MARINE INQUIRIES - HISTORY PRACTICE AND PURPOSE

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> "Parties to hearings by Commissions of Inquiry have no rights of appeal against the reports. The reason is partly that the reports are, in a sense, inevitably inconclusive. Findings made by Commissioners are in the end only expressions of opinion. They would not even be admissible in evidence in legal proceedings as to the cause of a disaster. In themselves they do not alter the legal rights of the persons to whom they refer. Nevertheless they may greatly influence public and government opinion and have a devastating effect on personal reputations ..."
>
> Mr Justice Cooke in re Erebus (No. 2) 1981 1NZLR 618 at page 653

In the last decade transportation in New Zealand has suffered an unusually high incidence of major accidents leading to major inquiries leading in turn to administrative law, criminal law and civil law outcomes. Public awareness and confidence in systems of transportation have been seriously affected by the now familiar cycle of:

1 Accident

2 Media version of accident

3 Preliminary report

4 Media version of preliminary report

5 Political/bureaucratic reasons for formal investigation or no formal investigation

6 Media version of 5

7 Media coverage of formal investigation

8 Final report

9 Medial coverage of final report

10 Review proceedings concerning final report

11 Media version of 10 in which the proceedings are described as appeal proceedings

12 Civil proceedings

13 Criminal proceedings

14 Multiple paperback book versions and television docu dramas of all of the above. (I might also suggest that the increasing application of the Official Information Act 1982 produces its own complicating factors and review proceedings can be expected anywhere between stages 1 and 8 of the above.)

This paper does not seek to be rigorously academic in examining the inquiry mechanisms of our law. Rather it reviews what has been achieved in practice. It also takes stock of the competing views concerning the reforms which can be made in the present system. In doing this it takes account of:

(a) the developing technology of shipping;

(b) the increasing awareness of industry participants of their constitutional and administrative law rights;

(c) international trends in improving inquiry mechanisms;

(d) the gathering movement towards more efficient and strategically planned bureaucratic structures expected during the second term of the present government.

The Purpose of Marine Inquiries

Unlike other legislation involving other types of inquiries neither the Shipping and Seamen Act 1952 (NZ) or the Merchant Shipping Act 1894 (UK) spell out their purpose in so many words. There is clearly room for subjective emphasis to be placed on the possible purposes as can be seen from various judicial dicta.

In the Princess Victoria case (1953) Lord McDermot C J stressed the forward-looking aspects by declaring the purpose to be

> "to ensure in the public interest that shipping casualties will be adequately investigated and material facts and causes brought to light if possible".

The formal investigation into the European Gateway (1986) whilst genuflecting to the "lessons to be learnt for the future" declared itself as having

> "the final, and subsidiary, purpose of considering whether the loss of the vessel and the consequent loss of life was caused by the wrongful act or default of any person and, if so, whether the court should impose penalties on those at fault".

In reality the punitive element of both preliminary and formal investigations is never very far from the surface. Yet the scheme of both the New Zealand and United Kingdom Acts provides for not only preliminary and formal inquiries:

(a) the imposition by Courts of serious penalties stemming from nautical "crimes",

(b) the removal of masters by the High Court, and

(c) the suspension or cancellation of certificates of masters, mates or engineers where those officers are convicted of offences involving fines or imprisonment.

All of these are quite separate from the formal inquiry process. A comparison with the Civil Aviation Act framework is instructive.

Statutory Guidance

In New Zealand and by comparison the investigation of air accidents is succinctly stated to be for the purpose of ensuring flight safety and not for the allocation of blame. The question of fitness to hold a pilot's licence is dealt with as an ancillary matter under the Civil Aviation Regulations 1953.

Similarly in the land transport mode, Sections 140 and 141 of the Transport Act 1962 enable transport licensing authorities to inquire in wide ranging into the operation of services and overall compliance with the law by the operators of those services. If the operators are found wanting the conditions of

their licences may be varied or the licences revoked for up to 3 years.

In neither the air nor land mode is there any suggestion that processes of inquiry are for any other purposes than those clearly stated in law. In the Erebus case (already cited) two senior judges of the Court of Appeal stated the legal issue there as being

> "simply whether the affected (company) officers were or were not deprived of the advantage of answering unformulated charges" (at page 651).

I will now examine the extent to which a confusion of purpose and the tendency towards "unformulated charges" has been at the heart of marine investigations in New Zealand for some many years. Predominantly the vagueness and general lack of focus on objectives has been most evident at the preliminary inquiry stage; where most of the New Zealand practical jurisprudence rests.

The Statutory Scheme

Part VIII of the Shipping and Seamen Act deals with shipping inquiries and courts. Important sections are set out as Appendix I.

I am indebted to Mr G Sanders for the extract of his research paper which appears as Appendix IA to this one. I would add the following statistical observations.

In the year ending March 1986 there were 379 accidents involving vessels. There were 70 preliminary inquiries and no formal inquiries at all. There are on record over 450 preliminary inquiry reports. It is noticeable from examining the files and reports that prior to 1980 the documented outcomes were relatively cut and dried. However, the growth of subsidiary issues and controversial arguments in the last 7 years is now reflecting itself in the prolixity of the Ministry's files. Relatively minor incidents are now causing more complex arguments and as a result there is a palpable perception that the system is under strain. This is acknowledged by the present Director of Marine (see Appendix II).

As will be seen from Appendix III the quality of public debate through the media is not high but at least it can be said that the Ministry of Transport does perceive growing problems and is receptive to proposals for reform.

The amended instructions issued to those carrying out preliminary inquiries (Appendix IV) reflect the growing need in recent years to stress to them the need for avoiding the allocation of blame. The instructions stress that preliminary

inquiries are designed only to elicit facts from which proper recommendations can be made under Section 324 of the Act.

The record would however suggest that the contextual link between Sections 323 and 325 are such that the question of blameworthy conduct is inherent even at the preliminary stage.

The stress laid in those sections upon loss of life, material damage and collisions between ships, seems relatively victorian compared with the recently revamped British provisions (Appendix V) These include reference to serious injury and potentially dangerous incidents as grounds for inquiries. In so providing the legislation takes a significant step. It conceptualises ships as technologically dangerous working environments where the need to monitor possibilities, trends and practices is at least as important as identifying and pursuing incompetent seafarers.

I have not had the opportunity or resources to research the Australian legislation. I have however examined a number of preliminary investigation reports. Despite the fact that the incidents giving rise to all of the reports involve deaths there is, without exception, a skilled and concentrated exposition of key factual considerations. Although the persons who gave statements are identified there are conscientious efforts made to separate standards of conduct from factual outcomes. These are reflected in annexed commentaries of researchers from outside the Federal Department of Transport.(1)

The same could be said for reports I have examined emanating from the United States National Transportation Safety Board. That Board has a wide brief to examine all transportation accidents with the assistance of specialist agencies. Those agencies have a wide spread of concerns ranging from shipping to aircraft to freight trains to subway trains to long distance buses. It is plain from those reports that the safe development of transport technology and the identification of unsafe practices is consciously uppermost in the reporting procedures.

Practical Examples of Preliminary Inquiries in New Zealand

A thumbnail sketch of the New Zealand shipping industry would be this. There are a multiplicity of small New Zealand-owned fishing vessels working alongside an equal multiplicity of foreign owned vessels of similar size. The main passenger activity is the inter-island roll-on roll-off ferry service which is of prime importance as a freight connection. Large passenger liners and freighters are predominantly overseas owned and the passenger ships in particular are very transient visitors. If they stay for more than a few hours it is for the worst possible reason.

Briefly stated therefore, serious shipping casualties in recent years have been the catastrophic loss of an inter-island ferry

and a passenger cruise liner and the grounding of a large freighter on its maiden voyage.

For the rest relatively small fishing vessels have collided or gone aground and by force of sheer numbers crew members appearing before inquiries have tended to be overseas based. The single incident of a major grounding of a foreign freight vessel falls into the same category.

Taking the preliminary inquiries first, what has been the "output" in real terms?

As a general comment there is an aspect of the New Zealand practice which may be a little surprising. While Section 324 of the Act requires the person carrying out the inquiry to report his findings to the Minister, together with a formal inquiry recommendation, it would appear that the reality is different. Inquiry reports proceed through the Marine Division of the Ministry of Transport in such a way that they are presented to the Minister as an "exhibit" to a departmental recommendation.

Often the recommendation deals with presentational matters and questions of confidentiality and administrative detail. In at least one case however (Inquiry No. 442), the recommendation of the department was that notwithstanding the investigating officer's recommendation, there was clear evidence of faulty navigation in that there was a failure by the master to ensure

proper watch-keeping. Departmentally a formal inquiry was recommended. That recommendation was simply endorsed by the Minister and an inquiry was in fact held.

Under the Act the Minister would appear to be free at all times to initiate a formal inquiry of his own motion. It could on the other hand be arguable that the preferable practice would be for the investigator to report directly in the manner provided for air accidents whereby the Chief Inspector of Air Accidents is seen as acting independently of the department. (Relevant air accident regulations are set out in Appendix VI.)

In Inquiry 385 a formal inquiry under Section 325 was recommended in a case where a fishing vessel had been extensively damaged and declared a constructive total loss. Once again the recommendation to the Minister was a departmental one taking issue with some of the observations made in the preliminary report. The reasoning in the department's ministerial paper was that the master ought to have been prosecuted under Section 163 of the Act for neglect of duty but the chances of success were not great, nor was the possible penalty very severe. A formal inquiry under Section 328 had been considered but a person of suitable experience could not be found to conduct it. Section 328 was therefore invoked largely because of a lack of expert resources in both proving a case under the Act, or carrying out a Section 325 inquiry and the inadequacy of certain penalties in the Act.

In another fishing vessel case the ministerial press release reveals a highly pragmatic decision-making process at work. It was said that the cause of the stranding of the vessel was known and a formal inquiry was not required. The Minister went on to say, through a press release, that "in view of the gross incompetence shown by this master, I am informing all joint venture companies that, in the future, he will not be accepted as a master on any fishing vessel operating in the New Zealand economic zone".

Thus the opportunity was given to signal an administrative remedy not to mention a political warning to the world at large. In the course of it blame was unequivocally allocated. As a further observation one could be noted that the preliminary inquiry itself recommended neither a formal inquiry nor a prosecution on the basis that "the principals are no longer in New Zealand" (file No. 411).

Of some interest, in terms of the application of Section 325, is the decision to hold a formal inquiry into the grounding of the Pacific Charger on 21 May 1981. The vessel was registered in Liberia and there were no New Zealand officers aboard. Ultimately, an inquiry was held in Liberia which depended totally on materials made available through the New Zealand inquiry. (Extracts from the Liberian inquiry are attached as Appendix VII.)

The preliminary inquiry was highly critical of the master of the vessel declaring him to have been incompetent in the carrying out of his duties. He was castigated for his total reliance on the radar of the vessel, failure to make use of his assisting officers and confusion navigational tasks with others which he could properly have delegated at the crucial time. The justification for having a formal inquiry was originally stated in these terms

> "as this grounding and its consequences are a matter of great commercial and legal concern in New Zealand a formal inquiry should be held".

The covering departmental report to the Minister took the opportunity to broaden that observation with the linking the mishap to the New Zealand public interest; or at least great interest on the part of the public. The report stressed that the Harbour Board practices were not satisfactory and could be improved and that those practices had been earlier canvassed in the "Wahine" inquiry of 1968 when a ferry boat sank in the same harbour. Furthermore, the harbour practice of not closing the port in adverse weather stemmed from unsatisfactory legislation and some recommendations might be tilted in that direction (NB: the law is still in the same state today).

It was also added that the Merchant Seamen's Guild and the Seamen's Union would wish to make public comment on flags of convenience and therefore some clarification of standards might ensue.

It is at least arguable that if an inquiry other than by the flag state had to be held at all, it would be preferable to invoke Section 2 of the Commissions of Inquiry Act 1908 which enables a commission to inquire into any question arising out of or concerning any matter of public importance notwithstanding that the accident referred to above was not one where any member of the public was killed or injured. It is arguable with equal force that the holding of the inquiry in New Zealand forced the hand of the Liberian authorities who then made determinations on certificates. Those determinations were in all probability the only ones which could be arrived at once New Zealand had taken advantage of the availability of witnesses which Liberia would, for a number of reasons, certainly have been unable to do. (The industry is probably divided 50-50 on the need for an inquiry by the New Zealand authorities in that case.)

The discussion on the 'Mikhail Lermonotov' non-inquiry is best expressed through Appendix VIII. Once again industry views would appear to be divided in roughly the same proportions as over the Pacific Charger.

Criminal Proceedings

The courts have strenuously defended the victims of abuse of procedures in Commissions of Inquiry. This has significantly

changed attitudes in the area of natural justice. But at least as yet this is not so with regard to the criminal aspects.

One of the major uses to which preliminary inquiry statements are put is as evidence to support charges under the Shipping and Seamen Act and other related marine legislation. The offences are, in places, stated by the Act to be "crimes". Nonetheless statements obtained by preliminary inquiries continue to be the single largest factor in such successful prosecutions as are brought by the Marine Division.

There have been a number of challenges in the District Court to the propriety of the use of such statements in terms of the Judges Rules. Such objections have uniformly been given short shrift by District Court judges. Notwithstanding the appellation "crime", the predominant legal theory of the nature of such offences is that they are "public welfare regulatory" in nature and are not truly criminal. (This notwithstanding the serious effects of loss of certificate and imprisonment up to 2 years which, in theory, may ensue.) In addition there is High Court authority to suggest that rules applicable to the police, if only in a loose way, are not applicable to departmental officers who enforce public welfare regulatory offences. (It is worth noting that in earlier times a formal caution was given to persons appearing before preliminary inquiries. By formal instruction investigations are required not to give such a warning despite the powers of compulsion

inherent in their function. The practice of using depositions in criminal proceedings nonetheless remains.)

It may well be that one of the factors which may bring about major change in the conduct and defined purposes of preliminary inquiries would be a change in attitude of District Court judges. Such a change might well occur were the High Court ever to concur with an argument based on the disadvantageous circumstances facing many deponents in such inquiries; circumstances that might render any statements obtained inherently unreliable. This is a convenient point to discuss the procedural practices of preliminary inquiries in New Zealand.

Procedural Standards

While there is not global dissatisfaction with preliminary inquiries as such, there is the developing awareness that departmental practices are due for overhaul. Within the last 18 months there has been evidence of both an industry and administrative rethink gradually taking place.

First, an important policy decision was taken during Select Committee hearings on the Shipping and Seamen Amendment Bill (now the Amendment Act of 1987). The Bill had provided that where a person was interviewed by a marine inspector or

superintendent he would not be able to invoke the privilege against self-incrimination. (This would in practice include preliminary inquiries or any other form of interrogation given that persons appearing before inquiries see the questioner more in terms of an inspector than a commissioner even when he is vested with powers of both.)

As a result of the parliamentary process that provision was expressly removed from the Bill. Indeed, the departmental instructions concerning inquiries now state the undesirability of conveying the impression that preliminary inquiries are a form of interrogation at all.

Second, the instructions now also discourage the examining of witnesses on oath.

The new implication would appear to be that resort to a formal inquiry is preferable to placing a quasi-judicial overlay on the preliminary investigation. This is particularly so if a witness refuses to answer a crucial question.[2]

In the nature of things those appearing before preliminary inquiries are probably in a state of mind which roughly approximates to the victim of a crime (rather than a criminal) being interviewed in a police station. They may be in shock and totally unused to the English language or New Zealand investigatory systems. The last thing on their minds is that they are participating in a procedure nominally designed to

compile advice to a Minister of the Crown. The upshot will, in many cases, be the giving of the statement which will either (a) be produced later in the District Court, or (b) be used to support an assertion that no formal inquiry is required on the grounds that the acts of the maker of the statement were a prime or sole cause of the shipping casualty.

Both the criminal and administrative law consequences can be severe following a proceeding where statutory goals were, I suggest, unclear and the procedural safeguards minimal.

Confidentiality and Legal Representation

Confidentiality of proceedings can only be guaranteed during the hearing and up to the point where the Minister is given the report.

It should be said that even after the passage of the Official Information Act 1982 it was still assumed in the Ministry that the nature of the preliminary inquiry was such that the Act did not apply to the depositions. That interpretation was consistent with and would have meant that the previous policy of not releasing detailed and prejudicial evidence given at a Commission of Inquiry depositions was one which could be continued.[3]

However, the 'Mikhail Lermonotov' matter compelled the Marine Division to undertake a detailed analysis of the legislation governing release of hitherto confidential statements. It is now clear that the Act does in fact apply to depositions. This is because they are not generated as part of a Commission of Inquiry proceeding but simply stem from interviews conducted by officers having the powers of commissioners. From now on it will probably be the case that all depositions will be released on request subject to minimal deletions. Release will also have to post-date criminal proceedings either in contemplation or progress.

The Total Situation

We have now arrived at a position where:

(a) persons are interviewed in surroundings unfamiliar to them so that answers may be got from them, the total purposes of which is not clear (even to lawyers) nor consistent from case to case;

(b) such persons are entitled not to incriminate themselves but may be in a frame of mind where they may do so by force of circumstances;

(c) the answers they give may be publicly available and have the devastating public results of the kind referred to in the quotation of the Erebus case on page 1 of this paper;

(d) although statements are read over in the manner of police statements, the final report is simply sent to the Minister through the department in a manner quite dissimilar to the 'legislated natural justice' provisions provided for in air accident investigations (see regulation 15 in Appendix VI);

(e) the statements are accepted as admissions in criminal law trials despite there being no procedural safeguards other than the possibility of having a lawyer in attendance (Appendix IV).

That there is not universal dissatisfaction with the present position is possibly attributable to a number of factors.

Any criminal charges which might be brought to court are frequently not answered because of inability on the part of the informant to serve papers on the defendant. Often the putative defendant has been repatriated and pays the "penalty" of not returning to New Zealand as a seafarer. (Rough justice but a kind of justice nonetheless!)

Broadly, the practice followed enables the causes of accidents to be reasonably well identified without resort to costly

formal inquiries (the 'Pacific Charger' is the exception that proves the rule).[4] And, perhaps most importantly, A and B notices to mariners which are of valuable assistance in avoiding future casualties are promptly circulated.

There is wide, if not universal, sympathy with the view that the overriding concern is that of obtaining evidence that is sharply recalled and not blunted through passage of time, discussion with legal advisers or other parties. To this extent the highest level legal advice the Ministry has been given over the last 20 years has heavily emphasised the need for a minimum of formality and the desirability of ensuring a "stream of consciousness" flow of statements. The sooner after the event the statements are taken, the better, or so the argument goes.[5]

I believe the better approach would be to examine the feasibility of a new system based on a redefinition of statutory objectives. Many of the features of the present system would comfortably fit within any reformed approach. The main thrust would be to ensure fairness, clarity and consistency of practices and a proper emphasis on identifying safety issues.

Proposals for Change

The holistic approach taken by the United States authorities in maintaining what appears to be a uniform standard of accident investigation across the board fits in well with the probable development of "super ministries" as the emerging form of administration in New Zealand. The best guess that one can make at this stage is that a departmental umbrella organisation based on health and safety will be developed. Consistent standards of investigation and licensing in the transportation area would come into being alongside those emanating from the industrial and occupational health areas.

Encompassing both domestic and international law interests the following philosophic all values might usefully grow together in the future:

(a) The law could acknowledge and ensure that providers of freight and passenger services of whatever kind have a paramount duty to aspire to meeting state-of-the-art standards of safety.

(b) Aside from the detecting (and, rather more hopefully, the prevention) of deliberate misconduct and reckless disregard of standards, the best protection of the travelling public is a reliable system for gathering safety information and ensuring the interchange of that information.

(c) Recurrence of accidents is the mischief against which the bulk of our resources ought to be marshalled. The major cause of recurrence is lack of reliable information and the understanding of how accidents have happened in the past, especially the immediate past.

(d) Rather than perceiving shipping activities as opportunities for seafarers to indulge in criminal conduct, it is better to emphasise the concept of a progressively safer working environment; one in which information interchange and cooperation during the actions are primary virtues. Contrary to the trend towards open-ended release of information to all types of interest groups (which possibly now threatens the integrity of preliminary inquiries) it is better to allow people to admit their mistakes to safety investigators. It can be left to other investigators to uncover criminal conduct through their own efforts.

(An example of the 'safer working environment' approach is seen in Appendix IX. This is a short Act of the Australian (Federal) Parliament which is companion to the Freedom of Information Act. While it is <u>theoretically</u> possible under the Air Navigation Amendment Act 1984 to disclose the contents of cockpit voice recorders, there is a strongly stated statutory intention not to have their contents disclosed as evidence in disciplinary, criminal or civil cases. Disclosure even to the courts is a last

resort. This acknowledges that the contribution accident investigation made to these devices is of primary concern.)

(e) The preliminary inquiry should be treated as closely as possible to the contents of the cockpit voice recorder. An investigator examining a cockpit voice recorder tape is able to formulate both negative and positive conclusions. Sometimes the result will be the quick conclusion there was no pilot error or mechanical deficiency in the particular aircraft. At that point the investigator knows where not to look in development reasons for the accident. Equally the recording may take him deeper into questions of pilot competency, medical fitness or aircraft design.

(f) The negative aspect of a Marine inquiry is essentially that of ruling out the need for a formal inquiry. This is the threshold question and in many cases it can be answered without questioning a single witness. One would imagine that if an inter-island ferry sank with or without major loss of life a formal inquiry would be inevitable. As things stand however, no matter how readily the short question is answered the practice is to use the preliminary inquiry to gather data capable of answering a number of questions all loosely linked to the purposes of the Shipping and Seamen Act. Any reformed legislation should prescribe the format for a formal recommendation supporting a secondary inquiry whilst limiting or at least

rendering confidential the matters which might be gone into during the balance of the preliminary investigation.[6]

(g) The formal investigation has somewhat clearer objectives. But it still has the effect of confusing in the public mind the need for maintaining public confidence in public transportation with the human tendency to find fault in individual person(s).

(h) The taking of certificates should be divorced from the formal inquiry process but not to the extent that evidence so produced is of no relevance in the licensing context. Rather, following the precedent of Section 141 of the Transport Act, the future licensing or certification of an officer should not be seen as a subsidiary matter forming part of a larger question of how a disaster took place.

The act of removing certificates should clearly stem from a different form of inquiry which should be based on the formulation posted by R M Dunning.[7]

> "Was there such a serious lack of proper care which in the circumstances demonstrates that there could be an unacceptable risk to the future safety of shipping in continuing to licence the individual concerned?"

As of now the New Zealand system is tending to answer that question in the wrong arena, ie, the preliminary inquiry.

Conclusion

In regular default of a formal inquiry we are often getting a hybrid result described by one prominent Wellington lawyer as "a formal preliminary inquiry". One where untested evidence leads to further informal "trial" in the job market or through the media where other distortionary side effects arise. There, or in the criminal courts by generating admissible evidence not obtained in a comparable way in any other transport mode.

Footnotes

1 For example Report of the Investigation of the capsize of MV "Gabriella" is instructive. The vessel capsized in the Harbour at Port Kembla on 15 August 1986. The investigation took place between 15 August 1986 and 29 January 1987. Two persons drowned in the incident. The conclusions are stated as:

> "On the assumption that X happened, the operation then would have become very dangerous. The following action should have been taken under these circumstances:
>
> (a) cease further winching;
>
> (b) order persons from the ship;
>
> (c) carefully monitor developments;
>
> (d) assess options ... states options which <u>might</u> have been considered." (Abbreviated)

2 In the words of a senior Ministry investigator:

> "If a solicitor advises his client not to answer any questions, that fact is recorded, but in serious casualties that sort of action would almost certainly result in a formal investigation or inquiry being recommended." (MLAANZ Seminar, Tokaanu, April 1987)

3 It is worth mentioning that the Official Information Act does no more than give administrators guidance and grounds for withholding information or releasing it in the public interests. It does not <u>prohibit</u> the release of information held by departments which is not directly subject to the Act. If it were thought expedient to render preliminary inquiry reports confidential it would be necessary not only to exempt them from the Official Information Act but also to introduce overriding legislation, probably in the Shipping and Seaman Act. That would override both the Information Act and oust the discretion of any administrator or Minister to make such information available. Failing the passage of such legislation it would have to be argued that within the criteria of the Official Information Act the release of particular depositions might be contrary to the public interest grounds in that Act. Present knowledge would suggest that the latter course would be ineffective.

4 There was also the additional bonus that some measure of confidentiality could attach to the preliminary depositions. Prosecution could not be guaranteed and reporting of prosecutions in the New Zealand media is not uniformly consistent. Often they are not reported at all. The Official Information Act 1982 introduces new considerations however.

5 Much of that advice is dependent on exacts from McMillan's Shipping Inquiries in Courts (1929). The relevant passage is:

> "Proceedings are in camera, and no opportunity is given to cross-examine. It is important that the inquiry should be held as soon after the occurrence of the event as possible. Evidence given de recenti is of particular value, and if the inquiry is delayed witnesses may have disbursed, and the collection of evidence thereby made more difficult and expensive. Moreover, persons whose interests may be affected usually themselves take statements from the witnesses immediately after the occurrence of the causality, and the evidence of witnesses is liable to be coloured by the form of the questions first put to them."

6 The Ministry's best legal advice is currently to the effect that a preliminary inquiry has only one purpose, ie, to enable the Minister to decide whether there should be a formal inquiry and to this end it should be conducted without intervention or interference so as to come to a speedy conclusion. The practice has however diverged. At the April 1987 MLAANZ Seminar Captain Ponsford who conducted the preliminary investigation into the Lermonotov Mikhail stated:

> "in cases where it is almost certain that a formal investigation or inquiry will be ordered, the preliminary inquiry and report can be quite brief. On the other hand, if the Marine Inspector thinks that nothing further would be established by a formal investigation or inquiry, the preliminary must be very thorough and comprehensive."

The question now arises to what end such thoroughness is directed given the sole purpose of the inquiry.

7 Lloyds Ship Manager April 1986 pages 58 to 59.

APPENDIX I

PART VIII

SHIPPING INQUIRIES AND COURTS

As to the extended meaning of the term "ship" under this Part of this Act, see the definition of that term in s. 2 (1) of this Act.

Inquiries as to Shipping Casualties

323. Cases where shipping casualty deemed to occur—For the purposes of inquiries and investigations under this Part of this Act a shipping casualty shall be deemed to occur—

(a) When on or near the coasts of New Zealand any ship is lost, abandoned, stranded, or materially damaged or has been in collision with any other ship [or has had a fire on board]:

(b) When any loss of life ensues by reason of any casualty occurring to any ship on or near the coasts of New Zealand:

(c) When in any place any such loss, abandonment, stranding, material damage, [casualty, or fire] as above-mentioned occurs, and any witness is found in New Zealand:

(d) When in any place any such loss, abandonment, stranding, material damage, [casualty, or fire] as above-mentioned occurs or is supposed to have occurred to any New Zealand ship:

(e) When any Commonwealth ship is lost or is supposed to have been lost, and any evidence is obtainable in New Zealand as to the circumstances under which she proceeded to sea or was last heard of:

[(f) When any loss of life ensues by reason of any accident or mishap occurring to any ship or by the use or management of any ship on or near the coasts of New Zealand:

(g) When in any place any such accident or mishap occurs to any New Zealand ship or by the use or management of any New Zealand ship.]

Cf. 1908, No. 178, s. 233; Merchant Shipping Act 1894, ss. 464, 478 (U.K.)

In para. (a) the words in square brackets were added by s. 17 (1) (a) of the Shipping and Seamen Act (No. 2) 1970, and in paras. (c) and (d) the words "casualty or fire" were substituted for the words "or casualty" by s. 17 (1) (b) and (c) respectively of that Act.

Paras. (f) and (g) were added by s. 61 of the Shipping and Seamen Amendment Act 1959.

324. Preliminary inquiry to be held—(1) Where a shipping casualty has occurred, a preliminary inquiry may be held respecting the casualty by any Superintendent or by any other person appointed for the purpose by the Minister.

(2) For the purpose of any such inquiry the person holding the same shall have the powers of a Marine Inspector under this Act.

(3) Where any such inquiry is held, the person holding the same shall report his findings to the Minister.

(4) A person authorised as aforesaid to make a preliminary inquiry shall, in any case where it appears to him requisite or expedient (whether upon a preliminary inquiry or without holding such an inquiry) that a formal investigation under section 325 of this Act or a formal inquiry under section 328 of this Act should be held, report to the Minister accordingly.

Cf. 1908, No. 178, s. 234; 1948, No. 10, s. 7; Merchant Shipping Act 1894, s. 465 (U.K.)

325. Formal investigation—(1) Where—

(a) A shipping casualty has occurred; or

(b) The Minister has any reason to believe that any master, mate, or engineer of a Commonwealth ship is from incompetency or misconduct unfit to discharge his duties, or that, in case of collision or of any ship or other vessel or any aircraft or any person in distress, he has failed to render such assistance or to give such information as is required under Part VII of this Act, or that he has endangered the safety of any ship,—

the Minister may cause a formal investigation to be held.

(2) The formal investigation shall be held before a Court consisting of such [District Court Judge], or such other

person, being a barrister or solicitor of the [High Court] of not less than 7 years' standing, as the Minister, with the approval of the Minister of Justice, appoints.

(3) The formal investigation shall be subject to and conducted in accordance with such conditions and regulations as may be prescribed by rules made in relation thereto pursuant to section 327 of this Act.

(4) The formal investigation shall be conducted in such a manner that if a charge is made against any person, that person shall have the opportunity of making a defence.

(5) The formal investigation shall be held in some Courthouse or other suitable place to be determined in accordance with rules made pursuant to section 327 of this Act.

(6) For the purposes of a formal investigation the Court shall have the powers of a [District Court] in any case where jurisdiction is conferred on a [District Court Judge] or one or more Justices in relation to any matter in respect of which proceedings may be commenced by an information or complaint under [the Summary Proceedings Act 1957].

(7) The Court holding the formal investigation shall hold the same with the assistance of one or more Assessors, of nautical, engineering, or other special skill or knowledge, to be appointed by the Minister.

(8) Where an investigation involves, or appears likely to involve, any question as to the cancellation or suspension of the certificate of a master, mate, or engineer, the Court shall hold the investigation with the assistance of not less than two Assessors, and, subject to the provisions of subsections (9), (10), and (11) hereof, at least one of those Assessors shall if possible be a person having experience in the trade in which the casualty happens or with which the formal investigation is concerned.

(9) Where the formal investigation involves or appears likely to involve any question as to the cancellation or suspension of the certificate of a master or mate, at least one of the Assessors shall be the holder of a certificate of the grade of master of foreign-going ship.

(10) Where the formal investigation involves or appears likely to involve any question as to the cancellation or suspension of the certificate of an engineer, at least one of the Assessors shall be the holder of an engineer's certificate of the first class [for foreign-going ships].

(11) Where the formal investigation relates solely to matters connected with the engineers or engines of a ship,

and involves or appears likely to involve any question as to the cancellation or suspension of the certificate of an engineer, there shall be 2 Assessors, each of whom shall be the holder of an engineer's certificate of the first class.

(12) The management of the case shall be superintended by such person as the Minister may appoint, and he shall render to the Court such assistance as is in his power:

Provided that, if the formal investigation is held in respect of a charge against a master, mate, or engineer, the Minister may direct that the person who has brought that charge to his notice shall conduct the case, and, if the Minister so directs, that person shall be deemed to be the party having the conduct of the case.

(13) Where the formal investigation involves a question as to the cancellation or suspension of a certificate, the Court shall, at the conclusion of the case or as soon afterwards as possible, state in open Court the decision to which it has come with respect to the cancellation or suspension thereof.

(14) The Court, after hearing the case, shall make a full report to the Minister containing a full statement of the case and of the opinion of the Court thereon, accompanied by such report of or extracts from the evidence and such observations as the Court thinks fit, and if the Court determines to cancel or suspend any certificate it shall send the certificate cancelled or suspended to the Minister with the report.

(15) A certificate shall not be cancelled or suspended by a Court under the powers given in that behalf by section 333 of this Act unless a copy of the report, or a statement of the case on which the formal investigation has been ordered, has been furnished to the holder of the certificate before the commencement of the formal investigation.

(16) Each Assessor shall either sign the report or state in writing to the Minister his dissent therefrom and the reasons for his dissent.

(17) The Court may make such order as it thinks fit respecting the costs of the formal investigation, or any part of those costs.

(18) For the purpose of enforcing any order of the Court for the payment of costs, a duplicate of the order may be filed by the person to whom the costs are payable in the office of the [District Court] named in the order, and shall thereupon be enforceable in all respects as a final judgment of the [District Court] in its civil jurisdiction.

(19) Every witness may be allowed such expenses as would be allowed to a witness attending as a Crown witness on subpoena to give evidence in criminal proceedings before the [High Court].

(20) The Minister may, if in any case he thinks fit, pay the costs of any such formal investigation.

(21) Where any formal investigation under this section concerns or involves any ship which is not a New Zealand ship or concerns or involves the conduct of a master, mate, or engineer of any such ship, the Minister shall transmit a copy of the report to the Government of the country in which the ship is registered or to which the ship belongs.

Cf. 1908, No. 178, ss. 235, 239; 1909, No. 36, s. 59; Merchant Shipping Act 1894, ss. 466, 471 (U.K.)

In subs. (6) the Summary Proceedings Act 1957, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Justices of the Peace Act 1927.

In subs. (10) the words in square brackets were added by s. 62 of the Shipping and Seamen Amendment Act 1959.

326. Investigation may be reheard—(1) The Minister may in any case where a formal investigation has been held under section 325 of this Act, order the case to be reheard, either generally or as to any part thereof, and shall do so—

(a) If new and important evidence is discovered which could not be produced at the formal investigation; or

(b) If for any other reason there is in his opinion ground for suspecting that a miscarriage of justice has occurred.

(2) The Minister may order the case to be reheard either by the Court by which the case was heard in the first instance or by another Court constituted pursuant to the provisions of section 325 of this Act or by the [High Court], and the case shall be so reheard accordingly.

(3) Where on any formal investigation any decision has been made with respect to the cancellation or suspension of the certificate of a master, mate, or engineer, and an application for a rehearing under this section has not been made or has been refused, an appeal shall lie from the decision to the [High Court].

(4) Where on any formal investigation the Court finds that a shipping casualty has been caused or contributed to by the wrongful act or default of any person, and an application for a rehearing under this section has not been made, or has been refused, the owner of the ship, or any other person who,

having an interest in the formal investigation, whether or not he was a party thereto, has appeared at the hearing and is affected by or whose conduct is referred to in the decision of the Court, may appeal from that decision in the same manner and subject to the same conditions in and subject to which a certificated officer may appeal under this section against a decision with respect to the cancellation or suspension of his certificate.

(5) Any rehearing or appeal under this section shall be subject to and conducted in accordance with such conditions and regulations as may be prescribed by rules made in relation thereto pursuant to section 327 of this Act.

Cf. 1908, No. 178, s. 243; 1909, No. 36, s. 39; Merchant Shipping Act 1894, s. 475 (U.K.); Merchant Shipping Act 1906, s. 66 (U.K.)

327. Rules of procedure on investigations—Without limiting the general power to make rules conferred by section 504 of this Act, rules may be made under that section relating to formal investigations, and to the rehearing of or appeals from the decision of the Court holding any such investigation, and in particular with respect to the appointment and summoning of Assessors, the procedure, the parties, the persons allowed to appear, the notice to those parties or persons or to persons affected, the amount and application of fees, and the places in which formal investigations shall be held.

Cf. 1908, No. 178, s. 244; Merchant Shipping Act 1894, s. 479 (U.K.)

As to investigations, see the Shipping Casualty Rules 1937 (S.R. 1937/221).

328. Alternative procedure in case of small craft, fishing boats, and restricted-limit ships—(1) Where—

(a) A shipping casualty occurs which involves only a New Zealand ship which is a ship under 25 tons register carrying cargo only or a fishing boat, or a ship in respect of which a restricted-limit certificate is in force, or a ship which is pursuant to section 246 of this Act exempt from survey under Part IV of this Act, or any 2 or more of such ships; or

(b) The Minister has any reason to believe that any master or engineer of any such ship, being a Commonwealth ship, is from incompetency or misconduct unfit to discharge his duties, or that, in case of collision or

APPENDIX IA

PRELIMINARY INQUIRIES INTO SHIPPING CASUALTIES

- SOME CONTEMPORARY ISSUES

In what circumstances can a preliminary inquiry be held? Are those circumstances too restrictive?

The power to hold preliminary inquiries is conferred by section 324 of the Shipping and Seamen Act 1952, which authorises any Superintendent, or any other person appointed for the purpose by the Minister, to hold such an inquiry whenever a shipping casualty has occurred.

The term "shipping casualty" is defined in section 323 of the Act, however it is not clear whether the definition is exhaustive. A recent review[1] of the comparable Canadian legislation concluded that to constitute a shipping casualty warranting the appointment of a preliminary inquiry into its causes, the incident had to fall within the statutory definition. If the Canadian view of exhaustiveness is correct, then deficiencies in our definition can be identified:

(i) With respect to incidents involving foreign ships[2] the Act only applies where the loss of a ship or the loss of life is known to have occurred. There is no provision for presumption of loss.

(ii) Where loss of life ensues a shipping casualty is deemed to have occurred.[3] A casualty giving rise to serious injury does not constitute a shipping casualty in terms of the Act.

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[1] Proposals and Rationale in Respect of Investigations under The Canadian Shipping Act, Maritime Code - Book V - Division B - Investigations (unpublished).

[2] Where a Commonwealth or New Zealand ship is presumed to be lost, however, a shipping casualty is deemed to have occurred - section 323(e) and (g) of the Shipping and Seamen Act 1952 ("the Act").

[3] The Act, section 323(b).

(iii) Damage caused by a ship but not resulting in damage to the ship or loss of life does not fall within the definition of a shipping casualty.[4]

(iv) Potentially dangerous incidents do not fall within the statutory definition.

It might be thought that these criticisms arise from an unnecessarily restrictive interpretation of the section and that a more liberal interpretation is warranted, given the purpose of the statute. However dissatisfaction with comparable statutory definitions couched in similar language, has led Canada and the United Kingdom to echo these criticisms and amend their legislation accordingly. For example, the power in Britain to cause preliminary inquiries and formal investigations now specifically extends to

(i) Presumed loss of a ship, which at the time of its presumed loss was registered in the UK or was presumed to be within the territorial waters of the UK;[5]

(ii) Incidents giving rise to serious personal injury of a crew member or passenger of a ship registered in the UK or which, at the time of the incident, was within the territorial waters of the UK;[6]

(iii) Any damage caused by such a ship[7], and

(iv) Any incident which was capable of causing a casualty

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[4]For example, an incident involving a ship colliding with a wharf and causing damage to the wharf but escaping injury itself, will not constitute a shipping casualty under the Act so long as no loss of life ensues. Where life is lost section 323(f) of the Act is applicable.

[5]The Merchant Shipping Act 1970, section 55(1)(a).

[6]ibid, section 55(1)(b).

[7]ibid, section 55(1)(c).

into which an inquiry might be ordered.[8]

It is to be hoped that the present review of the Shipping and Seamen Act 1952 will extend the statutory definition to incorporate those further incidents recognised by the (UK) Merchant Shipping Act 1970. Whilst it might be expected that the New Zealand Courts will be willing to adopt a broad approach to the interpretation of section 323 of the Shipping and Seamen Act as it presently stands, a legislative lead will be of immediate practical assistance to a Superintendent of Mercantile Marine or other person appointed by the Minister to conduct a preliminary inquiry into an incident which may or may not constitute a "shipping casualty" in terms of the Act. The coercive powers enjoyed by a Marine Inspector only extend to a person conducting a preliminary inquiry where there has been a "shipping casualty" as defined by the Act. The present uncertain state of the law may result in a Superintendent of Mercantile Marine declining jurisdiction to conduct a preliminary inquiry into an incident which does not readily fall within the statutory definition, for fear that the exercise of the coercive powers which he might ordinarily be expected to have, would expose the Marine Department, the Minister, and himself to civil damages for any breach of the proprietary or personal rights of others which would be infringed by the unlawful exercise of those powers.

What does the Marine Division of the Ministry of Transport perceive to be the purpose of preliminary inquiries? Is this view justified?

The Act does not set out the purpose of a preliminary inquiry other than to say that if held it must be held "respecting the casualty".[9] The person holding the inquiry must report his "findings"[10] to the Minister and may recommend that a formal investigation or inquiry be held.[11] Unlike earlier

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[8]ibid, section 55(1A); (UK) Merchant Shipping Act 1979 section 32(2)(b).

[9]The Act, section 324(1).

[10]ibid, section 324(3).

[11]ibid, section 324(4).

legislation[12], which provided for the constitution of "Courts of Inquiry into the causes of wrecks" the Shipping and Seamen Act 1952 leaves the proper purpose of preliminary inquiries to be inferred from the scheme of the statute. The Marine Division of the Ministry of Transport, which is charged with administering Part VII the Act, has identified[13] three purposes of preliminary inquiries:

(i) To ascertain the facts surrounding a shipping casualty,

(ii) To enable the Minister to determine whether or not he should cause a more formal investigation to be held, and

(iii) To help provide information relating to safety at sea.

On their face, these rationale seem unextraordinary enough and appear compatible with both Part VIII of the Act generally as well as complying with the specific requirements of section 324. However, reports of preliminary inquiries are open to being criticised for adopting too strict an interpretation of the meaning of "the facts" surrounding the shipping casualty being investigated. For example, the Report[14] of the Preliminary Inquiry into the grounding and subsequent foundering of the "Mikhail Lermontov" in the Marlborough Sounds on 16 February 1986, states that the loss of the vessel was traceable to the "sudden decision" of the pilot to navigate the ship through the passage between Cape Jackson and Cape Jackson Lighthouse.[15] The reason for that sudden decision, if ever ascertained by the Inquiry, is not disclosed in the Report, although it

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[12]The Enquiry in Wrecks Acts of 1863 and 1869.

[13]SMM Circular 1984/87 Survey Circular 1984/26 Shipping Accidents/ Casualties, Marine Division of the Ministry of Transport, Wellington (unpublished), at p 3.

[14]Dated 26 February 1986, unpublished.

[15]ibid, at p 6.

would have been thought that the reasons for the decision which resulted in the loss of the ship formed part of the "facts surrounding [the] shipping casualty". Similarly, the "facts" surrounding the loss of the "Rainbow Warrior" in Auckland Harbour on 10 July 1985, as disclosed in the three page Preliminary Inquiry Report[16], were that the cause of the sinking was "the ingress of water into the hull at two places" occasioned by explosions "external" to the vessel. It may be concluded that the Marine Division does not see the discovery of the reasons behind the eventuating of the facts as found, as necessarily forming any part of the function or purpose of a preliminary inquiry.

It may also be inferred that the Marine Division does not see the discovery of such reasons as necessarily falling within the province of a more formal inquiry, as in both the Mikhail Lermontov and Rainbow Warrior Inquiries for example, it was recommended by both the respective preliminary inquirers that no formal investigations be set afoot as the "facts" surrounding the casualties were said to have been clearly established.[17]

What procedure applies to preliminary inquiries? Are the safeguards adequate? In what circumstances ought there to be a formal investigation instead of (or in addition to) the preliminary inquiry?

Section 324 of the Shipping and Seamen Act which authorises the holding of a preliminary inquiry, makes no reference to the rules of procedure applicable to their conduct. Nor do the provisions of the Act which prescribe the powers of Marine Inspectors - powers also enjoyed by a person conducting a preliminary inquiry - attempt to regulate any procedure. The Shipping Casualty Rules 1937 do not extend

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[16]Reported in part only in the "Evening Post" newspaper, 7 May 1986. The Preliminary Inquiry Report into the loss of the Rainbow Warrior does not appear to have been released by the Minister.

[17]The reason given in the Mikhail Lermentov inquiry Report was that the preliminary inquiry had "established beyond any reasonable doubt the facts leading to the grounding and subsequent loss" of the vessel. (emphasis added); at p 9 of the Report.

to preliminary inquiries.[18] Unlike many inquiries constituted pursuant to other enactments, the Commissions of Inquiry Act which prescribes rules of procedure, does not apply to preliminary inquiries. There is, in fact, no statutory or regulatory instrument which governs the procedure of a preliminary inquiry.

By comparison, elaborate rules of procedure are prescribed by both the Act and the Shipping Casualty Rules in respect of formal investigations and inquiries, re-hearings and appeals. So it cannot be said that the non-provision of procedural rules to apply to the conduct of preliminary inquiries is some kind of legislative oversight. Indeed, successive revisions of the Act and its predecessors have left the modern section 324 largely unaltered since its inception. Rather, it is suggested that it was never thought necessary to provide for rules of procedure in respect of preliminary inquiries, as the complex modern form which some contemporary inquiries have assumed, was never contemplated by the Act. The history of the legislation suggests that it is doubtful whether it was ever intended that a preliminary inquiry would convene as such, let alone don the garb of an administrative tribunal.

Yet the modern approach seems bent on importing into the conduct of a preliminary inquiry, the quasi-judicial trappings of formality and protocol with the attendant expectations which they generate - in particular, that proper procedural rules will apply, whatever they may be. The preliminary inquiry into the sinking of the "Mikhail Lermentov" for example, took the form of a hearing which extended over several days and which was conducted by a Marine Inspector assisted by a Surveyor of Ships. A number of witnesses and their legal counsel appeared, although what procedural rules prevailed is not known, as the report is silent on this aspect, and the hearing was conducted behind closed doors. The names of the persons appearing, their evidence, what was said in cross-examination (if allowed) are all matters left to conjecture, as to date the transcripts of evidence have not been released.

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[18] Rule 5: "Investigation" means a formal investigation into a shipping casualty.

It might be thought that the question of what procedure should apply to the conduct of a preliminary inquiry, is not of great importance, given that the function of the inquiry is inquisitorial and not judicial, that the proceedings are heard in private, and that the findings of the inquiry do not determine legal rights. Unlike a Court conducting a formal investigation, a person conducting a preliminary inquiry has no power to suspend or cancel a certificate of competency. The preliminary inquiry report is comparable to the report of a Commission of Inquiry which

> "... by itself has no more legal effect and carries with it no more legal consequence than an article in a newspaper." - per Williams J in Jellicoe v Haselden (1903) 22 NZLR 343 at p 361.

The report is not even admissible as evidence relating to the cause of a casualty where such evidence is sought to be adduced in subsequent civil proceedings. The findings of a preliminary inquiry, in the end, are only expressions of opinion.

But the findings contained in the preliminary inquiry report, whilst not determining legal rights, may affect them. The report, if made public by the Minister, may greatly influence public and official opinion and damage the reputation of a person who is criticised in it. The reported findings may contain adverse comments about the conduct of a person prior to, during, or after the happening of a casualty. The seamanship of an officer may be questioned or doubted. He may be severely censured for his conduct not only in respect of the shipping casualty itself, but for the stance he may adopt (or appear to adopt) when answering questions put by the preliminary inquirer. The findings may reflect on the ability, integrity or honesty of the person whose conduct is investigated. The inquirer's words may accuse and condemn. So long as he acts in good faith, defamatory comments contained in his report will not be actionable. The findings, if disclosed, may invite civil suit or prosecution under the criminal law.

When the potential consequences of a preliminary inquiry report which addresses such issues are recognised, it becomes apparent that the

holding of a preliminary inquiry is not the proper course for making such potentially damaging findings. The person holding the inquiry may (and in all probability, will) be quite unfamiliar with the procedural safeguards normally accorded a person giving evidence. The inevitable truth is that a layman, such as a Marine Inspector, cannot be expected to determine procedural rules which will ensure that a person about whom an adverse finding may subsequently be made, is accorded proper protection and is afforded a fair hearing.

A better approach may be to incorporate into Part VIII of the Act a statutory direction to the effect that where a person authorised to conduct a preliminary inquiry (whether upon or without holding such an inquiry) forms the view that the magnitude of the casualty is such that a formal investigation is proper or that there is good reason to believe that any inquiry will involve or raise a question relating to the culpability of any person in causing or contributing to the casualty, then the person authorised to conduct the preliminary inquiry shall immediately convey that view (and his reasons for it) to the Minister. Upon receiving that advice, the Minister should be required to immediately cause a formal investigation into the shipping casualty unless special circumstances demand otherwise.[19] Such a course would be consistent with section 324(4) of the Act which provides for a person authorised to make a preliminary inquiry recommending that a formal investigation be held where it appears to him "requisite or expedient" to do so "whether upon a preliminary inquiry or without holding such an inquiry".

As for what procedure should apply in respect of preliminary inquiries properly constituted, assistance may be derived from a consideration of inquisitorial analogies from other jurisdictions. The leading case in the field is In Re Pergamon Press Ltd [1971] 1 Ch. 388, where the English Court of Appeal held that a company inspector's

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[19]This would give the Minister some flexibility. For example the decision not to cause a formal investigation into the sinking of the "Rainbow Warrior" would fall within the special circumstances category.

function was also investigatory and not judicial, and that he must, in view of the consequences which may flow from his report, act fairly. Subject to that one constraint, he is the master of his own procedure. What fairness requires in any given case will be determined by the circumstances. The Court of Appeal seems to suggest that so long as the inquirer acts in good faith, he will be protected by at least a qualified privilege.[20] If the analogy holds good for marine inquiries,[21] an aggrieved person would be prevented from prosecuting a defamatory action against a person conducting a preliminary inquiry in response to adverse comments made about that person in the report.

Are the statutory provisions relating to marine inquiries adequate?

The legislative authority to conduct marine inquiries is derived from legislation modelled on the imperial statutes[22] of nineteenth century Britain. In many respects the modes of inquiry contemplated by the Shipping and Seamen Act 1952 is not dissimilar to that envisaged by the first draughtsmen. Even the operative procedural rules are the still extant Shipping Casualty Rules of 1937 made pursuant to a statute long since replaced. To date legislative tamperings with the provisions of the 1952 Act relating to marine inquiries, have been minimal. Taken together, these factors support the view that the underlying concept on which marine inquiries are and always have been based, has remained intact. Inquiries are still pursued primarily for the purpose of improving safety of life at sea, and in the process of administering legislation designed to achieve this end, it has someti-

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[20] In Re Pergamon Press Ltd (supra), at p 400; Lord Denning citing Home v Bentinck (1820) 2 Brod. & Bing. 130, 162 per Lord Ellenborough and Chatterton v Secretary of State for India in Council [1895] 2 QB 189, 191 per Lord Esher MR.

[21] It is submitted that it does! The prime functions of the preliminary inquirer under the Shipping and Seamen Act 1952, and the Companies Inspector under section 165 of the (UK) Companies Act 1948 are information gathering. Coercive powers are extended to both inquisitors to assist them in carrying out those functions. Neither the inspector nor the preliminary inquirer can determine legal rights but both have the capability to affect those rights. The analogy seems fair.

[22] (UK) Marine Merchant Act 1850: (UK) Merchant Shipping Acts 1894.

mes proved necessary to interfere with the rights of individuals by depriving them of their certificates of competency, thereby affecting their livelihood. Determination of rights and the adverse effects on rights normally brought about by the power of censure, are not pursued for their own purposes, or even so that blame might be attributed to the person or persons responsible for the shipping casualty being investigated. Rather, the determination or affecting of rights, where they occur, are necessarily incidental to the prime purpose of inquiries which is to ascertain the circumstances surrounding shipping casualties in the hope that future incidents of the kind investigated, might be averted.

The potential conflict between the public interest in promoting safety of life at sea, and the public interest in ensuring that individuals whose rights might be determined or affected by decisions of marine inquiries be afforded the proper protection that the law demands, requires that the resolution of that potential conflict should fall to specialised bodies equipped to fully investigate the circumstances surrounding a shipping casualty whilst recognising the rights of those individuals who may be affected by the inquiry. As one commentator[23] observed some sixty years ago:

> "The decision of such questions was thought by the legislature to be too important to be left to the uncontrolled discretion of a Government Department, unaccustomed to judicial methods of procedure."[24]

The dual task is not an easy one, but the Courts conducting formal investigations into shipping casualties are well placed to achieve it. Their inquisitorial powers are at least as extensive as those of any Commission of Inquiry. They are usually conducted by Judges versed in the law who are assisted by Assessors with specialised nautical expertise. Individuals appearing before or who are affected by the inquiry are extended the protection which the law demands. Procedural rules are prescribed by both statute and regulation. Re-hearings and appeals are available to remedy any injustice.

But the Courts of formal investigation and inquiry appear to be falling victim to the way in which the legislation is presently being

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24ibid, at p 2.

administered. This development is characterised by preliminary inquiries being pursued in respect of every shipping casualty, even where the magnitude of the casualty or the apparent culpability of any person in causing or contributing to the casualty, was obvious at the time when the decision to instigate the preliminary inquiry was made or became known during the course of the inquiry.

Despite the criticisms which may be made in respect of the manner in which the legislation is presently being administered, the statutory provisions relating to marine inquiries <u>are</u> workable. If properly applied, they provide the broad administrative mechanisms whereby extensive inquiry may be pursued whilst proper regard to the rights of individuals affected can be maintained. The present review of the Shipping and Seamen Act may yet focus attention on the way in which the marine inquiry provisions are interpreted and administered by the Minister and his Department. It may even move the Marine Division to reconsider its construction of the relevant provisions of the Act, in particular those relating to preliminary inquiries, and to recognise that preliminary inquiries ought not to be elevated to the status of de facto Courts of formal investigation but without the procedural safeguards which such properly constituted Courts afford.

Gerard Sanders

<u>G. J. Sanders</u>

Lermontov sinking - is there a cover up

No one need ever know why the Mikhail Lermontov ran aground in the Marlborough Sounds on February 16, and later sank. Don Jamison, the ship's pilot can take the facts to the grave as a secret, if he so wishes.

According to Hugh Jones, director of the Marine Division of the Ministry of Transport: "No one will ever know, except for Captain Jamison, unless he chooses to disclose it."

"No court — or court of inquiry — can make him say what happened unless he wants to."

The television programme Close-Up, he said, drew parallels with the Erebus disaster and implied that Jamison had been blamed unfairly.

"But if Captain Jamison feels he has been made a scapegoat, he is perfectly at liberty to talk. In fact he has chosen not to do so."

Captain Jamison, said Mr Jones, could still be the subject of a police charge because of the death of a member of the crew. Something, he added, that police are still investigating.

"Australian passengers from the ship have indicated that they may well take legal action and Captain Jamison may have to appear in a civil court."

There is, he added, a further inquiry which is being held by the Soviets in accordance with the Safety of Life at Sea Convention and the Soviets will submit that report to the International Maritime Organisations in due course.

Legally, Captain Jamison may have been advised not to talk though some information could emerge from the Soviet inquiry when that reports, said Hugh Jones.

The television programme implied there was some sort of Ministry of Transport cover up, said Mr Jones. "There was none."

He said: "The preliminary inquiry was held in camera because all such inquiries are, so that people feel free to talk.

"An inquiry was needed to find out what caused the Lermontov to sink. This the preliminary inquiry did. That is all an inquiry must do — preliminary or any other. That's what it did.

"How the ship sank," he said, and not "why" Captain Jamison took, the actions he did. He added: "We don't know why. Neither Captain Ponsford does nor do I.

"This television programme suggested there was a need for an official inquiry. All that could do is establish what happened. We are satisfied that the preliminary inquiry and Captain Ponsford's report did this."

Captain Ponsford, said Mr Jones, was an experienced seaman who had served on merchant ships and commanded both passenger and cargo ships. He queried if Captain Ian Bradley (interviewed on Close-Up) had similar experience to Captain Ponsford as master of cargo ship or large passenger liner.

"The programme also alleged there was pandemonium on the bridge, said Mr Jones. The report of the preliminary inquiry in fact states the Soviet Captain "rushed" to the bridge, but pandemonium did not follow, said Hugh Jones.

The calm actions of Captain Voroyov and his crew enabled the passengers, many elderly, to get off the ship with only the loss of life of one crewman — presumed killed when the Lermontov grounded or shortly afterwards, he said.

It was, he added, the vessel's ill fortune that the ship standing by, which might have helped nose the liner on to the beach, was the MV Tarahiko, an LPG tanker which was not gas free at the time and probably more dangerous than if she'd been full of LPG.

"It would have been dangerous' for the Tarahiko to have tried to nudge the Lermontov on to the beach and hold her there."

According to Hugh Jones pictures used on television (showing water flooding out through cracks) also appeared to indicate that there were yet questions to be answered about why the Lermontov took five and a half hours to sink.

"The ship had four pumps capable of pumping out 520 tonnes of water an hour. The plating didn't split and tear because the ship was stiffened against ice."

Nor, said Hugh Jones, is there any mystery about the holes in the hulls.

"The inference was drawn that if there were holes in the port side the Lermontov should have heeled over to port.

"But the ship had large refrigeration compartments on the port side as plans of the ship show. These flooded slowly because of the heavy insulation. As a result the ship heeled over to starboard when it sank. There's no mystery."

For the New Zealand authorities there is however an added twist to the Lermontov saga.

Captain Jamison has lost his coastal pilots licence and his harbour pilots licence was removed by the Marlborough Harbour Board — but he retains his British Masters Foreign Going Certificate of Competency.

Only the British can remove that.

Lermontov Sinking Left Questions Afloat

If the loss of the 20,351-tonne Russian liner Mikhail Lermontov proved anything, it may have been the limitations of New Zealand's maritime legislation in handling disasters at sea.

Justice may have been done; but seafarers say it cannot be said to have been seen to be done under New Zealand's present maritime legislation.

Protests over the findings of a Ministry of Transport preliminary inquiry into the loss of the ship may not die until the Government re-examines the whole marine inquiry process.

New Zealand's professional body of mariners, the New Zealand Company of Master Mariners, has questioned many aspects of the inquiry's findings, in the light of common practice and good seamanship, which are the bottom-line maxims governing the international collision at sea regulations.

Behind Closed Doors

One man died; hundreds of people experienced a close brush with death; and a shipowner suffered a multi-million-dollar loss of a fine passenger ship in New Zealand territorial waters.

Under legislation which derives from the United Kingdom Merchant Shipping Act of 1894, it is possible to handle disasters of the Mikhail Lermontov magnitude completely behind closed doors, without cross-examination of witnesses, and without the presence of lawyers.

Such losses could hardly occur on land or within New Zealand airspace without a full formal inquiry under New Zealand legislation.

In fact, legislation governing even fairly minor air accidents subjects them to exhaustive examination with all the accident reports being made public.

master mariners are concerned at two aspects of the Mikhail Lermontov situation.

They are unhappy with the findings of this preliminary inquiry and they are unhappy about preliminary inquiries themselves.

The first question is one that professional mariners have been asking.

How can a harbour pilot be blamed for the loss of a ship outside his pilotage area?

The preliminary inquiry found that Captain D. I. Jamison gave the ship a course which was to take her through the passage between Cape Jackson and Cape Jackson lighthouse.

It was the course which was to lead to disaster.

In a legal sense, all pilots act as advisers on board ships. The ships technically remain under the control of their masters who have the right to, and should, as a normal practice of good seamanship, continually check the instructions given by harbour pilots.

Directions On Route

It can be argued that disaster might not have struck the Mikhail Lermontov if her master, Captain Vladislav Varobyov, and officers had been scrupulously checking the pilot's instructions.

Captain Jamison's presence on board the Russian liner can be likened to that of a local guide a motorist may pick up to offer directions about the route.

The man behind the wheel (and, in the ship's case, the captain) retains the responsibility for safe motoring. If he accepts advice which causes an can be passed to the guide in the passenger seat.

Captain Varobyov was not on the bridge at the time. So far as the findings of the preliminary inquiry are concerned, Captain Jamison's course instructions were not countermanded or queried by the Russian watch officers on the bridge.

The Ministry of Transport left the matter of a formal inquiry to a Russian court which decided to deprive the ship's chief mate, Mr Sergey Stepanishchev, of the rank of marine navigator and withdraw his diploma for three years.

Although the incident happened in New Zealand territorial waters and the ship had international passengers, including New Zealanders, they had no opportunity to hear these matters in a New Zealand court.

One submission to the Minister of Transport, Mr Prebble, by professional mariners states:

"In comparison with the Pacific Charger grounding, where a moderate-sized cargo vessel grounded and was refloated without loss of life, the Mikhail Lermontov was lost totally, with one life.

Providentially Averted

"She was a large passenger ship and the potential for a great tragedy was only providentially averted. Yet the former vessel was the subject of a full formal inquiry and the latter a cursory preliminary inquiry without conclusions

"In the light of all the foregoing, would not a proper inquiry under the control of a judge, Queen's Counsel or a senior lawyer properly assisted by assessors and appropriate experts, not be appropriate?" It asks.

Captain S. Ponsford, who conducted the preliminary inquiry, thought not; nor did Mr Prebble.

Master mariners claim they have been told unofficially that the reason is that the Soviet Union would not attend such an inquiry in New Zealand.

The weaknesses of the preliminary inquiry system have long been known and were the subject of a detailed paper presented by a senior Ministry of Transport officer, Mr Stuart Milne, some years ago.

The original purpose of preliminary inquiries was to provide a quick technical assessment of a shipping casualty to enable the minister to decide if there should be a formal investigation or formal inquiry.

A preliminary inquiry can be and often is heard by a shipping master who is not necessarily a qualified mariner but normally a person with a clerical background. He can, and usually does, call on the services of technical experts.

The hearings are behind closed doors. Parties cannot cross-examine witnesses, and lawyers cannot be present, although this inquiry process can result ultimately in the loss of a professional certificate of competency and multi-million-dollar insurance claims.

The preliminary inquiry process can, in certain respects, be likened to a police inquiry before charges are laid. But there are no exact parallels with aviation accidents.

Any accident involving aircraft, and certainly those involving death or injury, must be notified to the chief inspector of air accidents. If an accident is not notified by those involved then an inquiry can be, and often is, triggered by an insurance claim.

The big difference between an air accident inquiry and a marine preliminary inquiry is that the air accident report is published for all to see.

Like the marine preliminary inquiry, the air accident investigator cannot take away any licences or apportion blame. But, because the results are published, the process of inquiry can be seen and questioned by all.

Parties likely to be affected by an air accident report may see and make submissions on the draft before it is finally published.

In the Mikhail Lermontov case, Mr Prebble published the preliminary marine inquiry report — an action which was itself, historically, rather unusual.

Had he not done so, it would have been necessary to invoke the Official Information Act and, perhaps, its appeals to the Ombudsman.

Applications under that statute have nevertheless since been made to secure the full transcript and notes of evidence upon which Captain Ponsford based his report, and which also are not usually released.

Mr Milne's paper highlights some other inadequacies in the preliminary inquiry system.

It gives discretion to departmental officers to define a casualty. Depending on their judgment of a situation, they are not necessarily obliged to hold a preliminary inquiry.

Inquiries In Russia

There is no legal requirement that the Minister of Transport keep the report of a preliminary inquiry confidential. But over the years there has been a consistent practice of doing so, on the advice of senior departmental officers and the Crown Law Office.

The results of a preliminary inquiry are not findings on which judgments of blame and costs should be awarded.

If losses have occurred and blame has to be attributed, that becomes the subject of a formal investigation or a formal inquiry.

[In the Mikhail Lermontov case, injured parties may have to await the outcome of any formal Soviet inquiries.]

Mr Milne's paper states: "A weakness in the current purpose of preliminary inquiries is that they do not involve investigation into, for example, a possible fraud such as scuttling."

The current New Zealand definition of "casualty" may not be wide enough to cover the loss or presumed loss or serious personal injury caused by fire on board, or by any accident to a ship's boat, or by any accident occurring on board a ship or a ship's boat, or any damage caused by a ship.

Mr Milne points out that the British Merchant Shipping Act 1970, which was amended in 1979, covers these things and allows an inquiry to be held if there was an incident capable of causing a casualty.

"One aspect of the New Zealand situation which may give cause for concern is that, under the present law, there is no procedure parallel to that introduced in Britain in 1970 where a departmental officer has delegated authority from the minister to suspend a certificate of competency pending a hearing," he said.

Protection For Workers

It can be argued that the present preliminary inquiry system is very humane and protects transport workers who, through the nature of their work, need the shelter of such a system to ensure that their actions are not exposed to unqualified public criticism which may jeopardise their livelihoods.

Transport workers on land and in the air live fully in the public spotlight in that respect.

APPENDIX IV

14. RIGHTS OF PERSONS ATTENDING A PRELIMINARY INQUIRY

1. Neither master nor any other person has the right to be present when statements are being taken from other persons. Each witness must be free to say what he wishes without being under any constraint and without being under any inclination to suppress relevant facts. No person other than the Superintendent and his advisers is entitled to know what a witness has said and accordingly no interested party can claim entitlement to examine or cross examine any witness.

2. (a) The Superintendent should not caution the deponent nor should he tell the deponent that the statement will be confidential.

(b) The deponent should be allowed to give his account of events in a statement in his own words. Any questions asked later by the Superintendent must be to clarify points of issue made by the deponent. Superintendents must give careful thought to the manner in which questions are put to the deponent and must NOT allow the inquiry to become an interrogation.

(c) Statements made by the deponents are to be either typed or handwritten and must be signed by the Superintendent and person making the statement at the time of the inquiry.

(d) Tape recording machines are NOT to be used at the inquiry.

3. Neither the master nor any other witness has the right to be represented by solicitor or counsel unless there is a genuine possibility that the witness might be the subject of a criminal charge arising out of the casualty and could incriminate himself in answering questions at the preliminary investigation. The possibility of criminal charges could only normally arise where the casualty has resulted in death or serious injury or where the fraudulent use of a certificate is involved. Where a person insists on his solicitor being present Head Office approval must be received before proceeding. In these circumstances only, may a solicitor be allowed to attend and strictly on the basis that:-

(a) He is present only while his client is examined.

(b) No examination, cross examination or prompting by the solicitor is permitted. (Persons conducting inquiries should insist on strict observance of this condition subject to the requirement of commonsense that the solicitor be allowed to assist his client if the latter is uncertain as to what he is being asked or forgets something he wishes to say and which is not elicited by the Superintendent).

(c) If the solicitor advises his client not to answer any question, the Superintendent may terminate the interview to consider and obtain advice from the Director of the Marine Division as to what further steps he should take.

15 ASPECTS OF CASUALTY TO BE CONSIDERED

1. It is important that every aspect of a casualty should be considered during a preliminary inquiry. Full and complete information on all the circumstances ensure proper consideration of the questions as to whether or not a formal investigation should be recommended.

2. In conducting the inquiry the Superintendent should ascertain the facts surrounding the casualty and ensure that the following aspects are properly covered:-

(a) If loss of life occurred, how it was caused.

(b) The nature of the damage to the ship resulting from the casualty.

(c) Any defects in the hull, machinery, or equipment of the ship which may have led to or contributed to the casualty. The date of expiry of the Survey Certificate should be noted.

(d) Whether the casualty was due to improper, unskilful, or negligent use of or interference with the machinery or other equipment.

(e) The adequacy and functioning of the safety appliances with which the ship is provided and the effectiveness of the precautionary or remedial

20 SUPERINTENDENTS TO REPORT TO MINISTER

1. Section 324(4) of the Act requires that a Superintendent holding a preliminary inquiry shall report his finding to the Minister, with a recommendation as to whether or not a formal investigation should be ordered pursuant to the provision of section 325 or section 328.

2. The primary considerations to be taken into account by the Superintendent in recommending to the Minister whether or not a formal investigation should be ordered are -

(a) Is it likely to throw additional light on the cause of the casualty which was not clear from the preliminary inquiry?

(b) Is it likely to establish the need for measures to be adopted to prevent the recurrence of similar casualties and thereby secure additional safety of life and property at sea?

(c) Is it indicated by the preliminary inquiry that there has been default, wrongful act, negligence, incompetence, misconduct or failure on the part of any person which needs further examination or which should be further considered as to whether a certificate of competency should be suspended or cancelled?

(d) Is the casualty one involving loss of life, or is it one which has attracted considerable public attention for some other reason, and would a public inquiry help to restore public confidence?

(Note: Loss of life does not of itself constitute a reason for recommending a formal investigation if the facts are clear and no other issues are involved).

3. The original and one copy of the Superintendent's report addressed to the Minister is to be forwarded to Marine Division, Head Office (Attention SEO(MS)). Each copy of the report is to be accompanied by supporting deposition, reports and other relevant documents. Any other material or exhibits which is of significance to the inquiry but which is impractical to deliver should be held in safe custody pending instructions as to its disposal.

21 INFORMATION AND REPORTS TO BE CONFIDENTIAL

1. The Superintendent is not to disclose to any person the results of his inquiry or the nature or contents of evidence or his recommendation to the Minister.

2. Information in response to requests from the news media is to be restricted to the progress of the inquiry and in no circumstances should the Superintendent comment on any aspects of the casualty itself.

3. Any person making a deposition is entitled to a copy of his deposition, but the Superintendent shall not give a copy of any such deposition to any other person, notwithstanding that he may be the employer of the deponent.

19 September 1986

CONDUCT OF PRELIMINARY INQUIRIES

1. There has been criticism on legal grounds of some of the procedures set out in the "Instructions on Holding Preliminary Inquiries into Shipping Casualties" appended to SMM Circular 1984/7 (Survey Circular 1984/26) dated 16 July 1984.

2. Pending a possible review of these Instructions officers carrying out Preliminary Inquiries are to:

(a) take depositions and evidence informally and not on oath as directed in paragraph 6.3 of the instructions.

Only in exceptional circumstances e.g., if it appears that the witness is being evasive or unreliable should evidence be asked for on oath. If evidence is taken on oath the witness must be advised that no guarantee of confidentiality can be given and that evidence may be used in any subsequent proceedings. A note that such warning has been given must be included in the witness signed deposition.

(b) Evidence should be confined strictly to ascertaining what the facts are and should generally avoid questions of **why** certain things were done or not done, unless these are crucial to the investigator's decision as to whether or not to recommend that a Formal Investigation be held.

(c) Preliminary Inquiries and their reports should be kept as brief as possible within the parameters se' out in paragraph 3 of the Instructions namely "purpose of Preliminary Inquiry".

(d) Any witnesses requesting to be represented by a solicitor may be allowed to do so without reference to Head Office. The solicitor must comply with the stipulations specified in paragraph 7.3(a), (b), (c) of the Instructions but this should be applied with reasonable discretion and latitude.

(e) In drafting a report to the Minister officers are once again reminded to report only the facts and to avoid attributing blame or liability.

H.D.M. Jones
Director, Marine Division

Head Office or Regional Office may be appointed to conduct the inquiry with assistance from the local surveyor or from a surveyor or surveyors from another port.

In each case the appointment will be made having regard to the nature of the casualty and the resources needed and available for its appropriate investigation.

5.3 The surveyor appointed to conduct a preliminary inquiry is to ensure that all relevant aspects of the casualty are considered.

To this end he should seek advice and if necessary the assistance of other officers with specialist knowledge.

For example a nautical (or engineer) surveyor appointed to conduct an inquiry may ask an engineer (or nautical) surveyor, or a radio surveyor or a shipwright, or other specialist officer either to brief him on questions to ask or, preferably, to assist in the examination of all or some of the witnesses.

5.4 In every case early investigation and reporting to Head Office is essential. It is not sufficient merely to write to the owner or master of a craft that has reportedly been involved in an accident - immediate personal investigations must be undertaken.

5.5 When a preliminary inquiry is held, the report, with supporting evidence, is to clearly state that it is a preliminary inquiry report, it is to be provided in duplicate and addressed to the Minister of Transport. The report is not to be sent direct to the Minister but is to be sent undercover of a memorandum addressed to Director of Marine, Head Office for the attention of the SEO(MS).

Additional copies of the report are to be enclosed, which, when the report has been cleared by the Minister, will be sent to the Regional Surveyor and SMM for information.

5.6 If it appears to the person conducting an investigation or inquiry (ie. category B or category C) that an offence or offences have been committed, this is to be brought to the notice of the Superintendent whose responsibility it is to follow the matter up in accordance with established procedures.

BRITISH LEGISLATION (IN FORCE FROM 1983) DEFINING SHIPPING CASUALTIES

Inquiries and investigations into shipping casualties

55. (1) Where any of the following casualties has occurred, that is to say, –

(a) the loss or presumed loss, stranding, grounding, abandonment of or damage to ship; or

(b) a loss of life or serious personal injury caused by fire on board or by an accident to a ship or ship's boat, or by any accident occurring on board a ship or ship's boat; or

(c) any damage caused by a ship;
and, at the time it occurred, the ship was registered in the United Kingdom or the ship or boat was in the United Kingdom or the territorial waters thereof, the (Secretary of State for Trade) –

(i) many cause a preliminary inquiry into the casualty to be held by a person appointed for the purpose by the (Secretary of Sate); and

(ii) may (whether or not a preliminary inquiry into the casualty has been held) cause a formal investigation into the casualty to be held, if in England, Wales or Northern Ireland, by a wreck commissioner and, if in Scotland, by the sheriff.

(1A) Where an incident has occurred which the Secretary of State considers was or is capable of causing a casualty into which he could require an inquiry in pursuance of the preceding subsection, the powers to hold an inquiry or an investigation of both which are conferred on him by paragraphs (i) and (ii) of that subsection shall be exercisable in relation to the incident as if it were such a casualty.

(2) A person appointed under this section to hold a preliminary inquiry shall for the purpose of the inquiry have the powers conferred on an inspector by section 729 of the Merchant Shipping Act 1894.

1978/112

THE CIVIL AVIATION (ACCIDENT INVESTIGATION) REGULATIONS 1978

KEITH HOLYOAKE, Governor-General

ORDER IN COUNCIL

At the Government Buildings at Wellington this 10th day of April 1978

Present:

THE RIGHT HON. R. D. MULDOON PRESIDING IN COUNCIL

PURSUANT to section 19 of the Civil Aviation Act 1964, His Excellency the Governor-General, acting by and with the advice and consent of the Executive Council, hereby makes the following regulations.

ANALYSIS

REGULATIONS

1. Title and commencement—(1) These regulations may be cited as the Civil Aviation (Accident Investigation) Regulations 1978.

(2) These regulations shall come into force on the day after the date of their notification in the *Gazette*.

2. Interpretation—In these regulations, unless the context otherwise requires,—

"Accident" means an occurrence during the operation of an aircraft to which these regulations apply that results in damage to or structural failure in the aircraft, or results in the death of or injury to a person in or leaving the aircraft or in contact with it or with anything that is or was in it or attached to it; and includes an occurrence during the operation of an aircraft that, in the opinion of the Chief Inspector, carried with it the risk that an accident might have occurred:

"Accredited representative" means a person designated by a contracting State for the purpose of participating in an accident investigation or inquiry in another contracting State:

"Act" means the Civil Aviation Act 1964:

"Authorised" means authorised by the Minister:

"Chief Inspector" means the Chief Inspector of Air Accidents appointed pursuant to section 18 (2) of the Civil Aviation Act 1964:

"Contracting state" means a country that is a party to the Convention:

"Convention" means the Convention on International Civil Aviation signed on behalf of the Government of New Zealand in Chicago on 7 December 1944, and includes the International Standards and Recommended Practices and Procedures adopted by the International Civil Aviation Organisation in pursuance of Article 37 of the Convention:

"Court" means a Court of Inquiry appointed pursuant to regulation 17 (2) of these regulations to hold a public inquiry:

"Inspector" means an Inspector of Air Accidents appointed pursuant to section 18 (2A) of the Civil Aviation Act 1964, and includes the Chief Inspector:

"New Zealand aircraft" means an aircraft registered in New Zealand:

"Notifiable accident" means an accident to which regulation 9 of these regulations applies:

"Owner", in relation to an aircraft, means the registered owner or, if the aircraft is not registered, the proprietor:

"Pilot in command" means the pilot responsible for the operation and the safety of an aircraft in flight:

"Public inquiry" means an inquiry held pursuant to regulation 17 (1) of these regulations:

"Seriously injured", in relation to any person, means having sustained injury that—

(a) Requires hospitalisation for more than 48 hours, commencing within 7 days from the date the injury was received; or

(b) Results in a fracture of any bone, except simple fractures of fingers, toes, or nose; or

(c) Involves lacerations that cause severe haemorrhage, nerve, muscle, or tendon damage; or

(d) Involves injury to any internal organ; or

(e) Involves second or third degree burns, or any burns affecting more than 5 percent of the body surface:

"State of registry" means the State where an aircraft is registered:

"Wreckage site" means any place at which an aircraft involved in an accident has come to rest, and includes any area of land or any object with which such an aircraft has made contact immediately prior to arriving at its final resting place, and also includes any area or object on which has been deposited any part, equipment, passenger, or object from such an aircraft.

PART I

PRELIMINARY

3. Regulations not in derogation of other enactments—Except as expressly provided by any other Act or enactment, or any order or regulations made thereunder, the provisions of these regulations are in addition to and shall not derogate from any such Act, enactment, order, or regulations.

4. Application of regulations—(1) Subject to subclause (2) of this regulation, these regulations shall apply to all New Zealand aircraft, and to all aircraft within the territorial limits of New Zealand whether or not they are New Zealand aircraft.

(2) These regulations shall not apply to any aircraft used for the purposes of Her Majesty's naval, military, or air forces, or to any aircraft of a foreign state used for military purposes.

5. Purpose of Accident Investigations—It is hereby declared that the main purpose of accident investigations is to determine the circumstances and causes of the accidents with a view to avoiding accidents in the future, rather than to assign blame or liability to any person.

PART II

ADMINISTRATION

6. Investigation of accidents—(1) The Chief Inspector may, if he thinks fit, carry out an investigation of any accident himself, or may cause any other Inspector to carry it out.

(2) The Chief Inspector may seek such advice or assistance as he thinks necessary in making an investigation.

(3) Subject to the directions of the Minister, the Chief Inspector shall determine the extent to which an investigation shall be carried out and whether upon completion the investigation will be followed by the rendering of a report thereon to the Minister or by the circulation of a brief to the aviation industry or interested parties.

7. Powers of Inspectors—For the purpose of the investigation of any accident an Inspector may—

(a) Have access to and examine any aircraft involved in the accident, the place where the accident occurred, and every wreckage site, and for that purpose require any such aircraft or any part or equipment thereof and the accident site itself to be preserved unaltered pending examination:

(b) Examine, remove, test, take measures for the preservation of, or otherwise deal with any aircraft involved in the accident or any part thereof or anything contained therein:

(c) Require the production of all books, papers, documents, certificates, and articles that he considers relevant, and retain any such books, papers, documents, certificates and articles until completion of the investigation:

(d) By written notice require the attendance of such persons as he thinks fit to call before him, and require such relevant information or returns from any such person as he thinks fit:

(e) Take statements regarding the accident from such persons as he thinks fit, and require any such person to make and sign a declaration of the truth of the statement made by him:

(f) Enter and inspect any place or building if its inspection appears to him to be necessary for the purposes of the investigation:

(g) To take such measures as he thinks fit for the preservation of evidence.

8. Right of passage over adjoining land—(1) Where an aircraft is wrecked or damaged at any place in New Zealand, all persons may, unless there is some public road equally convenient and if they do as little damage as possible, for the purpose of rendering assistance to the aircraft or its occupants, or of saving the lives of the occupants of the aircraft or of saving the aircraft, pass and re-pass, either with or without vehicles, over any land, without being subject to interruption by the owner or occupier, and deposit on that land any goods or any other article recovered from the aircraft.

(2) Any owner or occupier who suffers direct injury or loss in consequence of the exercise of the rights given by subclause (1) of this regulation or by regulation 7 of these regulations shall be entitled to receive therefor compensation fixed by agreement with the Minister with the concurrence of the Minister of Finance, or, in default of agreement, to be fixed by a Compensation Court under Part III of the Public Works Act 1928.

(3) No owner or occupier of land upon which there is an aircraft that is wrecked or damaged shall—

(a) Impede or hinder any person in the exercise of the rights given by subclause (1) of this regulation or by regulation 7 of these regulations by locking his gates, or refusing upon request to open the same, or otherwise refusing or preventing entry; or

(b) Impede or hinder the deposit of any goods or other article recovered from the aircraft on the land; or

(c) Prevent or endeavour to prevent any such goods or other article from remaining deposited on the land for a reasonable time until they can be removed to a safe place of public deposit.

NOTIFICATION

9. Notification of accidents—(1) This regulation applies to every accident in which a person is killed or seriously injured, or in which an aircraft suffers damage or structural failure that adversely affects its structural strength, performance, or flight characteristics and that requires major repair or the replacement of the component affected.

(2) Where a notifiable accident occurs, the pilot in command at the time of the accident or, if he is dead or incapacitated, the operator of the aircraft, shall forthwith give notice thereof to the Office of Air Accidents Investigation by the quickest means of communication available; and if the accident has caused injury to any person or damage to any third party property shall also notify forthwith the nearest office of the Police of New Zealand of the accident and of the place where it occurred.

(3) Where an aircraft that has taken off, or is due to land, within the territorial limits of New Zealand is overdue — that is to say where it has not arrived at its intended destination within the maximum flying time it would have with a full load of fuel — a notifiable accident shall be deemed to have occurred to that aircraft.

(4) Every notice under this regulation shall state, as far as possible, the following information:

(a) The type, nationality, and registration marks of the aircraft:

(b) The name of the owner, operator, and hirer (if any) of the aircraft:

(c) The name of the pilot in command of the aircraft:

(d) The date and time of the accident:

(e) The last point of departure and the next point of intended landing of the aircraft:

(f) The position or last known position of the aircraft with reference to some easily defined geographical point:

(g) The number of persons on board the aircraft:

(h) The number of persons killed as the result of the accident:

(i) The number of persons seriously injured as the result of the accident:

(j) The number of persons killed or seriously injured elsewhere than on the aircraft as a result of the accident:

(k) The nature of the accident and brief particulars of damage to the aircraft.

(5) The person who is required to give notice under this regulation shall not delay giving it if all the matters specified in subclause (4) of this regulation are not immediately known, but shall give notice of any matters not contained in his initial notice as they become known to him.

10. Written notice—In addition to the notice required to be given under regulation 9 of these regulations, the pilot in command of an aircraft involved in an accident or, if he is dead or incapacitated, the operator of the aircraft shall complete a written report in a form prescribed by the Chief Inspector and forward it within 7 days of the accident to the Office of Air Accidents Investigation.

CUSTODY, ACCESS, AND RELEASE OF AIRCRAFT

11. Custody of aircraft—An aircraft involved in a notifiable accident shall be deemed to be in the custody of the Chief Inspector, and shall remain so until released by him.

12. Access to and interference with aircraft involved in notifiable accident—(1) No person other than an authorised person or a member of the Police Force shall have access to an aircraft in the custody of the Chief Inspector or to the site of any wrecked or damaged aircraft, and no such aircraft shall be removed or otherwise interfered with except under the authority of the Chief Inspector:

Provided that, without any such authority,—

(a) The aircraft may be removed or interfered with so far as may be necessary for the purpose of extricating persons or animals involved, removing any mail carried by the aircraft, preventing destruction by fire or other cause, and preventing any damage or obstruction to the public or to air traffic or other transport:

(b) If an aircraft is wrecked on water, the aircraft or any of its contents may be removed to such an extent as may be necessary for bringing it or them to a place of safety.

(2) Where pursuant to the proviso to subclause (1) of this regulation any thing or article is removed from an aircraft in the custody of the Chief Inspector it shall be removed only so far away from the aircraft as may be necessary to ensure its safety, and if removed from any hold in the aircraft things and articles shall be kept in separate and distinct areas so as to indicate from which hold in the aircraft they have been taken.

(3) The Chief Inspector may authorise any person, so far as he thinks it necessary for the purposes of any investigation or inquiry under these regulations, to do all or any of the following things:

(a) To take measures for the preservation of the aircraft:

(b) To have access to, examine, remove, or otherwise deal with the aircraft or any part thereof or thing or article therein:

(c) To make records by photographic or other adequate means of any material evidence capable of being removed, effaced, lost, or destroyed.

13. Release of damaged aircraft—When the custody of an aircraft or of any part thereof or thing or article therein is no longer necessary for the purposes of an investigation, the Chief Inspector shall release the aircraft, or that part or thing, as the case may be, to the owner of the aircraft or, in the case of an aircraft other than a New Zealand aircraft, to the person or persons duly authorised in that behalf by the State of Registry.

PART V

INVESTIGATION

14. Calling of witnesses—For the purposes of carrying out the duties and functions imposed on him by these regulations, an Inspector shall have the same powers and authority to summon witnesses and receive

evidence as are conferred on Commissions of Inquiry by the Commissions of Inquiry Act 1908, and the provisions of that Act except sections 11 and 12 (which relate to costs) shall apply accordingly.

15. Notice and Representation—(1) Where it appears to an Inspector that any degree of responsibility for an accident may be attributable to any person, that person or, if he is dead, his legal personal representatives, shall, if practicable, be given notice that blame may be attributed to him, and that he or they may make a statement or give evidence, and produce witnesses, and examine any witnesses from whose evidence it appears that he may be blameworthy.

(2) Where a person to whom notice has been given pursuant to subclause (1) of this regulation fails to notify the Inspector within 28 days of receiving that notice that he intends to do anything authorised thereby, or notifies that Inspector that he does not intend to do so, the Inspector may at once complete his investigation.

(3) Subject to subclause (2) of this regulation, the Inspector shall complete his investigation either as soon as he has considered any statement or evidence submitted in accordance with subclause (1) of this regulation, or at the expiration of 90 days from the date on which the last notice relating to the accident was given pursuant to that subclause, whichever first occurs.

(4) The Minister may intervene at any stage of an investigation in order to make representations or to examine witnesses, if it appears to him expedient so to do in the public interest.

(5) Any person to whom notice has been given pursuant to subclause (1) of this regulation shall be entitled to be represented by counsel.

(6) Every person whose attendance is required, or who is examined, by an Inspector under these regulations shall be allowed and paid, out of money appropriated by Parliament for the purpose, such expenses as would be allowed to a witness attending as a Crown witness on subpoena to give evidence in a criminal proceeding before the Supreme Court.

16. Report of Investigation—(1) Every report of an investigation of an accident made by the Chief Inspector to the Minister shall contain the circumstances of the case and his conclusions as to the cause of the accident, together with any observations and recommendations that he thinks fit to make with a view to the preservation of life and the avoidance of similar accidents in future.

(2) The Minister may, in such manner as he thinks fit, cause to be published all or any part of any such report.

PART VI

Public Inquiries

17. Public Inquiry—(1) Where it appears to the Attorney-General expedient in the public interest to do so, he may direct that a public inquiry be held in respect of any accident after the Chief Inspector has completed the investigation of the accident as far as the process of gathering the facts relating to it is concerned.

(2) Every public inquiry shall be conducted by a Court of Inquiry appointed by the Attorney-General and consisting of—

(a) A Magistrate or Judge who shall preside; and

(b) Two or more assessors possessing aeronautical or other special skill or knowledge, none of whom shall be an Inspector.

(3) Every Court shall have all the rights and powers of a Commission of Inquiry under the Commissions of Inquiry Act 1908, and that Act shall, subject to these regulations, and with the necessary modifications, apply to every Court.

18. Purposes of public inquiry—(1) A public inquiry shall be conducted for the purpose of establishing, in relation to any accident,—

(a) The place and time of the accident:

(b) The causes of the accident and the circumstances in which it arose:

(c) Any facts that, in the interests of public safety, should be known to the authorities charged with the administration of civil aviation in order that appropriate measures may be taken for the safety of persons engaged in activities relating to aviation.

(2) A Court shall not be concerned with the civil or the criminal liability of any person arising out of an accident, and no evidence relating to any such liability shall be admitted by any Court for the purposes of any public inquiry unless, in the opinion of the Court, the evidence is necessary for establishing any of the matters specified in subclause (1) of this regulation.

(3) At any public inquiry the Court may admit any evidence that it thinks fit, whether or not it is otherwise admissible in a Court of law; but no evidence shall be admitted by the Court for the purposes of the public inquiry unless in its opinion the evidence is necessary for the purpose of establishing any of the matters specified in subclause (1) of this regulation.

19. Procedure relating to public inquiry—(1) The room in which a public inquiry is held shall be open to the public:

Provided that the Court may, in the interests of justice or in the public interest, exclude all or any persons from the whole or any part of the proceedings at the inquiry.

(2) Where a public inquiry is to be held, the Court shall fix the date, time, and place, and shall give notice thereof to the Minister, the pilot in command, the owner and the operator of the aircraft concerned, and such other persons as the Court thinks fit.

(3) The Court shall at the inquiry examine on oath all persons who tender their evidence respecting the facts in issue, and all other persons whom it thinks it expedient to examine.

(4) The Minister, the pilot in command of the aircraft at the time of the accident, the owner of the aircraft, and the operator of the aircraft shall be parties to a public inquiry.

(5) The Court may, at any stage of a public inquiry, direct that any person who in its opinion ought to be joined as a party be so joined.

(6) Any party to a public inquiry may be represented by counsel, may call witnesses, and may address the Court.

(7) Proceedings at a public inquiry shall commence with the production and examination of witnesses on behalf of the Attorney-General.

(8) All witnesses called at a public inquiry may be cross-examined by any party to the proceedings and re-examined by the party by whom the witness was called.

(9) Except as otherwise provided by these regulations or the Commissions of Inquiry Act 1908, the Court shall determine its own procedure.

20. Report of public inquiry—(1) At the conclusion of a public inquiry the Court shall forward a report of its findings, signed by all the members of the Court, to the Attorney-General.

(2) Where any member of the Court disagrees with any of its findings, he may state his reservations concerning or disagreement with the findings in writing; and any such reservations or disagreement shall be attached to and form part of the report of the Court.

(3) The Attorney-General may cause the whole or any part of the report of any Court to be made public in such manner as he thinks fit.

21. Rehearing—(1) Where, in respect of any public inquiry, the Attorney-General is satisfied that either—

(a) New and important evidence that could not be produced at the inquiry has been discovered; or

(b) For any other reason it is necessary or desirable in the interests of justice or in the public interest that another public inquiry be held—

he may direct an inquiry to be reheard, either before the original Court or before another Court.

(2) The provisions of these regulations relating to public inquiries shall apply to any rehearing.

22. Remuneration of assessors—There shall be paid, out of money appropriated by Parliament for the purpose, to any assessors appointed to the Court under these regulations, remuneration by way of fees, salary or allowances and travelling allowances and expenses in accordance with the Fees and Travelling Allowances Act 1951, and the provisions of that Act shall apply accordingly as if any such assessors were members of a statutory Board within the meaning of that Act.

PART VII

GENERAL

23. Accidents in New Zealand to foreign aircraft—Where an accident to an aircraft registered in a contracting State occurs in or over New Zealand the provisions of Annex 13 to the Convention shall apply to any investigation except for and to the extent of any difference to Annex 13 that may be filed with the International Civil Aviation Organisation by New Zealand.

24. Accidents outside New Zealand—(1) Where an accident occurs to a New Zealand aircraft outside the territorial limits of New Zealand

and in the territory of a contracting State, the Minister may appoint an accredited representative, with or without advisers, to participate in any investigation or inquiry conducted by the contracting State.

(2) Where an accident occurs to a New Zealand aircraft outside the territorial limits of New Zealand otherwise than in the territory of a contracting State, or where the location of the accident cannot be established definitely as being in the territory of a contracting State, it shall be the responsibility of the Chief Inspector or an Inspector nominated by him to conduct an investigation as if the accident had occurred within the territorial limits of New Zealand.

(3) Where an accident to a New Zealand aircraft occurs in the territory of a contracting State, and that contracting State conducts an investigation or inquiry, the Chief Inspector shall, on request by the appropriate authority of that State, furnish that authority with all the relevant information within his possession.

PART VIII

Penalties and Revocations

25. Penalties—Every person who contravenes or fails to comply with any provision of these regulations or any requirement of an Inspector under these regulations commits an offence, and shall be liable on summary conviction to a fine not exceeding $1,000 or to imprisonment for a term not exceeding 6 months.

26. Revocations—The Civil Aviation (Investigation of Accidents) Regulations 1953 are hereby revoked.

P. G. MILLEN,
Clerk of the Executive Council.

EXPLANATORY NOTE

This note is not part of the regulations, but is intended to indicate their general effect.

These regulations revoke and replace the Civil Aviation (Investigation of Accidents) Regulations 1953. The principal changes effected relate to the purpose of investigating air accidents, the role of the Attorney-General with regard to air accidents, the custody of aircraft involved in air accidents, and the rights of persons suspected of bearing some responsibility for an air accident.

Issued under the authority of the Regulations Act 1936.
Date of notification in *Gazette*: 13 April 1978.
These regulations are administered in the Ministry of Transport.

APPENDIX VII

REPUBLIC OF LIBERIA
MINISTRY OF FINANCE
MONROVIA, LIBERIA

OFFICE OF THE COMMISSIONER
FOR MARITIME AFFAIRS

Decision of the Commissioner of Maritime Affairs, R.L.
In the Suspension and Revocation Proceeding
In the Matter of
The Grounding at Baring Head
Off Wellington, New Zealand of
M/V PACIFIC CHARGER (O.N. 6987)
On 21 May 1981

AUTHORITY

This Decision is rendered pursuant to the provisions of Section 11, 18, and 258 of Liberian Maritime Law and Liberian Maritime Regulation 9.258(7).

COMMENT

The Motor Vessel PACIFIC CHARGER (O.N. 6987) ran aground off Baring Head, outside the Port of Wellington, New Zealand at about 0258 on 21 May 1981. The weather conditions just prior to the grounding were exceedingly poor. Visibility was reduced to about 1000 meters due to heavy rain. Winds from the South to Southeast were steady at 50-55 knots, with gusts to 70 knots.

PACIFIC CHARGER was delivered to her owners in Sasebo, Japan on 24 April 1981. PACIFIC CHARGER left Sasebo on 25 April 1981, and made brief stops at Kobe and Nagoya, prior to sailing from Yokohama on 2 May 1981 with a cargo of about 4,100 tons of car parts and steel products bound for Auckland, New Zealand and thence to Wellington, N.Z.

At about 0226 on 21 May, when about 3.5 miles short of the line of leads into Wellington Harbor, the Master Captain Chiou Ruey-Yang prematurely altered course to starboard, which placed PACIFIC CHARGER on a hazardous course towards Baring Head and led to her ultimate grounding.

The Honorable Fred T. Lininger, Senior Deputy Commissioner of Maritime Affairs, R.L. appointed Captain Michael J. Perfect as Investigating Officer to conduct a Preliminary Investigation into this grounding in accordance with Liberian Maritime Regulation 9.258(4). Captain Perfect and Captain A. D. R. Munro were later designated by the Senior Deputy Commissioner to represent the Bureau of Maritime Affairs, R.L. in the Formal Investigation in Wellington ordered by the Honorable C. C. A. McLachlan, Minister of Transport, New Zealand. The Report of the New Zealand Court of Inquiry, headed by Sir James Wicks, was published in January 1982.

One of the conclusions of the New Zealand Court of Inquiry was that the PACIFIC CHARGER was unseaworthy by virtue of incompetent manning.

In view of the serious nature of the casualty and this unusual conclusion recorded by the New Zealand Court, the Senior Deputy Commissioner of Maritime Affairs appointed Vice Admiral William F. Rea, III, U.S. Coast Guard (Ret.) as Hearing Officer

Comment

9. The purpose of this Suspension and Revocation Proceeding was to determine if there were any acts of misconduct, inattention to duty or negligence on the part of any licensed officer on the PACIFIC CHARGER at the time of the casualty. The applicable section of Liberian Maritime Regulations that speaks to this is Section 1.17(3) and it reads as follows:

> "(3) Officers Licenses of Competence shall be valid for a period of five years and shall be subject to renewal. Any license may be revoked at any time upon proof of (a) incompetency; (b) physical or mental disability; (c) habitual drunkenness; (d) willful failure to comply with the provisions of the Liberian Maritime Law or Regulations; (e) criminal conduct; or (f) other conduct incompatible with proper performance of duties and obligations as an officer serving on board a Liberian Flag vessel."

It was <u>not</u> the purpose of this Proceeding to determine the cause of the casualty.

10. A public Suspension and Revocation Hearing was conducted on 16 June 1982 at the office of Liberian Services, Inc., Reston, Virginia. A verbatim record was made of this Proceeding and is on file in that office.

11. Charges were made against two officers of the M. V PACIFIC CHARGER as follows:

a. As to Master, Captain Chiou, based on the New Zealand Report:

(1) Not using the Second Mate responsibly to assist in navigation;

(2) Not keeping a safe distance off the land and waiting for the Pilot to come to him;

(3) Not continuing on course 118 degrees until arriving at a line of the leads into Wellington Harbor;

(4) Not taking a visual compass bearing of Baring Head Light when it was visible to verify radar observation;

(5) Not using echo sounding equipment which would have warned him of shallowing water;

(6) Not confirming with the Pilot the correct boarding area;

(7) Not using the radio direction finder to check his position;

(8) For improper use of radar, i.e. relying on a single bearing and distance only, rather than cross bearings; and for not realizing that the clutter control was eliminating images on the closer ranges;

(9) Not having anchors made ready for immediate use; and

(10) Not observing the erratic steering and alterations of ship's headings.

Discussion

30. No prudent Master who has never been into a strange port would ever attempt to enter in darkness in low visibility with wind 50 to 55 knots gusting to 70 knots. Also one must wonder why the Pilot Station did not at least suggest to the Master that he wait until the weather moderated before attempting to enter. Under conditions described it is doubtful that even if a vessel had arrived at the Pilot Station that the Pilot would have been able to board. There was some indication of this in the record.

31. I am not sure how to explain the actions - or rather the inaction of the Second Mate during the period just prior to stranding. It may be that the Master did not trust him, or that he felt he did not need his help (which is difficult to understand), or that the Second Mate did not know what to do. The fact that the Master left the bridge at 2400 and did not return until 0130 and at the same time authorized the Second Mate to change course when arriving at a specified position on the chart indicates that the Master must have had some confidence in him. I am inclined to believe that the Master was negligent in not using the services of the Second Mate between 0200 and 0258 rather than that the Second Mate was not performing. Because there is a much more serious charge involving the Second Mate this is almost academic in so far as the Second Mate's activities are concerned.

32. There was apparently some hope that at this Proceeding the Chief Mate, Mr. Chang, might shed some light on the actions of the Master and the Second Mate during the crucial period from 0130 to 0258 on the 21st. This turned out to be disappointing as he shed basically no light on what was going on inside the bridge. He went off watch at 2000 on the 20th. At 0230 on the 21st he was up, proceeded to the wing of the bridge, then went down on deck and attempted to go forward to make anchors ready for immediate use. Heavy weather prevented this; so he returned to his quarters to change into some dry clothes and while there the vessel stranded. He did testify that when on deck he saw Baring Head Light.

33. The New Zealand Report raised a question about the experience of the Chief Mate and questioned that he had been a Commissioned Deck Watch Officer in the Chinese Navy. Evidence was introduced at this Proceeding to confirm that the Chief Mate, Mr. Chang, did, in fact, graduate from the Chinese Naval Academy with a degree as Bachelor of Science and served in the Navy from 1962 through 1969 as a Commissioned Deck Watch Officer. As a footnote, Mr. Chang was viewed by Sir James Wicks who conducted the Court of Inquiry, as the one deck officer who was really competent.

34. Although the Counsel for the Government of Liberia spoke to other Findings of the Court of Inquiry in addition to those relating to the charges of persons being considered at this Proceeding, such as the cause of the casualty, this Hearing Officer will not deal with these matters. It was clearly stated at the outset that this Proceeding was not to be involved in determining the cause of the casualty. Having said that, the Hearing Officer takes note that the Government of Liberia Counsel refuted specifically the charge that the PACIFIC CHARGER was unseaworthy by reason of being inadequately manned. This Hearing Officer had no comment.

35. The Counsel for the Government of Liberia called attention to the Hearing Officer that the Bureau of Maritime Affairs has instituted procedures (which he did not detail) which will prevent future issuance of Liberian Licenses based on forgeries.

CONCLUSIONS

36. As to the Master, Captain Chiou, based on evidence available to Hearing Officer, it is the opinion that -

(a) the Master did <u>not</u> wilfully fail to comply with provisions of Liberian Maritime Law or Section 1.17(3)(d) of Liberian Maritime Regulations;

(b) the Master's conduct was incompatible with the proper performance of duties and obligations as an officer serving on board a Liberian Flag vessel as noted in Section 1.17(3)(f) of Liberian Maritime Regulations in that:

(1) He did not use the Second Mate responsibly to assist him in navigation;
(2) He did not keep a safe distance off the land and wait for a Pilot to come to him;
(3) He did not continue on course 318 until arriving at a line of the leads into Wellington Harbor;
(4) He did not take visual compass bearing of Baring Head Light when it was visible to verify radar observations;
(5) He did not use echo sounding equipment which would have warned him of shallowing water;
(6) He did not confirm with the Pilot the correct boarding area;
(7) He did not use the radio direction finder to check his position;
(8) He improperly used radar by relying on a single bearing and distance only, rather than cross bearings, and he did not realize that excessive clutter control was eliminating images on the closer ranges;
(9) He did not have anchors made ready for immediate use.

37. The charges in paragraph 36 above, as set forth in the New Zealand Report are proved.

38. As to the Second Mate, Mr. Kao, the charges that he did not act responsibly to assist with the navigation of the vessel and acted inadequately as a lookout are marginal in that the Master clearly took over - so much so that in the New Zealand Report he is described as a "One-man band." Since there was no opportunity to observe the Master and Second Mate as they were not witnesses at this Proceeding it is not known if the Master may have been very intimidating towards the Second Mate. A more aggressive Second Mate may well have gone ahead and performed his duties in assisting with the vessel's navigation. I have reached the conclusion in regard to the charges that the Second Mate did not act responsibly after being relieved of the conn by the Master and that he did not act adequately as a look-out were not proven sufficiently to recommend any action against his license. On the other hand, the charge of having committed an act of fraud in obtaining his Liberian License was clearly proved.

RECOMMENDATIONS

39. As to the Master, Captain Chiou, it is recommended that his license as Master, Oceans, Any Gross Tonnage be revoked. It is further recommended that no sooner than one year from date of casualty that he be permitted to reapply for a Chief Mate's license and that it be issued only after submitting evidence acceptable to the Administration that he has received training in the use of shipboard radar. Although such recommendations would appear to be futile in view of the presumed loss at sea of Captain Chiou, it is important that the record show that if he were still sailing these would be the recommendations that would be made to the Administration.

40. As to the Second Mate, Mr. Kao, clearly the license that has been issued to him should be revoked in accordance with the provisions of Section 1.17(3)(d) Liberian Maritime Regulations in that he used a forged Republic of China license to obtain his Liberian License. Further, it is recommended that the Liberian Administration take further action under the provisions of Section 294 Liberian Maritime Law by instituting criminal proceedings for his fraudulently obtaining his Liberian License.

41. As to Chief Mate, Mr. Chang, it is recommended no charges be made against him and no action taken against his license.

42. That the Bureau of Maritime Affairs initiate immediate and aggressive efforts to discourage and eliminate the use of counterfeit and fraudulent licenses.

W. F. Rea, III
Vice Admiral, U.S. Coast Guard (Ret.)
Hearing Officer

Reston, Virginia
15 September 1982

Annexes:

1. Participants List
2. Exhibits List
3. Photograph of PACIFIC CHARGER aground

APPENDIX VIII

Formal Lermontov inquiry favoured

By MARTIN GOSLING
Transport Reporter

THE MARINE consultants who advised the Soviets during the Mikhail Lermontov inquiry say there should have been a formal investigation into the sinking of the 20,000 tonne liner.

P and I Services partners Ian Mackay and Alistair Irving gave submissions yesterday to the Parliamentary select committee considering changes to the Shipping and Seamen's Act.

The changes include greater powers for marine inspectors conducting casualty investigations.

The extra powers may indicate that a new investigation group, separate from the Ministry of Transport's marine division, may be on the way.

In their submissions, P and I Services said the preliminary inquiry into the February 16 sinking in the Marlborough Sounds had gone too far, and a formal inquiry should have been held.

After the hearing Mr Irving told The Dominion the three-man team Moscow sent to Wellington to examine the sinking and possible salvage had said the Soviet authorities, and the crew, were willing to take part in any inquiry the New Zealand Government required, including a formal investigation.

Mr Irving said that in the past 18 months the marine division's style had changed from short, snappy preliminary inquiries with rapid reports to the transport minister on whether a formal inquiry was needed, to more in-depth investigations by marine inspectors.

"The Mikhail Lermontov inquiry was more than a preliminary inquiry — it tended to usurp a formal inquiry," Mr Irving said.

Instead of the traditional informal talks with those involved, marine chief inspector Captain Steve Ponsford had formally called witnesses, and at times recalled them.

"We've got progressively more formal. It now seems more of an investigation. These preliminary inquiries are going a bit far — they are doing what the formal inquiries should be doing," Mr Irvine said.

One of the biggest differences between the two types of hearing, was that preliminary inquiry witnesses could have counsel only as observers, and were unable to hear what other witnesses had to say.

"There should have been a formal inquiry on the Mikhail Lermontov. I mean, a 20,000 tonne ship was sunk, a man's life was lost, the passengers lost all their possessions . . ." he said.

Marine division director Hugh Jones said last night that till recently inquiries had been conducted by marine superintendents who were basically non-technical staff.

There had been a swing toward inquiries by marine inspectors who were technical staff with greater powers, he said.

The change of style, and the extra powers envisaged in the review of the act, may point to a need for a new body, separate from the marine division, to conduct casualty inquiries.

This would be similar to the air accident inspectors who report direct to the transport minister and advise the civil aviation division but are separate from it. At times the inspectors have criticised the division.

Mr Jones said that option was being looked at and changes might be incorporated during the next stage of the review of the 560-page act.

"The marine casualty section of the act needs review," he said.

"You can argue for and against a separate body. There are a lot of pros and cons. Whether you see it as a good idea and working depends on whether you're for or against it. Till the act is reviewed, I wouldn't want to comment."

Air Navigation Amendment Act 1984

No. 69 of 1984

An Act to amend the *Air Navigation Act 1920*

[*Assented to 25 June 1984*]

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title, &c.

1. (1) This Act may be cited as the *Air Navigation Amendment Act 1984*.

(2) The *Air Navigation Act 1920*[1] is in this Act referred to as the Principal Act.

Commencement

2. This Act shall come into operation on the day on which it receives the Royal Assent.

3. After section 27 of the Principal Act the following section is inserted:

Evidence of cockpit voice recordings

"27A. (1) A cockpit voice recording made during the flight of an aircraft operated by an Australian operator is not admissible in evidence in any criminal proceedings in an Australian court against a crew member.

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"(2) Subject to sub-section (4), a cockpit voice recording made during the flight of an aircraft operated by an Australian operator is not admissible in evidence in any civil proceedings in an Australian court.

"(3) A party to proceedings in an Australian court for damages in respect of personal injury, death or damage to property may, at any time before the determination of the proceedings, apply to the court in which the proceedings have been instituted for an order that a cockpit voice recording, or part of a cockpit voice recording, made during the flight of an aircraft be admissible in evidence in the proceedings.

"(4) Where an application is made to a court under sub-section (3), the court shall examine the cockpit voice recording and, if it is satisfied, after hearing such argument (if any) as it considers necessary from the legal representatives of the parties to the proceedings—

(a) that, if the other evidence available to the court in the proceedings is the only evidence so available, a material question of fact in the proceedings will not be able to be properly determined;

(b) that the cockpit voice recording, or a part of the cockpit voice recording, if admitted in evidence in the proceedings, will assist in the proper determination of that material question of fact; and

(c) that, in the circumstances of the case, the public interest in the proper determination of that material question of fact outweighs the public interest in protecting the privacy of members of crews of aircraft,

the court may order that the cockpit voice recording, or that part of the cockpit voice recording, be admissible in evidence in the proceedings and, where the court makes such an order, the cockpit voice recording or that part of the cockpit voice recording is, notwithstanding sub-section (2), admissible in evidence in the proceedings.

"(5) The only persons who may be present at an examination by a court of a cockpit voice recording for the purposes of sub-section (4) are—

(a) the person or persons constituting the court, other than the members of the jury (if any);

(b) the legal representatives of the parties to the proceedings; and

(c) such other persons (if any) as the court directs.

"(6) Where a cockpit voice recording, or a part of a cockpit voice recording, made during the flight of an aircraft is, pursuant to sub-section (4), admitted in evidence in proceedings—

(a) the cockpit voice recording, or that part of the cockpit voice recording, is not evidence for the purpose of the determination of the liability in the proceedings of a crew member; and

(b) if there are 2 or more defendants in the proceedings of whom at least one is a crew member and at least one is not a crew member, the cockpit voice recording, or that part of the cockpit voice recording, is evidence for the purpose of determining whether or not any crew member has been negligent, to the extent only that such a determination is relevant to the determination of the liability in the proceedings of any defendant who is not a crew member.

"(7) Where—

(a) a court examines a cockpit voice recording under sub-section (4); or

(b) a cockpit voice recording or part of a cockpit voice recording is admitted in evidence in proceedings pursuant to an order made by a court under sub-section (4),

the court may direct that the cockpit voice recording or the part of the cockpit voice recording, or any information obtained from the cockpit voice recording or part of the cockpit voice recording, shall not be published or communicated to any person, or shall not be published or communicated except in such manner, and to such persons, as the court specifies.

"(8) A person shall not make a publication or communication to any person in contravention of a direction under sub-section (7).

"(9) A person is not entitled to take any disciplinary action against an employee of the person on the ground of a cockpit voice recording or any part of a cockpit voice recording or information obtained from a cockpit voice recording or any part of a cockpit voice recording.

"(10) A person (other than a person who is a Commonwealth officer within the meaning of the *Crimes Act 1914*) shall not publish or communicate to any person—

(a) a cockpit voice recording or any part of a cockpit voice recording; or

(b) any information obtained from a cockpit voice recording or any part of a cockpit voice recording,

otherwise than in an investigation or inquiry into an accident involving an aircraft conducted pursuant to regulations under the *Air Navigation Act 1920* or for the purposes of, or in connection with—

(c) criminal proceedings, other than criminal proceedings of the kind referred to in sub-section (1); or

(d) civil proceedings of the kind referred to in sub-section (3).

"(11) Nothing in this section affects the admissibility in any criminal or civil proceedings of evidence of words spoken by a person on the flight deck of an aircraft other than evidence constituted by a recording made by the use of a cockpit voice recorder or by a transcript or summary of such a recording.

"(12) A reference in this section to a cockpit voice recording is a reference to a recording, made by the use of a cockpit voice recorder, of any words spoken during a flight of an aircraft by a person on the flight deck of the aircraft, and includes a reference to any transcript or summary of such a recording.

"(13) A reference in this section to a cockpit voice recording made during the flight of an aircraft is a reference to a cockpit voice recording made during any period (whether before, during or after that flight) in which the cockpit voice recorder was required, by the Air Navigation Regulations or by Air Navigation Orders issued under those regulations, to be operated in connection with that flight.

"(14) In this section, unless the contrary intention appears—

'Australian court' means a court in Australia;

'Australian operator' means an operator whose principal place of business is in Australia;

'cockpit voice recorder' means a device that meets the requirements for cockpit voice recorders that are specified in Air Navigation Orders made under the Air Navigation Regulations;

'crew member', in relation to a flight of an aircraft, means a person who, at the time when the flight took place, was employed under a contract of service, or engaged under a contract for services, by the operator of the aircraft and was assigned for duty on the aircraft for the purposes of the flight;

'operator' has the same meaning as in the Air Navigation Regulations.

"(15) This section has effect notwithstanding anything in any other law and sub-section (9) also has effect notwithstanding anything in any agreement."

NOTE

1. No. 50, 1920, as amended. For previous amendments, see No. 93, 1936; Nos. 6 and 89, 1947; No. 80, 1950; No. 39, 1960; No. 72, 1961; No. 8, 1963; No. 93, 1966; No. 79, 1971; Nos. 130 and 216, 1973; No. 124, 1974; No. 91, 1977; No. 19, 1979; No. 27, 1980; No. 80, 1982; and No. 39, 1983.

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