Which Rules for Australian Maritime Trade? The Controversy Continues

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WHICH RULES FOR AUSTRALIAN MARITIME TRADE? THE CONTROVERSY CONTINUES

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INTRODUCTION

The *Carriage of Goods by Sea Act* 1991 (Cth) provides in section 2(3) for the introduction of the United Nations Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) on 1 November 1994 unless:

(a) that part of the Act referring to the Hamburg Rules is repealed; or

(b) there is a further period of three years for consideration of the Rules set aside by Parliament.

Part of the process leading up to the introduction of the Hamburg Rules is a careful consideration of the relative merits of the existing marine cargo liability regimes. There is an extensive literature on this point. The purpose of this paper is not to reiterate those arguments, but to look instead at the issues raised by section 3 of the *Carriage of Goods by Sea Act*. It is on the basis of the matters raised in section 3 that Australia's decision to change to the Hamburg Rules is to be taken.

I have a formal paper on this topic in preparation and any comments from Conference participants will be most welcome.

1. SEA CARRIAGE IS SERIOUS:

Recently I asked my International Business Law class to suggest why carriage by sea was so important to Australia's economic well-being. There was a silence, not unusual on these sorts of occasions, but accompanied, a little unusually for students these days, by an assortment of puzzled expressions on what are frequently over-confident faces.

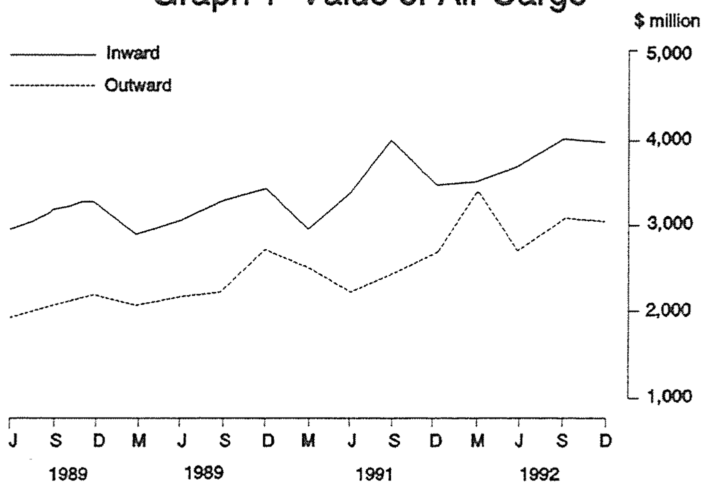
As any good lecturer should, I then gave what I hoped was a hint towards the desired response. I waved my hands in the air to indicate, very roughly, the coastline of Australia. Puzzled frowns gave way to the usual 'we are the guardians of all knowledge' expressions:

> 'Yes!' came the eager responses, "Yes, of course! Australia is surrounded by water!"

I nodded encouragingly, and referred to the lack of road and rail links connecting Australia with the Rest of the World. Wise nods greeted this revelation.

But these are young people of the 90's. 'What of air carriage?' they demanded. 'We go everywhere by 'plane, doesn't everything?' I showed them some figures to illustrate the problem:

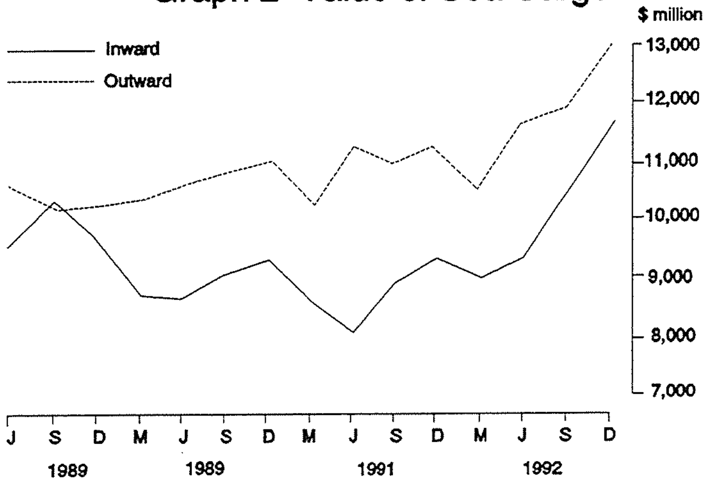
Graph 1 Value of Air Cargo



Source: *Australian Bureau of Statistics: Foreign Trade Australia - International Cargo (December Quarter 1992), page 1.*

The class considered this graph. 'Where is the problem?' asked the students. 'We see a valuable and increasing carriage of trade cargo by air in this graph.' I responded with another graph:

Graph 2 Value of Sea Cargo



Source: *ibid. (Note that these figures are quarterly)*

'Yes', mused the students, 'we can see that sea cargo is more valuable, especially outward sea cargo (exports), but so?'

'Consider these figures in tabular form', I replied, flashing more overhead projections.

TABLE 1
Volume of Exports and Imports by Air (GWT Tonnes)

Exports	1989-90:	183,000
	1990-91:	174,000
	1991-92:	198,000
	1992-93:	127,000 (to 30 Dec)
Imports	1989-90:	172,000
	1990-91:	161,000
	1991-92:	167,000
	1992-93:	91,000 (to 30 Dec)

Source: ibid at p.2 (adaptation).

TABLE 2
Volume of Exports and Imports by Sea (GWT Tonnes)

Exports	1989-90:	282,620,000
	1990-91:	304,598,000
	1991-92:	316,783,000
	1992-93:	161,651,000 (to 30 Dec)
Imports	1989-90:	32,295,000
	1990-91:	32,433,000
	1991-92:	34,416,000
	1992-93:	19,481,000 (to 30 Dec)

Source: ibid (adaption)

TABLE 3
Percentage by Volume of exports and imports by sea in each year (%)

	Exports	Imports
1989-90	99.47	99.9
1990-91	99.5	99.9
1991-92	99.6	99.9
1992-93	99.5	99.9 (to Dec 30)

Source: ibid (adaptation)

'Ah', discovered the students, 'the greater value of inward and outward sea cargo per quarter, as illustrated by your Graph 2, is based on greater tonnages carried by sea. Naturally, this must be so, given the nature of our exports.' A lively discussion ensued, tonnages were discussed, and references made to bulk cargoes, rural exports and the balance of merchandise trade.

I then presented the following tables to give our discussion context:

TABLE 4
Outward Cargo by Commodity by Mode of Transport
($ million)

ATFCC Section and description		*Quarter Ended*	*Sea*	*Air*	*Total*
0	Food and live animals (a)	Sept 92 Dec 92	2,396 2,783	104 183	2,500 2,966
1	Beverages and tobacco	Sept 92 Dec 92	93 68	1 2	93 70
2	Crude materials, inedible, except fuels	Sept 92 Dec 92	1,915 2,230	28 20	1,943 2,250
3	Mineral fuels, lubricants and related materials (a)	Sept 92 Dec 92	2,513 2,637	- -	2,513 2,638
4	Animal and vegetable oils, fats and waxes (a)	Sept 92 Dec 92	31 45	- -	31 45
5	Chemical and related products, nes. (a)	Sept 92 Dec 92	316 335	117 120	432 455
6	Manufactured goods classified chiefly by materials (a)	Sept 92 Dec 92	1,588 1,636	143 133	1,731 1,769
7	Machinery and transport equipment (a)	Sept 92 Dec 92	810 971	595 647	1,406 1,618
8	Miscellaneous manufactured articles (a)	Sept 92 Dec 92	157 154	294 332	451 486
9	Commodities and transactions, nes (b)	Sept 92 Dec 92	1,996 2,132	1,836 1,699	3,832 3,831
	TOTAL	*Sept 92* *Dec 92*	*11,814* *12.991*	*3,118* *3,137*	*14,932* *16,128*

(a) Excludes confidential commodities. Those items are included in Section 9.
(b) Includes confidential commodities.

Source: ibid at p.3

TABLE 5
Inward Cargo by Commodity by Mode of Transport
($ million)

ATFCC Section and description		Quarter Ended	Sea	Air	Total
0	Food and live animals (a)	Sept 92 Dec 92	477 576	30 30	507 605
1	Beverages and tobacco	Sept 92 Dec 92	114 126	1 1	115 127
2	Crude materials, inedible, except fuels	Sept 92 Dec 92	353 377	14 11	367 388
3	Mineral fuels, lubricants and related materials (a)	Sept 92 Dec 92	825 892	- -	825 892
4	Animal and vegetable oils, fats and waxes (a)	Sept 92 Dec 92	43 52	- -	43 52
5	Chemical and related products, nes. (a)	Sept 92 Dec 92	963 1,031	393 395	1,356 1,426
6	Manufactured goods classified chiefly by materials (a)	Sept 92 Dec 92	1,808 1,912	307 269	2,115 2,181
7	Machinery and transport equipment (a)	Sept 92 Dec 92	3,635 4,461	1,801 1,915	5,437 6,376
8	Miscellaneous manufactured articles (a)	Sept 92 Dec 92	1,462 1,421	887 919	2,349 2,341
9	Commodities and transactions, nes (b)	Sept 92 Dec 92	672 810	683 537	1,355 1,347
	TOTAL	*Sept 92* *Dec 92*	*10,353* *11,657*	*4,117* *4,078*	*14,469* *15,735*

(a) Excludes confidential commodities. Those items are included in Section 9.
(b) Includes confidential commodities.

Source: ibid

'Mmm', muttered the class, beginning to think of their mid-lecture Coke and Chips, 'Yes, our valuable (and bulk) exports by sea are primary products, namely, food, live animals, crude minerals, coal, and so on. Even most of manufactured exports go by sea. And we are equally reliant on sea carriage for our manufactured imports! So much for air carriage of our traded merchandise!'

The class had thus discovered Australia's almost absolute reliance on carriage of its trade goods by sea. Both exports and imports of goods are increasing:

TABLE 6
Trade Balance ($ million)
Year to 30 June

	1990-91	*1991-92*	*1992-93*
Merchandise			
Exports (fob)	52,155	54,930	60,037
Imports (fob)	-49,256	-51,054	-59,436
Balance on Merchandise Trade	2,899	3,876	601

Source: ***Australia Bureau of Statistics - Balance of Payments Australia June Quarter 1993, at p.12***[1]

However, although it must be said that manufactured exports are increasing steadily, and that these could, where appropriate, be carried by air, manufactured exports still only constitute about 19% of Australia's total trade in exports.[2] Our main trade remains in commodities (rural and resource) which can only realistically be carried by sea where exported in bulk.[3]

It must also be considered which categories of our manufactured exports are increasing:

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1 See Appendix 1. Balance of Payments - Summary 1990-93.

Of course, only balances of **merchandise** trade are being considered here. Trade in services is also increasing, and air carriage has a role to play in that trade, via tourism. However, the topic in question can concern only carriage of trade **cargoes**, and not trade in services. Economically, the only relevant non-merchandise aspect of a discussion of a cargo liability regime would involve flows of income out of Australia via relevant foreign corporations and insurers. This may naturally contribute to the balance on current account deficit illustrated in Appendix 1.

2 See Reserve Bank of Australia: *Recent Trends in Australian International Trade*, RBA Bulletin, November 1992 at page 1. Many of our trading partners have manufactured exports totalling around 40-50% or more of total trade. This may have implications for Australia with respect to our choice of cargo liability regime.

3 See ABS: Foreign Trade, Australia: Merchandise Exports and Imports by Country, 1991 - 1992, March Quarter 1993, for detailed breakdowns of commodity/manufactured trade.

TABLE 7
Manufactured Export Volumes
Main Contributors to Growth, 1986/87 - 1991/92

SITC Division[4]		*Annual average growth (%)*	*Contribution to total growth (%)*	*Share of manufactured exports (Values, 1991/92) (%)*
75	Office machines and automatic data processing machines	29.1	28.5	8.1
66	Non-metallic mineral manufactures, nes	23.3	6.4	5.9
89	Miscellaneous manufactured articles, nes	15.9	5.4	5.0
79	Transport equipment (excl, road vehicles)	7.0	5.0	7.4
78	Road vehicles	8.7	4.6	7.4
54	Medicinal and pharmaceutical products	19.7	4.3	4.4
71	Power generating machinery and equipment	12.0	4.0	6.0
87	Professional, scientific and controlling instruments and apparatus, nes	15.0	3.7	3.2
69	Manufactures of metals, nes	11.9	3.6	5.4
57	Plastics in primary forms	109.4	3.5	1.8
	Total of above	17.1	68.9	54.5
	Total Manufactured exports[5]	14.7	100.0	100.0

Source: Reserve Bank of Australia Bulletin, November 1992, at p.3

Many are large items, or items exported in large quantities, and again can only realistically be carried by sea.

'What is our conclusion?' I can almost hear my students asking as they pack up their folders, tape-recorders and/or laptop computers, and head for the door. 'At what point have we arrived?'

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4 See Appendix 2 for the Standard Industrial Trade Classification Divisions used for our manufactured exports from Australia.

5 RBA, op cit. and Footnote 3 to that article. Generally, exports which have low value added - such as aluminium, gold and steel - are included in "resources" rather than manufactures". Food is also excluded, since the aggregated ABS data do not allow a reasonable distinction between processed food (which properly belongs in manufactures) and semi or unprocessed food-stuff (many of which would normally be classified as agricultural products). On the other hand, beverages (such as beer and wine) are a distinct ABS category and are included in manufactures. The Department of Foreign Affairs and Trade (DFAT) use disaggregated ABS data to split the broad category of food products into processed and unprocessed. *See Exports, Primary and Manufactured Products*, Central Statistics Section, Department of Foreign Affairs and Trade. Thus, determining the actual volumes of manufactured exports can be more difficult than might be supposed. However, the overall volumes remain relatively small by weight.

Conclusion One:

- **Australia is almost totally reliant on carriage of its merchandise trade by sea.**
- **For both economic and political reasons, this trade, both inward and outward should increase.**
- **Therefore, the choice of a cargo liability regime for Australia's carriage of goods by sea is no trivial matter.**

2. WHICH COUNTRIES ARE OUR MARITIME TRADING PARTNERS?

Consider these figures for goods carried by sea:

TABLE 8
Export Destinations by Volume (GWT Tonnes)

Destination	*GWT Tonnes*	*% of total*
Oceania and Antartica	2,277,000	1.40
UK and Ireland	4,503,000	2.80
Southern Europe	3,742,000	2.30
Western Europe	13,363,000	8.30
Northern Europe	938,000	0.58
Eastern Europe	687,000	0.42
USSR and Baltic States	47,000	0.03
Total Europe and USSR	23,279,000	14.43
Middle East and North Africa	4,579,000	2.83
South East Asia	6,723,000	4.16
North East Asia	111,462,000	68.95
South Asia	4,196,000	2.60
Total Asia	122,381,000	75.71
North America	4,758,000	2.90
South America Central America Caribbean	1,712,000	1.10
Africa (not North Africa)	629,000	0.40
Other	2,144,000	1.30

Source: *ABS-Foreign Trade, Australia: International Cargo December quarter, 1992 at p.7 (adaptation)*[6]

[6] These figures are for the **half-year** ended December 1992. The percentage calculations are my own, and show the usual rounding so that totals may be slightly more or less than 100%. This comment is to be applied to each of Tables, 8, 9, 10 and 11.

Therefore, major export destinations **by volume** are:

				%	%
(a)	**Asia**	(i)	North east Asia	68.95	
		(ii)	South east Asia	4.16	
		(iii)	South Asia	2.60	75.71
(b)	**Europe**	(i)	Western Europe	8.30	
		(ii)	UK and Ireland	2.80	
		(iii)	Southern Europe	2.30	
		(iv)	remainder - Europe	1.03	14.43
(c)	**North America**			2.90	2.90
					93.04

TABLE 9
Export Destinations by Value ($m)

Destination	*$m*	*% of total*
Oceania and Antarctica	1,808	7.29
UK and Ireland	708	2.85
Southern Europe	729	2.94
Western Europe	1,700	6.85
Northern Europe	69	0.28
Eastern Europe	58	0.23
USSR & Baltic States	20	0.08
Total Europe & USSR	3,282	13.23
Middle East and North Africa	960	3.87
South East Asia	3,134	12.63
North East Asia	11,562	46.61
South Asia	548	2.21
Total Asia	15,244	61.45
North America	2,678	10.80
South America Central America Caribbean	191	0.77
Africa (not North Africa)	227	0.92
Other	483	1.95

Source: ibid at p.8 adapted

Major export destinations by value are:

				%	%
(a)	**Asia**	(i)	North east Asia	46.61	
		(ii)	South east Asia	12.63	
		(iii)	South Asia	2.21	61.45
(b)	**Europe**	(i)	Western Europe	6.85	
		(ii)	Southern Europe	2.94	
		(iii)	UK and Ireland	2.85	
		(iv)	remainder - Europe	0.59	13.23
(c)	**North America**			10.80	10.80
(d)	**Oceania**			7.29	7.29
					92.77

TABLE 10
Import Sources by Volume (GWT Tonnes)

Import Source	*GWT tonnes*	*% of total*
Oceania and Antarctica	2,980,000	15.30
UK and Ireland	181,000	0.90
Southern Europe	234,000	1.20
Western Europe	566,000	2.90
Northern Europe	150,000	0.80
Eastern Europe	1,000	0.005
USSR & Baltic States	1,000	0.005
Total Europe & USSR	1,132,000	5.81
Middle East and North Africa	5,110,000	26.20
South East Asia	4,467,000	22.90
North East Asia	2,105,000	10.80
Southern Asia	191,000	0.98
Total Asia	6,763,000	34.68
North America	2,827,000	14.50
South America Central America Caribbean	413,000	2.10
Africa (not North Africa)	230,000	1.20
Other	26,000	0.13

Source:* *ibid at p.9, adapted

Thus, major import sources by **volume** are:

				%	%
(a)	**Asia**	(ii)	South east Asia	22.90	
		(i)	North east Asia	10.80	
		(iii)	South Asia	0.98	34.68
(b)	**Middle East and North Africa**			26.20	26.20
(c)	**Oceania**			15.30	15.30
(d)	**North America**			14.50	14.50
					90.68

TABLE 11
Import Sources by Value ($m)

Import Source	*$m*	*% of total*
Oceania and Antarctica	1,300	5.90
UK and Ireland	1,084	4.90
Southern Europe	699	3.20
Western Europe	2,729	12.40
Northern Europe	533	2.40
Eastern Europe	3	0.014
USSR & Baltic States	1	0.0045
Total Europe & USSR	5,049	22.92
Middle East and North Africa	818	3.72
South East Asia	2,584	11.74
North East Asia	8,024	36.46
South Asia	189	0.86
Total Asia	10,797	49.06
North America	3,692	16.8
South America Central America Caribbean	215	0.98
Africa (not North Africa)	128	0.58
Other	12	0.055

Source: ibid at p.10, adapted

Major import sources by value are:

				%	%
(a)	**Asia**	(i)	North East Asia	36.46	
		(ii)	South East Asia	11.74	
		(iii)	South Asia	0.86	49.06
(b)	**Europe**	(i)	Western Europe	12.40	
		(ii)	UK and Ireland	4.90	
		(iii)	Southern Europe	3.20	
		(iv)	Remainder - Europe	2.42	22.92
(c)	**North America**			16.80	16.80
(d)	**Oceania**			5.90	5.90
					94.68

Conclusion Two:

- **Our major export destinations by sea are Asia, Europe and North America.**

- **Our major import sources by sea are Asia, Europe, North America, Oceania, and the Middle East.**

3. EXPORTS, IMPORTS AND THE HAMBURG RULES

3.1 Export Destinations

Our major export destination is Asia. In order of importance the specific areas of Asia are:

TABLE 12
Export Destinations

By Volume (75.71%)	*By Value (61.45%)*
North East Asia South East Asia South Asia	North East Asia South East Asia South Asia

The areas may be further described as:[7]

TABLE 13
Asian Trade Divisions

(i) North East Asia	*(ii) South East Asia*	*(iii) South Asia*
China Hong Kong Japan North Korea South Korea Macau Mongolia Taiwan	Brunei Cambodia Indonesia Laos Malaysia Myanmar Philippines Singapore Thailand Vietnam	Afghanistan Bangladesh Bhutan India Maldives Nepal Pakistan Sri Lanka

Of these countries, the Philippines, Singapore and Pakistan are signatories to the Hamburg Rules, but none has the Hamburg Rules in force. Moreover, it is North East Asia, especially Japan, South Korea and China, which represents our major export destination. None of these countries is a Hamburg signatory, or has the Hamburg Rules in force.

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7 These are the Australian Bureau of Statistics classifications of trade areas for the purpose of collecting Cargo Statistics. See Foreign Trade Australia: International Cargo, December quarter 1992 at pp.16-18.

Our second major export destination by both volume (14.43%) and value (13.23%) is Europe. Europe is further classified as:

TABLE 14
European Trade Divisions

(i) Western Europe	*(ii) UK and Ireland*	*(iii) Southern Europe*
Austria Belguim (EC) Luxembourg (EC) France (EC) Germany (EC) Netherlands (EC) Switzerland	UK (EC) Ireland (EC)	Albania Bosnia Herzogovina Croatia Cyprus Gibraltar Greece (EC) Holy See Italy (EC) Macedonia Malta Portugal (EC) Slovenia Spain (EC)
(iv) Northern Europe	*(v) Eastern Europe*	*(vi) USSR and the Baltic States*
Denmark (EC) Finland Iceland Norway Sweden	Bulgaria Czech Republic Hungary Poland Romania Slovak Republic	Armenia Azerbaijan Belarus Estonia Georgia Kazakhstan Kyrgyztan Latvia Lithuania Moldavia Russian Federation Tajikistan Turkmenistan Ukraine Uzbekistan

Of these States, twelve[8] are signatories to the Hamburg Rules viz. Austria, France, Germany, Portugal, Denmark, Finland, Norway, Sweden, Czech and Slovak Republics, Hungary and the Holy See, and two, Romania and Hungary have the Hamburg Rules in

8 Assuming Czechoslovakia's signature operates for the Czech Republic and Slovak Republic respectively, and including the Holy See in the Southern European Category.

force since 1 November 1992.[9] However, our main destination in Europe is Western Europe and there are no export destinations in that category with the Hamburg Rules currently in force.

North America (defined as USA and Canada)[10] is our third largest export destination by both volume and value. Although the USA is a signatory to the Hamburg Rules, it has shown no inclination to further its acquaintance with that regime of marine cargo liability and, indeed, has not even ratified the amendments to the Hague Rules. Canada, although its ***Carriage of Goods by Water Act***, which came into force on 6 May 1993, contains a provision to enable the future adoption of the Hamburg Rules, only requires that a **review** be undertaken before 31 December 1999 (and every five years thereafter). Thus, Canada is not stampeding towards adoption of the Hamburg Rules at this moment.

3.2 Import Sources

In addition to the countries discussed in 3.1 above, Australia has additional import sources in the Middle East and Oceania. The classification for these areas is as follows:[11]

(i) Middle East and North Africa

Algeria	Mauritania
Bahrain	Morocco
Cape Verde	Oman
Egypt	Qatar
Iran	Saudi Arabia
Iraq	Sudan
Israel	Syria
Jordan	Tunisia
Kuwait	Turkey
Lebanon	United Arab Emirates
Libya	Western Sahara

Four of these countries have the Hamburg Rules in force since 1 November 1992, viz Egypt, Lebanon, Morocco and Tunisia. None of these countries is a major source of crude oil which is the relevant item of import interest to Australia.

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9 Trade with Eastern Europe where goods are carried by sea is less than 1% of the total carriage for both inward and outward carriage.

10 See Footnote 7.

11 Australian Bureau of Statistics classifications, op cit.

(ii) Oceania[12]

Australian Antarctic Territory	Nauru
Christmas Island	New Caledonia
Cocos (Keeling) Islands	New Zealand *
Cook Islands	Palau
Federated States of Micronesia	Papua New Guinea *
Fiji	Solomon islands
French Polynesia	Tokelai
Guam	Tonga
Kiribati	Tuvalu
	Vanuatu

The only trade partners of any note in this list are New Zealand and Papua New Guinea.[13] Neither has embraced the Hamburg Rules, nor has any other country on this list.

3.3 Other Hamburg Rules Signatory Nations

The other States which are signatories to the Hamburg Rules are located in the following statistical divisions for sea cargo purposes.[14]

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12 A selected list of Oceanic States only.

13 For detailed breakdowns of trade to each country, see ABS: Foreign Trade Australia - Merchandise Exports and Imports 1991-92 and March Quarter, 1993. The figures include total trade, not just goods carried by sea. The statistics reveal (as % of total Exports and Imports from and to Australia):

	Exports (%)	*Imports (%)*
New Zealand	5	5
Papua New Guinea	2	2

14 See Footnote 7.

South America, Central America, Carribean	*Africa (excluding North Africa)*
Barbados (1/11/92) Brazil Chile (1/11/92) Ecuador Mexico Panama Venezuela	Botswana (1/11/92) Burkina Faso (1/11/92) Ghana Guinea (1/11/92) Kenya (1/11/92) Lesotho (1/11/92) Madagascar Malawi (1/11/92) Nigeria (1/11/92) Senegal (1/11/92) Sierra Leone (1/11/92) Tanzania (1/11/92) Uganda (1/11/92) Zaire Zambia (1/11/92)

Of these signatories, Barbados, Chile, Botswana, Burkina Faso, Guinea, Kenya, Lesotho, Malawi, Nigeria, Senegal, Sierra Leone, Tanzania, Uganda, and Zambia have the Hamburg Rules in force since 1 November 1992. These countries represent, statistically:

(i) South America, Central America, Carribean

	By Volume (% of total)	*By Value (% of total)*
Exports by sea	1.10	0.77
Imports by sea	2.10	0.98

(ii) Africa (excluding North Africa)

	By Volume (% of total)	*By Value (% of total)*
Exports by sea	0.40	0.92
Imports by sea	1.20	0.58

The carriage of goods by sea into and out of Australia with respect to these countries is very small statistically, especially when considering the **value** of that trade by sea.

3.4 Where are the Hamburg Rules in Force?

To summarise the above findings, the Hamburg Rules are in force in following statistical sea-cargo trade divisions:

Eastern Europe	*Middle East & North Africa*	*Africa*	*South America & Carribean*
Hungary Romania	Egypt Lebanon Morocco Tunisia	Botswana Burkina Faso Guinea Kenya Lesotho Malawi Nigeria Senegal Sierra Leone Tanzania Uganda Zambia	Chile Barbados

None of these statistical divisions represents a major trade destination or source for Australia.

Conclusion Three:

- **None of Australia's major export trading partners has the Hamburg Rules in force.**
- **None of Australia's major import sources has the Hamburg Rules in force.**

4. WHICH RULES FOR AUSTRALIA?

The status of our major trading partners with respect to liability for marine cargo loss or damage is as follows:[15]

Export Trade Partners			*Import Trade Partners*		
China	-	Code of Maritime Law	Indonesia	-	Commerical Code
Hong Kong	-	Hague-Visby	Malaysia	-	Hague
Japan	-	Hague-Visby	Philippines	-	own legislation
South Korea	-	Commercial Code	Singapore	-	Hague-Visby
Taiwan	-	Maritime Code	Thailand	-	own legislation
Belguin	-	Hague-Visby	Iran	-	Hague
Luxembourg	-	Hague-Visby	Iraq	-	none
France	-	Hague-Visby	Saudi Arabia	-	none
Germany	-	Hague-Visby	Syria	-	Hague-Visby
Netherlands	-	Hague-Visby	Turkey	-	Hague
Switzerland	-	Hague-Visby	New Zealand	-	Hague
UK	-	Hague-Visby	Papua New Guinea	-	Hague
Greece	-	Hague-Visby			
Italy	-	Hague-Visby			
Portugal	-	Hague			
Spain	-	Hague			
Canada	-	Hague-Visby			
USA	-	Hague			

The inference is obvious. If none of our major trading partners is, as yet, operating under the Hamburg Rules, why should Australia do so from 1 November 1994?

This is an especially important question when section 3(1)(b) of the **Carriage of Goods by Sea Act** 1991 (Cth) is taken into account. Section 3(1) provides:

The object of this Act is to introduce a regime of marine cargo liability that:

(a) is up-to-date, equitable and efficient; and

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15 A selected list only. Countries with their own legislation or Codes have adopted provisions from various of the regimes in force (eg. China, South Korea), or have formulated separate rules (eg. Thailand, Taiwan). I have not sought at this stage to distinguish formally between the various means of adopting a marine cargo liability regime. New Zealand's Transport Law Reform Bill 1993 incorporates the Hague-Visby Rules into that legislation.

(b) *is compatible with arrangements existing in countries that are major trading partners of Australia; and*

(c) *takes into account developments within the United Nations in relation to marine cargo liability arrangements.*

It is obvious from the above discussion that the requirement in s3(1)(b) is **not** going to be met, even in the medium-term, or in this century. Perhaps we should say, or ever? So why should Australia accede to the Hamburg Convention?

4.1 Hamburg: harmony, handicap or hallucination[16]

I put the question of Australia's accession to the Hamburg Rules of my International Business Law class after they had strolled back from their mid-lecture break. We considered s3(1) of the **Carriage of Goods by Sea Act 1991** (Cth) with due solemnity. 'How are we to resolve this issue?' I asked.

'We should look at each part of s3(1) in turn', they declared, suddenly fired with legal enthusiasm. So we contemplated s3(1)(a), (b) and (c):

- ***a marine cargo liability regime that is up-to-date*** - the Hamburg Rules are the most recent full statement of a marine cargo liability regime. Is this all that is required under s3(1)(a)? How is 'up-to-date' to be otherwise interpreted? Perhaps it means, in this context, choosing a set of Rules more suited to the modern realities of sea-carriage, which may include carriage under sea way bills, transshipment and multimodal formats, as well as Rules containing 'up-to-date' concepts of carriage in containers, of deck cargo carriage, of carriage of live animals, of geographic coverage by the Rules, of the basis of carrier liability and exemptions to that liability. If that is the meaning of 'up-to-date' then the Hamburg Rules should be the correct choice for a shipper nation such as Australia.

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16 The reasons in Part 4.1 et seq of this discussion are stated without formal argument. The literature on the Hague/Hague-Visby/Hamburg debate is extensive. See the attached bibliography in Appendix 3. A further useful bibliography is by Pratter, J. *Selected Bibliography on the Law of Carriage of Goods by Sea, 1975-1992* (1993) 24 J. Mar. L & Comm. 191. The reasons are not stated in any preferred order.

- ***a marine cargo liability regime that is equitable*** - the issue of the equity of any particular set of Rules cannot be resolved satisfactorily since every interested party has a different interpretation of a division of liability which constitutes an equitable share of liability for loss or damage to cargo. Ideas of an equitable distribution might range from no liability to be placed upon the carrier to absolute liability for the carrier. Any set of Rules is going to be a compromise between cargo and carrier interests. Is Hamburg any more desirable in this context than Hague-Visby?

  We might argue that the discussion in Part I of this paper suggests that Australia, as an exporter of largely primary and crude products fits easily into the category of States already applying the Hamburg Rules. If your view of the world does not embrace Australia as a less-developed country, reject this argument. However, even if we agree that Australia is entering the field of the sophisticated manufactured goods exporter, we are still a **shipper** nation, whether the goods shipped are primary products or manufactured items of the elaborately transformed variety.

  If this notion is accepted, why choose a liability regime which is said to be more favourable to the carrier? We should be choosing the Hamburg Rules.

- ***a marine cargo liability regime which is efficient*** - any discussion of the relative efficiency of Hague-Visby vis-a-vis Hamburg must necessarily include a cost-benefit analysis of any changes which would be brought about by the implementation of the Hamburg Rules. This means not just a discussion of possible effects on the insurance aspects of a change to Hamburg, about which much has already been written, but a full consideration of the economic effects (especially on the current account deficit) of such changes as the new basis of carrier liability, the absence of specific exemptions, new liabilities for deck cargo and live animals, and the longer period of coverage available. This may well be an impossible task given the lack of empirical data available for either regime. In the absence of such empirical analysis, how is relative efficiency to be measured in choosing to move to Hamburg? It cannot be, so that aspect of the requirement in s3(1)(a) is probably a bureaucratic nonsense.

- ***a marine cargo liability regime that is compatible with arrangements existing in countries that are our major trading partners*** - we have already seen the overwhelming evidence that this requirement in s3(1)(b) will not, or even cannot, be met if we choose to move to the Hamburg Rules in 1994 ahead of our major trading partners. But what if we **do** make the change in 1994? Is it Armageddon for Australia maritime trade? Will our Asian trading partners desert us for less adventurous shores? This does not seem likely, or if they do desert us it may be for reasons unconnected with our choice of marine cargo liability regime.

If some of our European trading partners make the move to Hamburg, this could obviously signal a serious consideration of the adoption of the Hamburg Rules by major maritime players. However, is Australia incapable of giving a lead to our trading partners in this regard? It might be said that Australia, though a small actor on the maritime stage, is not a contemptible one. We have been in the vanguard of tariff reform and have set a morally uplifting example to the negotiators of the current GATT round of trade barrier reductions. We could do so as well in the field of the liability for marine cargo loss or damage.

The problem is, as it is for our tariff reform stance, will anyone else follow us? Or will our trade partners regard our move to Hamburg as a quaint Antipodean idea perhaps brought on by over-exposure to the sun? For those of you who see our tariff policy as foolish, ill-considered, unctuous, suicidal and/or the cause of mirth and puzzlement to our trading partners, a move to the Hamburg Rules in 1994 must seem, by analogy, unnecessary to say the least.

The change to the Hague-Visby Rules is gaining momentum in world maritime trade. Case law decisions on the Hague-Visby Rules are not unappealing to cargo interests. Many of the major interests involved are against the move. So why change? We should not change just because the Hamburg Rules are **there**. Real advantages for Australia must be found before we make the change.

No doubt real advantages **can** be found for Australia as a shipper nation on a purely literal reading of the Hamburg Rules. But how are they to be interpreted? They must be interpreted to give shippers the advantages which they appear to contain, or there will be no legal or economic advantage in the move to Hamburg, and any political advantage will be dissipated by added uncertainty.

- ***a marine cargo liability regime that takes into account developments within the United Nations in relation to marine cargo liability arrangements*** - there are already three marine cargo liability regimes in force. Is the United Nations proposing a review? If there is no widespread acceptance of Hamburg, will a new UN meeting be convened to reconsider the situation? Perhaps we could have the Sydney Rules (probably proposing no liability for the carrier?) or the Melbourne Rules (proposing the carrier as insurer of cargo carried?), or the Brisbane Rules (the carrier to be liable for cargo loss or damage to the same extent whether the carriage is by sea, road, rail or air)?[17]

We might shudder to contemplate a fourth or fifth cargo liability regime. Surely, harmony in this matter is an **economic** imperative, rather than a legal or (worse) a political issue. Whatever advantages are perceived for cargo interests in the Hamburg Rules will turn out to be illusory if, by adopting them, we cut ourselves off from the major league of maritime nations, and place ourselves in the 'less-developed' camp. This may satisfy those who feel that, politically, we need to offer assistance to such countries, or those who argue that our future trade expansion lies in those markets which have already adopted the Hamburg Rules.

On the other hand, our adoption of the Hamburg Rules in 1994 might act as a catalyst to the eventual harmonisation of the regimes of marine cargo liability rules, with the USA possibly (by-passing Visby) deciding to proceed direct to the Hamburg Rules. Our move to Hamburg would then be no handicap, but merely show the sort of percipient and sensitively-handled decision which we are accustomed to see emanating from Canberra.

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17 See 'Advancing Australia - Building on Strength', the election statement of the Prime Minister, Paul Keating on 24 Febuary 1993 at p.38-39, and a press statement by Senator Bob Collins, Minister for Transport and Communications, 17/8/93 re the establishment of a Task Force to consider a nationally-integrated transport system.

Conclusion Four:

- **The Hamburg Rules do contain legal advantages for shipper nations such as Australia.**
- **Whether the Hamburg Rules contain economic advantages is unknown, or, at best, doubtful.**
- **We should adopt the Hamburg Rules only if both types of advantage can be demonstrated.**

5. FALLING OFF THE FENCE?

It is easy to argue on this issue in the typically legal fashion of 'on the one hand this' and 'on the other hand that'. Those of you with entrenched views about the appropriate regime will only hear the information which accords with your position anyway. In my opinion, what is wrong with the Section 2(3)(b) solution in the short term? We can argue some more, write more papers, lobby with the US government to change to Hamburg (they are Democrats after all and the Hamburg Rules should have political appeal in their ranks), and make a final decision later. This accords well with the views of that well-known maritime lawyer St. Augustine who said:[18]

"Give me Hamburg - but not yet!"

[18] Text slightly adapted from *Confessions* book viii, Ch. 7.

APPENDIX 1
Balance of Payments - Summary ($ million)

	Year		
	1990-91	1991-92	1992-93
Current Transactions -			
Goods and Services -			
Merchandise (a) -			
Exports fob	52,155	54,930	60,037
Imports fob	-49,256	-51,054	-59,436
Balance on merchandise trade			
Services -	***2,899***	***3,876***	***601***
Credits	12,999	13,921	14,957
Debits	-16,404	-16,520	-17,665
Net services	***-3,405***	***-2,599***	***-2,708***
Balance on goods and services	***-506***	***1,277***	***-2,107***
Income -			
Credits	3,935	4,114	3,976
Debits	-22,154	-20,059	-18,054
Net income	*-18,219*	*-15,945*	*-14,078*
Unrequited transfers -			
Credits	4,728	4,584	3,108
Debits	-2,250	-2,296	-2,369
Net unrequited transfers	*2,478*	*2,288*	*739*
Balance on current account	***-16,247***	***-12,380***	***-15,446***
Net capital transactions -			
Official -			
General government -			
Foreign investment in Australia	737	2,083	9,065
Australian investment abroad	-420	652	77
Total	*317*	*2,734*	*9,143*
Reserve bank -			
Foreign investment in Australia	-22	21	39
Australian investment abroad	-1,446	3,929	3,923
Total	*-1,468*	*3,950*	*3,962*
Total official	*-1,151*	*6,684*	*13,105*
Non-official -			
Foreign investment in Australia	20,698	13,009	3,719
Australian investment abroad	-2,126	-3,612	-2,758
Total non-official	*18,572*	*9,398*	*961*
Balance on capital account	17,421	16,082	14,065
Balancing item	*-1,174*	*-3,702*	*1,381*

(a) Balance of payments basis

Source: ***Australian Bureau of Statistics - Balance of Payments Australia, June Quarter 1993 at p.12***

APPENDIX 2
Export Categories Used to Calculate "Elaborately Transformed Manufactures" (viz Manufactured Exports)

	Standard Industrial Trade Classification Division	*Examples of Main Products*
11	Beverages	Beer, wine
Machinery		
71	Power generating machinery and equipment	Internal combustion engines and parts, gas turbines and parts, turbo-prop and turbo-jet engines and parts
72	Machinery specialised for particular industries	Earth-moving machinery, drilling and boring machinery, minerals processing equipment and parts
73	Metal working machinery	—
74	General industrial machinery and equipment, nes and machine parts, nes	Hot water heaters, pumps, bearings, gear boxes, materials handling equipment
75	Office machines and automatics data processing machines	Photocopiers, computers and computer parts
76	Telecommunications and sound recording and reproducing apparatus and equipment	Radio and television transmission equipment and parts, parts for electrical line telecommunications, radar, navigational aids and radio remote control equipment
77	Electrical machinery, apparatus, appliances and parts (incl. non-electrical counterparts of electrical domestic equipment)	Electrical switching equipment, whitegoods
Transport Equipment		
78	Road vehicles	Passenger motor vehicles, vehicle parts
79	Transport equipment (excl. road vehicles)	Helicopters, light aircraft, aircraft parts, ferries, pleasure craft
Manufactures NEC		
51	Organic chemicals	—
52	Inorganic chemicals	—
53	Dyeing, tanning and colouring materials	Titanium oxide based pigments, putties and fillings
54	Medicinal and pharmaceutical products	Antibiotics, blood fractions and vaccines, opium derivatives, medicaments for retail sale
55	Essential oils and resinoids and perfume materials; toilet, polishing and cleansing preparations	Detergents, perfume, soap, other cosmetic preparations
56	Fertilisers	—
57	Plastics in primary forms	Polyethylene, polypropylene
58	Plastics in non-primary forms	Sausage casings, flat shapes of polyethylene and polypropylene, plastic tubes, pipes, hoses and fittings
59	Chemical materials and products, nes	Wheat gluten, pesticides and herbicides for retail sale, explosives, fuses and detonators

	Standard Industrial Trade Classification Division	*Examples of Main Products*
61	Leather, leather manufactures, and dressed fur-skins, nes	—
62	Rubber manufactures, nes	Tyres
63	Cork and wood manufactures (excl. furniture)	Particle board, fibreboard
64	Paper, paperboard, and articles of paper pulp, of paper or of paperboard	—
65	Textile yarn, fabrics, made-up articles nes, and related products	Floors coverings, bed linen
66	Non-metallic mineral manufactures, nes	Glass and glassware, unset diamonds, unset cultured pearls, unset precious/semi-precious stones
69	Manufactures of metal, nes	Iron or steel structures and parts, aluminium casks, metal hardware items
81	Prefabricated buildings; sanitary, plumbing, heating and lighting fixtures and fittings, nes	—
82	Furniture and parts; bedding, mattresses, mattress supports, cushions and similar stuffed furnishings	—
83	Travel goods, handbags and similar containers	—
84	Articles of apparel and clothing accessories	—
85	Footwear	—
87	Professional, scientific and controlling instruments and apparatus, nes	Medical, surgical and vet. sciences instruments, surveying equipment, spectrographic equipment
88	Photographic apparatus, equipment and supplies and optical goods, nes; watches and clocks	Film, plastics spectacle lenses, photographic chemicals
89	Miscellaneous manufactured articles, nes	Military weapons, books, journals, and magazines, artworks and antiques, recorded tapes and CDs, hearing aids (excluding implants), surgical aids and implants, jewellery

nec - not elsewhere classified
nes - not elsewhere specified

***Source:* *Reserve Bank of Australia Bulletin*, November 1992, at p.3.**

APPENDIX 3
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