECTION OF THE SEA (DISCHARGE OF OIL FROM SHIP'S) ACT 1981.

I refer you to Section 6 of this Act which provides that it is to be read as being in addition to and not in derogation of or in substitution for any other law of the Commonwealth or any law of a State or Territory. (77)

This section indicates that the Commonwealth legislation is intended to be cumulative upon the State law and not to cover the whole field relating to oil pollution. There is no reference to ship's agents in this Act and therefore any

provisions imposing liabilities and penalties on ship's agents in State Acts cannot be inconsistent with the Commonwealth Statute.

Section 7 of this Act provides that the Act is to apply within and outside Australia and to extend to every external Territory.

It appears to me that in those States where the agent is liable for oil pollution the purpose behind the legislation is to enable vessels to sail without being detained whilst still having available a person within the jurisdiction who can be served with proceedings and be subject to enforcement proceedings if the owner or master fails to pay the cost of cleaning up.

It may well be suggested that this is somewhat iniquitous as in the vast majority of cases the ship's agent has absolutely no control over events which may give rise to an oil spillage.

IMMIGRATION

Under the Commonwealth IMMIGRATION (UNAUTHORISED ARRIVALS) ACT 1980 the ship's agent is liable to a heavy penalty if he is in any way directly or indirectly involved or knowingly concerned in bringing into the country persons other than those prescribed under the Act. (78) In addition to a monetary penalty a Court may under Section 20 order the forfeiture of the vessel and cargo. (79)

The term "Agent" is not defined in this Act.

Under Section 6(1) of the Commonwealth MIGRATION ACT an immigrant who not being the holder of an entry permit that is in force, enters Australia thereupon becomes a prohibited immigrant. (80)

Section 28 imposes criminal liability upon the agent if a prohibited immigrant enters Australia from a vessel. (81)

Under Section 29 the agent of a vessel is deemed to be guilty of an offence if a vessel with stowaways on board comes into a place or port in Australia. (82)

Under Section 36 the agent is jointly and severally liable with the master owner and charterer for the cost of keeping and maintaining the prohibited immigrant. (83)

Under Section 45 if the agent owner master or charterer is guilty of any offence under the act the ship may be detained and the agent may be called upon to give a surety for the payment of any penalties to obtain the ship's release. (84) There is no compulsion in this respect and obviously an agent should only give a surety as a matter of last resort and then only with adequate financial protection from the owner.

Commonwealth Navigation Act 1912 as amended

The NAVIGATION ACT contains several provisions which relate to ship's agents and I shall therefore mention these separately.

There is no definition of "Agent" or "Owner" (except in the latter case to include an operator where the owner is not the operator) contained in this Act although several sections impose liability on a ship's agent.

Under Section 45 a member of a crew of a ship that is engaged in overseas voyages must not be employed in any port in handling cargo or ballast relating to the loading or unloading of a ship. Penalties are imposed on the master, owner, agent or charterer for breach of this section. (85)

Section 80 of the Act deals with the settlement of Seamens Wages and casts obligations on the owner and master of a ship and the seaman. There does not appear to be any obligation cast upon the ship's agent yet the last part of the section provides:

> "Penalty (on owner, employer, agent, master or seaman) -
>
> (a) if the offender is a natural person - $500 or
>
> (b) if the offender is a body corporate - $1000" (86)

Under Section 120 which relates to provisions and water a ship's agent can be made liable for supplying or causing to be supplied provisions or water which are later found to be deficient. (87)

A Ship's Agent under Section 125 can also be made liable to penalties if he permits a ship to be taken to sea without medical supplies which are prescribed under the regulations. (88)

You are all no doubt aware of Section 132 of the Act which relates to payment of wages for sick or injured seamen. Under sub-section (5) of this section if the seaman is not paid wages to which he is entitled or if he is brought back to his proper return port before he is fit to travel the owner and the agent of the ship are each guilty of an offence. (89)

Under Section 132A the "proper authority" which is defined in Section 6 (90) may require the ship's agent to deposit with it monies to cover the expected liability of the owner under Sections 127 or 132 or may require the agent to give security. Penalties are provided for failure to meet these requirements. (91) The provisions are mandatory.

Section 148C is interesting in that it provides for the master of a ship to prepare accounts and make payments to a proper authority in respect of the wages of a seaman left behind on shore. Subsection (5) provides for penalties to be imposed on the master and owner of the ship for any breach of the section and there is no mention of the word agent. However subsection (4) provides that upon delivery of effects and the payment of the wages of a seaman to the proper authority the owner agent and master of the ship are discharged from further liability. (92)

Under Section 161 if the wife or child of a seaman receives a benefit from any public body or institution for the relief of destitute persons that institution is entitled to reimbursement out of the seamans's wages. Section 162 provides for an official authorized by the Minister to give notice to the ship's owner or agent requiring the owner or agent to retain the appropriate portion of the seaman's wages and to notify the seaman. The agent is also required to notify the official in writing of the seaman's return to his home port. (93)

If a foreign seaman is absent without leave whilst his ship is in Australia Section 178 of the Act enables any Justice upon complaint to, inter alia, issue a warrant for the seaman's apprehension and to deliver the seaman to the ship's agent to be conveyed to the ship. (94)

Under Section 186 of the Act the Commonwealth may recover any expenses incurred when a foreign seaman is left behind at an Australian Port from the ship's owner agent or master. (95)

Section 202 of the Act provides for penalties where an agent receives passage money from a number of persons in excess of those specified in any steamship's certificate of survey.

If a ship is permitted to go to sea without compasses in accordance with regulations or duly adjusted in accordance with regulations, under Section 233 the agent commits an offence. (96)

Under Section 287 of the Act vessels are not permitted to engage in the Coasting trade if they are receiving bonuses or subsidies from any countries other than Commonwealth countries. Breaches of this section attract penalties on the ship's owner master or agent. (97)

Furthermore under Section 288 if a ship that is not licenced to engage in the coasting trade does so the master owner and agent are each guilty of an indictable offence. (98)

Section 293 of the Act imposes joint and several liability upon ship's owners masters and agents for contraventions of Part VI of the Act (I.E. Ss. 284-293A) which deal with the coasting trade. (99)

I draw your attention to Division 3 of the Act which relates to Prosecution and Penalties. This division sets out the penalties provided for breaches of sections of the Act where the penalty is not otherwise stated in the particular section.

In particular I draw your attention to the fact that Section 394(2) enables a Court of Summary Jurisdiction to deal with Indictable Offences if the Defendant and prosecutor consent. When a charge is dealt with this way penalties are of course substantially lower.

As you are all no doubt aware there are a great number of regulations made under the NAVIGATION ACT and many of these impose liability on the ship's agent.

The NAVIGATION (CINEMATOGRAPH FILM) REGULATIONS provide that

the owner master and agent of a ship are guilty of an offence where cellulose-nitrate based film is used in cinematrographic equipment. (100)

The NAVIGATION (DISTRESSED SEAMEN) REGULATIONS provide for certain relief to be given to "distressed seamen" (101). The term "distressed seamen" is deemed to have the same meaning as in Division 19 of Part II of the Act. Regulation 18 provides for the Commonwealth to recover the expenses incurred in respect of the relief and maintenance of a distressed seaman from the master, the owner, the seaman and in the case of a foreign ship the person whether principal or agent who engaged the seaman for service on the ship. However sub-regulation (2) provides that in any proceedings brought by the Commonwealth to recover expenses it is a defence to prove that the seaman deserted, was imprisoned or was discharged on the grounds of misconduct. (102)

Under Regulation 9 of the NAVIGATION (GRAIN) REGULATIONS the owner master or agent of a ship on which it is proposed to load bulk grain must give notice of intention to do so in the prescribed form to the prescribed authority. Failure to do so results in the owner master and agent being guilty of an offence. (103)

Upon completion of loading the master under Regulation 11 must notify the prescribed authority. If this is not done and the ship is taken to sea the owner master and agent are guilty of an offence. (104)

Various other obligations are cast on the ship's agent in these regulations and penalties are provided if the obligations are not complied with.

LIABILITY AT COMMON LAW

As previously mentioned, an agent may find himself

unintentionally in the position of a principal.

Contract made personally or as agent on behalf of Principal

In Maritime Stores Ltd. -v- H.P. Marshall & Co. Ltd. (1963) 1 Lloyds Rep. 602 the Defendants acted as ship's agents for the foreign charterers of the vessels "Agia Thalassini" and "Loradore".

Prior to the vessel sailing the ship's agent, the master and the master stevedore met and it was decided that certain gear had to be obtained to load steel pipes on deck. At the meeting, a director of the Defendants told the stevedores to obtain whatever cargo gear was required and to send the accounts as usual to the Defendants. Soon after, Captain Horseman of H.E. Canner & Co. (Stevedores) placed an order for this gear with the Plaintiff and the Plaintiffs brought an action against the agent alleging that the order was placed by the stevedores on behalf of the agents as principals.

The Defendants contended that the order was placed by the stevedores on behalf of the charterers.

Roskill J. stated that the determining factor in the case was what happened at the meeting. That is it was made clear that what was going to be ordered was something which the ship's agent knew was going to be ordered, the ordering of which he approved on the terms that his company (the Defendant) would be assuming a personal liability to the Plaintiff.

The Court therefore held that the ship's agent was liable.

In his Judgement Roskill J. pointed out that both the Plaintiff and the Defendant were companies of the utmost repute with high reputations but that "the Court was faced

with the not unfamiliar position of having to decide which of two innocent parties (had) to bear the loss caused by the insolvency of a third (the charterer)".

He also cited Pearce J. in Rushholme & Bolton & Roberts Hadfield Ltd. -v- S.G. Read & Co. (London) Ltd. (1955) 1 W.L.R. 146 where that Judge quoted Scrutton L.J. in H.O. Brandt & Co. -v- H.N. Morris & Co. Ltd. (1917) 2 K.B. 784:

> "The fact that a person is agent and is known so to be does not of itself prevent his incurring personal liability. Whether he does so is to be determined by the nature and terms of the contract and the surrounding circumstances. Where he contracts on behalf of a foreign principal there is a presumption that he is incurring a personal liability unless the contrary intention appears; and similarly where he signs in his own name without qualification."

Scrutton L.J. also said:

> "Later in Gadd -v- Houghton (1876) 1 Ex. D. 357 which may perhaps be called the leading case, Mellish L.J. states the same principle 'As is said in the note to Thompson -v- Davenport, (1829) 9 B and C 78, when a man signs a contract in his own name he is prima facie a contracting party and liable and there must be something very strong on the face of the instrument to show that the liability does not attach to him.' When I find in this contract the words 'We have this day bought from you' and the signature 'H.O. Brandt & Co.' in my view something very strong is needed to show that Brandt & Co. have not contracted personally."

Signing Bills of Lading

It must be borne in mind that a ship's agent's relationship with his principal is contractual and therefore he has a potential liability to his principal for breach of contract as well as a concurrent liability in tort for negligence. The relationship of principal and agent is of a fiduciary nature and therefore gives rise to an obligation of the utmost good faith.

As between the agent and a third party the agent must always

be careful to ensure that he is not contracting personally as he will then be personally liable on the contract and that he is not acting outside his authority as he will then be personally liable for breach of the implied warranty of authority.

Obviously the capacity in which the ship's agent enters into agreements depends on each individual agreement. If the agent acts as a principal then he will always be personally liable on the contract.

This is of particular importance in relation to the signing of bills of lading. If an agent has the authority of his principal to sign bills of lading he should ensure that it is clear on the bill of lading that he is signing as agent only.

In my opinion the agent should also ensure that he does everything possible to disclose the name of his Principal and the fact that he is contracting merely as agent for that principal and not in any way assuming any personal liability.

Although the case does not relate to Bills of Lading, in Universal Steam Navigation Co. Ltd. -v- Jame McKelvie & Co. (1923) 129 L.T. 395 a charterparty was entered into between T.H. Seed & Co. as agents for the owner of a vessel and James McKelvie & Co. charterers. The charterparty was signed by J.A. McKelvie "for and on behalf of James McKelvie & Co. charterers (as agents)".

When sued by the owners of the vessel for breach of the charterparty McKelvie & Co. pleaded that they had acted as agents for an Italian Company.

The House of Lords held that the Defendant had incurred no personal liability as their signature "as agents" indicated

clearly that they were only acting in that capacity.

At page 397 Lord Cave L.C. said:

> "If the respondents had signed the charterparty without qualification they would of course have been personally liable to the shipowners; but by adding to their signature the words "as agents" they indicated clearly that they were signing only as agents for others and had no intention of being personally bound as principals."

Agent acting outside authority

An example of where a ship's agent acted outside its authority is V/O Rasnoirnport -v- Guthrie & Co. Ltd. (1966) 1 Ll.R. 1.

In that case a bill of lading was signed and issued by the ship's agents which stated that 225 bales of rubber had been shipped whereas in fact only 90 bales had been shipped.

Mocatta J. held:

1. That the mere fact that neither a master nor an agent had ostensible authority from his owners to sign a bill of lading for goods not on board was not sufficient to exclude the implication of a warranty of such authority from the signature of the bill of lading by the ship's agents; and that therefore the ship's agents by issuing and signing a bill of lading as the agents of the shipowners impliedly warranted that they had the authority of the shipowners.

2. That if the holders of the bill of lading could show that they acted on the representation in the bill of lading that 225 bales had been shipped, they would be entitled to recover in contract proved damages from the ship's agents for breach of implied warranty of authority.

Confusion concerning signature on Bill of Lading and disclosure of agency

An example of where confusion arose regarding the signature appearing on a bill of lading is Anderson's (Pacific) Trading Co. Pty. Ltd. -v- Karlander New Guinea Line Ltd. (1980) 2 N.S.W.L.R. 870.

In that case frozen goods loaded onto the M.V. "Golden Swan" were found to be defrosted on delivery. The holder of the bill of lading sued the charterer of the vessel.

The bill of lading contained a "Demise Clause" which provided as follows:

> "If the vessel is not owned by or chartered by demise to the Company or Line by whom this bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary), this bill of lading shall take effect only as a contract with the owner or Demise Charterer as the case may be as Principal made through the agency of the said Company or Line who act as Agents only and shall be under no personal liability whatsoever in respect thereof."

The bill of lading was on the Defendant's (Charterers) usual form of document which stated that it was affirmed by the master or duly authorised vessels agent on signing. Neither the identity nor the existence of the owner was disclosed on the bill of lading which was signed

> "For KARLANDER NEW GUINEA LINE LTD. KARLANDER (AUST) PTY. LTD. .... As agents"

The Court held that the Defendant was a time charterer of the vessel only.

The Plaintiff argued that notwithstanding the existence of the demise clause, the Defendant by failing to disclose both the fact of its agency and the identity of its principal

remained personally liable to the Plaintiff pursuant to the contract.

In order to establish a disclosure of the fact of its agency the Defendant relied upon the name of the vessel, the existence of the demise clause itself and upon the printed and added material which comprised the signature on the bill of lading.

The Defendant argued that it signed the bill of lading only as agent for the vessel.

Hunt J. in his judgement said that when it is apparent upon the face of the document that the signatory to that document has signed as agent and not as Principal the personal liability of that agent where the name of the Principal is not disclosed depends upon the intention of the parties as shown on the face of the contractual document itself. Southwell -v- Bowditch (1876) 1 C.P.D. 376, 377.

He said further that in the present case an intention to exclude the agents personal liability appeared upon the face of the document (in the demise clause) only if it be also shown on the face of the document that the Defendant was the agent of the owner, thus bringing the demise clause into operation. As the Defendant's agency for the vessel itself was consistent with the Defendant's ownership of the vessel the requisite intention did not appear from the face of the document.

Therefore the Defendant was found to be personally liable under the bill of lading.

In Pacol Ltd. and Others -v- Trade Lines Ltd. and R/I Sif IV (The "Henrik Sif") (1982) 1 LlR 456 by a Time Charter the Second Defendant (owners) let their vessel to the First Defendant (charterers).

The Plaintiff owners of cocoa butter had its goods shipped under three Bills of Lading issued by the First Defendant which Bills of Lading contained the following demise clause:

> "If the ship is not owned by or chartered by demise to the company ... by whom this Bill of Lading is issued ... this Bill of Lading shall take effect only as a contract with the owner or demise charterer as the case may be as principal made through the agency of the said company ... who act as Agents only and shall be under no personal liability whatsoever in respect thereof."

After the cargo had been discharged and the 12 months limitation period under the Hague Rules began to run the Plaintiffs alleged that the cargo had been contaminated and pursued a cargo claim against the First Defendant Time Charterer) through its agents Tideway Shipping Agencies Ltd. ("Tideway").

Unfortunately Tideway did not inform the Plaintiffs that the First Defendant was not the proper party to proceed against but instead dealt with the claim in such a way that the Plaintiffs thought their assumption that the First Defendant was the proper party was correct. On that assumption the Plaintiffs acted and obtained time extensions from the First Defendant but not from the Second Defendant.

When proceedings were issued almost two years later the First Defendants denied that it had acknowledged the shipment of cargo on board the vessel by Bills of Lading and denied that it was at any time a bailee or carrier or that it owed the Plaintiffs any duty of care in relation to the shipment. The Second Defendant contended that the action was time barred. The Plaintiffs however argued that the First Defendant was estopped from denying that it was a party to the Bill of Lading and/or from relying on the demise clause.

Webster J. held that Tideway knew of the terms of the Bill of Lading and the demise clause, realized that the Plaintiffs had no claim against the First Defendant and that the only claim was against the Second Defendant, realized that the Plaintiffs were mistaken in their impression that the First Defendant should be sued and that Tideway deliberately encouraged this belief.

He also held that on the facts Tideway was under a duty to alert the Plaintiffs to the true facts as a reasonable man would have expected Tideway acting honestly and responsibly to have informed the Plaintiffs one way or another that they were seeking extensions of time from the wrong party. Therefore the Plaintiffs established estoppel by silence.

Due to the correspondence that passed between the Plaintiffs and the First Defendant's agents the Judge held that the First Defendants were prevented from denying for the purposes of the action the allegation by the Plaintiff that the First Defendant was party to the Bills of lading. Therefore the First Defendant was treated as party to the Bills of Lading and it was for this reason that the Plaintiff had a cause of action against the First Defendant.

You can see from this case that due to the agents conduct the First Defendant was exposed to liability to which it would not otherwise have been exposed. Although it was not canvassed in this case the question would then arise as to whether on the facts the agents would in turn be liable to the First Defendant. Certainly, in my opinion, if they had not kept their principals properly informed so that their principal could give them proper instructions then they would be so liable.

We have seen that a ship's agent in Australia is potentially exposed to far ranging statutory liability. The schedule to

this paper attempts to list many of the relevant statutes. If an agent is aware of this range of statutory liability which may confront him in certain circumstances then he should be able to so arrange his commercial and administrative affairs so as to take account of them. For example he should obtain funds from his principal to cover such things as freight tax to be retained for payment under Section 269 of the INCOME TAX ASSESSMENT ACT or to cover liability which may eventually arise under the MIGRATION ACT for repatriation of deserters. Of course it is not realistic to suggest that an agent should obtain funds or some form of security from his Principal to cover the wide range of liabilities which may confront him in certain circumstances. Fortunately it is not often that an agent will be faced with actual statutory liability.

In the case however of contractual liability that an agent necessarily must incur, such as, guarantees for crane hire, launch and tug hire, pilotage and dues, he is certainly able to make provision for this with some degree of certainty in the running of his business. The simple protection in such a case is again for him to be placed in funds specifically to cover such personal contractual commitments. In practice we all know that this is easier said than done. Particularly in tramp operations an appointment may be made in some haste and an agent must incur personal expenditure and commitment before funds can be obtained from the Principal.

At least in the case of potential statutory and contractual liability the agent knows of its presence and can take steps to cover himself or minimize his exposure. In the case of potential liability arising out of tortious or fraudulent actions the agent can only strive to operate an efficient and careful business so as to minimize the possibility of such liability. He owes a duty of care to his principal and also to third parties with whom he may be dealing on behalf

of his principal e.g. marketing negotiations with a potential shipper. The errors which may be made by an agent and/or his staff in the discharge of their duties on behalf of principals may give rise to liability of the agent in numerous and diverse circumstances. It is difficult for an agent to foresee in what contexts such liabilities could arise. In order to ensure that the possibility of making errors is minimized or eliminated an agent should analyse as thoroughly as possible his operation and identify areas of potential vulnerability. Having identified such areas, systems can be incorporated so as to avoid the chance of any error. Such a practical analysis highlights some of the more important areas where mistakes could be made and give rise to liability of the agent. Some such areas are considered under the following headings.

1. Identification of Principal

It seems to have become common to have one agent representing owners and disponent owners. Where a vessel is under time charter it is particularly important for an agent to identify to third parties supplying "necessaries" to the ship the account for which principal they are supplied. It is relatively common practice for all accounts to be directed to the "ship her owners and the Master". This is not accurate, for example, where bunkers are supplied for time charterers account. Under our Admiralty jurisdiction a ship can only be arrested in an action for "necessaries" if liability exists in the actual owner; Shell Oil Company -v- The Ship "Lastrigoni" (1974) 131 C.L.R. 1. It has happened that inaccurate specification of responsibility has led to a bunker supplier arresting a ship on the basis of an account rendered to owners when it should have been rendered to the time charterers.

If this was the consequence of an agent's direction or

lack thereof, the agent could be liable to the Owner who suffered loss by virtue of the arrest.

2. Conflict of Interest

It is not the province of this paper to discuss the reasons why one agent may be representing two or more principals. In Australia it appears to be quite a common practice. In fact in Western Australia the remoteness of some ports means that one agent may have several principals one of whom is also the shipper. Suffice it to say that there are compelling commercial reasons why this occurs. This state of affairs may and in many cases does give rise to a conflict of interest. What may be in the interest of an owner may not be in the interest of a time charterer. In my experience agents should readily be able to identify the signs of a potential conflict and take the necessary steps to avoid problems. If a complicated situation arises, say, for example, where a ship is rejected by a shipper because of dirty holds and the time charterer places the vessel off hire, under some fixtures it can be most important to determine why the holds are in such a condition. In such a situation it becomes important for an owner to be guarded in the disclosures that may be made if he is to contest the charterers right to place to the vessel off hire. If only one agent is representing owners and disponent owners he may become privy to prejudicial evidence from both sides and he may find it difficult if not impossible, to properly advise two principals in dispute. If an agent does not recognize a situation of conflict and withdraw then he will not be able to properly attend to the interest of either principal and personal liability would almost certainly result from any loss that occurs.

3. Agents advising Master

An agent must be very careful as to any advice that he gives a Master. Masters, particularly if language and local custom present problems may rely heavily on their agent. An agent may find himself called upon to advise a Master on a technical or even legal point which he is not qualified to do. Excellent communications these days has meant that this is not a common occurrence. In the more remote ports in Australia where a decision has to be made urgently (which we all know is a feature of this industry) strong pressure may be applied to an agent to advise on something which would otherwise not come within his expertise. I have known a case where an agent has told a Master that although cargo was not received in proper condition he (the Master) should leave Bills of Lading clean and not clause it in accordance with the Mates receipts.

It is not uncommon for an agent to be called upon to make an assessment as to the necessity to call in Classification surveyors to check for hull damage. Such a survey could delay the ship and if an agent has in mind his principal's interests (in the event that his principal is a time charterer) he will want the ship moving. I hasten to add here that in my experience it is rare for agents to volunteer advice or opinions outside of their area of knowledge. If it happens it is invariably as a result of the pressing request of the Master but this does not mean that agents may not be liable for giving advice which proves to be wrong.

4. <u>Union affiliated problems</u>

Some of you may recall the Royal Commissions into the Maritime Industry in Australia, particularly so far as it concerned the Painters and Dockers. Where a union decides to take action against a ship or ships, agents

must be very cautious in the manner in which they seek to resolve such problems on behalf of their principals. To my knowledge the practice of making payments to unions for no consideration other than to have the vessel permitted to operate, no longer exists. Such practices were questionable and conceivably could have attached personal criminal liability to an agent even though he was attempting to act in his principals best interests and on his express instructions.

5. Independence of Agents

An agent should be free of any influences which may prevent him from being objective in acting in the interests of his principal. If he is called upon to arrange such things as stevedoring, towage and providoring he must obtain the most competitively priced competent contractors available. This is so even though it may mean using a contractor which may compete against an entity in which the agent has an interest.

6. Marketing - Liner Service

Agents for Liner service operators will usually perform functions other than those of a ship's agent. He will have a marketing responsibility to his principal. This means that he will be required to seek out cargo for carriage on his principal's or another's vessel (e.g. in the case of slot charterers on a consortium vessel) and in exchange will earn a commission. Competition for cargo in these times of recession is fierce. It is important that an agent seeking to obtain freight for his principal makes full disclosure to a shiper of the prevailing rates and the terms and conditions under which the cargo will be carried. Clear reference to the Bill of Lading should be made at the time of booking. Misrepresentation has become a popular cause of action

in the Federal Court under the Trade Practices Act and a disgruntled shipper who receives a freight review or suffers a delay or some form of deviation may bring an action against an agent for misrepresentation or misleading conduct. I know of at least one case where this has occurred. In that case the shipper took action against the agent alleging misrepresentation in that the cargo was carried above deck in an unventilated container when the agent allegedly represented that it would be carried below deck in a ventilated container.

7. Release of Cargo/Payment of Freight

It will often be the agents responsibility to ensure that the cargo is not released to the receiver until the freight is paid and an original Bill of Lading is produced. If an agent fails to collect the freight prior to release of the cargo he may well be liable to his principal as a consequence. Similarly if an agent fails to ensure that an original Bill of Lading is produced and in so far as possible that this is produced by the receiver entitled to the cargo he will be liable. It is not sufficient, for example to release cargo on production of a photocopied Bill of Lading. This leads one to mention a not uncommon practice which is not without risk and that is the release of cargo without production of an original Bill of Lading. A carrier may allow the release in exchange for a letter of indemnity from the receiver supported by a Bank Guarantee. If this situation arises it is of the utmost importance that the agent obtains his principal's prior written approval and ensures that he receives the supporting bank guarantee prior to the release of the cargo. An owner who allows this practice may well not be indemnified by his P. & I. Club in the event of a claim. It is therefore crucial that if it is to be done, it be done properly.

This caveat applies also to the well known practice at the other end of the carriage i.e. issuing clean Bills of Lading with respect to damaged cargo in consideration of the obtaining from the shippers a letter of indemnity indemnifying the owner against any claim arising out of the condition of the cargo. Such letters are almost certainly not enforceable in this jurisdiction (Brown, Jenkinson -v- Percy Dalton (1957) 2Q.B. 621) and an agent should perhaps draw this to the attention of his foreign principal who may not realize that the letter is valueless.

8. Agents collecting freight

During the recent recessionary times there has, not surprisingly, been a higher than usual number of time charterers and owners encounter serious financial difficulties. When this occurs, particularly when time charterers collapse, there is normally a scramble for whatever monies are still intact and identifiable. This may include freight in respect of the time chartered vessel over which an unpaid owner believes he has the right to a lien (this is particularly so with the NYPE form). Stated in very broad terms the law seems to be, and I quote from "Time Charters" by Michael Wilford, Terence Coghlin, Nicholas J. Healy, Jr., and John D. Kimball (2nd Edition p. 335):

> "Where a ship is under time charter, bill of lading freight will normally, in practice, be paid to the charterers' agents, even though the cargo is shipped under bill of lading contracts to which the owners are a party. If the owners notify the charterers' agents of their claim to the bill of lading freight before the agents receive the freight the agents may be obliged to collect it for the owners rather than for the charterers. The same is probably true where notice is given by the owners after freight has been received by the agents; this was so decided in Wehner -v- Dene

(1905) 2 K.B. 92, but was expressly left open in the subsequent case of Molthes Rederi -v- Ellerman's Wilson Line (1926) 26 Ll.L.Rep. 259: see further below.

The owners are bound to account to the time charterers for any bill of lading freight received by them after they have deducted the amount due to them under the time charter. The owners may deduct only those sums that are due to them at the time the bill of lading freight was paid to the agents."

If an agent receives notice from an owner that any expected or received freights are subject of a lien then agents should take advice. The nature of this advice will depend upon the facts of each case and the type of fixture involved. What is important is that the agent does not disregard such notification and forward freights onto his time charterer principal without being certain that he is entitled to do so. If an agent fails to respond to such a notice of lien he may be obliged to account to the owner who has given such notice.

Whatever perspective one takes of the operation of a ship's agent it is clear that his exposure under statute, and at common law to his principal and others is significant. To a degree he can protect himself in some cases by obtaining sufficient funds in hand from his principal. In many cases this precaution is not practical and it would seem that aside from running his business in an efficient manner the only other precaution is to take out appropriate Protection and Indemnity cover. Like any professional indemnity insurance this can be costly. There are specialist P. & I. Clubs set up specifically to cover ship's agents and I think that it is within the province of this paper to briefly make mention of this. The cover afforded is, in broad terms, as follows:-

Cover is available to an agent when performing the following services in his capacity as an agent only and in the normal

course of his business as a ship's agent.

1. Whilst making arrangements on behalf of owners, charterers or operators of a vessel for:

   (i) The use by the ship of any port, dock, berth etc. or any facilities connected therewith;

   (ii) The supply to the ship of provisions or services of any type normally procured by a ship's agent.

   (iii) The procurement, handling or carriage of cargo, passengers and their baggage.

   Cover is also extended to agents who represent Shipowners Mutual Insurance Associations, Lloyds or Classification Societies. Cover as well is afforded to an agent acting as a principal and in the normal course of his business when, in attending to the supply of a ship, he procures bunkers, water or provisions, cleaning services, stevedoring services, waste disposal services, security services and the handling storage or transport of cargo, containers and trailers.

   Whilst performing the abovementioned services the cover afforded encompasses the following risks:

   1. <u>Liabilities to principals</u>

   In this respect the agent is covered for his failure to carry out his principal's mandate, carrying out his principal's mandate improperly or exceeding his principal's mandate in a manner which results in his prinicpal incurring liabilities which the principal has not agreed to accept.

There are, not unexpectedly, exceptions and qualifications to this cover. These relate in the main to intentional or reckless acts or omissions by the agent or a failure by the agent to take reasonable steps to establish proper systems and controls to avoid liability.

2. Liabilities in relation to contracts made on behalf of principals

In this respect the agent is covered in respect of any liability arising under a contract entered into by the agent as agent for his principal to the extent that the agent is unable to obtain reimbursement for such liability from his principal and as well in respect of any misrepresentation as to the extent of his authority to act on behalf of his principal.

Again, not unexpectedly, there are exceptions and qualifications to this cover. These again relate to intentional or reckless acts or omissions of the agent. More importantly however the failure by the agent to take reasonable steps to establish proper systems and to exercise appropriate supervision to ensure that no contract is made on behalf of a principal without his authority; that all such contracts on behalf of a principal expressly provide that the agent acts as agent only and that the identity of the principal is disclosed to the other party to the contract are matters which may affect his right to obtaian cover. You will recall that this area of potential liability has previously been discussed.

3. Liabilities to third parties

In this respect the agent is covered against his liabilities to third parties; most topically, in respect

of loss of or damage to or loss in respect of cargo and other property and any consequential loss. Broadly speaking it covers contractual and tortious liability resulting from the failure of the agent in whole or in part to perform properly his contractual obligations. The cover afforded also extends to liability for death or bodily injury of any person and any loss consequential thereupon. Again, there are exceptions and qualifications to the cover afforded. Of particular importance is the exclusion of cover in cases of liability arising from delivery of the cargo without taking in exchange the relevant Bill of Lading or other document of title or the delivery of cargo contrary to instructions to withhold delivery given by a person entitled to give such instructions.

4. Liabilities to authorities

In this respect the agent is covered, broadly speaking, against any statutory liability imposed upon him which includes, inter alia, liability under guarantees or customs bonds given by the agent in the normal course of his business. The agent's liability to pay fines and other financial penalties including breaches of statutes relating to pollution by oil or other hazardous substances is also covered. Again not unexpectedly, there are exceptions and qualifications. The most important practical qualification here appears to be the exclusion of any liability of an agent insofar as that liability arose from the terms of the contract entered into by the agent which imposes on him responsibility for the negligence or default of the other party to the contract.

5. Failure to recover disbursements

In this respect the agent is covered against financial

loss that he may incur as a ship's agent where such loss is incurred by the agent on behalf of his principal in order to avoid liabilities for penalties or damages if and to the extent that he is unable to recover such loss from his principal. One of the important qualifications to the agent's right to obtain reimbursement in this respect is that he should have taken all reasonable steps to avoid or mitigate such loss by procurring from his principal prior to being obliged to incur any disbursement on his principal's behalf, a working fund sufficient to meet all disbursements likely to be incurred as a matter of routine. In the event the agent was obliged to incur extraordinary disbursements on his principal's behalf he must, as a prerequisite to his right of indemnity, satisfy the club he took all reasonable steps to obtain payment or security therefor before the ship sailed from the port.

These and preceding aspects have of course been discussed previously in this paper.

The agent is also entitled to be indemnified by his club in numerous other respects but the recitation of the above suffices to indicate in broad terms, the far ranging cover that is afforded. An agent who, having obtained membership of such a club, and who conducted his affairs in a reasonable and prudent manner could confidently expect to be indemnified in relation to liabilities commonly encountered to the extent, where that is applicable, that he cannot obtain indemnity from his principal.

With respect to the agent's potential liability in contract and/or tort to his principal and others a reasonable and prudent agent again may expect with confidence to receive indemnity from liabilities incurred by him.

Although only indirectly relevant to the subject of this

paper it is worthy of mention that in many cases an agent will have the right to arrest his Principal's vessel under the Admiralty jurisdiction of all Australian States. This is worthy of mention since the right to arrest may have arisen as a result of a liability incurred by an agent by virtue of his agency. This right would appear to be limited only to the vessel in respect of which the particular liability arose excluding sister ships. An agent's right to arrest will be based upon a claim for necessaries supplied to the owners and will include a claim for money paid by him to those who supplied necessaries, for example, bunkers or stevedores. To quote from Roscoe on Admiralty Practice (5th Edition at p. 207):

> "A person who pays for necessaries supplied to a ship has, as against that ship and her owners, as good a claim as the person who actually supplied them, and he who advances money to the person who thus pays for the purpose of enabling him to pay, stands in the same position as the person to whom the money is advanced."

Whilst there may be many situations where an agent's agreement with his Principal will provide him with an indemnity for any statutory liability he may incur there will be situations where this is of little or no comfort. Principals will be bound to indemnify an agent where the statutory or other liability is secondary to the primary liability of the Principal. But if the Principal is financially unsound the agent must fall back on his own resources.

Professional people in all fields are aware of the ever increasing need to provide services of the highest quality and of the risks attendant upon a failure to achieve that standard. As general societal and commercial awareness has increased so, apparently, has the inclination to resort to litigation to vindicate ones perceived rights. Ship's agents are no more immune than any other field of professional endeavour.

If an agent makes a mistake which gives rise to financial detriment to his principal or a third party then he may expect to be called upon to indemnify that other person. An agent holds himself out as an expert in his field and he may accordingly expect the courts to apply to him the appropriate duty of care. In terms of quantum an agent's potential liability is not insubstantial and may have catastrophic consequences. It would, accordingly, appear to be of fundamental importance that an agent has the broadest possible P. & I. cover as a means of ensuring his continued existence and viability.