

Liabilities of Classification Societies

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'*My Lords, for more than 150 years classification societies have classified merchant ships in the interests of safeguarding life and ships at sea. For this purpose classification societies attend to the building of ships in order to determine whether the ships merit classification in accordance with their standards. Classification societies also conduct periodic surveys of ships to ascertain whether the ships are entitled to retain classification. Moreover, if ships sustain damage, classification societies are called in to survey the damage and to determine what repairs must be done, and when, for the ship to retain her classification.*'

Lord Steyn – '*The Nicholas H*', July 1995

1. Introduction

I do not propose to trace the history and development of classification societies as this has been done in various articles[1] and also in various judgments dealing with various issues, including liability, of classification societies.

I will however note that from the origins of classification in London in 1760; the publication of the first shipping 'Register' detailing vessel ownership, characteristics and condition in 1764; and the founding in 1829 of the first classification society as we know them to the present, the nature, role, functions and responsibilities of classification societies have changed considerably.

Classification societies originally held out to exist in the main for insurers in terms of risk assessment but also for use of all maritime professionals including ship owners, charterers and mariners. Their role changed significantly during the latter part of the 19th century when classification societies were retained more and more by ship owners to issue ratings on vessels for significant periods.

Today the role of classification societies is broad and save for the manning and actual operation of vessels, covers the various functions outlined by Lord Steyn in the extract from his judgment in *The Nicholas H*[2] appearing at the beginning of this paper, for various interests including ship owners, P & I Clubs, marine insurers, charterers and financial institutions. Various other parties including mariners and government administrators often also rely on the expertise of these societies.

Sean Durr in a useful paper titled 'An Analysis of the Potential Liability of Classification Societies'[3] highlights, in his introduction, the confusion that currently exists in relation to the actual role performed by classification societies. Clearly the actual role and degree of assumption of responsibility by classification societies is fundamental to a proper review of their legal exposure and possible liability.

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[1] An Analysis of the Political Liability of Classification Societies – S.M Durr

[2] Marc Rich & Co A.G & Others v Bishop Rock Marine Co Ltd & Others [1995] 2 Lloyd's Rep 299 (HL)

[3] supra – 1

I will attempt in this paper to briefly set out the areas in law where classification societies may have an exposure if they fail to carry out their work with sufficient expertise and care, together with various possible international law and procedural law issues that might have a bearing on the issue.

Although I do consider a number of relevant court decisions in various jurisdictions in different countries, I have neither the qualifications nor expertise to analyse them in any depth in the context of the laws in jurisdictions other than Australia. Further, in view of the often substantially different laws and legal systems in different countries, I have essentially limited the focus of this review to developments on the issue in the United Kingdom, the United States and Australasia.
It will be noted that, apart from a recent shift in approach by the Australian courts on the issue of how it is determined when a duty of care in tort is owed; the further assumption of responsibility by classification societies in relation to implementation of the International Safety Management Code ('ISM Code') and the possible application of the misleading and deceptive conduct provisions under the *Trade Practices Act* in Australia and the *Unfair Contracts Act* in New Zealand in claims against classification societies, this paper raises few new issues in relation to the liability of classification societies which have not already been reviewed many times over the past decade.

2. Liabilities of Classification Societies

2.1 Proper law and jurisdiction issues

Before briefly reviewing the trends in respect of liability of classification societies under different categories of law, it is important to note that conflict of laws issues (jurisdiction, choice of law and enforcement of foreign judgments) may be of equal, if not greater relevance, as to whether claims can be successfully bought against classification societies.

There are broad Rules of Private International Law in common law systems, which provide assistance and consistency in dealing with these issues. These rules however, may be of little assistance in determining how courts in other jurisdictions may deal with these questions. Further, rules relating to jurisdiction and enforcement of foreign judgments often

vary between countries even though there may be a common approach on the choice of law issue.

In Australia, courts will only have **jurisdiction** to determine a claim against a classification society, if they have jurisdiction over the subject matter as well as the classification society itself. As far as the subject matter is concerned, the courts have certain powers in relation to the types and monetary limits of matters they may hear. In broad terms a court will be able to establish personal jurisdiction over a particular defendant if (a) the defendant is properly served with the court's initiating process or (b) the defendant can be taken to have submitted otherwise to the court's jurisdiction.

Once jurisdiction is established courts may be required to address the issue of whether they should, as a matter of discretion, excise that jurisdiction and hear and determine the matter. The issue of whether the court is the *forum conveniens* or *non conveniens*, will hinge on the question of whether it is also the natural forum (ie the forum with which the action has the most real and substantial connection) and if so, whether there are exceptional circumstances that would make proceeding in the natural forum unjust. Matters such as convenience, expense, access to justice, law governing the relevant transactions and places where the parties are located are relevant.

Choice of Law issues arise when some aspects of the facts relating to the litigation in hand does not occur in the country seized of the matter, or one of the parties is not one of its nationals. This will invariably be relevant in claims against classification societies.
Anglo-Australian choice of law rules are underpinned by each different category of claim having its own choice of law rule. The choice of law rule selects one or more connecting factors as determining which country's laws are to be applied.

As far as choice of law and *tort* is concerned, the rule is that a plaintiff may sue a classification society in Australia to enforce a liability in respect of a wrong occurring outside a country if (a) the claim circumstances are of such a character that, if they had occurred within Australia, a cause of action would have arisen entitling the plaintiff to enforce against the classification society, the civil liability of the kind which the plaintiff claims to enforce; and (b) the circumstances of the occurrence give rise to a

civil liability under the law of the place in which the wrong occurred, are of a kind which the plaintiff claims to enforce.

Where a claim against the classification society is in *contract*, then the choice of law issue will usually be determined by express or implied terms under the contract which would be enforced unless not 'bona fide' or 'contrary to public policy'. As to the governing law where no effective system is selected by the parties, the `objective' proper law applies. The objective proper law is the system with the closest and most real connection. Consideration has to be had not only in respect of the contract itself but also the whole of the transaction (ie places of negotiation, contracting, performance; language, form, and subject matter of contract; parties nationality, domicile, place of business; connection with a legally related contract; place agreed for litigation or arbitration; money of account.)

I do not propose to deal with the conflicts of laws issue relating to the **enforcement of foreign judgments**, save to say that their recognition and quick enforcement will usually depend on relevant statute law in place in each country for this purpose. In Australia the *Foreign Judgments Act* 1991 (Cth)4 applies.

2.2 Contract

The duties of and liabilities of classification societies in contract is usually clearer and more straight forward than in other areas of the law. Contractual obligations and exemptions and limitations of liability are invariably set out in writing.

However, issues such as the effect / enforceability of indemnity, exclusion and limitation clauses; duties in contract and tort actually assumed and statutory immunity may not always be that clear and may be treated differently in different jurisdictions.

Whereas some decisions in the USA[5] suggest that broad exclusion clauses are unenforceable and / or contrary to public policy, decisions in the UK

[4] Note each State in Australia has its own legislation as well.

[5] Great American Insurance Co v Bureau Veritas 338 F.Supp 999 (S.D.N.Y 1972); In re Oil Spill by Amoco Cadiz 1986 A.M.C 1945

and certain European countries are focussed on factors such as reasonableness and whether there has been `wilful misrepresentation' or `gross negligence'. Relevant statute law in various countries regulating business dealings / contracts may also have an impact on the enforceability of clauses designed to exempt classification societies. In Australia and New Zealand, contractual terms including exclusion clauses are, subject to their not being repugnant to any relevant statutory law, construed and given effect on the basis of their ordinary plain meaning.

Even though contracts for services by classification societies purport to spell out the contractual duties of classification societies, their scope and ambit is not always clear. Duties of classification societies have been found to extend beyond the mere survey and classification (in accordance with the rules and standards of the society), to also encompass exercising care in the inspection and detection of damage and defects in a ship[6].

The *Sun Dancer*[7] case in the United States in the early 1990's, dealt with a number of interesting contractual issues relating to the exposure of classification societies. The vessel was a cruise liner registered in the Bahamas. The owners retained the American Bureau of Shipping (`ABS') to survey the vessel and produce certain classification and safety certificates required under relevant Bahamian legislation. The safety certificates were provided by ABS following a survey of the vessel. Shortly thereafter the vessel struck an underwater rock off the coast of Canada and sank after taking in water. The vessel would not have sunk had it not been for a defective piping system and holes in the bulkhead both of which were violations of the safety conventions. Neither been detected nor reported by ABS.

The owners claimed that ABS had been negligent and in breach of contract. ABS initially relied on an exclusion clause in the contract which exempted it from all liability. The court did not accept this defence or an argument based on the Ryan - doctrine[8], which in limited cases removed

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[6] Gull Tampa Drydock Co v Germanischer Lloyd 634 F.2d 879 (1981)

[7] Sundance Cruises Corp v American Bureau of Shipping, 799 F.Supp 363, 1992 AMC 2946 (S.D.N.Y 1992), aff'd, 7F. 3d 1077, 1994 AMC 1(2d Cir. 1993), cert denied, 1145 CT 1399 (1994)

[8] Ryan Stevedoring Co v Pan – Atlantic Steamship Corporation 350 U.S 124, 133-134, 1956 AMC 9(1955) "Although a shipowner has a non-delegable duty of seaworthiness, under certain specific & limited circumstances it can share its absolute liability. Thus, a contractual right to

the right to claim in tort in that country. However the court did afford ABS the protection of an immunity provision in the Bahamian Merchant Shipping Act on the basis that ABS was appointed under that Act and there was no evidence that it had not acted in good faith in the performance of its duties.

Interestingly however, the statutory immunity was held to extend only to the statutorily required safety certificates and not in respect of the issuance of the classification certificate. Nevertheless, the court held that the owners were not entitled to rely on a classification certificate as a guarantee that the vessel was of sound construction. It limited the function of the issuance of the classification certificate to enabling owners to take advantage of any insurance rates available to a classed vessel. This conclusion appears to have been reached on the basis of the fact that owners have a non-delegable duty to furnish a seaworthy vessel.

CMI Initiative

There are currently model contractual clauses available to classification societies for inclusion in agreements between them and governments and ship owners. These were drafted by the Comit Maritime International (`CMI') assembly in New York in 1999 and was a product of a Joint Working Group on a Study of Issues relating to Classification Societies (`CSJWG') which was constituted in 1992 upon the initiative of the CMI.

The purpose of the initiative was to consider the legal rights, duties and liabilities of classification societies, as well as the relationship between classification societies and ship owners. Essentially the model clauses focus in on the responsibilities of classification societies and ship owners and makes provision for limitation of liability and in the case of agreements with governments, the application of parallel statutory immunities.

I am advised by the International Association of Classification Societies (`IACS') that the model clauses are currently on the back-burner and the so-called `Gothenburg Group' of North Sea States and more recently the European Commission have been threatening to impose more stringent liability and less generous limits on classification societies.

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indemnification is implied if there are unique special factors demonstrating that the parties intended that the would be indemnitor bear the ultimate responsibility for the Plaintiff's safety: SM Durr – Supra - 1

Role Under ISM Code

Classification societies are now becoming increasingly involved in certification and verification under the ISM Code and in fact member societies of IACS had been actively engaged in securing the lucrative market of Documents of Compliance (DOC) and Safety Management Certificates (SMC) certification in conjunction with a consultative role helping shipping companies develop their Safety Management System (SMS) including in some cases with a quality assurance (QA) system along the lines of ISO 9002 or similar.

Philip Anderson reports in his guide to the ISM Code[9] that IACS have not only developed a procedural requirement (PR9) on ISM Code Certification but also developed their own guidelines for IACS auditors undertaking certification and a mandatory series of model training courses for auditors. They have apparently also developed an electronic database recording statistics on the progress of the ISM code certification and in particular lists of the names of ships which had been issued with SMC's by IACS members.

In view of the fact that owners are able and in fact being encouraged by IACS to turn to its members for numerous services, ie – traditional class approval; ISO / QA consultation; QA accreditation; ISM – SMC and DOC certification; ISM consultation; statutory certification.

IACS is attempting to deal with the significant potential for conflict of interest by facilitating different members to perform different functions within any one company.
It seems quite clear that classification societies contractual exposure has been significantly broadened by their assuming responsibilities in respect of the ensuring compliance with the statutory requirements under the ISM Code. No longer will those classification societies involved, be able to argue that their role is limited to classification in accordance with their standards. Many of the standard terms including exemption and indemnity clauses which currently form part of their standard service terms and conditions, may no longer be broad enough. In fact the very nature of the traditional role of classification societies may have

[9] ISM Code – "A Practical Guide to the Legal and Insurance Applications" – P Anderson (Lloyd's Factual Shipping Guides) 1998

broadened significantly by virtue of the assumption of vastly different roles by classification societies in relation to the ISM Code. Clearly the exposure of classification societies has been broadened both in relation to claims by third parties and by flag state administrators. I comment briefly on these further exposures later in the paper.

2.3 Tort

> *`… it was pointed out that classification societies are charitable non-profit-making organisations, promoting the collective welfare and fulfilling a public role. But why should this make any difference? Remedies in the law of tort are not discretionary. Hospitals are also charitable non-profit making organisations. But they are subject to the same common duty of care … as betting shops or brothels.'*
>
> Lord Lloyd (dissenting judgment) - *"The Nicholas H"*.

Various third parties rely or purport to rely on classification societies using reasonable care in the carrying out of their services. These include vessel builders and purchasers; charterers, insurers, seafarers and financial institutions.

The *Nicholas H*[10] decision of the House of Lords in England is probably the current leading case on what duty of care is owed by classification societies and to whom. Although the decision was handed down in 1995, it still broadly reflects the position in the jurisdictions under review. As I indicate later on, however the courts in Australia have moved in a slightly different direction as far as the tests required to establish when a duty of care is owed, to whom and in respect of what.

The *Nicholas H* was a case in which cargo owners suffered a total loss of their cargo due to the vessel sailing in an unseaworthy condition. Soon after sailing from the loading port, cracks were noticed in her hull, and the vessel proceeded to a port of refuge. At first the classification society's surveyor recommended permanent repairs of an extensive nature, but after a repairing team had gone to the vessel from Greece and the owners

[10] Marc Rich & Co AG & Others v Bishop Rock Marine Co Ltd and Others [1995] 2 Lloyd's Rep 299 (HL)

had `baulked' at carrying out permanent repairs, the surveyor was content with temporary repairs, and recommended the

vessel to sail as classed to the discharged port and there to be further examined and dealt with as necessary. Shortly after leaving the port of refuge, the vessel sank with loss of her cargo, but no loss of life.

The ship owner settled with cargo owners on the basis of its entitlement to limit liability according to the Hague Rules. The cargo owners subsequently sued the classification society for the balance of their loss. Essentially the argument against the classification society was that it had negligently approved the temporary repairs and, had such approval not been granted, the vessel would not have sailed and the cargo not lost.

The majority held that the classification society did not owe a duty of care to the cargo owners. The following is a brief summary of the reasons:

- In addition to foreseeability, the issue of proximity and considerations of fairness and justice are also applicable where the resultant damage is physical.

- The ship owner rather than the classification society was responsible for the direct infliction of the physical damage (loss). The classification society had no contract with cargo owners and cargo owners were not aware that the surveyor had been brought in to survey the vessel. There was insufficient proximity between the cargo owners and the classification society.

- The result of a recognition of a duty of care would enable cargo owners (or rather their insurers) to disturb the balance created by the Hague Rules and Hague Visby Rules as well as the tonnage limitation provisions, by enabling cargo owners to recover in tort against a peripheral party, to the prejudice of the protection of ship owners under the existing system.

- Classification societies act in the public interest and the classification society involved was an independent and non-profit making entity, created and operating for the sole purpose of promoting the collective welfare, namely safety of lives and ships at sea.

- It is questionable whether classification societies would be able to carry out their functions as efficiently if they became the ready

alternative target of cargo owners who already have contractual claims against ship owners.

- It would be unfair, unjust and unreasonable as against the ship owners who would ultimately have to bear the costs of holding classification societies liable, such consequence being at variance with the bargain between ship owners and cargo owners based on an internationally agreed contractual structure.

- It would be unfair, unjust and unreasonable towards classification societies, notably because they act for the collective welfare and unlike ship owners they would not have the benefit of any limitation provisions.

Interestingly, cargo owners argued in addition that the classification society was liable because it had voluntarily assumed responsibility in the circumstances. This was not accepted by the court on the basis that the cargo owners were not aware of the surveyor's examination of the ship at the relevant time.

A useful critique of this judgment is set out in Durr's paper[11] to which I've already referred. He has also provided a useful synopsis of certain cases[12] dealing with the issue of third party claims against classification societies in the UK, Europe and the USA. What is clear is that not notwithstanding the protectionist stance taken by the court in *Nicholas H*, different facts and circumstances may well bring different results. Notably Lord Lloyd in a strong dissenting judgment essentially disagreed with a number of the factual conclusions reached by the majority and in particular held, with the safeguard of the proximity test, a finding against the classification society would not, in the circumstances of that case, have opened the flood gates to claims by third parties. As indicated in the extract from his judgment referred to at the beginning of the section of the paper, Lord Lloyd saw no real logic in classification societies receiving the general protection they do.

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[11] supra 1

[12] The Morning Watch QB (Com. CT) 15 Fel 1990 547; The Nicholas H supra 2; The Great American supra 5; In re Marine Sulphur Transportation Corporation 312 F. Supp 1081, 1098 (S.D.N.Y 1970), rev'd, 460F, 2d 89 (2'd Cir), Cert denied, 409 US 982 (1972)

Of interest is that the High Court in Australia (unlike the UK and New Zealand) has retreated, albeit in a case involving pure economic loss[13], from its previous preoccupation with the concept of 'proximity' in determining when a duty of care may be owed. Reasonable foreseeability of the risk of harm remains a pre-condition to the existence of duty of care, but the notion of 'proximity' is subsumed in or gives way to new substitutes namely – knowledge of magnitude of risk; control; vulnerability (ie contractual protections, other steps of self-protection and insurance); proportionality; reliance and assumption of responsibility. In addition policy conditions, namely indeterminacy and preventing interference of freedom are brought into the equation and may negate the existence of a duty of care. Unfortunately the High Court failed to provide a coherent unifying theme to replace 'proximity' as a control mechanism and there is still unpredictability in respect of the tests and likely outcome. Although the approach of the courts in Australia to the issue of duty of care owed by classification societies may now be different, the outcome may well be the same as in the *Nicholas H.*

An interesting and very useful case on the subject in New Zealand was the 1999 decision of its Court of Appeal in *R M Turton & Co Limited (In Liquidation) v Kerslake & Partners*[14]. Although this case involved a claim in tort by a building contractor against an engineering company it did involve issues relating to the imposition of duty of care when a contractual matrix defined the roles of the parties in the context of a building project. The issues were very similar to those involved in third party claims against classification societies providing expert services relied upon by parties other than those linked contractually. The decision suggests that it would appear that the courts in New Zealand would follow the '*Nicholas H'* approach on the issue fairly closely.

Durr[15] also correctly points out that successful prosecutions against classification societies may expose them to civil liability. He deals with the plea of guilty by Lloyd's Register classification society to a charge that had failed to ensure the safety of the public under the UK Health & Safety Act following the collapse of a passenger ferry walkway at the UK port of Ramsgate in September 1994. Although the Port of Ramsgate was also

[13] Perre v Afand Pty Ltd [1999] HCA 36 (12 August 1999)
[14] New Zealand Law Reports, 1958 – 2001 Vol 3 – Part 1, 2000; [2000] NZLR 406
[15] supra 1

found guilty, it was found it bore a lesser share of responsibility due to its reliance on the expertise of the classification society and two Swedish construction companies that were involved in the design and construction of the walkway.

For a considerable period, classification societies have purported to limit their role and services to contractual duties regarding survey and classification of vessels in accordance with rules and standards established and promulgated by the societies for that purpose. Within the confines of this limited role they also purport to use due care in the detection of defects in ships they survey. I have already raised the spectre of a significant broadening of classification societies contractual exposure flowing from their becoming increasingly involved in certification and verification under the ISM Code together with consultative roles in helping shipping companies develop their SMS.

There are likely to be increased possibilities of more direct communication with and reliance on classification societies by third party interests, giving rise to circumstances which may be tantamount to a clear assumption of responsibility on the part of classification societies.

Notwithstanding the general reluctance of courts to date to impose a duty of care on classification societies in respect of parties relying on their services and expertise, clearly the broader roles being assumed have the potential to increase their exposure to liability in tort

Reference has already been made to the CMI initiative in relation to the legal rights, duties and liabilities of classification societies and the production of model clauses by the CSJWG in 1999. Standard terms and conditions of classification societies do contain disclaimer, indemnity and limitation of liability provisions. Historically however, these have been directed at traditional classification services rendered. With the roles classification societies are now assuming, these clauses and any applicable immunities may have to be broader to afford classification societies protection against third party claims.

2.4 Liability Acting on Behalf of Administrators

Classification societies have in the past acted for and fulfilled certain duties of flag state administrators. I have already commented on the

broadening roles of classification societies by virtue of their now being involved in certification and verification under the ISM Code.

Needless to say classification societies may also have conflict of interest dilemmas. Phillip Anderson[16] raises the possible difficulties of so-called 'one step shop' with shipowners being able to turn to their classification societies for a listed services from traditional class approval to statutory certification. I have already mentioned that IACS seems to be dealing with the issue on the basis that different societies be allowed to perform different functions within any one company to minimise the conflict risk.

Durr[17] discusses the exposure of classification societies whilst fulfilling a statutory function of applying national and international regulations on behalf of flag state administrations. He identifies the following three areas where liability may rise: (i) to the administrator itself in respect of duties delegated; (ii) to shipowners and third parties in respect of negligence in performing the statutory service; and (iii) criminal liability in respect of negligence amounting to a criminal offence.

As far as the first area is concerned, liability will be very much dependent on the agreement in place with the administrator and whether any statutory immunity applies. The Model Clauses drafted by the CSJWG to which I have referred, attempt to limit the exposure of classification societies in this regard.

As far as the second area is concerned I have already dealt with the general approach of courts to the imposition, of a duty of care to third parties, on classification societies. Further the possible legislative immunity provided by some flag states has been raised in the context of the *Sundancer* case[18].

As far as criminal liability is concerned, I have already referred to the flow-on exposure classification societies face in respect of successful prosecutions such as that in Ramsgate Ferry Walk - Way collapse in 1994.

2.5 Liabilities under Australian Trade Practices Act

[16] supra 9 – Page 39
[17] supra 1 – Section 3.5
[18] supra 7 and The Scandinavian Star

Even though the courts continue to find reasons to limit the imposition of a duty of care in tort on classification societies, liability under the Australian *Trade Practices Act 1974 (CTH)* ('TPA') could in certain circumstances be more straightforward.

Section 52 creates a norm of conduct under 'Part V Consumer Protection' laws, the breach of which gives rise to a cause of action for damages pursuant to section 82 of the TPA. Section 52 (1) of the TPA provides:

> 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.' (emphasis my own).

Section 82 (1) provides:

> 'A person who suffers damage by conduct of another person that was done in contravention of a provision of Part IV, IVB or V or Section 51 AC may recover the amount of the loss or damage by action against that other person or against any other person involved in the contravention.' (emphasis my own).

New Zealand also has legislation[19] providing a statutory prohibition on misleading or deceptive conduct and provides for remedies for breach of the prohibition in similar terms to the TPA. The extent to which remedies under this statue can be used in respect of damages suffered by parties relying on conduct of classification societies, is something for lawyers in that jurisdiction to consider and address. I mention this legislation therefore for no other reason other than it does have similar provisions aimed at protecting parties who rely on conduct which is misleading and deceptive.

As to what constitutes '**trade or commerce**', the High Court of Australia in a case[20] involving a claim under Section 52 of the TPA by an injured worker, held that the making of the representation by a company foreman to the injured worker in relation to safety issues in removing bolts at the

[19] Fair Trading Act 1986

[20] Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLE 594

entry points of an airconditioning shaft, was not conduct 'in trade or commerce'. The Court acknowledged that as a matter of language, the term could be construed as an encompassing conduct in the course of the myriad of activities which are not, of their nature, of a trading or commercial character but which are undertaken in the course of, as incidental to, the carrying on of an overall trading or commercial business. However it held that as far as Section 52 was concerned, the section only referred to conduct which was itself 'an aspect or element of activities or transactions which, of their nature, bear 'a trading or commercial character.'

Even though the High Court has adopted a narrow definition, it is hard to envisage activities or transactions of classification societies which, of their nature, are not of a trading or commercial character.

To '**engage in conduct**' involves doing or refusing to do an act; giving an effect to a provision of a contract or arrangement or arrive at or give effect to an understanding. By the nature of the services provided by classification societies they would probably be found to have either been doing an act and / or giving an effect to an understanding.

Whether or not the conduct of a classification society is '**misleading or deceptive**' is a question of fact to be determined in the relevant circumstances. It must convey a representation and importantly intent to mislead or deceive is not necessary.

Whether or not a classification society is in breach of Section 52 involves determining (i) the class or classes of person who if misled would trigger Section 52 and (ii) the relevant class for the purposes of establishing the standard to apply on the issue of whether or not conduct has in fact been misleading or deceptive.

In respect of the first issue, the Courts have through a series of decisions indicated that Section 52 applies across the spectrum ie from conduct directed at the public at large to private negotiations. The High Court in *Parkdale Customs Built Furniture v Puxup Pty Ltd* [21] observed that the 'Consumer Protection' title to Part V did not mean that the general terms of Section 52 should be read down to only apply to 'consumers' although

[21] (1982) 149 CLR 191

the intention of the section is to protect the public in their capacity as consumers of goods and services.

In respect of the second issue, Section 52 does not expressly state what persons or class of persons should be considered as possible victims for the purpose of deciding whether conduct is misleading or deceptive. The court in the *Parkdale* case reasoned that consideration must be given to the class of consumers likely to be affected by the conduct. It was held in the decision in *Finucane v NSW Eggs Corporation*[22] that the class of people to be considered could not be stated in absolute terms and would depend on the particular facts. It was further held that the issue must be considered by reference to all people who come within the relevant section of the public. The court in the *Parkdale* case took the view that Section 52 should be generously construed, although it should be regarded as contemplating the effect of the conduct complained of on reasonable members of the class to which it was directed.

The up'shot seems to be that misleading or deceptive conduct on the part of classification societies would have to effect the class or classes of person likely to act upon or rely on the conduct. Disclaimers clearly limiting and warning off reliance may restrict the class or classes of person quite markedly.

Accordingly if the classification society issued a certificate to their ship owner where the certificate is required for the ship to be registered under the flag state, then it seems the flag state itself would be included as a member of the relevant class for the purpose of the TPA. Where a certificate is issued to a ship owner with the classification society being aware that it was required to assist the ship owner to sell the ship, use the ship as security for a loan or take out an insurance policy, then reasonable members of the relevant class would probably include potential purchases, for the bank or insurance company.

The final element that needs to be satisfied is that of **causation**. Section 82 (1) of the TPA requires that in order to recover damages a third party claimant must prove the loss or damage claimed or suffered was 'by' conduct in breach of the TPA.

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[22] (1988) 80 ALR 486 at 515

In *Wardly Australia Limited v Western Australia*[23] the Court held that the word 'by' clearly expressed the motion of causation, albeit without defining or elucidating it, and should be understood as taking up the common law practical or common-sense concept of causation, except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the TPA. It seems clear therefore that there must be a relevant nexus between the conduct complained of and the loss or damage suffered.

A recent High Court decision in *Bryan Sampson Henville & Another and Graham Geoffrey Walker & Another*[24] is significant in relation to issues of contributory negligence and causation on the remedy side of the TPA. The effect of the judgment is that all losses flowing from breaches of Section 52 that are a direct consequence, are recoverable even if unforeseeable. Losses that are indirect will be presumed to be a consequence of the misleading conduct subject to those losses being proximate to the conduct and the defendant failing to establish that there was in fact a totally different cause. This is a departure from the approach of Courts previously and now it is not enough to establish that there was another cause of the loss. Damages are recoverable in full if the misleading and deceptive conduct played some role, even if minor.

A number of recent cases demonstrate that the impact of Section 52 is not limited to domestic commercial activity. However the defendant and its conduct must satisfy the criteria outlined in Section 5 of the TPA.

Section 5 (1) states that Parts IV, IVA and V:

> 'Extend to the engaging in conduct outside Australia by bodies incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia.'

While Section 5 extends the obligation of the TPA to a wide range of conduct engaged in, outside Australia, the conduct must be 'in trade or commerce' in order to constitute a contravention of Section 52. Section 1.4 defines 'trade or commerce' to mean 'trade or commerce within Australia

[23] (1992) 175 CLR 514 at 525
[24] [2001] HCA 52 – 6 September 2001 P55 / 2000

or between Australia and places outside Australia'. Conduct which is therefore wholly unrelated to trade or commerce with Australia, will therefore not be caught.

In summary, unless the person engaging in the impugned conduct is an Australian citizen or ordinarily resident in Australia, or is a body incorporated or carrying on business within Australia, only conduct occurring in Australia will be actionable. Conversely, if the conduct occurs in Australia, there will be no need to enquire as to which company the person engaging in the conduct is a citizen, ordinarily resident incorporated or carrying on business to ascertain whether Section 52 has been contravened.

A classification society outside Australia and its conduct, must therefore satisfy the criteria outlined in section 5 for it to be brought within the scope of Section 52. It is therefore important to establish where the 'conduct' of the classification society occurs.

As to what constitutes 'carrying on business' was discussed in *Tycoon Holdings Ltd v Trencon Jetco Inc*[25], in which the validity of the cause of action under Section 52 turned on Section 5(1) which extended to conduct by corporate bodies "carrying on business within Australia". On the facts, it had not been established that the defendant was directly carrying on business in Australia simply because it advertised or because its representation from time to time made business visits to Australia. Continuity is fundamental to the notion at carrying of business.

I have been unable to find any cases involving claims against classification societies using a breach of Section 52 of the TPA as the cause of action. However a misleading and deceptive conduct case *Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Limited*[26] which related to the wrongful issue of a clean bill of lading by a foreign carrier is of interest.

The facts and review of the decision by Colin Lockhart in his very useful article "Extraterritoriality and Conflict of Laws Issues in Actions Based on Misleading Conduct'[27] are as follows: Hunter Grain purchased soyabean

[25] (1992) 34 FCR 31 (Federal Court)
[26] [1993] 117 ALR 507
[27] Federation Press 1996 – Misleading or Deceptive Conduct – Issues and Trends

meal which was loaded in Oregon on a vessel owned by Hyundai, which did not carry on business in Australia. The vessel was subject of a time charter to a company carrying on business in Australia and described in the judgment as 'Malaysian' as well as a voyage charter to the vendor of the goods. The goods were contaminated during loading due to the state of the loading equipment, but the stevedores, acting as the vendor's agent, refused an order from the master of the ship, an agent of Malaysian, to cease loading when the contamination became apparent. Notwithstanding the contamination, a clean bill of lading was subsequently issued by Hyundai after it obtained an indemnity from the vendor against the consequences of the issue of the bill. Hunter Grain's bank paid the vendor the purchase price pursuant to a letter of credit once it received the bill and when Hunter Grain discovered the contamination, it commenced actions against Hyundai and Malaysian for contravention of sections 52 and 53 of the TPA and equivalent provisions of the FTA (New South Wales) as well as for breach of contract, negligence and fraud.

Shepherd J rejected the TPA claims, holding that Malaysian had not engaged in misleading or deceptive conduct and that Hyundai was not incorporated nor carried on business in Australia, and had not engaged in conduct in Australia. His Honour drew a distinction between the 'act which caused the plaintiff damage' being 'proffering to the plaintiff and its bank of a bill of lading which contained a clear receipt for the cargo', which was conduct of the vendor and which occurred in Australia, and 'relevant conduct of Hyundai', which was the signing of the bill of lading and forwarding it to the vendor. The latter were held to be actions which took place entirely outside Australia.

Curiously, the matter of whether Hyundai was thereby involved in a contravention constituted by the vendor's conduct in Australia, does not appear to have been raised and, hence, the court did not address the issue raised above as to whether acts constituting involvement must be done in Australia.

So far as Malaysian was concerned, it was found that the company did not engage in misleading or deceptive conduct as it issued a qualified Mate's receipt and did not see the bill of lading before the commencement of proceedings by Hunter Grain.

The decision in Hunter Grain gave rise to some uncertainty as to when conduct is 'concluded' for the purposes of s5 of the TPA. First, the conduct in question consisted of a representation made outside Australia, but received in Australia. Secondly, the court found that the representor knew and expected that the representation would be received in Australia. Yet it was held that the conduct was concluded when the bill of lading was signed and sent to the vendor's agent and not on receipt of the message.

Finally it is important to note that there are comparative or complimentary provisions to Section 52 of the TPA in Australian State Legislation[28] and the time limit of which claims can be brought under Section 82 of the TPA is three years[29].

[My thanks to my colleague David Bott of Phillips Fox in Perth who was of tremendous assistance in researching certain areas of this paper.]

[28] Fair Trading Act (ACT) 1992; Fair Trading (NSW) 1987; Consumer Affairs and Fair Trading Act (NT) 1990; Fair Trading Act (QLD) 1989; Fair Trading Act (SA) 1987; Fair Trading Act (TAS) 1990; Fair Trading Act (VIC) 1999 and Fair Trading Act (WA) 1987.

[29] It should be noted that there are moves afoot to amend this to 6 years.