

AUSTRALIAN MARITIME LAW UPDATE: 2010

Michael White* and Alex Molloy**

1 Introduction

The 2010 year for the maritime jurisdiction and activities has been a fairly steady one for Australia. The illegal fisheries incursions by foreign fishing vessels into the Australian EEZ have been only running at a reasonable level with no major issues. The annual excursion of the Japanese whaling fleet all the way from Japan to the Southern Ocean was met with vigorous opposition from the Sea Shepherd fleet of three vessels this year and there were some significant developments, including the Australian government action against Japan in the International Court of Justice ('ICJ'), as to which see shortly. In relation to marine pollution offshore, the three shipping incidents (*APL Sydney*, *Pacific Adventurer* and *Shen Neng 1*) are all noted as is the significant offshore oil well spill (the Montara Oil Platform). The 'boat people' arrivals are creating a major issue in the media and for the government, although most of them are genuine refugees and their numbers are only a small percentage of persons who are in Australia unlawfully. There have been some interesting cases decided by the judges of various courts and also the legislative changes show a real interest, at last, in an Australian government setting about reforming and updating the long-neglected Australian shipping industry.

2 Fisheries and Other Offshore Issues

2.1 Fisheries

The fisheries industry offshore from Australia is well developed in relation to prawns, tuna and similar product but is not otherwise well developed and there is no deep water fleet. Even so in 2010 Australia's commercial fishing and aquaculture industry was valued at A\$2 billion and employed directly and indirectly some 16 000 people. The commercial fisheries produced some 52 000 tonnes of catch.¹

In relation to the incursions of foreign fishing vessels into Australian waters, there were 16 apprehensions of illegal foreign fishing boats for the calendar year 2010 and from those boats some 35 fishers had prosecutions brought against them during the year.²

Apart from the foreign fisheries offshore, over the course of 2010 the various States and the Northern Territory prosecutions dealt with quite a number of local fisheries offences in their respective offshore and inland waters jurisdictions.

2.2 Whaling Issues

Previous Updates have set out the issues, the laws and a summary of the facts about the annual southern hemisphere summer excursion of a Japanese government sponsored whaling fleet to the Southern Ocean. During the period December 2010 into early 2011 the usual Japanese whaling fleet arrived in the Southern Ocean, to the usual protest by the Australian and the New Zealand governments and Sea Shepherd Conservation Society and Greenpeace. Readers will recall from the earlier Updates that the issues relate to taking whales in Australian waters off the Australian Antarctic Territories is a weak Australian claim as only four other nations recognise it. Taking whales for 'scientific research' is, however, another matter. Scientific research is allowable under the *International Convention for the Regulation of Whaling* ('Convention'),³ but all the evidence points to there being no need to kill the whales for it and that the conduct of the Japanese fleet and government is a breach of the Convention.

*QC, B.Com., LLB., PhD (law); Adjunct Professor, University of Queensland.

**B.Com., LLB. Student, University of Queensland.

[This article was first published in the 2011 issue of *Journal of International Maritime Law and Commerce* and is reproduced with their kind permission. -Ed]

¹ Australian Department of Agriculture, Fisheries and Forestry, *Domestic Fisheries* (27 June 2011) <www.daff.gov.au/fisheries/domestic>.

² Email from Australian Customs Media Department to Michael White, 30 May 2011.

³ *Ibid.*

Sea Shepherd has harassed the fleet each season for some years now and the summer season of 2010-2011 was no exception.⁴ The Sea Shepherd vessels *Steve Irwin*, *Bob Barker*, and *Gojira* searched for, found and harassed the Japanese whaling fleet and particularly the factory ship the *Nisshin Maru*. When the Japanese fleet turned for home in February 2011, after a fire in the factory ship, the Sea Shepherd people were very pleased. Their media release stated that their actions had reduced the whale take to about 10% of the target of about 800 whales and their leader, Captain Watson said: 'I have a crew of 88 very happy people from 23 different nations including Japan and they are absolutely thrilled that the whalers are heading home and the Southern Ocean Whale Sanctuary is now indeed a real sanctuary.'⁵

Back on 6 January 2010 there had been a collision between the Sea Shepherd's vessel *Ady Gil* and the Japanese whaling vessel *Shonan Maru No.2*, with the *Ady Gil* sinking but without loss of life; as set out in the 2009 Update. Readers may recall that the Australian Maritime Safety Authority ('AMSA') tried to investigate but it had no real jurisdiction and the Japanese government declined to cooperate so its report was inconclusive. However, the NZ government had jurisdiction as the *Ady Gil* was flagged with it and it investigated and published its report in November 2010.⁶

The key part of the Report as to blame stated that the *Shonan Maru No.2* as the overtaking vessel failed to keep clear which resulted in a close quarters situation during which the vessel again failed to take avoiding action. For its part, the *Ady Gil* was the stand-on vessel so had right of way but failed to keep an effective lookout and failed to take early avoiding action once the risk of collision had arisen. The report found that there was no evidence that the collision resulted from an intention to have one on the part of either of the Masters.⁷ These facts mean that both Masters had breached some aspect of the *International Collision Regulations*.⁸

A lot of posturing arose from the collision but one may mention that the NZ Report noted that the automatic chart plotters from the *Ady Gil* had been removed onto the *Bob Barker* but when the NZ authorities asked for them they were missing. On 24 May 2010, however, they were found washed up on the beach at Tasmania and the NZ Report states that one explanation is that they were thrown overboard before the *Bob Barker* reached port in Tasmania.⁹

The Master of the *Ady Gil*, Peter Bethune, later rejected the finding that he was partly to blame because, he said, the speed of events was so fast he had no time to evade and the water canon from the Japanese vessel was blasting down on him.¹⁰ However, the video of the stern of the *Ady Gil* shows a spurt of water from the propellers that moved the vessel ahead shortly before the collision and made the collision inevitable in those close quarters. Mr Bethune boarded the *Shonan Maru No.2* about a month after the collision to take his protest further and was detained onboard. He was transported to Japan, spent five months in detention there, was convicted of trespass and assault, further punishment was suspended and he was deported.¹¹

As mentioned, in January 2011 the fleet headed back to Japan and the Australian government media release of 18 February reflected its attitude, and that of many Australians, in stating:

The Government welcomes Japan's decision to recall its whaling fleet from the Southern Ocean for the current whaling season. This is a positive step. But the Government wants to see an end to whaling, not just for a season, but for good. There is widespread concern in the international community at Japan's so called "scientific" whaling program and widespread calls for it to cease. These activities are contrary to international law and that is why we have commenced, and will continue, our case in the International Court of Justice. We are pleased to see the Japanese fleet returning home. We hope that the Japanese Government takes this opportunity to reconsider its whaling policy more broadly.¹²

The reference to the commencement of an action in the ICJ is to the action brought by Australia against Japan seeking relief from the court. The ICJ web site has some details and the ICJ media release of 1 June 2010 summarises the Australian claim:

⁴ Sea Shepherd Conservation Society, *Sea Shepherd* (2011) <www.seashepherd.org>.

⁵ Ibid.

⁶ Maritime New Zealand, *Ady Gil and Shonan Maru No. 2: Collision on 6 January 2010* (30 September 2010) <<http://www.maritimenz.govt.nz/AdyGil/Investigation-report-Ady-Gil-Shonan-Maru-Lo-rez.pdf>>.

⁷ Ibid [5]-[8].

⁸ *International Regulations for the Prevention of Collisions at Sea (COLREGS)*, 1972.

⁹ Maritime New Zealand, above n 6, [31].

¹⁰ 'Anti-Whaling Skipper Disputes Crash Report', *The Australian* (Sydney), 19 November 2010, 6.

¹¹ Ibid.

¹² Australian Minister for Foreign Affairs, *Withdrawal of the Japanese Whaling Fleet* (18 February 2011) <http://www.foreignminister.gov.au/releases/2011/kr_mr_110218.html>.

THE HAGUE, 1 June 2010. Australia yesterday instituted proceedings before the International Court of Justice against the Government of Japan, alleging that

‘Japan’s continued pursuit of a large scale programme of whaling under the Second Phase of its Japanese Whale Research Programme under Special Permit in the Antarctic (“JARPA II”) [is] in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling (“ICRW”), as well as its other international obligations for the preservation of marine mammals and marine environment.’

The Applicant contends, in particular, that Japan ‘has breached and is continuing to breach the following obligations under the ICRW:

- (a) the obligation under paragraph 10 (e) of the Schedule to the ICRW to observe in good faith the zero catch limit in relation to the killing of whales for commercial purposes; and
- (b) the obligation under paragraph 7 (b) of the Schedule to the ICRW to act in good faith to refrain from undertaking commercial whaling of humpback and fin whales in the Southern Ocean Sanctuary.’

Australia points out that

‘having regard to the scale of the JARPA II programme, the lack of any demonstrated relevance for the conservation and management of whale stocks, and to the risks presented to targeted species and stocks, the JARPA II programme cannot be justified under Article VIII of the ICRW’ (this article regulates the granting of special permits to kill, take and treat whales for purposes of scientific research).

Australia alleges further that Japan has also breached and is continuing to breach, inter alia, its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora and under the Convention on Biological Diversity.¹³

It can be seen, therefore, that Australia is arguing that this Japanese fleet is embarking on commercial whaling, which the *Convention* prohibits, rather than directly attacking the assertion by Japan that it is conducting scientific research, which is a different but not mutually exclusive argument. The matter rests there with the ICJ case proceeding slowly through its various phases. Success in the matter may well turn on how well the Australian government marshals suitable evidence on the point and presents its case.

Whether the Japanese whaling fleet returns to the Southern Ocean at the end of 2011 remains to be seen but the diplomatic pressure being applied by many countries, and the heat in the issues ventilated in the International Whaling Commission,¹⁴ must be having an effect and the Japanese government may well reconsider its attitude.

2.3 Boat People

During 2010 ‘boat people’ continued to arrive. Most of these people were refugees escaping from appalling and violent events in Sri Lanka and Afghanistan and most had paid money to organisations involved in people smuggling. Mixed in with the refugees are people just hoping for a better life (economic refugees) and a few violent and criminally-minded people. A table of ‘boat people’ arrivals from 1966 to May 2011, below, shows how the 2010 year had by far the most arrivals of boats and persons in the last 14 years.

People smuggling into Australia

Year	Number of boats	Number of passengers
1996	19	660
1997	11	339
1998	17	200
1999	86	3721
2000	51	2939
2001	43	5516
2002	1	1
2003	1	53
2004	1	15
2005	4	11
2006	6	60
2007	5	148

¹³ International Court of Justice, *Australia Institutes Proceedings Against Japan for Alleged Breach of International Obligations Concerning Whaling* (1 June 2010) < <http://www.icj-cij.org/docket/files/148/15953.pdf> >.

¹⁴ The International Whaling Commission, *IWC Home Page* (2010) <www.iwcoffice.org>.

2008	7	161
2009	60	2726
2010	134	6535
2011*	24	1385

*Current as at 17/5/2011.

Source: Australian Customs Media Department email 30 May 2011.

A sad event occurred on 15 December when a boat loaded with 92 men, women and children lost power and drifted on to the rocky coast of Christmas Island in the Indian Ocean, the island on which the refugees are processed, with 50 of them drowning. The boat was crewed by professional people smugglers and they were only a few miles short of the port on Christmas Island, for which they were making. They called for help with a mobile phone and were seen from the land so the Navy and the Customs Department vessels in the area went to their rescue. It was too late, however, for many of them. Inquiries are continuing into the details of the loss, including how the vessel was not detected by Australia's expensive offshore surveillance and detection system. The coronial inquest being conducted, as at May 2011,¹⁵ is investigating a wide range of matters and the coroner's report should comprehensively set out the facts and findings.

As discussed in earlier Updates, the Australian government has passed legislation to remove certain rights in some of the Australian laws relating to persons who arrive without prior authority, including the supervision of government actions by the courts. The issue of whether the 'boat people' who arrive by sea without authority are entitled to enjoy the full rule of law in Australia was raised in the *Tampa* incident but did not get to the Full Court of the High Court. In 2010 in *M61 v Commonwealth*,¹⁶ however, the matter did reach the Full Court of the High Court and the court decided unanimously (7-0) that the full rule of law did apply even though the legislation had purported to 'excise' some of the Australian off-lying islands from its application to unauthorised entrants.

The basic facts, taken from the judgment, are that the Sri Lankan plaintiffs arrived without authorisation by boat at the Territory of Christmas Island which, under the *Migration Act 1958* (Cth) is termed an 'excised offshore place'.¹⁷ Neither plaintiff is an Australian citizen. Neither held a valid visa to enter Australia and, because of the island being 'excised', they had no right to apply for one even if otherwise entitled. On arrival they were detained under s 189(3) of the *Migration Act 1958* (Cth). Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Officers of the Department of Immigration and Citizenship made, in each case, what departmental documents refer to as a 'Refugee Status Assessment', or 'RSA', and concluded that neither plaintiff was a person to whom Australia had protection obligations.

The lawfulness of the plaintiffs' temporary detention was not in issue; the issue was whether due process under the law had been exercised by the department in dealing with the plaintiffs. The Court's decision meant that the departmental officer, in recommending to the Minister that the plaintiff was not a person to whom Australia has protection obligations, made an error of law in not treating the provisions of the *Migration Act 1958* (Cth) and the decisions of Australian courts as binding. Further, the court declared that the departmental officer's decision failed to observe the requirements of procedural fairness.¹⁸

Some figures about the numbers and the costs of 'boat people' described in government circles as 'irregular maritime arrivals' were revealed by the Minister for Immigration in May 2010. They showed that for the 2009-2010 financial year, 139 asylum seekers were deported to their home countries, of which 124 were voluntary and 15 were forced. They also showed that the cost was between A\$5 000 and A\$15 000 per person for the deportation alone, with the greater cost caused by the need to escort the deportees, and the total cost for that financial year was A\$2 million.¹⁹ On top of these costs are the millions being spent on apprehension, detention, processing and legal, welfare, and health assistance. At 28 February 2010 there were about 6 000 refugees in detention, of which more than one third have been there for more than six months and 2 350 of whom were still

¹⁵ Debbie Guest, 'Boatpeople Pleaded For Help Before Wreck', *The Australian* (Sydney) 19 May 2011, 2.

¹⁶ *E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41.

¹⁷ Section 5 of the *Migration Act* provides in part: "'excised offshore place" means any of the following: (a) the Territory of Christmas Island; (b) the Territory of Ashmore and Cartier Islands; (c) the Territory of Cocos (Keeling) Islands; (d) any other external Territory that is prescribed by the regulations for the purposes of this paragraph; (e) any island that forms part of a State or Territory and is prescribed for the purposes of this paragraph; (f) an Australian sea installation; (g) an Australian resources installation. Note: The effect of this definition is to excise the listed places and installations from the migration zone for the purposes of limiting the ability of offshore entry persons to make valid visa applications."

¹⁸ *E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41, 105.

¹⁹ Lanai Vasek, 'Failed Boatpeople Are Costing Us Up to \$2m', *The Australian* (Sydney), 23 May 2010, 2.

awaiting their primary assessment as refugees or not.²⁰ From the detention point of view one could say that the Australian detention centres are seriously overcrowded and there has been much unrest in them and some rioting.

3 Marine Pollution and Oil Spills

3.1 Pacific Adventurer Oil Spill

On 11 March 2009 the M.V. *Pacific Adventurer*, an 18 391 GRT 1 123 TEU geared multi-purpose containership, was caught in a heavy storm off the east coast of Australia near Brisbane and 21 containers of fertiliser broke loose and went overboard. As they were tossed around in the heavy seas they punctured a port and a starboard fuel tank so that bunker oil spilled out leading to pollution of nearby beaches. The fuller facts were set out in last year's Update. The owners constituted a fund of about A\$17 million in the Federal Court, in its Brisbane registry.

During 2010 very little has developed about the matter. There are about 70 claimants against the fund and a working party has been established to report to the court if the claims can be settled or not. During 2010 much discussion occurred about the claims, with many of the claimants being required to give fuller details to justify themselves. By the end of 2010 the Federal Court judge was giving sterner indications that he wanted the matter moved on and on 14 December 2010 he appointed Deputy Registrar Murray Belcher, in the Brisbane Registry, to case manage the matter. Mr Belcher held a case management conference on 28 January 2011²¹ in which he directed the claimants to quantify their claims, the other parties to indicate which of them they accept and which oppose and why.²² In March 2011 Swires filed a Notice of Motion for the amounts agreed between the parties to be paid out and that the claims of those parties that had not filed a Statement of Claim as required should be struck out. This will be heard on 27 June before Justice Reeves, the Federal Court judge in Brisbane who has taken over from Justice Dowsett in that position. The results will be reported in the Update next year.

One other aspect of the *Pacific Adventurer* matter, as mentioned in the 2009 Update is that the Queensland government has brought a prosecution against the owners and the master of the *Pacific Adventurer*. The allegations are that the spill offended the provisions of the *Transport Operations (Marine Pollution) Act 1995* (Qld) ('*TOMPA*').²³ A defence under *MARPOL* is if the pollution occurs from 'damage' to the ship.²⁴ This defence has been incorporated into *TOMPA* in that s 28 provides, in effect, that it is a defence if the spill resulted from damage to the ship and all reasonable precautions were taken afterwards to deal with the spill.²⁵ While the matter has yet to be fully aired in court, it appears that the owners and the master are saying that the puncture of the hull by the containers was the damage that resulted in the spill. The prosecution is alleging that they acted recklessly with knowledge that damage will probably result in that they failed to maintain the lashings holding the containers that caused the containers to be lost overboard.

The Australian High Court previously considered the meaning of 'damage' in 2002 in *Morrison v Peacock*²⁶ and held that the defence of 'damage' to the ship or its equipment to a prosecution for liability for an oil spill must involve a sudden change in the ship or its equipment so it excludes gradual changes, such as resulting from wear and tear. The High Court decision has established the Australian law so that the meaning and intent of the 'damage' defence requires a sudden change of circumstances.

²⁰ Ibid.

²¹ The matter was delayed somewhat as parts of Queensland, including Brisbane, suffered disastrous flooding in mid-January 2011 with thousands of houses and other buildings being damaged, stock, bridges and other material swept away and 22 people killed in flash flooding.

²² *Swire Navigation Co Ltd and Bluewind Shipping Ltd & Ors v State of Queensland & Ors* (P) QUD214/2009.

²³ *Transport Operations (Marine Pollution) Act 1995* (Qld) s 26 provides: "Discharge of oil into coastal waters prohibited: (1) If oil is discharged from a ship into coastal waters, the following persons each commit an offence— (a) the ship's owner; (b) the ship's master; (c) another member of the ship's crew whose act caused or contributed to the discharge, unless the member was complying with an instruction from the master or of someone authorised by the master to give the instruction."

²⁴ *International Convention for the Prevention of Pollution From Ships (MARPOL)*, 1988ATS 29, reg 4.

²⁵ *Transport Operations (Marine Pollution) Act 1995* (Qld) s 28: "Defences to discharge offence: (1) Each of the following is a defence to a prosecution for a discharge offence— ... (b) the discharge resulted from damage, other than intentional damage, to the ship or its equipment and all reasonable precautions were taken after the damage happened or the discharge was discovered to prevent or minimise the discharge of the oil; (2) For subsection (1)(b), damage to a ship or its equipment is intentional damage only if the damage arose in circumstances in which the ship's owner or master or, for a discharge offence against section 26(1), another member of the ship's crew— (a) acted with intent to cause damage; or (b) acted recklessly and with knowledge that damage would probably result."

²⁶ *Morrison v Peacock (The Sitka II)* 210 CLR 274.

The claims on the fund in court and the criminal prosecution will be addressed in the Update next year by which time they should have been resolved.

3.2 Montara Offshore Oil Spill

On 21 August 2009 one of the wells situated in the Montara oil field off the north-west of Australia in the Indian Ocean/Timor Sea blew out and released oil and gas. The National Plan swung into action to deal with the oil spill, another drilling rig, the West Triton, was brought in to drill under the seabed to plug the well and, on 1 November, a fire broke out and severely damaged the platform and the nearby West Atlas drilling rig. The well was plugged on 3 November 2009, which put out the fire. The facts were set out in the 2009 update and this comment relates to developments in 2010.

The Australian Maritime Safety Authority conducted the clean up and its reports revealed that the majority of the spill was within 35kms of the platform, response operations extended over 105 days with some 247 personnel involved, aerial and vessel spraying of dispersant occurred and there were some 130 aerial surveillance flights.²⁷ None of the nearby marine parks were affected.

The Commonwealth government commissioned an inquiry by Mr David Borthwick AO PSC, a former senior Commonwealth public servant. He handed his Report to the government in June 2010 which was released publicly in November 2010 together with the Draft Government Response to the 105 recommendations in the report.²⁸ Then on 25 May 2011 the government published its final response,²⁹ which was much the same as the draft responses in December 2010, with a good summary of the final Response being set out in the 'General Policy Review Bulletin # 16 (May 2011)'.³⁰

The Montara Report was lengthy and thorough and its findings included that the company's installation of the barrier in the well to stop a blowout escaping was deficient and that it did not even install the second barrier that was required to be in place.³¹ The Report was also highly critical of the NT government officers³² but it omitted making any real critical analysis of the strengths and weaknesses of the Commonwealth departments.

One of the recommendations was that the government should ensure effective arrangements to ensure petroleum companies fully pay for all cleanup costs and all costs of operational and scientific monitoring.³³ The Report also considered the relevant provisions of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* and found they were deficient in that there is 'a major gap in the application of environmental legislation applying to Commonwealth waters'.³⁴

The environmental monitoring had been hampered because there was no base of scientific material against which to compare changes and such research as existed had mainly been done at the surface of the water column because when the dispersants acted to disperse the oil from the ocean surface into the water column what was needed was water sampling in the water itself.³⁵

Another important recommendation included the creation of a 'single, independent regulatory body' to look after safety - this was repeating and confirming what had already been recommended by the Productivity Commission in 2009.³⁶

²⁷ Australian Maritime Safety Authority, 'Annual Report 2002/2003', (2003) *National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances*, 17.

²⁸ Australian Government, *Draft Government Response to the Report on the Montara Commission of Inquiry* (28 Oct 2010) <www.ret.gov.au/Department/Documents/MIR/response-to-montara-inquiry-report.pdf>.

²⁹ Australian Government, *Final Government Response to the Report of the Montara Commission of Inquiry* (25 May 2011) <<http://www.ret.gov.au/montarainquiryresponse>>.

³⁰ Australian Department of Resources, Energy and Tourism, *General Policy Review Bulletin #16* (30 July 2011) <http://www.ret.gov.au/resources/upstream_petroleum/offshore_petroleum_regulation_and_legislation/general_policy_bulletins/Pages/GeneralPolicyBulletins.aspx>.

³¹ *Montara H1 ST1 Well Release Incident Report* No 143203 (2009) 7.

³² *Ibid* 16.

³³ *Ibid* 23.

³⁴ *Ibid* 25.

³⁵ *Ibid* 26.

³⁶ Productivity Commission, 'Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services', Research Report (2007), 257.

On 24 November 2010 the relevant Minister confirmed his view that if PTTEPAA (the operator of the rig) or the NT Designated Authority had done their jobs properly the Montara blowout would never have happened³⁷ and the Commonwealth government accepted nearly all of the recommendations of the Commissioner.

These included that the National Oil Pollution and Safety Authority ('NOPSA') should have its powers extended and a new National Offshore Petroleum Safety and Environmental Management Authority ('NOPSEMA') was to be established which will be responsible for the day-to-day administration and regulation of occupational health and safety, well integrity, environment plans and day-to-day operations in the Commonwealth offshore areas. This, of course, is long overdue and reduces the reliance on the State and NT government departments for regulation of some vital areas.

Under the Offshore Constitutional Settlement 1979 between the Commonwealth and the States and subsequent legislation and government arrangements, the Commonwealth only regulates from the three mile limit outwards. The States and the NT laws apply within that area and also the States are given most of the responsibility of overseeing the offshore industry apart from workplace health and safety. Under the proposed new NOPSEMA structure, the States are given the option to allow their three mile areas to come under NOPSEMA but, given the history of the past 110 years since federation, having all of the State governments agree to all of the provisions is not likely. If some opt in and some stay out Australia may be in a more complicated legal and regulatory situation than that prevailing at the moment. Some of the legislative changes have already been made and others are proposed,³⁸ although getting them through the parliament is not guaranteed by any means.

Since the spill, after a careful review of the improvements in governance in the company, PTTEPAA has been given permission to continue with its many petroleum interests and more development programs. PTTEPAA has assured the government it has reformed its management of its activities in Australian waters.³⁹

3.3 Sheng Neng I

On 3 April 2010 the fully laden Chinese registered bulk carrier *Shen Neng 1* ran aground on Douglas Reef, in the Great Barrier Reef offshore from the port of Gladstone. The *Shen Neng 1* had loaded coal in Gladstone and was bound for China. The ship sustained extensive hull damage, mainly as heavy weather drove it across the coral reefs, and some four to six tons of oil were spilled.⁴⁰ Svitzer Salvage was engaged by the owners as the salvor and tugs came from distant places hired by the salvor and also by AMSA under its emergency powers. The National Plan to clean up the oil was activated, dispersant was sprayed, some shore clean up occurred and the two tugs, *Pacific Responder* and *Pacific Conquest* deployed booms as a precaution.

The *Shen Neng 1* was successfully refloated on 12 March, nine days after grounding, and it was moved to temporary anchorage outside Gladstone. The difficulties involved in moving the stricken ship into Gladstone harbour for discharge of the cargo and for repairs were too great, so it was towed south to sheltered waters in Hervey Bay, behind the major pristine sand island, Fraser Island, with great protests from environmentalists. There, some 19,000 tonnes of coal were discharged into other bulk carriers, the hull repaired and the vessel left Australian waters under the tow of the *De Da* tug for China on 31 May 2010.⁴¹

The Australian Transport Safety Bureau ('ATSB') Report on the cause of the grounding included:

The ATSB investigation found that the grounding occurred because the chief mate did not alter the ship's course at the designated course alteration position. His monitoring of the ship's position was ineffective and his actions were affected by fatigue.

The ATSB identified four safety issues during the investigation: there was no effective fatigue management system in place to ensure that the bridge watchkeepers were fit to stand a navigational watch after they had supervised the loading of a cargo of coal in Gladstone; there was insufficient guidance in relation to the proper use of passage plans, including electronic route plans, in the ship's safety management system; there were no visual cues to warn either the chief mate or the seaman on lookout duty of the underwater dangers directly ahead of the ship; and, at the

³⁷ Martin Ferguson, *Australian Maritime Digest*, No. 197 of 2010, 1 December 2010, 8. The Report of the Commission of Inquiry, the Government's Draft Response, information on how to make submissions and other supporting documents are available at <<http://www.ref.gov.au/montarainquiryresponse>>.

³⁸ Australian Department of Resources, Energy and Tourism, *General Policy Review Bulletin #15* (15 May 2011) <<http://ref.gov.au/resources/Documents/upstream-petroleum/regulation-legislation/GPB-15-May-2011.pdf>>.

³⁹ Angela MacDonald-Smith, 'Thais in Timor Sea return bid', *The Australian Financial Review*, 15 February 2011, 18.

⁴⁰ Australian Maritime Safety Authority, above n 27, 18, 43

⁴¹ *Ibid* 18, 44.

time of the grounding, the protections afforded by the requirement for compulsory pilotage and active monitoring of ships by REEFVTS, were not in place in the sea area off Gladstone.⁴²

In short, the Chief Mate had virtually no decent sleep for quite some time due to supervising loading, which was the Chief Mate's job, and when they sailed and he came on his bridge watch he was so tired that he failed to alter course and so the ship steamed onto a part of the reef.⁴³ This is why the ATSB report has emphasised that fatigue management was a major issue.

The report also referred to the fact that there was no requirement for compulsory pilotage nor was there ship passage monitoring under the Great Barrier Reef and Torres Strait Vessel Traffic Service ('REEFVTS') in the southern part of the Great Barrier Reef. The Commonwealth government has since extended the area for ship monitoring under the REEFVTS to cover the area, which required IMO endorsement.⁴⁴ However, it considered that it would be too difficult logistically to make reef pilotage compulsory through what is, in effect, reasonably easy navigation through this part of the reef. A prosecution is proceeding for an offence under the *Great Barrier Marine Park Act 1975* (Cth) and its outcome will be reported in the next Update.

3.4 APL Sydney Pipeline Break

The matter was discussed in the 2009 Update so we need only remind readers that on 13 December 2008 the *APL Sydney* came in from sea and was ordered to anchor in Port Phillip Bay to await the allocation of a berth before unloading in Melbourne. A gale was blowing and the ship dragged its anchor and, amongst other dramas, the anchor broke a gas pipeline lying on the bottom of Port Phillip Bay.⁴⁵

The pipeline was used to transport gas from a refinery on one side of Port Phillip to some factories on the other. Naturally the supply was interrupted and the factory owners brought claims into the Federal Court for their losses. The shipowner, however, claimed its rights to limit⁴⁶ and constituted a fund in the Federal Court in its Melbourne registry in the amount of A\$32 million. There were clearly quite a few large claims and their total exceeded the amount in the fund. So in 2009 the factory owners brought their claim in the Federal Court in Melbourne before Finkelstein J, in *APL Sydney*,⁴⁷ where the claimants argued that their claims should not come under the claims against the fund established in the court by the owner under limitation of liability rights.

The manufacturers' main point was that their claims, which were for pure economic loss without any physical damage, did not come within the wording of the *Convention on Limitation of Liability for Maritime Claims* and the *Limitation of Liability for Maritime Claims Act 1976* (Cth). However, Finkelstein J held that the claims for economic loss were consequential loss claims within Article 2.1(a) so they did come within the Convention.⁴⁸

A second argument was advanced that the actions were not caught within the Convention because under Article 2.1(c) there had been no 'infringement of rights' as properly understood when used in the Convention. His Honour held that the 'rights' that were infringed on these circumstances included a legally enforceable claim resulting from an act or omission of another person and these included those rights infringed by the factory owners when their gas pipeline was broken. As a result, the claims had to come within the Convention on this ground as well.⁴⁹

Then in 2010, in *Strong Wise Ltd v Esso Australia Resources Pty Ltd*,⁵⁰ Rares J had to decide if there was more than the one incident or occurrence. If there was held to be more than one then the limit of liability and so the amount in the fund were increased. The issues turned on the meaning of a 'distinct occasion' and an 'occurrence' under the Convention and the Act. In a long and careful judgment his Honour held that it was a

⁴² Australian Transport Safety Bureau, *Independent Investigation Into the Grounding of the Chinese Registered Bulk Carrier Shen Neng I at Douglas Shoal, Queensland* (14 April 2011) ATSB <http://www.atsb.gov.au/publications/investigation_reports/2010/mair/274-mo-2010-003.aspx>.

⁴³ Ibid 13. The ATSB Report has a good diagram of this part of Reef.

⁴⁴ *Marine Order Part 56 2011* (Cth) reg 4. IMO Resolution MSC.161(78) endorsed provision of REEFVTS in the Torres Strait and Inner Route of the GBR in 2004, while the proposed 2011 extension was endorsed in IMO Resolution MSC.315(88) in 2010. IMO endorsement was required because approximately 55% of the area covered by the extension of REEFVTS is beyond Australia's territorial sea.

⁴⁵ Australian Transport Safety Bureau, above n 41.

⁴⁶ *Limitation of Liability for Maritime Claims Act 1989* (Cth) (LLMCA), which enacted the *Convention on Limitation of Liability for Maritime Claims 1976* (Cth).

⁴⁷ *APL Sydney* (2009) 187 FCR 282.

⁴⁸ Ibid [28].

⁴⁹ Ibid [37].

⁵⁰ *Strong Wise Ltd v Esso Australia Resources Pty Ltd* (2010) 185 FCR 149 (18 March 2010 and corrigendum on 18 May 2010) was the judgment from the trial and the actual order for the declarations and orders as to costs were made in (2010) 185 FCR 237 (8 June 2010).

question of fact in each case⁵¹ and the test he used was whether there had been any subsequent act to the initial act, or not:

But where a subsequent act, neglect or default of the same shipowner separately operates to cause different or separately identifiable loss or damage to the same third party, or to others, then a new claim or claims will arise on that later distinct occasion. The latter occasion is distinct because, first there is a new event (the separate act, neglect or default), secondly, there is new loss or damage and thirdly, the new cause is, as a matter of common sense, not a necessary or inseparable consequence of the earlier act, neglect or default.⁵²

His Honour held that these events gave rise to two distinct occasions that occurred in direct connection with the operation of the ship under Arts 2(1)(a) and 6(1) of the Convention. The first occasion was the events that preceded the actual occasion of the anchor fouling the pipeline when the Master should have weighed anchor and sailed clear even though Harbour control had said he should await the return of the pilot before he did so. The second was the chain of events leading to and immediately following the rupture after the windlass had failed, the pilot reboarded and the ship's engines were put ahead on the basis that the dragging anchor would be clear. However, the anchor was not clear, with the result that the pipeline then ruptured.⁵³

Neither case has been appealed and nor have the actions settled, so the result of this preliminary litigation is that all of the claimants will need to compete for the amount in the fund, provided that they are successful at trials of their various matters. However, the funds in court will be two separate funds and they will amount to double the amount otherwise available for the tonnage of the *APL Sydney*. The various claimants will need to show from which occasion their loss or damage arose.⁵⁴

4 Overview of Maritime Cases

4.1 *Balnaves v Smith; Malone v Smith* [2010] QSC 39 (unreported BC201000716)

A collision between two small passenger boats in the Coomera River, Queensland, resulted in severe personal injuries and a trial before Justice Peter Applegarth, Supreme Court of Queensland, in 2010. Mr Balnaves and his passenger Mr Malone collided with Mr Smith, an employee of Coomera Houseboat Holidays Pty Ltd, while travelling on the north arm of the Coomera River, which is about 30kms south of Brisbane. Balnaves was operating a Bayliner Capri pleasure craft and Smith was operating a Haines Hunter Speedboat. Balnaves, Malone and Smith all suffered severe injuries.⁵⁵

Balnaves commenced proceedings against Smith, alleging that he negligently caused the collision, and Malone commenced proceedings against Balnaves and Smith claiming that they both negligently contributed to the collision. Both actions were commenced outside of the two year limitation period provided for by s 396 of the *Navigation Act 1912* (Cth) ('the Act'),⁵⁶ a Commonwealth law, but within the period otherwise allowed by Queensland law.

There was a multitude of conflicting evidence provided by the parties and the single impartial witness to the collision, along with expert evidence, including reports of the location of the accident, the conduct of the vessels immediately prior to the collision, and the conversations that occurred between the parties after it.⁵⁷ Applegarth J was required to determine where responsibility for the collision lay, what law applied to apportionment of blame and whether the action should be barred for the failure of the parties to commence their claims within the limitation period.

His Honour found that Mr Balnaves, in his Bayliner Capri vessel, was travelling at high speed on the incorrect side of the channel and, that having placed the Bayliner on a collision course with the Haines Hunter, he failed to take effective action to avoid a collision.⁵⁸ He further found that Balnaves was negligent for failing to proceed at a safe speed so that he could take proper and effective action to avoid a collision. He was also negligent for

⁵¹ Ibid [87].

⁵² Ibid [79].

⁵³ Ibid [361].

⁵⁴ Ibid [363].

⁵⁵ *Balnaves v Smith; Malone v Smith* [2010] QSC 39, [1].

⁵⁶ Ibid [2].

⁵⁷ Ibid [27]-[59].

⁵⁸ Ibid [114]-[120].

failing to keep to his starboard side of the channel and, once the two boats were on a collision course, for failing to turn immediately to starboard to ensure that the boats passed to port. This conduct amounted to breaches of rules 6, 9, and 14 of the *International Collision Regulations*.⁵⁹

As to Mr Smith's conduct, his Honour found that he continued to proceed at the high speed of 30 knots despite noticing that the opposing vessel was on the wrong side of the channel and that Smith's failure to proceed at a safe speed so that he could take proper and effective action to avoid a collision was negligent and in breach of rule 6 of the *International Collision Regulations*.⁶⁰ His Honour further considered that Smith's failure to take timely action to avoid the collision, and his failure to turn immediately to starboard upon seeing the Bayliner was negligent and involved further breaches of rules 8 and 14 of the *International Collision Regulations*.

In light of these facts, Applegarth J found that both Smith and Balnaves negligently contributed to the collision.⁶¹ Here there arose the issue of what law applied to this collision in a river, the Commonwealth or the Queensland law, as they were different on how to apportion the blame. Smith's counsel argued for the Commonwealth law and that s 259 of the *Commonwealth Navigation Act 1912*⁶² applied for determining apportionment. Balnaves' counsel submitted that the *Commonwealth Act* did not apply because, under s 2 of that Act, it did not apply to pleasure craft, or in the alternative, to vessels involved in intrastate, as opposed to inter-state, voyages.⁶³ As a result the Queensland law applied under contributory negligence which, under the common law, required a statute. Under the traditional Admiralty law it did not.⁶⁴

Applegarth J then raised for consideration whether the old 50/50 Admiralty law apportionment rule would apply based on s 247 of the *Supreme Court Act 1995* (Qld), which was based on the former Act that applied the English law in Queensland. This stated that the laws of Admiralty will apply to determine apportionment in the case of a collision between two ships.⁶⁵ As a result, his Honour canvassed the history of the development of the Admiralty law relating to collisions and the enactment of the State and the Commonwealth laws. His judgment is a most interesting scholarly consideration of the Australian Admiralty law and he held the State law applied to this case.⁶⁶ He was of the view that the legislation removed the old common law defence of contributory negligence as an absolute defence'.⁶⁷ His Honour considered that the *Navigation Act* did not apply and that the remedial provisions of ss 6 and 10 of the *Law Reform Act 1952* (Qld) allowed the court to apply determinations of contribution and apportionment between negligent parties to a maritime collision. His Honour held that the law on how to apportion was as follows:

In accordance with established principles, I have regard to the degree of departure from the standard of care of the reasonable person and also compare the relative importance of the acts of the parties in causing the damage. It is the whole conduct of each negligent party in relation to the circumstances of the collision which must be subject to comparative examination.⁶⁸

This is in accordance with s 259 of the *Navigation Act 1912* anyway. Turning then to the facts, his Honour found that both parties were guilty of similar negligent conduct, but that the negligence of Balnaves contributed to a greater degree to the accident due to his failure to turn his vessel to starboard which amounted to a substantial departure from the standard of care required by good seamanship. Accordingly, his Honour apportioned liability at 65% against Balnaves and 35% against Smith.⁶⁹

⁵⁹ *International Regulations for the Prevention of Collisions at Sea (COLREGS)*, 1972.

⁶⁰ *Balnaves v Smith; Malone v Smith* [2010] QSC 39, [105]-[113].

⁶¹ *Ibid* [124].

⁶² *Navigation Act 1912* (Cth) s 259: "Rule as to division of loss (1) Where, by fault of 2 or more ships, damage or loss is caused to one or more ships, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each ship was in fault: Provided that, if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally."

⁶³ *Ibid* s 2: "Application of Act (1) Except in so far as the application of this section is expressly excluded by a provision of this Act, this Act does not apply in relation to: (a) a trading ship proceeding on a voyage other than an overseas voyage or an inter-State voyage; (b) an Australian fishing vessel proceeding on a voyage other than an overseas voyage; (ba) a fishing fleet support vessel proceeding on a voyage other than an overseas voyage; (c) an inland waterways vessel; or (d) a pleasure craft; or in relation to its owner, master or crew."

⁶⁴ Martin Davies and Anthony Dickey, *Shipping Law* (Lawbook Co, 3rd ed, 2004) 426-434; Alexander Street and Blake Larkin, *Navigation; Collisions and Liability; Marine Inquiries* (Federation Press, 2000); Michael White, *Australian Maritime Law* (Federation Press, 1990) 239-260.

⁶⁵ *Balnaves v Smith; Malone v Smith* [2010] QSC 39, [121]-[123].

⁶⁶ *Ibid* [121]-[123].

⁶⁷ *Ibid* [122]. The common law never did apply to Admiralty law in relation to contributory negligence, which is one of the features that distinguished and still distinguishes the two sets of laws.

⁶⁸ *Ibid* [123]. As set out in *Pennington v Norris* (1956) 96 CLR 10, 16, a motor vehicle accident case, and since followed in Australia.

⁶⁹ *Ibid* [124]-[129].

4.1.2 The Limitation of Liability

Whether the Commonwealth or the State law applied was also relevant to the time limit by which the actions should have been commenced. The defendant Smith pleaded that the claims of Balnaves and Malone fell outside the limitation period provided for by s 396(1) of the Commonwealth Act (two years). Balnaves and Malone submitted that the Commonwealth Act did not apply because s 2 of that Act excluded its application with regard to pleasure craft and trading vessels on intrastate voyages,⁷⁰ as mentioned above, so the Queensland law applied (three years).⁷¹

His Honour held that the action was governed by the Queensland State law, in this case the *Limitation of Actions Act 1974* (Qld), which allows for a three year limitation period. Accordingly, the plaintiffs' claims fell within the limitation period.⁷² Just in case it went on appeal and was relevant his Honour held that, if s 396 of the *Navigation Act* did apply, it would be appropriate to exercise his discretion to extend the limitation period to the time when the action did commence.⁷³

The eventual orders were that judgment was given for the plaintiff in each proceeding with the apportionment of liability for the collision as to 65% to Balnaves in his Bayliner vessel and 35% to Smith in his Haynes Hunter vessel. It is an important judgment as it is the first time a judge of a superior Australian Court has addressed these issues in detail and, as has been set out, in the end he applied the ordinary Australian law of torts.⁷⁴

4.2 *Brisbane Slipways Operations Pty Ltd v Pantaloni* [2010] FCA 654 (BC201004304)

4.2.1 Facts and Claims

The plaintiff, Brisbane Slipways ('Slipways') alleged that defendant, Pantaloni, failed to pay monies due for services rendered under a slipway repair document.⁷⁵ The plaintiff commenced proceedings in rem against the *Aremiti 4* under ss 10 and 17 of the *Admiralty Act 1988* (Cth) ('the Act') for Pantaloni's breach of contract. Pantaloni was nominated as the 'relevant person' who would be liable on the claim for an action in personam.

In support of this claim, the plaintiff alleged that Pantaloni was the owner or demise charterer of the vessel at the time of the arrest and, at the time proceedings were commenced, the requirements under ss 17 or 18 of the Act were thereby satisfied. The plaintiff further claimed that, in any case, Pantaloni's appearance before the court constituted a submission to the jurisdiction of the court, and that their action in contract could proceed in personam.⁷⁶

Pantaloni contended that he was neither the owner nor demise charterer of the vessel at the time of its arrest, nor at the time the proceedings were commenced and accordingly the jurisdiction to proceed in rem under ss 17 and 18 of the Act could not be established. The defendant sought that the proceedings be struck out, the original arrest be ruled invalid, and that the monies paid by Pantaloni into the court to secure the release of the arrested vessel be repaid.⁷⁷

Aside from the primary contentions as to whether Pantaloni was the owner or demise charterer for the purposes of supporting an action in rem under ss 17 and 18, and whether the action could subsist in personam, the court was required to determine the following issues:

1. Whether, in the event that the money paid into court by Pantaloni is paid out, it should then be subject to a freezing order;

⁷⁰ Ibid [131].

⁷¹ *Limitation of Actions Act 1974* (Qld).

⁷² *Balnaves v Smith; Malone v Smith* [2010] QSC 39, [135].

⁷³ Ibid [132]-[143].

⁷⁴ As it happens, a judge of the Federal Court later in the year set out the law on the assessment of damages from a collision case, albeit in another context, and it is worth setting out as Applegarth J was not called on to do so in the *Balnaves Case*. Rares J, in the *STX Case* mentioned under, wrote in para 107 in his judgment: "107. The general rule in assessing damages in tort for loss of use of a vessel due to a collision is to determine what she would have earned had she not been incapacitated in the period for which the claim is made: *Admiralty Commissioners v S.S. Valeria* [1922] 2 AC 242 at 246, 247 per Lord Buckmaster with whom Lords Dunedin and Atkinson concurred."

⁷⁵ *Brisbane Slipways Operations Pty Ltd v Pantaloni* [2010] FCA 654, [53].

⁷⁶ Ibid [3].

⁷⁷ Ibid [2].

2. Whether an amended statement of claim from the plaintiff should be struck out for failing to provide particulars; and
3. Whether Arc en Ciel Voyages, a company associated with Pantaloni, should be joined as a fourth defendant in the proceedings.⁷⁸

4.2.2 Finding as to Whether Pantaloni was Owner or Demise Charterer at the Relevant Times

His Honour considered that Pantaloni's decision-making role in the formation of the contract, his extensive commercial dealings in relation to the ship concerning finance arrangements, and steps taken by him to arrange inspection of the ship all indicated that he was asserting control over the ship.⁷⁹ That assertion of control subsisted from the time of the arrest through to the commencement of the proceedings.⁸⁰ Further, Pantaloni's payment into court to secure the release of the ship was conduct consistent with his earlier control of the vessel.⁸¹ Accordingly, the requirements of control under ss 17(a) and 18(a) were established.

However, His Honour found that Pantaloni was neither the owner nor the charterer of the vessel at any time for the purposes of satisfying ss 17(b) and 18(b).

With regard to ownership under s 17(b), the court found that Pantaloni was not an owner in the sense of enjoying any beneficial interest in the ship capable of perfection by a remedial order and did not enjoy any other proprietary interest in the ship (citing the decision in *Maria Luisa (No 2)* (2003) 130 FCR 12).⁸² This was notwithstanding that Pantaloni was exercising control over the ship and purporting to engage in a range of commercial activities and negotiations relating to the ship.⁸³

Greenwood J also found that Pantaloni could not be considered the demise charterer of the ship for the purposes of s 18(b). Pantaloni had never been the charterer, demise or otherwise, of the vessel.⁸⁴ The appropriate charterer of the vessel was the company Prestige Marine SARL, which had not been nominated as the relevant person.⁸⁵

The court concluded that the plaintiff was not entitled to commence proceedings in rem for a general maritime claim under either s 17 or s 18 of the Act.⁸⁶ His Honour ordered that the proceedings in rem be struck out.⁸⁷

4.2.3 Finding as to Whether the Action Should Subsist In Personam

Greenwood J then found that Pantaloni had not filed a conditional notice of appearance in accordance with the Federal Court Rules. Further, he had engaged in the proceeding *beyond* the question of whether the jurisdiction was properly enlivened, and had contested the elements of the claim itself. Accordingly, his Honour considered that the plaintiff's claim should subsist against the defendant in personam under the jurisdiction conferred on the Court by s 9 of the *Admiralty Act 1988* (Cth).⁸⁸

4.2.4 Finding on the Plaintiff's Motion to Freeze the Security Paid into Court by Pantaloni

The court considered that in order to freeze the security paid into court by Pantaloni, it must be convinced that the applicant had a good arguable case on an accrued cause of action justiciable in the court and that, having regard to all the circumstances, there was a danger that the monies within the jurisdiction would be removed from the jurisdiction leaving a prospective judgment at least partly unsatisfied.⁸⁹

⁷⁸ Ibid [11].

⁷⁹ Ibid [103].

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid [107].

⁸³ Ibid.

⁸⁴ Ibid [114]-[115].

⁸⁵ Ibid [113]-[114].

⁸⁶ Ibid [116].

⁸⁷ Ibid [118].

⁸⁸ Ibid [117]-[118].

⁸⁹ Ibid, [102].

Greenwood J found that the high portability of the funds due to their electronic nature combined with the fact that Pantaloni had no assets within the jurisdiction indicated that there was a real risk that a prospective judgment of the court could go unsatisfied.⁹⁰ Accordingly, his Honour ordered that the security be frozen rather than paid out to Pantaloni.⁹¹

4.2.5 Finding as to the Lack of Particulars in the Plaintiff's Amended Statement of Claim

Greenwood J gave orders for further particulars to be provided by the plaintiff in its new statement of claim to be filed and served under the action in personam.⁹² While this issue will not be examined in further depth due to its only being of a procedural nature, it is important to note that the action was not defeated due to this motion.

4.2.6 Finding as to Whether Arc en Ciel Voyages Should be Joined as a Fourth Defendant

The plaintiff claimed that Pantaloni, as a director of Arc en Ciel Voyages, was acting on behalf of his company in engaging the services of the plaintiff.⁹³ In support of this contention was the fact that Pantaloni had corresponded under the signature block of Arc en Ciel Voyages. The plaintiff submitted that, in the event that Pantaloni was acting on behalf of Arc en Ciel Voyages, it would be appropriate to join the company as a fourth defendant to the proceedings. Pantaloni responded that the contract with the plaintiff was signed on behalf of the time charterer Prestige Marine SARL and not Arc en Ciel Voyages.

Greenwood J ruled that joinder of Arc en Ciel Voyages was not necessary to adjudicate the dispute in question. Despite amending their statement of claim to include Arc en Ciel Voyages as a fourth defendant in the proceedings, the plaintiff did not advance any arguments as to liability of that party. Indeed, there was 'no matter in dispute in the proceeding as to the role or liability of Arc en Ciel Voyages in relation to the conduct of Mr Pantaloni giving rise to the contract and ultimately the claim against him'.⁹⁴

The motion for Arc en Ciel Voyages to be joined was rejected.

4.2.7 Finding as to Whether Pantaloni was Owner or Demise Charterer at the Relevant Times

Greenwood J ordered that the proceedings in rem be struck out, that the action proceed in personam, that the security paid into court by Pantaloni be subject to a freezing order, and that the plaintiff provide more particulars regarding the claim.

4.3 *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887

4.3.1 Facts and Claims

This case concerned an appeal by Cargill International SA ('Cargill') against a decision made by David Jackson QC, as arbitrator to their dispute with Peabody Australia Mining (known as Excel Coal Ltd at the time of the arbitration). The arbitration concerned Excel's claim for monies outstanding from a number of coal deliveries to Cargill. The arbitrator found in favour of Excel's claim for USD299 822.74.

The plaintiff appealed to the NSW Supreme Court, claiming that the arbitrator failed to deal correctly with an argument put to him in relation to its demurrage claim. The first issue that the Court was required to decide was whether the arbitration was governed by the *Commercial Arbitration Act 1984* (NSW) ('the State Act') or the UNCITRAL Model Law in accordance with s 16 of the *International Arbitration Act 1974* (Cth) ('the Commonwealth Act'). This in turn required the Court to decide the following issues:

⁹⁰ Ibid [119]-[121].

⁹¹ Ibid, [125].

⁹² Ibid [160].

⁹³ Ibid [147].

⁹⁴ Ibid [151].

- whether the agreement of the parties to refer any disputes to international arbitration under the rules of the International Chamber of Commerce (the ‘ICC Rules’) constituted an agreement to opt out of the Model Law, such that the State Act would apply; and
- if the above agreement did opt out of the Model Law, whether the dispute was one falling within the Admiralty jurisdiction of the Court, so as to override the effect of s 40 of the State Act, which precludes the grant of leave to appeal where there is an ‘exclusion agreement’.

In the event that the Court found that the State Act applied and the appeal fell within Admiralty jurisdiction (as Cargill claimed), the plaintiff submitted that the decision of the arbitrator should be overturned due to a manifest error of law in accordance with s 38(4)(b) of the State Act.

If the court found that the Commonwealth Act applied, then the plaintiff submitted in the alternative, that the decision of the arbitrator should be overturned on the basis that the decision was in conflict with the public policy of the State under art 34(2)(b)(ii) of the Model Law.

4.3.2 Findings on Whether the Parties Intended to Opt Out of the Model Law

Ward J decided that the agreement between the parties to submit to the ICC Rules did not constitute an implied agreement to opt out of the Model Rules. This involved expressly disapproving of, and declining to follow, the decision in *Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH v Australian Granites Ltd* [2001] 1 Qd R 461, which held that an agreement to submit to the ICC Rules in these circumstances constituted an agreement to opt out of the Model Law.⁹⁵

His Honour considered that, on the facts, the parties cannot be said to have adopted the ICC Rules with the knowledge or intention that that doing so would necessarily be construed as opting out of the Model Law.⁹⁶ Even taking the parties to have known about the *Eisenwerk* decision, the clause in question submitting to the ICC Rules was sufficiently different to the clause in *Eisenwerk* to cast doubt on whether the parties objectively intended to opt out.

Therefore, there was no agreement between the parties to opt out under s 21 of the Commonwealth Act, and accordingly, the Model Law would apply.

4.3.3 Findings on Whether the Arbitrator’s Decision Was in Conflict with the Public Policy of the State

Having found that the Commonwealth Act and the Model Law applied, Ward J considered whether the arbitrator’s failure to deal with the plaintiff’s alternative demurrage argument amounted to a denial of natural justice, such that an appeal should be allowed for being in conflict with the public policy of the state under art 34(2)(b)(ii) of the Model Law.

The plaintiff submitted that the arbitrator failed to deal with their submissions that laytime should continue to run unless and until a notice of intention to claim force majeure is given and that ‘delay’ in the giving of the notice will occur whenever the notice is not given simultaneously with the force majeure event.

Ward J held that, on the facts, it was unclear that this submission was ever put to the arbitrator in the terms so formulated. Given that this was the case, there could be no denial of natural justice for the arbitrator’s failure to deal with the submission.⁹⁷

4.3.4 Findings as to Whether the Action Fell Within the Admiralty Jurisdiction of the Court

As noted above, this submission was contingent on Ward J finding that the State Act applied. Having decided that the Commonwealth Act applied, it was unnecessary for the court to make a finding on this issue. However, Ward J considered that, had he found that the State Act applied, he would have found that the action was one falling within the Court’s Admiralty jurisdiction.

⁹⁵ *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887, [91].

⁹⁶ *Ibid* [110].

⁹⁷ *Ibid* [241].

His Honour held that the claim would be a maritime claim under Admiralty jurisdiction if it could be proved that, applying a liberal approach, the claim was one arising out of an agreement that was essential to the performance of the sea carriage.⁹⁸ His Honour considered that the agreement in question was for the delivery of coal for the purpose of and in preparation for its carriage by sea.⁹⁹ Accordingly, the agreement gave rise to a maritime claim that fell within the Admiralty jurisdiction of the Court.

4.3.5 Findings Regarding a ‘Manifest Error of Law’ in the Event that the State Act Applied

Ward J considered that, even had he found that the State Act applied, there was not a manifest error of law on the part of the arbitrator that would give rise to a right of appeal. His Honour did find, however, that there was strong evidence of an error of law, the resolution of which would be likely to add substantially to the certainty of the law of the sea.¹⁰⁰

The error in question was the arbitrator’s use of the parties’ post-contractual conduct as an aid in construing the definition of ‘working weather days’. Ward J held, however, that it was not an error that would have affected the overall outcome of the dispute, and thus, the requirement that it would substantially affect the rights of the parties was not met.¹⁰¹ His Honour considered that, even had he found that the State Act applied, the plaintiff would not have established a right of appeal.

4.3.6 Orders

Leave to appeal was rejected on the grounds that the plaintiff had failed to establish a denial of natural justice under the Commonwealth Act. Even had the State Act applied, leave to appeal would have been denied for failure to prove an error of law that would substantially affect the rights of the parties.

Ward J also noted that, in any event, he would not have deemed it appropriate in the circumstances to exercise his discretion to allow the appeal. His Honour was of the view that:

the complexity of the construction issues as now put, when coupled with the fact that they do not appear to have been clearly articulated in that fashion before, suggests strongly that this is an attempt to re-litigate the issues which have been dealt with in some detail,

and that there should be finality in that exercise, as provided for under the parties’ arbitration agreement.¹⁰²

4.4 *Stott v Russell and Fellows v Russell* [2010] NTSC 49

4.4.1 Facts and Claims

This case concerned an appeal against fines imposed by a Magistrate for offences under the *Marine Act* (NT) and the *Fisheries Act* (NT). The appellant Stott pleaded guilty to the offence of putting a vessel to sea with a lesser number of certified people than required, failing to maintain control of his assistants during fishing operations and knowingly sending a 6.2m fishing vessel to sea without the required buoyancy. He was fined a total of A\$43 000 for these offences.

The second appellant, Fellows, was convicted of taking a vessel to sea with a lesser number of certified people than required, being master of a vessel put to sea without the required buoyancy and one count of fishing for barramundi fish without being the holder of a licence. Fellows was fined a total of \$30 000.

Both parties appealed and argued that the fines imposed were manifestly excessive having regard to the offences and the offender.

4.4.2 Findings on Whether the Fines were ‘Manifestly Excessive’

⁹⁸ Ibid [124].

⁹⁹ Ibid [125].

¹⁰⁰ Ibid [222].

¹⁰¹ Ibid [223].

¹⁰² Ibid [248].

Blokland J held that the fines, with the exception of the fine imposed for barramundi fishing without a licence, were manifestly excessive and that the appellants should be re-sentenced. His Honour accepted the appellant's submissions that the learned magistrate at first instance overestimated the objective seriousness of each offence.¹⁰³

The Magistrate at first instance deemed that the offences were of a very serious nature because they related to the safety of the vessel, and that failure to comply with them could result in loss of life or costly rescue operations.

Blokland J noted on appeal that while regulating safety was very important, not every breach of safety requirements contained the same risks and dangers. In this case, the number of required personnel was based on the class 3B survey that allowed operation of the vessel to 200 nautical miles. At the time of the offence, the appellants' vessel was operating at 5 nautical miles. Had the vessel been surveyed to operate at 15 nautical miles, the crew it was carrying at the time would have fulfilled all regulatory requirements.¹⁰⁴

In coming to a decision, his Honour also noted that there was never any allegation that any person's life was put at stake as a result of the appellants' breaches, that there was some compliance with safety requirements, and that the catch was within the limits of the licence so that there was no detriment to the resource.¹⁰⁵

4.4.3 Orders

Blokland J ordered that all sentences except for the sentence relating to fishing for barramundi without a licence be quashed. His Honour held that he would re-sentence the appellants once information concerning their capacity to pay was before the court.

4.5 *Strong Wise Ltd v Esso Australia Resources Pty Ltd (No 2)* (2010) 185 FCR 237

4.5.1 Facts and Claims

This case concerns the appropriate order of Rares J arising from his decision between the same parties in *Strong Wise Ltd v Esso Australia Resources Pty Ltd*.¹⁰⁶ The facts and findings of the original decision have been discussed above (see [3.4]). The applicant and respondents contended that very different orders should have resulted from Rares J's conclusion that two 'distinct occasions' occurred when the *APL Sydney* damaged the pipeline.

The applicant claimed that Rares J should order it to create a liability fund in respect of the first occasion, and make a declaration that it was entitled to establish a liability fund in respect of the second occasion. The respondents claimed that the proceedings should be dismissed with costs because the shipowner had pleaded that only one distinct occasion arose, and that the Court's finding of two distinct occasions defeated their substantive claim. They contended that the Court had no jurisdiction to give the shipowner different relief to what they had originally pleaded.

4.5.2 Findings on the Proper Order to be Made

Rares J rejected the respondent's argument that the court lacked jurisdiction to grant relief consistent with his Honour's findings that two 'distinct occasions' occurred. His Honour considered that the issue of whether there was more than one 'distinct occasion' was always part of the controversy between the parties brought before the Court. Indeed, if the respondent's submissions were correct, it would be impossible for a shipowner to limit liability under the Convention,¹⁰⁷ in circumstances where, in the course of the proceedings, it was established that more than 'distinct occasion' had arisen.¹⁰⁸

His Honour believed that this position achieved no discernable purpose, and would only act to frustrate the right of a shipowner to limit liability under the Convention. His Honour held that the fact that the shipowner did not plead an alternative case to meet the Court's finding of two 'distinct occasions' should not defeat its substantive

¹⁰³ *Stott v Russell and Fellows v Russell* [2010] NTSC 49, [41].

¹⁰⁴ *Ibid* [34].

¹⁰⁵ *Ibid* [41], [43].

¹⁰⁶ *Strong Wise Ltd v Esso Australia Resources Pty Ltd* (2010) 185 FCR 149.

¹⁰⁷ *Convention on Limitation of Liability for Maritime Claims 1976* in the *Limitation of Liability for Maritime Claims Act 1989* (Cth).

¹⁰⁸ *Strong Wise Ltd v Esso Australia Resources Pty Ltd (No 2)* [2010] FCA 575, [23].

right to limit its liability under the Convention. The applicant's imprecision in identifying a claim or occasion should not result in that party being deprived of its right to limit liability.¹⁰⁹

This finding was strengthened by the fact that no new issue would be raised between the parties by allowing the applicant to rely on the finding of two 'distinct occasions'. Further, Rares J was unconvinced that the respondents would have conducted their case in any other way had the applicant pleaded an alternative claim seeking the orders under question. His Honour considered that the respondents had sought to establish several 'distinct occasions' and would have done so regardless of whether the applicant pleaded the alternative claim.¹¹⁰

Finally, his Honour considered that ordering the applicant to establish a fund in relation to the first 'distinct occasion' and giving a declaration in relation to the second served the purpose of avoiding multiplicity of proceedings.¹¹¹ Even were he to order that the proceedings be dismissed, nothing would stop the applicant from legitimately pursuing the same orders in other proceedings.¹¹²

4.5.3 Orders

Rares J ordered that the plaintiff establish two funds, one for each separate occasion, with the amount for each being the limitation of the plaintiff's liability.

4.6 *STX Pan Ocean Co Ltd v Bowen Basin Coal Group Pty Ltd, David John Thomson & An (No 2)* [2010] FCA 1240 (12 November 2010)

4.6.1 Facts and Claims

STX Pan Ocean Co Ltd ('STX') entered into a charter party on 12 March 2010 with Bowen Basin Coal Group Pty Ltd ('Bowen') for Bowen to carry two cargoes of coal, each of approximately 42 000 tonnes, from Kwinana, Western Australia to ports in the People's Republic of China. David John Thomson ('Thomson') was the sole director of Bowen and made all of its arrangements and representations. STX is a large well known shipowner and charterer with its head office in South Korea.¹¹³ Bowen was represented as being of substantial worth but, as it later transpired, had few if any assets. Bowen had, in February 2010, bought the coal from The Griffin Coal Mining Co Pty Ltd (Administrators Appointed) ('Griffin Coal') but it did not then have a buyer for it.

STX did not have its own ships available so it entered into two time charters (NYPE) for *Yong An 2* and *Izola*. However, the price of coal had dropped and Bowen could not get its price and had sold the coal with a loss of some USD1.3 million.¹¹⁴

The *Yong An 2* arrived at Kwinana and gave notice of readiness to load on 3 April but loading only started on 14 April as Bowen could not deliver as it had not paid Griffin Coal. However, the *Yong An 2* finally loaded and later sailed and on 16 April the *Izola* arrived and gave notice of readiness to load but demurrage charges started to run three days later as Bowen could not deliver the second cargo. After about a month, on 17 May, STX accepted the breach of the contract by Bowen and then repudiated the contract and terminated the charter party;¹¹⁵ and it presented a substantial bill to Bowen for the charter parties and the demurrage claims.

In the end STX brought proceedings in the Federal Court in which it sought judgment against Bowen and also against Thomson for both express and implied representations that Bowen was ready, willing and able to perform which representations were in breach of s 52 of the *Trade Practices Act 1974* (Cth) (*TPA*).¹¹⁶ STX also claimed that there were fraudulent representations in post contractual negotiations in that Thomson represented that Bowen could meet its obligations and this was done in order to induce STX not to end the charter party earlier.¹¹⁷

¹⁰⁹ Ibid [42].

¹¹⁰ Ibid [51].

¹¹¹ Ibid [53].

¹¹² Ibid [56].

¹¹³ *STX Pan Ocean Co Ltd v Bowen Basin Coal Group Pty Ltd* [2010] FCA 1002, [1]-[11].

¹¹⁴ Ibid [24].

¹¹⁵ Ibid [3].

¹¹⁶ Section 52 prescribes false or misleading representations. Section 51A provides that representations with respect to future matters should be taken to be misleading unless there was a reasonable basis for making them.

¹¹⁷ *STX Pan Ocean Co Ltd v Bowen Basin Coal Group Pty Ltd* [2010] FCA 1002, 3.

4.6.2 The Findings at Trial

On 21 May Justice Rares made a freezing order (Mareva injunction) against Bowen and Thomson's assets and on the required affidavits being filed it was revealed that neither of them had much in the way of assets and both had substantial liabilities so that, in fact, Bowen was 'hopelessly insolvent'.¹¹⁸

On the first day of the trial Rares J entered judgment for STX for almost USD2.5 million and the trial proceeded as Thomson defended against the allegations that he should be liable for the loss as Bowen was unable to pay. Justice Rares carefully and fully set out the facts and the law in his judgment. Thomson did not give evidence and one of the findings was in fraudulently handing over a letter of indemnity in which a person's signature was falsely entered on it.¹¹⁹

His Honour found that Thomson was the controlling mind of Bowen and that, under the provisions of the TPA, he had aided, abetted, counselled or procured the contravention of the Act.¹²⁰ He then found that there was no proof of a number of allegations against Thomson's representations having been relied on and induced STX's conduct because STX was a well informed and experienced commercial company that had its own sources of information. However, Rares J did find Thomson liable on the count that had STX known how hopelessly insolvent Bowen was earlier it would have terminated the charter party back on 6 May and the reason was that Thomson personally made, or caused others to make, false post-contractual representations for which STX is entitled to recover for the money expended on the *Yong An 2* and the *Izola*.¹²¹ His Honour concluded by giving judgment for STX for the period 6 - 17 May 2010 and required the parties to make the calculations and return on a later date.

One of the interesting aspects of the trial was that STX had advanced its evidence on the basis that damages for the demurrage on the charter party should be calculated in tort law or alternatively as provided in s 82 of the TPA. This was a complex trial and one of the objects sought by STX was that Thomson should pay as Bowen could not. Rares J set out the law on the matter as follows:

STX argued in the alternative, that the measure of its damages in its claims against Mr Thomson under s 82 of the Act and in tort was the loss it made consisting of the right to be paid by Bowen Basin under the charterparty. That is, STX argued that Mr Thomson's misrepresentations were a cause of its loss of unpaid freight and demurrage payable in accordance with the charterparty in the total sum for which judgment was entered against Bowen Basin.

I reject this argument. The measure of damages in contract is conceptually different to that in tort, and, generally, for claims under s 82 of the Act: *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 11-13 per Mason, Wilson and Dawson JJ. In contract, damages are awarded with the object of putting the plaintiff in the position he would have enjoyed had the contract been performed: namely, damages for loss of the bargain, or expectation loss, as well as for damage suffered, including expenditure incurred, in reliance on the contract, or reliance loss. In tort, the measure is only similar to reliance loss, namely damages are awarded with the object of putting the plaintiff in the position he would have been in had the tort not been committed: *Gates* 160 CLR at 12. In assessing damages in tort, it is necessary to determine what the plaintiff would have done had he not relied on the representation: *Gates* 160 CLR at 13.¹²²

4.6.3 Orders

On 26 November 2010 the parties returned and, after hearing further argument on damages and costs, Rares J gave judgment.¹²³ He calculated damages for the *Yong An 2* of USD268 166 and for the *Izola* of USD217 885 plus bunkers consumed for the two vessels of USD20 000.¹²⁴ In relation to costs, as STX had succeeded but not on all counts, he awarded it 80% of its costs to be taxed.¹²⁵

4.6.4 Appeal

It is appropriate to note that in December 2010 Thomson filed an appeal on numerous grounds and sought the primary judge's orders be set aside and that he be awarded costs of trial and appeal. On receipt of this notice

¹¹⁸ Ibid [43].

¹¹⁹ Ibid [27].

¹²⁰ Trade Practices Act 1974 (Cth) s 75B.

¹²¹ *STX Pan Ocean Co Ltd v Bowen Basin Coal Group Pty Ltd* [2010] FCA 1002, 99.

¹²² *STX Pan Ocean Co Ltd v Bowen Basin Coal Group Pty Ltd* [2010] FCA 1002, [100]-[101].

¹²³ *STX Pan Ocean Co Ltd v Bowen Basin Coal Group Pty Ltd & Ors (No 3)* [2010] FCA 1374.

¹²⁴ Ibid [3],[8].

¹²⁵ Ibid [16].

STX cross appealed and sought that the full sum of the amount entered against Bowen be awarded in its favour against Thomson, together with its costs. On 23 March 2011 STX sought security for costs and Justice Jagot considered the matter and set out the law and the facts as to security.¹²⁶ The evidence was that Thomson was deeply indebted, including to his own solicitors and barristers, and so was not likely to be able to pay the costs if he lost the appeal, let alone the damages awarded against him at the trial. Jagot J held that the matter lay in his discretion, which should be exercised according to law and he needed to take into account the factors set out by the cases and the facts of this matter. He held that Thomson should provide security for STX's costs on appeal estimated at USD97 245 but this should be discounted by the time likely to be taken on the cross appeal and he ordered Thomson to lodge security of USD58,347 in default of payment of which the appeal be stayed.

4.7 Gem of Safaga [2010] FCAFC 14

4.7.1 Facts and Claims

This case concerns an appeal from a decision summarised in the 'Australian Maritime Law Update: 2009'.¹²⁷ It concerns the arrest of the ship *Gem of Safaga* as surrogate for the ships *JBU Onyx* and *JBU Opal* under s 19 of the *Admiralty Act 1988* (Cth) ('the Act'). The relevant person named in the writ was West Asia Maritime Ltd ('West Asia') which was alleged to be in control of the *JBU Onyx* and *JBU Opal* at the time the action arose, and was the owner of the *Gem of Safaga* at the time of its arrest.¹²⁸ West Asia sought an order that the arrest be set aside for failure to prove control or ownership of the relevant vessels.

West Asia submitted that it was not the owner of the *Gem of Safaga* because it only owned 9 out of 10 shares in the vessel. The remaining share was held by Four M Maritime Private Ltd ('Four M'), which was a company controlled by, or associated with, the managing director of West Asia. They submitted that since the ship was not fully owned by West Asia, it could not be arrested as a surrogate. The primary judge found against West Asia, holding that the one share held by Four M was actually held on a resulting trust for West Asia as beneficiary. Accordingly, West Asia was the full beneficial owner of the ship, validating its arrest.¹²⁹

West Asia appealed to the full Federal Court. The respondent contended that in the event that West Asia was not the sole legal and beneficial owner:

- the arrest should still be valid against West-Asia as part-owner;
- that West Asia effectively gained all rights of ownership over the vessel under its co-ownership agreement with Four M, and should therefore be considered to be the owner; or
- that West Asia was recognised as owner under Indian law, and should therefore be held to be the owner under Australian law.

4.7.2 Finding on Whether West Asia was the Sole Legal and Beneficial Owner

The Court found that the primary judge erred in concluding that Four M was not the holder of the legal and beneficial interest of one share in the *Gem of Safaga*.¹³⁰ Besanko J¹³¹ considered that the issue turned on construction of the addendum to the memorandum of sale, which named West Asia and Four M as buyers.¹³² The fact that West Asia remained responsible for fulfilling the buyers' obligations did not detract from the fact that Four M was named as a buyer, and provided consideration under the contract.¹³³

Besanko J also decided the matter based on trust law and found that the primary judge erred in his reliance on several factors that led to his findings of a resulting trust. First, the primary judge considered that there was no reason for West Asia to share ownership with Four M, which indicated a resulting trust. Secondly, the primary judge considered that there was no evidence to suggest that Four M was able to finance its share of the

¹²⁶ *Thomson v STX Pan Ocean Co Ltd* [2011] FCA 254.

¹²⁷ Alex Molloy and Michael White, 'Australian Maritime Law Update: 2009' (2010) 41(3) *Journal of Maritime Law & Commerce* 283, 305.

¹²⁸ *Gem of Safaga* [2010] FCAFC 14, 3.

¹²⁹ *Ibid* [7].

¹³⁰ *Ibid* [10].

¹³¹ Ryan and Jagot JJ concurring.

¹³² *Gem of Safaga* [2010] FCAFC 14, [50].

¹³³ *Ibid* [50]-[51].

acquisition of holding of the ship. Besanko J held that these considerations were immaterial in circumstances where the sale documents themselves named Four M as part owner.¹³⁴

The primary judge also found that the non-payment of income to Four M for its share in the vessel indicated that it was holding its share on trust for West Asia. He held that the non-payment of income, which might have been relevant if it was suggested that the agreements were a sham, was not relevant to the issue of whether Four M held the legal and beneficial interest in the single share of the ship in circumstances where the loan and sale documents named Four M as owner.¹³⁵

The Full Court held that none of the factors relied on by the primary judge could have the effect of displacing the loan and sale documents, which established Four M as owner of a share in the *Gem of Safaga*. Their Honours concluded that Four M held the legal and beneficial interest of their share, and, accordingly, that West Asia was not the sole owner of the *Gem of Safaga*.¹³⁶

4.7.2 Finding on Whether the Arrest was Valid Against West Asia as Part-Owner

The Appeal Court found that part-ownership of a surrogate by a relevant person does not support a right of arrest under s 19 of the Act. The Court also rejected that s 19 can be engaged when the relevant person is the major owner of the surrogate ship; a test which their Honours considered was too imprecise for Parliament to have intended.¹³⁷

Besanko J considered that it was not unusual under a co-ownership agreement for there to be an agent for use and disposition of the ship, and that Four M had not relinquished its ownership rights by entering into such an agreement. The court rejected the respondent's contention that West Asia became a s 19 'owner' under the co-ownership agreement.¹³⁸

The Court considered that the evidence before the primary judge indicated that Indian maritime law also required, for the purposes of arrest, that the relevant person have a right to dispose of the entirety of the ship.¹³⁹ Since this was not the case with West Asia, the application of Indian law would not assist the plaintiff.¹⁴⁰

4.7.2 Orders

The Full Court allowed the appeal, and ordered that the ship be released from arrest, having concluded that West Asia was not sole owner and so the arrest was invalid.

4.8 *Tran v The Commonwealth* (2010) 187 FCR 54

4.8.1 Facts and Claims

The applicant, Tran, was the owner and Master of a wooden vessel that was used to transport 53 people into Australian territorial waters without visas. The ship was taken into the custody of the Commonwealth, and the Chief Executive Officer of Customs ('CEO') signed a declaration stating that he believed the value of the ship to be less than the cost of maintenance, and directed the ship to be destroyed under s 185B(4)¹⁴¹ of the *Customs Act 1901* (Cth). However, at the time of signing, the CEO knew the ship was being used by the Australian Federal Police as part of their investigations, and the CEO did not have any belief as to the value of the ship.

Tran was indicted on criminal charges under the *Migration Act 1958* (Cth) ('the Act'), but was subsequently acquitted of all charges having successfully proved the defence of 'sudden or extraordinary emergency' under the *Criminal Code Act 1995* (Cth). Tran brought a claim against the Commonwealth in the Federal Court alleging unlawful destruction of his ship. The primary judge found against him, holding that he had contravened

¹³⁴ Ibid [58]-[61].

¹³⁵ Ibid [70].

¹³⁶ Ibid [72].

¹³⁷ Ibid [87].

¹³⁸ Ibid [90].

¹³⁹ Ibid [101].

¹⁴⁰ Ibid.

¹⁴¹ Section 185B(4) of the *Customs Act 1901* (Cth) provides: "(4) The CEO may direct an officer to destroy, or move and destroy, the ship, or cause such thing to be done, if the CEO has reasonable grounds to believe that the ship is in such poor condition that its custody or maintenance by the Commonwealth would involve an expense that would be likely to be greater than its value."

s 42(1) of the *Act*, and that accordingly, the automatic forfeiture provisions under s 261A(1) of the *Act* operated and the destruction of the forfeited vessel was valid.¹⁴²

Tran appealed to the Full Court.¹⁴³

4.8.2 Findings by the Appellate Court on Whether the Ship was Forfeited Under the Act

The Commonwealth argued that the ship was automatically forfeited because it had been used or involved in a contravention of s 42(1) of the *Act* in bringing to Australia 53 persons who became unlawful non-citizens when the ship entered Australia.¹⁴⁴

The Court agreed that automatic forfeiture would apply where a vessel was used in ‘contravention’ of the *Act*. However, their Honours held that the primary judge erred in his interpretation of the term ‘contravention’. The Full Court held that the term ‘contravention’ would only include criminal offences against the *Act* and not the s 42 civil contravention which the primary judge considered to engage the automatic forfeiture of the applicant’s vessel.¹⁴⁵ Rares J pointed out a number of anomalies including the ‘unfairness and capriciousness’ of the construction of the *Act* if the primary judge’s findings were allowed to stand. One example which was given was that any Master who saved somebody at sea, as Masters are required to do under the law, would find the ship automatically forfeit to the Commonwealth upon bringing the saved person into Australian waters without a visa.¹⁴⁶

The Full Court unanimously agreed that the ship was not forfeited to the Commonwealth under s 261A(1) of the *Act*.

4.8.3 Finding on Whether Destruction Could be Justified under s 185B(4) of the Act

The Full Court was split only on what resulted from the unanimous decision that it was not lawful for the respondent to destroy the vessel. Landers and Besanko JJ found that, since the primary judge did not address this issue, it was appropriate to remit the matter back to the primary judge who had the benefit of hearing the evidence, especially since this would allow both parties recourse to appeal the decision back to the Full Court.¹⁴⁷

Rares J held that there were no reasonable grounds for the CEO to form that belief on the evidence presented at trial, and that the CEO did not form that belief on the facts anyway.¹⁴⁸ Accordingly, the destruction of the vessel could not be validated under s 185B(4) and there was no need to remit the matter back. However, since two of the three judges decided that the matter should be remitted for further consideration, the final orders directed the primary judge to make a finding on this issue.

4.8.4 Findings on Whether the Appellant was Entitled to Damages

Given that the majority of the Court declined to address the respondent’s justification under s 185B(4), this issue was not resolved by the Court, and was remitted for consideration by the primary judge.¹⁴⁹ Rares J, having decided that the forfeiture was not valid, found that the Commonwealth had committed the tort of conversion, and would have remitted the matter only for determination of damages.¹⁵⁰

4.8.5 Findings on Whether Forfeiture Would Give Rise to a Right of Compensation

The judges dealt with the matter of compensation for destruction of the vessel. Underlying this aspect is that the Australian *Constitution* has provision for paying some restitution for destruction of the vessel in certain

¹⁴² The *Migration Act 1958* (Cth), s 261A provides: “(1) The following things are forfeited to the Commonwealth: (a) a vessel used or involved in a contravention of this Act (where the contravention occurred in Australia), if the contravention involved: (i) the bringing or coming to Australia of one or more persons who were, or upon entry into Australia became, unlawful non-citizens; or (ii) the entry or proposed entry into Australia of one or more such persons; ...”.

¹⁴³ *Tran v The Commonwealth* (2010) 187 FCR 54.

¹⁴⁴ *Ibid* [47] per Rares J.

¹⁴⁵ *Ibid* [12] per Lander J, 90 per Rares J, 206-208 per Besanko J.

¹⁴⁶ *Ibid* [107] per Rares J.

¹⁴⁷ *Ibid* [21] per Lander J, 237 per Besanko J.

¹⁴⁸ *Ibid* [123] per Rares J.

¹⁴⁹ *Ibid* [283] per Besanko J.

¹⁵⁰ *Ibid* [126]-[128] per Rares J.

circumstances.¹⁵¹ The background was that on Federation in 1901 the Commonwealth did not own anything and obviously would need to acquire land etc but the *Constitution* ensured that it was done on just terms. High Court cases have made it clear that the Commonwealth must ‘acquire’ something for this to occur. The shortcoming is that this requirement only relates to the commercial value of the vessel and, perhaps, the catch. In an action in conversion or similar the value to the Indonesian owner, the loss of time and other aspects that an action for damages, based on the tort of conversation or unlawful detention would be awarded.

There is provision for compensation for property in the *Migration Act*.¹⁵² Besanko and Landers JJ found that the destruction of the applicant’s ship did not amount to an acquisition of property as required by the wording of this section of the *Constitution*, and hence no right to compensation arose. Besanko J was convinced that while the destruction of the vessel deprived the applicant of his property in the ship, neither the respondent nor any third party became owner of the ship.¹⁵³ Landers J agreed with this reasoning.¹⁵⁴

Rares J declined to address this issue having found that there was no valid forfeiture on the facts and hence the issue of acquisition of property could not arise.

4.8.5 Orders

The Full Court allowed the appeal and directed the primary judge to consider whether s 185B(4) would apply to justify destruction of the applicant’s vessel, and if not, whether the applicant would be entitled to damages.

There is, of course, a considerable background to this decision of the Full Federal Court in *Tran v Cth*. The Australian coast has been subjected to large numbers of fishing vessels coming into the EEZ unlawfully over the past decade with many of them being small wooden fishing vessels coming from Indonesia. These same sorts of vessels are also used to smuggle unlawful immigrants into the country. The vessels are not valuable in commercial terms, but in some cases they are all that the Indonesian fisherman owns and is the means of livelihood for the family back in the village in Indonesia. When detained on the allegation of being unlawfully in Australian waters, the issue for the Australian personnel is that of getting the vessels and occupants to a suitable Australian port and then caring for them until the conclusion of court proceedings. This has become a source of major expense and frustration. Further, most of these vessels do not meet Australian seaworthy standards and some of them fail the quarantine requirements. The solution arrived at was to amend the legislation to give the power to destroy the vessels, but the weakness and injustice of this lay in the fact that this could be done on the mere allegation of unlawfulness rather than on conviction of an offence and as part of the penalty.

In Mr Tran’s case he was subsequently acquitted of the alleged offences of people smuggling. This is a test case and it showed that the government officials had no right to detain him, his crew, his boat and certainly no right to destroy it because he was acquitted of the charges brought against him. In fact the authorities over the years have become so frustrated and, on this occasion, careless of others rights, that they were shown to have quite failed to come near to complying with the law. After the matter was challenged and it came into the hands of the Commonwealth lawyers, they argued that laws other than those relied on by the officials at the time justified the destruction. The lengthy, careful and scholarly judgments by Rares and Besanko JJ make this clear in considerable detail. Lander J, who agreed with them, summarised the situation as follows:

As the reasons of the members of the Court show, the persons who were responsible for the destruction of the appellant’s vessel did not purport to rely in any way on any of the provisions of the *Migration Act*. The respondent never utilised the statutory regime upon which it now relies before it destroyed the vessel. In particular, it did not give the mandatory notice of seizure under s 261D to the appellant. The respondent claimed at the time to be entitled to destroy the vessel under s 185B(4) of the *Customs Act*. The respondent’s claim that the *Migration Act* authorised

¹⁵¹ Constitution of the Commonwealth of Australia s51(xxi) provides: “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:- ...(xxi) the acquisition of property on just terms ...for any purpose in respect of which the Parliament has power to make such laws”.

¹⁵² Migration Act 1958 (Cth) s 3B provides: “Compensation for acquisition of property (1) If: (a) this Act would result in an acquisition of property; and (b) any provision of this Act would not be valid, apart from this section, because a particular person has not been compensated; the Commonwealth must pay that person: (c) a reasonable amount of compensation agreed on between the person and the Commonwealth; or (d) failing agreement—a reasonable amount of compensation determined by a court of competent jurisdiction. (2) Any damages or compensation recovered, or other remedy given, in a proceeding begun otherwise than under this section must be taken into account in assessing compensation payable in a proceeding begun under this section and arising out of the same event or transaction. (3) In this section ‘acquisition of property’ has the same meaning as in paragraph 51(xxxi) of the Constitution.”.

¹⁵³ *Tran v The Commonwealth* 187 FCR 54, 230.

¹⁵⁴ *Ibid* [18] per Landers J.

the destruction was made after the event and because the respondent thought that it was better able to defend itself by relying on the provisions of the *Migration Act* rather than the *Customs Act*.¹⁵⁵

5 Legislative Developments

During 2010 there were, as usual, a number of relevant acts passed into law by the Commonwealth Parliament and their main aspects are mentioned under.

5.1 Protection of the Sea Legislation Amendment Act 2010

The Federal Parliament passed the *Protection of the Sea Legislation Amendment Act 2010* (Cth) which amends the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) ('the PPS Act') and the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) ('the Bunker Act') in a number of ways.

Perhaps the most significant change is the introduction of 'responder immunity' into the *Bunker Act*. This amendment will protect from civil suit anybody who does, or omits to do, reasonably and in good faith, anything to minimise pollution damage occurring in Australia or in the Australian exclusive economic zone.¹⁵⁶ This immunity will not extend to the shipowner or shipowners responsible for the spill. This amendment has been included to address concerns that individuals and organisations may inadvertently become liable to pay compensation if their attempts to help reduce damage inadvertently lead to further damage.¹⁵⁷

The amendments to the PPS Act are of a more minor nature, and are designed to incorporate the revised version of Annex VI to the *International Convention for the Prevention of Pollution from Ships* ('MARPOL') into Australian law. Annex VI concerns the reduction of air pollution by ships, and the revised annex provides for a stepped reduction in the sulphur level in fuel oil used in ships, with the aim of reducing emissions of sulphur oxides.

5.2 Fisheries Legislation Amendments

In 2010 two acts were passed amending Australian fisheries legislation. They were the *Fisheries Legislation Amendment Act 2010* (Cth) and the *Fisheries Legislation Amendment Act (No. 2) 2010* (Cth).

The first amending act has made three broad changes. First, it amends the *Fisheries Management Act 1991* (Cth) to provide for the implementation of a computer program that will automatically generate decisions regarding the management of fishing concession, including applications for concessions. Secondly, it will allow the Australian Fishing Management Authority ('AFMA') to provide officers involved in front line inspection and patrol activities with defensive equipment including bulletproof vests, handcuffs and batons. Finally, it has streamlined the regulation of fish receiver licences under the *Torres Strait Fisheries Act 1984* (Cth) following feedback that the existing system was cumbersome.

The second amending act is largely concerned with regulatory simplification of the *Fisheries Management Act 1991*, the *Fisheries Administration Act 1991* (Cth) and the *Fishing Levy Act 1991* (Cth). Two particular changes are noteworthy: First, the act has enabled AFMA to delegate certain powers and functions under the FM Act to 'primary stakeholders', including holders of fishing concessions. Secondly, the act enables AFMA to provide services to Commonwealth, State, and territory agencies, and to charge for providing these services.

5.3 Commercial Arbitration Amendments

The *International Arbitration Amendment Act 2010* (Cth) has introduced some fifteen amendments to the *International Arbitration Act 1974* (Cth) ('the Act'). The amendments are generally designed to clarify the circumstances in which the United Nations Commission on International Trade Law ('UNCITRAL') Model Law will apply and to provide assistance in interpretation of the Act.

¹⁵⁵ Ibid [4] per Lander J.

¹⁵⁶ *Protection of the Sea Legislation Amendment Act 2010* (Cth) sch 2.

¹⁵⁷ *Explanatory Memorandum to the Protection of the Sea Amendment Bill 2010* (Cth).

5.4 Other Amendments

Several other acts were passed to make minor changes to Australian maritime law. The *Environment Protection and Biodiversity Conservation Amendment (Recreational Fishing for Mako and Porbeagle Sharks) Act 2010* (Cth) has introduced new protections for the Mako and Porbeagle sharks. Further, the *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Act 2010* (Cth) was passed, incorporating a number of changes to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), and augmenting the functions of the National Offshore Petroleum Safety Authority. Numerous legislative changes have been made and are in the process before the Parliament arising from the Montara Offshore Oil spill and these will be addressed in more detail in the 2011 Update.

6 Other Issues

6.1 Major Reforms of Australian Shipping and Ports Industries

For many years a series of reports were submitted to the Australian government that the Australian shipping industry and its ports needed legislative, infrastructure and administrative reform, but they went unheeded. In 2009 the government, under Prime Minister Julia Gillard and the Hon Anthony Albanese, the Minister for Infrastructure, Transport, Regional Development and Local Government, started to move on the election promises to look into the matter and start improvements and reforms. During 2010 some good progress was made in the right direction.

In June 2010 the Department released the Discussion Paper on the Reform of the *Navigation Act 1912* ('*Navigation Act*'), which is the main shipping regulatory act and the Australian successor to the old *British Merchant Shipping Acts*, especially the 1894 version which particularly then applied to the British Colonies. The main focus of this reform is to lay the legislative ground work for the Australian Maritime Safety Authority to be the single national regulatory authority to have control over all of Australian commercial shipping. This reform in its present model requires agreement to be obtained from all of the States and the Northern Territory on all of the main points. About 110 years of federal experience shows that this is unlikely to be achieved.

The other reform issue in the *Navigation Act* relates to coastal shipping or 'cabotage' as is the general name for the carriage of coastal cargoes by foreign ships. Over the past decade the small number of ships that were on the Australian register has further declined as the taxation regime in Australia has been punitive of owning Australian ships when compared with those of other nations. Rather than fix the tax gathering regime and lose some primary revenue, earlier governments frequently used, or some would say abused, the permit system in the Act to allow foreign-registered ships to carry cargoes around the Australian coasts.¹⁵⁸ The permit system was designed so that, provided there was no Australian ship sensibly available, then a foreign ship could carry the cargo from one port to another on the Australian coast. The frequency of the use of the permit system lay in the discretion of the minister and its frequent use at the expense of Australian-registered ships further reduced the financial incentive to register ships in Australia rather than in another country. A slow and steady debate has since resulted and a final government policy is impending.

The next step was a Discussion Paper for Stakeholder consultation of 'Reforming Australia's Shipping' which follows to a large extent on from the *Navigation Act* Discussion Paper. The three main areas for discussion brought forward by this paper were:

1. The arrangements to replace Part VI of the *Navigation Act*;
2. The changes to the tax provisions; and
3. Development of the maritime workforce.¹⁵⁹

The third point is important as the decline in Australian shipping has also seen a proportional decline in Australians with shipping skills. It has become so serious that port authorities are having difficulty in finding

¹⁵⁸ *Navigation Act 1912* (Cth): 1012, Part VI. s 286 is the core of it, as follows: "286 Permits to unlicensed ships. (1) Where it can be shown to the satisfaction of the Minister, in regard to the coasting trade with any port or between any ports in the Commonwealth or in the Territories: (a) that no licensed ship is available for the service; or (b) that the service as carried out by a licensed ship or ships is inadequate to the needs of such port or ports; and the Minister is satisfied that it is desirable in the public interest that unlicensed ships be allowed to engage in that trade, the Minister may grant permits to unlicensed ships to do so, either unconditionally or subject to such conditions as he or she thinks fit to impose."

¹⁵⁹ Australian Department of Infrastructure, *Reforming Australia's Shipping*, Discussion Paper (2011) 3.

skilled seafarers to fill the important positions of reef and port pilots, harbour masters, administrators and other skilled maritime positions.

Apart from the matters already mentioned, several proposals for reform encompass port efficiency and infrastructure reform, a tonnage tax in which ship owners can opt for the current tax regime with accelerated depreciation or a one-off annual tax on the tonnage of the ship, tax remission for Australian seafarers who work overseas, and an international register (a Second Register).¹⁶⁰ These proposals have received wide acclaim for their aims and a vigorous debate is occurring about how the details should fall out. Teresa Hatch, executive director of the Australian Shipowners Association, has a good point in suggesting that much benefit would flow from extending reforms to the ships servicing the offshore oil and gas platforms and industry and to the vessels in the growing Australian coastal cruise liner industry.¹⁶¹

7 Conclusion

It may be observed from the above that during 2010 there were numerous issues that arose in the Australian jurisdiction. Issues have included whaling, boat people, marine pollution from ships and an offshore platform and several important maritime cases; some of which will be influential in other national jurisdictions. There is also, after many years of neglect, quite considerable reform of shipping and ports being undertaken by the Federal Government. All-in-all 2010 was an active year for maritime matters in Australia.

¹⁶⁰ See Natalie Gerritsen, 'Special Report', *The Australian Financial Review* (Sydney), 5 May 2011.

¹⁶¹ *Ibid.*