THE LIMITATION OF LIABILITY OF SHIPOWNERS AND OTHER PERSONS

By James Wong *

1. INTRODUCTION

For shipowners, charterers, cargo claimants and marine insurers, the subject of limitation of liability is of vital importance. The object of this article is to survey briefly the development of this area of Australian maritime law. An attempt is made to highlight some of the shortcomings and anomalies in the hope that appropriate legislative changes will be introduced in the near future to update the law. One related aspect of this article is to consider the benefits that may be derived if certain reforms are implemented. There could then be a marked rise in Australia's revenue based on an increase in legal work and litigation in maritime matters in Australia.

2. IMPERIAL LEGISLATION

Until the adoption of the *Statute of Westminster* 1931 (Imp), the Commonwealth was merely 'a self-governing colony though latterly having dominion status'.[1] The operation of the *Statute of Westminster Adoption Act* 1942 (Cth) did not affect Imperial legislation which had extended to Australia as part of the Commonwealth or State law.[2] A classic example is furnished by the case of *McIlwraith McEacharn Ltd v The Shell Company of Australia Ltd*[3] decided by the High Court of Australia in 1945. There the tug *Bonnie Bell* had a loaded lighter lashed to her starboard. As a result of the tug being negligently navigated, the steam collier *Hetton Bank* collided with a bridge, causing extensive damage to it and herself. The respondent was the charterer of the tug and had hired the lighter from her owner. To obtain relief from unlimited liability the respondent instituted a limitation suit. The law in force in Australia and the protection conferred on shipowners were based entirely on the *Merchant Shipping Act* 1894 (Imp), as amended. In the appeal, the High Court had to consider whether the respondent in both situations, ie as demise charterer of the tug and as hirer of the lighter, came within the meaning of the word 'owner'. The Imperial provisions directly applicable to the case were those of section 503 of the *Merchant Shipping Act*, 1894,[4] as

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1 *China Ocean Shipping Co and Another v State of South Australia* (1978-79) 27 ALR, p 8, per Barwick CJ.

2 See, however, *ibid*, p 53, as to dissenting judgment of Murphy J.

3 (1945) 70 CLR 175.

4 57 and 58 Vic, c 60.

amended by section 1 of the *Merchant Shipping (Liability of Shipowners Act* 1898[5] and sections 70 and 71 of the *Merchant Shipping Act* 1906.[6] The decision of the Supreme Court of New South Wales (Full Court) was unanimously upheld by the High Court. The respondent was held to be entitled to limit its liability according to the aggregate tonnages of the steamship *Bonnie Bell* (with the addition of any engine room space deducted) and the lighter lashed to her.

It is noteworthy that, from the commencement of its operation until well over four decades later, the *Navigation Act* 1912 (Cth) contained no provisions on the limitation of shipowners' liability. By section 161 of the *Navigation Amendment Act* 1958[7] the first attempt was made to confer such protection mainly on the Commonwealth and Australian States as owners, builders and demise charterers of ships. This was effected by inserting sections 330 to 336 as Part VIII of the Principal Act, which was later repealed and substituted by a new Part VIII under section 65(1) of the *Navigation Amendment Act* 1979.[8]

By section 509, the provisions of Part VIII of the *Merchant Shipping Act* 1894, as amended, dealing with the limitation of liability, were extended to the whole of her Majesty's Dominions, including Australia. The consistency and uniformity of the application of Part VIII were destroyed by the passing of the *Merchant Shipping (Liability of Shipowners and Others) Act* 1958 (UK).[9] The consequences of such an anomaly were not highlighted until about sixteen years later in *Bistricic v Rokov and Others*.[10] The appellant seaman sued the respondent shipowners for damages for personal injuries sustained when the ship was in Sydney Harbour. An action was later brought by the respondents to limit their liability under section 503 of the *Merchant Shipping Act* 1894 (Imp). In reply, the appellant relied on section 2(4) of the *Merchant Shipping (Liability of Shipowners and Others) Act* (UK). In two situations, this provision rendered section 503 inapplicable to any liability in respect of loss of life or personal injury caused to a person engaged on, or in connection with, a ship under a contract of employment. They arose where such a contract was governed by a non-United Kingdom law which (i) either did not set any limit to that liability. or (ii) set a limit exceeding that set to it by section 503. It was accepted by the parties concerned that the appellant's contract of employment was governed by the law of New South Wales. The High court affirmed the judgment of Samuels J, and the unanimous decision of the New South Wales Court of Appeal by holding that section 2(4) did not extend to New South Wales as part of its law. All five High Court Judges were in agreement that the 1958 Act

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[5] 61 and 62 Vic, c 14.

[6] 6 Edw VII, c 48.

[7] No 36 of 1958

[8] No 98 of 1979.

[9] 6 and 7 Eliz II, c 62.

[10] (1976) 11 ALR 129. For decision of Samuels J, in Trial court, see [1974] 2 NSWLR 143.

(UK) had no application to an Australian State. The reason given by Mason J, which had the support of two other Justices, including Barwick CJ, was most convincing. He referred to the legislative policy underlying section 11 of the *Statute of Westminster* 1931 (Imp). Thus in the light of the constitutional development of Australia culminating in her attainment of legislative autonomy and nationhood, a United Kingdom Act would not apply to an Australian State, unless otherwise expressly stated. The result was that claims of seamen in the position of the appellant founded on tort were limited by section 503 of the *Merchant Shipping Act* 1894 (Imp).

The decision in *Bistricic v Rokov and Others* reflected the Commonwealth Parliament's failure to update the law. So long as this situation existed, the defects would have serious implications for Australian shipping industry. Non-demise charterers, ship operators and certain other persons would not be entitled to limit or exclude their liability under Part VIII of the *Merchant Shipping Act* 1894 (Imp) The unlimited liability borne by such persons often increased the premiums of insurance policies for covering third-party liability. Thus unless the ships to be proceeded against had already been arrested in actions *in rem* brought by claimants, few shipowners would consider instituting limitation suits in Australian courts.[11] The above reasons also explain the comparatively low revenue derived from litigation and legal work in maritime law, and the high costs of operating Australia-based ships.

3. POSITION UNDER *NAVIGATION ACT* 1912 (CTH)

The *Navigation Amendment Act* 1979 (Cth)[12] was passed about three years after the historic decision in *Bistricic v Rokov and Others*. It featured an important move by the Commonwealth Parliament to bring the law into line with recent developments in other countries.

(1) *Exclusion of Article 1 paragraph 1(c).* However, unlike the United Kingdom's Act[13] the 1979 Act (Cth) has not given effect to the entire International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships 1957.

Paragraph (1)(*c*) of Article 1 is expressly excluded by section 333[14] from operating as part of the Commonwealth law. It reads:

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[11] See *Merchant Shipping Act* 1894 (Imp) s 503 without amendment by *Merchant Shipping (Liability of Shipowners and Others) Act* 1958 (UK), s 2(1) and s 509. Both these sections were repealed in so far as they extended to the Commonwealth and the States as part of their laws. See *Navigation Amendment Act* 1979 (Cth), s 104(3).

[12] S 104(3) repealed Part VIII of the *Merchant Shipping Act* 1894 (UK) in so far as it extended to the Commonwealth and the States as part of their laws.

[13] *Merchant Shipping (Liability of Shipowners and Others) Act* 1958 (UK), mainly repealed except s 11.

[14] *Navigation Act* 1912 (Cth), s 333 inserted by *Navigation Amendment Act* 1979 (Cth), s 65(1).

> The owner of a sea-going ship may limit his liability ... in respect of claims arising from any of the following occurrences, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner:
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> (a)... ;
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> (b)... ;
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> (c) any obligation or liability imposed by any law relating to the removal of wreck and arising from or in connection with the raising, removal or destruction of any ship which is sunk, stranded or abandoned (including anything which may be on board such ship) and any obligation or liability arising out of damage caused to harbour works, basins and navigable waters.

The purpose of paragraph 1(*c*) is to grant shipowners important relief in those situations where they would be subject to unlimited liability at common law or under some legislation. Port and harbour authorities are under a duty to provide safe, unobstructed waterways and other facilities. Under common law or statutory powers, they are entitled to raise, remove or destroy any wreck or sunken goods that interfere with the use of their waterways. At common law, a port authority may recover from the shipowner, as damages, the expenses of removing a wreck, constituting an obstruction, from a navigable channel.[15] In some cases, a statutory right to recover such expenses in the form of a debt is conferred by legislation.[16] The distinction between the liability at common law and the statutory right is that the former sounds in damages and could be limited under section 503(1) of the *Merchant Shipping Act* 1894 (UK) while the latter, being conferred by statute, could not.[17]

The point relating to the statutory right was involved in the House of Lords decision in *Stonedale No 1 (Owners) v Manchester Ship Canal and Others.*[18] This case illustrates one type of claim not limitable under Australian law. Owing to improper navigation, but without the owners' actual fault or privity, the appellants' barge sank in the Manchester Ship Canal, constituting an obstruction in the fairway to ships navigating therein. Section 32 of the *Manchester Ship Canal Act* 1936 (UK)[19] empowered the corporation to cause the vessel to be raised and to recover

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[15] In *Dee Conservancy Board and Others v McDonnell and Another* [1928] 2 KB 159, the action was based on the plaintiffs' rights at common law. On appeal, the English Court of Appeal held that the cost of removing the obstruction was recoverable as damages.

[16] For position under Commonwealth legislation, see *Navigation Act* 1912 (Cth), s 329(1); *infra.*

[17] See case authorities as analysed by McPherson, JA, in *Barameda Enterprises Pty Ltd* v *Ronald Patrick O'Connor and KFV Fisheries (Qld) Ltd* [1987] 2 Lloyd's Rep 666, p 686.

[18] [1956] AC 1.

[19] 26 Geo v & 1 Edw VIII, c 124.

from her owners 'all expenses incurred ... in connexion with that vessel'. In respect of the expenses so incurred, the appellants sought to limit their liability under sections 1 and 3 of the *Merchant Shipping (Liability of Shipowners and Others) Act* 1900 (UK).[20] In affirming the Court of Appeal decision, the House of Lords held that those two sections only operated to limit liability in tort, ie where it lay in damages. Lord Tucker explained that section 32 of the 1936 Act (UK) gave the 'right to recover as a debt the expenses of raising a sunken vessel' 'irrespective of any liability based on injury or damage'. It was 'a different cause of action altogether'.[21]

The words 'obligation or liability' in the first limb of paragraph 1(*c*) (ie 'any ... such ship') are obviously intended to cover expenses recoverable at common law and the right to recover such expenses given by the legislation.[22] Similar words are used in the second limb. This fact suggests that the claims covered could extend beyond tortious liability for physical 'damage caused to harbour works ... '. Suppose a ship negligently rams and demolishes part of the port installations or harbour works. Urgent measures are needed to prevent marine traffic congestion. Expenses may be incurred in keeping navigation open, warning ships of danger or in providing alternative discharging or loading arrangements. The negligent shipowner is under a 'liability' at common law for the damage caused, and could also be under a statutory 'obligation' to compensate the port authority in respect of the expenditure.

The effect of omitting Article paragraph 1(*c*) under section 333 is not confined to safeguarding the rights and interests of port and harbour authorities under State laws.[23] It is worth emphasizing that the exclusion of the valuable protection has very serious implications for both Australian and foreign shipowners. The provisions of Article 6 paragraph 2 seem to suggest that the inability of a shipowner to limit his liability could extend to the charterer, manager and operator of the ship. Thus for the shipowner and all other persons involved, whose 'obligation or liability' to third parties is not covered by insurance, the gap in the statutory protection can result in financial disaster.

(2) *High Court Decision.* The validity of the *Navigation Amendment Act* 1979 (Cth) was challenged in the recent High Court of Australian decision in *Kirmani v Captain Cook Cruises Pty Ltd: Green, Third Party.*[24] This is a milestone in the development of Australian maritime law. The plaintiff (Mrs K) was carried as a passenger on a pleasure cruise in Sydney

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[20] 63 and 64 Vic, c 32.

[21] [1956] AC 1, p 13.

[22] See *The Millie* [1940] P p 1.

[23] Statutory right is conferred on a Commonwealth Minister: *Navigation Act* 1912 (Cth), s 329(1).

[24] (1985) 59 ALJR 265. The High Court unanimously refused the application for a certificate to permit an appeal to the Privy Council: (1985) 59 ALJR 480.

Harbour in the vessel *Captain Cook II*, owned by the defendant company. She alleged that her personal injuries were caused by the defendant company's negligence. When sued for damages, the defendant company invoked section 503 of the *Merchant Shipping Act* 1894 (Imp) for the purpose of limiting its liability. The constitutional issues raised concerned the legislative competence of the Commonwealth Parliament and the validity of the *Navigation Amendment Act* 1979 (Cth). The High Court held that, by reason of section 2(2) of the *Statute of Westminster* 1931 (Imp) and section 51 *(xxix)* of the Commonwealth Constitution, the Commonwealth Parliament had the power and authority to enact the 1979 Act (Cth). Accordingly, section 104(3), which came into force on January 31, 1981, was held to have repealed Part VIII of the *Merchant Shipping Act* 1894 (Imp).

If the repeal merely affected the application of Part VIII as part of Commonwealth law[25] an anomaly would arise. *Captain Cook II* was an intra-State, and not a sea-going, vessel. Indeed, it was argued on behalf of New South Wales and Queensland that the Commonwealth Parliament was incapable of repealing Part VIII of the Imperial Act as part of State laws. The problem was boldly forestalled by the majority of the Judges who held that the repeal of Part VIII was valid as part of both Commonwealth and State laws.

From a different aspect, the twofold repeal might have presented another difficulty. If the new provisions in Part VIII introduced by the 1979 Act (Cth) were not in force as part of State laws, a most serious gap would have existed. The owners of ships, like the *Captain Cook II*, which are governed primarily by State laws, including their charterers, managers, operators, masters and crews, would have no statutory protection. Fortunately, the Commonwealth Parliament has removed the difficulty by amending section 332(3)[26] of the *Navigation Act* 1912 (Cth). This amended provision states that Division 1 of the new Part VIII will not apply to an intra-State vessel to the extent that 'a law of a State ... ' applies the provisions of the 1957 Convention to that vessel.[27] Its effect is obvious since no State Parliament has, to date, implemented such provisions.

In giving effect to the 1957 Convention[28] as Commonwealth and State laws, the Commonwealth Parliament had to make further modifications. The wording of Article 1 paragraph 1 (ie 'The owner of a sea-going ship

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[25] Under the *Navigation Amendment Act* 1979 (Cth), s 103 the 'Merchant Shipping Act' is defined to include the amendment by any other Imperial Act or any Act in so far as that Act is part of the Commonwealth law. By s 104(3), Part VIII of the *Merchant Shipping Act* is repealed. When s 103 and s 104(3) are read together, one gets the impression that the repeal only applies to Part VIII in its operation as part of Commonwealth Law.

[26] See *Navigation Amendment Act* 1979 (Cth), s 65(1).

[27] See s 332(3), as amended.

[28] Ie with the exception of the provisions in Article 1, para 1(*c*).

may limit his liability ...') makes it clear that the protection does not avail the owner of a *non-seagoing* ship of whatever description or size. In the absence of a comprehensive definition in the 1957 Convention, it appears that the expression 'sea-going ship' does not embrace an intra-State tug, barge, lighter, yacht, a large river boat or fishing vessel. Under the repealed section 334 (1) of the *Navigation Act* 1912 (Cth)[29], for the purposes of Division 1 of Part VIII, certain ships, which were not sea-going, were to be treated as if they were sea-going ships. Unfortunately, the requirements to be met under section 334(1), in order to qualify as 'sea-going ships', would prevent most owners of intra-State yachts and fishing vessels from limiting their liability. The scope of this provisions has been enlarged by a far-sighted amendment introduced by section 93 of the *Navigation Amendment Act* 1980 (Cth).[30] Much wider protection is now conferred by the amended section 334 of the *Navigation Act* 1912 (Cth). Accordingly, every ship which is not a ship within section 2(1) and is not a sea-going ship shall, for the purposes of Division 1 of Part VIII and the applied provisions of the 1957 Convention, be treated as if it were a sea-going ship. It is almost certain that the extended relief available under the amended section 334 will apply to liability of a tortious nature as well as consequential loss or damage due to negligence within Article 1 paragraphs 1(*a*) and (*b*). Claims based on any 'obligation or liability' of the kind covered by Article 1 paragraph 1 (*c*), including the expense incurred in the case of *Stonedale No 1 (Owners) v Manchester Ship Canal and Others*[31] are not the subject of limitation of liability.

(3) *Salvage Operations outside Ship.* The narrow wording of Article 1 paragraph 1(*b*) of the 1957 Convention[32] has given rise to a serious problem. It is clear that, under this paragraph, the right to limit liability will only avail a ship-owner[33] where the occurrence giving rise to the 'claim has not resulted from the actual fault or privity of the owner'.

Firstly, there are two types of claims which are not within paragraph 1(*b*) of Article 1. They are exemplified by the facts of, and the House of Lords decision in, *The Tojo Maru*.[34] Due to a collision, the Tanker *Tojo Maru* sustained damage. The salvors used a thirty-foot plate to cover a gaping hole in the hull. To hold the plate in position, bolts were fired from a Cox bolt gun. It was unsafe to operate this equipment unless steps had first been taken to render the adjoining tanks gas-free. Contrary to orders received and without having taken the precautionary measures, the

[29] As amended by the *Navigation Amendment Act* 1979 (Cth), s 65(1).

[30] No 87 of 1980.

[31] *Supra.* See *Barameda Enterprises Pty Ltd v Ronald Patrick O'Connor and KFV Fisheries (Qld) Pty Ltd* [1987] 2 Lloyd's Rep 666, p 688, per McPherson, JA.

[32] See *Navigation Amendment Act* 1979 (Cth), s 65(1) and *Navigation Act*1912 (Cth), s 333, as amended.

[33] As to other persons who are protected, see Articles VI and VII.

[34] *Owners of motor tanker Tojo Maru (her cargo and freight) v NV Bureau Wijsmuller* [1971] 1 All ER 1110.

chief diver carried out the work by firing the Cox bolt gun. An explosion was caused, resulting in extensive damage to the tanker, which necessitated the spending of 202,514 pounds Sterling on repairs. Further loss and damage, apparently consequential in nature, to the extent of 129,253 pounds Sterling were suffered. One of the crucial issues raised concerned the salvage contractors' attempt to limit their liability under section 503(1) of the *Merchant Shipping Act* 1894 (Imp), as amended by section 2(1) of the *Merchant Shipping (Liability of Shipowners and Others) Act* 1958 (UK). It was the finding of the arbitrator that 'when the diver fired the Cox bolt gun he was under the water'. After he had descended from the tug, he was not operating from the tug. In that situation, he was neither a member of the tug's crew, nor was he regarded as using the tug's equipment. Despite their sympathy expressed for the salvors, the House of Lords ruled that they were not entitled to limit their liability under section 503(1)(*d*) of the 1894 Act (Imp).[35] Their Lordships gave the provisions a somewhat narrow interpretation. They held that the diver's negligent act in firing the gun was not (i) a neglect or default in the navigation or management within the meaning of the provision, or (ii) committed by a crew member on the tug.

Section 503(1)(*d*) was based partly on Article 1 paragraph 1(*b*) of the 1957 Convention. It is therefore likely that an Australian court seized of a case with similar facts will follow the reasoning of the House of Lords in *The Tojo Maru*. The result is that a salvage contractor is almost certainly not able to limit his liability for negligent damage and for consequential loss arising in such circumstances.

(4) *Wreck-raising Expenses*. The *Navigation Act* 1912 (Cth) inflicts financial hardships on shipowners in certain situations. Suppose that, as a result of a collision negligently caused by another ship, the *MV Seafriar* was sunk and became a complete loss. In the absence of actual fault or privity on the part of the owner of the other ship, the damages recoverable by the *MV Seafriar* will be limited by section 333 of the *Navigation Act* 1912 (Cth). To this misfortune may be added a heavy financial burden.

Section 329(1) reads:

> If any ship is wrecked, stranded sunk or abandoned on or near the coast of Australia, the Minister shall have, in regard thereto, the following powers:-
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> > (a) To require the owner thereof, by notice in writing, to remove the wreck within a time specified ... or to give security for such removal to his satisfaction;

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[35] *Merchant Shipping Act* 1894, s 503(1)(*d*), as substituted by *Merchant Shipping (Liability of Shipowners and Others) Act* 1958 (UK), s 2(1)(*d*).

> (b) In the event of the owner not complying with such notice, to remove or destroy the wreck in any manner he sees fit;
> (c) To sell any wreck ... recovered under his orders, and out of the proceeds of the sale to retain a sum to cover the expenses incurred ... paying the surplus (if any) to the owner;
> (d) To recover from the owner any expenses incurred by him in connexion with such removal or destruction.

If the *MV Seafriar* was sunk 'on or near' an Australian coast, she would probably constitute an obstruction or danger to shipping. The shipowner cannot simply abandon the sunken ship or wreck in the hope of escaping further loss. Under section 329(2), the 'owner' is defined as 'the owner immediately prior to the time of the loss or abandonment of the ship'. This provision prevents him from relinquishing his status as owner. The expense incurred in removing or destroying the wreck in the 'manner he [the Minister] sees fit' could be exorbitant. Moreover, section 329(1)(d) has a disquieting effect. Its wording suggests that a shipowner, who is in no way to blame for the sinking or stranding of his ship, may be compelled to pay the expenses of removing or destroying the wreck. It has been pointed out that a claim of this nature is not limitable because Article 1 paragraph 1(*c*) of the 1957 Convention has not been enacted as law.[36]

If the damages recoverable against the *negligent* shipowner include the expenses paid or payable under section 329(1)(d), could the *innocent* shipowner recover such expenses in full?[37] It would be anomalous if the expenses imposed on an innocent shipowner are not, while the same amount when included in a tort claim against a negligent shipowner is, subject to the limitation of liability! This vital issue was determined in the recent Queensland case of *The 'Tiruna'*.[38] The plaintiff's prawn trawler was negligently struck and sunk by the defendant's prawn trawler. Pursuant to the Acting Harbour Master's direction apparently issued under section 212 of the *Queensland Marine Acts* 1958-1981, the wreck was removed. The plaintiff incurred $35,000 as wreck-removal expenses. All three Appeal Judges held that, since Article 1 paragraph 1(*c*) had been excluded from operating as part of the Commonwealth law, the owner could not limit his liability for such expenses.[39] The trial judge had held that the negligent shipowner was not entitled to limit his liability regarding the expenditure. On appeal before the Full Court of the Supreme Court of Queensland, the trial judge's decision on the point was upheld.[40]

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[36] *Supra.*

[37] See *The Urka* [1953] 1 Lloyd's Rep 478. The decision in *The Arabert* [1963] p 102 probably has no persuasive authority in Australia because of the difference in the wording of *Merchant Shipping Act* 1894 (UK), s 503(1) involved.

[38] *Barameda Enterprises Pty Ltd v Ronald Patrick O'Connor and KFV Fisheries (Qld) Pty Ltd* [1987] 2 Lloyd's Rep 666 (Supreme Court of Qld Full Court).

[39] *Ibid*, p 672, per Kelly, JA; p 677, per Macrossan, JA; 688 per McPherson, JA

[40] By two Appeal Judges: *ibid*, pp 673 at 680.

McPherson JA, states the effect of the exclusion of Article 1 paragraph 1(*c*) in clear terms as follows:[41]

> 'I am therefore disposed to accept the plaintiff's submission before us that s 333 ... operates not simply to omit art 1(1) (*c*) but affirmatively to prevent claims for wreck removal expenses from being the subject of limitation of liability ... it makes no difference that the claim in respect of which limitation is sought is made by the port authority at common law or under statute ... Equally I think it makes no difference that the claim is made by the owner of the sunken ship against the vessel or its owner responsible for her being sunk and having to be removed. The expenses incurred in doing so, and the liability to do so, are alike comprehended by the words of art 1(1) (*c*), the content of which is intended to be excluded from the range of claims capable of limitation by a shipowner.'

It is hoped that the judgments of Their Honours, Kelly J, and McPherson JA, which have resolved a difficult issue in Australian law, will be upheld in a case on appeal before the High Court. To avoid uncertainty, it is desirable to amend section 333 of the *Navigation Act* 1912 (Cth) to make the position clear by bringing Article 1 paragraph 1(*c*) into line with the above decision.

4. RECKLESS OR INTENTIONAL CARGO DAMAGE

Australia has fallen behind many of her trading partners. The Commonwealth Parliament has not given effect to the Brussels Protocol 1968 (The Visby Rules). This fact has placed shippers, consignees and bill of lading holders under a grave disadvantage in a number of ways.[42] Moreover, the amended section 10(1)[43] of the *Sea-Carriage of Goods Act* 1924-73 (Cth) provides that this Act does not affect the operation, *inter alia* of 'Part VIII of the *Navigation Act* 1912'. Under the current 1924-73 Act (Cth) there is nothing to deter carriers' servants, eg ships' masters and seamen, from recklessly or intentionally damaging or destroying cargo carried on board. As regards cargo loss or damage sustained in that way, the *Sea-Carriage of Goods Act* 1924-73 (Cth) does not prevent the claimants from suing in tort the carriers' servants responsible. It seems that in the personal action brought, the latter are not prevented from invoking the protection of Article 6 paragraph 3 of the 1957 Convention. This provision enables the master and crew members to limit their liability even though the occurrence which gave rise to the claims had resulted from their actual fault or privity. As a policy matter, the availability of this statutory relief in such circumstances is not conducive to the

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[41] *Ibid*, p 688.

[42] For example, under the *Sea-Carriage of Goods Act*, 1924-73 (Cth), claimants are deprived of the benefit of the container-cargo provision and the higher compensation provided by the Brussels Protocol 1968. See Article IV rule 5(*a*) and (*c*) of Schedule to *Carriage of Goods by Sea Act* 1971 (UK).

[43] See *Sea-Carriage of Goods Amendment Act* (Cth) (No 101 of 1979), s 3.

promotion of maritime trade in Australia. It is submitted that legislation should be introduced to rectify the anomaly.

5. OIL POLLUTION PROBLEMS

The gaps in the Commonwealth legislation on anti-pollution by oil are highlighted. Attention is focussed on an anomaly in law which adversely affects persons who incur, or are compelled to incur, clean-up costs and expenses to remove or prevent oil pollution damage. A difficulty associated with those claims is whether shipowners are able to limit their liability under Article 1 paragraph (1)(*b*) of the 1957 Convention.

(1) *Marpol Legislation.* The Marpol Convention 1973, as amended by the Protocol 1978, recognizes that 'the release of oil ... from ships constitutes a serious source of pollution'. It seeks to eliminate the intentional pollution of the marine environment by oil ... and to minimize accidental discharge of such substances'.[44] The *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth) (the 'Marpol Act')[45] and the *Navigation (Protection of the Sea) Amendment Act* 1983 (Cth)[46] have given effect to the Marpol Convention and the Protocol. With regard to the prohibition against the discharge of oil or oil mixtures into the sea, the main provisions of the 'Marpol Act' are found in section 9(1).[47] This provides that, subject to certain exceptions, 'if any discharge of oil or of any oily mixture occurs from a ship into the sea, the master and the owner of the ship are each guilty of an offence, punishable, upon conviction by a fine not exceeding -

(a) if the offender is a natural person - $50,000; or

(b) if the offender is a body corporate - $100,000.

A number of support facilities and practical measures are introduced to ensure compliance with the provisions of the two Acts. They include the retention of oil residues on board the ship[48] the entry to be made in and maintenance of the record book on board,[49] the duty of the master to report every discharge[50] and the requirements relating to the ship

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[44] See preamble to Convention and also *Regulations for the Prevention of Pollution by Oil* (1986) IMO, London.

[45] No 41 of 1983. Ss 3 to 35 given effect on January 14 1988: *Commonwealth of Australia Gazette*, No s 8 on 1988, p 1.

[46] No 40 of 1983. Ss 3-10 given effect on January 14, 1988: *Commonwealth of Australia Gazette*, No s 8 of 1988, p 1. S 6 of the Act applies to ships carrying or using oil and introduces new requirements regarding ship construction certificates, oil pollution prevention certificates and periodical surveys.

[47] To be amended by s 6(*b*) of *Protection of the Sea (Prevention of Pollution from Ships) Amendment Act* (Cth) (No 81 of 1986), apparently not yet given effect.

[48] *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth), s 10.

[49] *Ibid*, ss 12-14.

[50] *Ibid*, s 11(1).

construction and oil pollution prevention certificates.[51] The underlying philosophy of the legislation is strengthened by Article 2 paragraph 3(*a*) of the Marpol Convention. This gives the key word 'discharge', as used in section 9(1) and other sections of the 'Marpol Act', a very broad meaning. In relation to oil and other harmful substances, the key word means 'any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying'.[52] This definition seems wide enough to cover any intentional, negligent and accidental discharge.

However, there are a number of situations where the Marpol legislation either has no application or is ineffective. Firstly the penalties imposed by section 9(1)(*a*) and (*b*) have no relevance to the time duration for which a discharge may occur or may have occurred, or the extent and nature of the damage caused. Secondly, section 9(1B) does not penalize 'a discharge of oil or an oily mixture from a foreign ship unless the discharge occurs near a State or an external Territory'.[53] This exception will render fishing grounds, holiday resorts and marine industry most vulnerable. The oil, negligently or intentionally discharged by foreign ships into the sea outside the prohibited areas around Australia, may easily be swept or carried by winds and tidal currents, resulting in extensive pollution damage. Thirdly, it appears that section 9(1) falls short of the objective in one important respect. Suppose an Australian or foreign ship negligently or even recklessly collides with an oil-carrying tanker, causing her cargo of oil to escape into the sea. The wording of section 9(1) is unclear as to whether the owner and the master of the ship responsible would be guilty of a breach, particularly where no discharge occurs from their ship. Fourthly, provided the requirements in section 9(2)(*d*) are met,[54] the escape of oil into the sea from the damaged tanker will not constitute an offence under section 9(1). Fifthly, under section 9(2), it is not an offence to discharge oil or an oily mixture from a ship -

> (a) into the territorial sea of Australia;
>
> (b) into the sea on the landward side of the territorial sea of Australia;
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> (c) for the purpose of securing the safety of, or saving life at sea;
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> (d) if the oil or oily mixture ... escaped from the ship in consequence of damage, other than intentional damage, to the ship or its equipment, and all reasonable precautions were taken ... for

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[51] *Navigation (Protection of the Sea) Amendment Act* 1983 (Cth), s 6, which inserts 'Division 12 - Ships Carrying or Using Oil' into the *Navigation Act* 1912 (Cth).

[52] Marpol Convention, Article 2 para (3)(*a*).

[53] Subject to amendment by *Protection of the Sea (Prevention of Pollution from Ships) Amendment Act* 1986 (Cth), s 6(*c*), apparently not yet in force.

[54] For text, see *infra*.

> the purpose of preventing or minimizing the escape of oil or oily mixture as the case may be; or
>
> (e) ...

If a discharge occurs in any of the above situations, property owners, occupiers, fishermen, oyster breeders and tourist operators would be adversely affected.[55] Such persons are entitled to protect their rights, interests and business activities by taking reasonable measures to prevent or minimize the loss or damage arising from the pollution. They may have incurred substantial expenses in taking preventive measures and clean-up costs. Under Australian maritime law, it is doubtful whether such claimants are entitled to be compensated either by suing the shipowner or by bringing an admiralty action *in rem* against the ship concerned.[56]

(2) *Civil Liability Legislation*. We shall look briefly at the position under the International Convention on Civil Liability for Oil Pollution Damage 1969. This Convention has been implemented by the *Protection of the Sea (Civil Liability) Act* 1981 (Cth).[57] Under Article 1, paragraph 6, 'pollution damage' is defined as 'loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship ... and includes the cost of preventive measures'. Subject to the defences provided[58], the Act imposes no-fault liability on shipowners to pay compensation to persons who suffer loss or damage caused by contamination including the cost of preventive measures taken by them.[59] However, it has two very serious limitations. No compensation is payable unless the escape or discharge of oil occurs from a sea-going vessel or

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[55] As to the vastness and seriousness of oil pollution damage, see *The 'Torrey Canyon'*, April 1967 (Cmnd 3242). Under the *Protection of the Sea (Powers of Intervention) Act* 1981 (Cth) (No 33) s 8(1) and (2), the Minister is empowered in certain circumstances to take measures to 'prevent, mitigate or eliminate the danger' from pollution or the threat of pollution by oil. From the viewpoint of property owners and private interests, it is questionable as to when such measures will be taken and whether the measures if taken, will be adequate in all cases. Additional powers to take non-convention measures are given in s10. As to the recovery of expenses incurred under ss 8 and 19, see *Protection of the Sea (Civil Liability) Act* 1981 (Cth), Part IV.

[56] The Canadian case of *Outhouse v The Thorshaun* [1935] 4 DLR 628 concerned damage by oil to lobsters. This occurred when part of a ship's cargo of oil was pumped overboard. The court held the remoter consequences of jettisoning oil from a ship amounted to 'damage done by a ship'. An action *in rem* against the ship was allowed. It did not, however, concern clean-up costs or expenses incurred in taking preventive measures.

[57] No 31 of 1981. As to the right, conferred on shipowners to limit their liability *incurred under this Act*, see Article V paras 1, 2 and 3 and s 20(1).

[58] See Article 3 paras 2 and 3 of the Convention.

[59] See s 8(1) and Article 3 para 1 in particular.

seaborne craft 'actually carrying oil in bulk as cargo'.[60] There is no right to recover where the pollution damage -

> (a) ... ;
>
> (b) was wholly caused by an act or omission done with intent to cause damage by a third party; or
>
> (c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids ... [61]

The foregoing evaluation has demonstrated that, despite the Commonwealth legislation currently in force, a serious anomaly exists in the law. Undeniably a large class of people runs the risk of being economically disadvantaged. The reason (as has been stated) is that, for the purpose of protecting their property, business interests, industry and occupation, it may be neceesary for large sums of money involved in clean-up costs to be expended.

Unfortunately, in the recent American case of *The 'Amoco Cadiz'*,[62] no attempt was made by Frank McGarr J, to enunciate that clean-up costs were recoverable in addition to the damage caused by oil pollution. This 'complex, multi-district litigation' was occasioned by the grounding of an oil tanker and the consequent spillage of its cargo of oil off the French coast. Actions in tort were brought in the United States by a host of plaintiffs. The owner of *Amoco Cadiz* was held liable without limitation for the damage suffered by the plaintiffs.[63] It is not clear from the report whether the clean-up costs incurred were also allowed as part of the damages. The Amoco defendants asserted counter and third-party claims against France and French government departments - who were among the plaintiffs - for their negligence in failing to prevent or contain the oil spill. Those claims were rejected. The learned judge ruled that no action or lack of action on France's part could found a right for the Amoco defendants 'to sue for lack of planning or ineffectual clean-up efforts'.[64] He went one step further when he said:[65]

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[60] Article 1 para 1.

[61] Article 3 para 2(*b*) and (*c*).

[62] [1984] 2 Lloyd's Rep 304.

[63] The vessel being unseaworthy and inadequately maintained, it was not proved that her owner was free from privity and knowledge regarding the negligence which proximately caused the grounding. He was, therefore, not protected under the *Limitation of Liability Act*, 46 USC, ss 181-189.

[64] [1984] 2 Lloyd's Rep 304, p 339.

[65] *Ibid*, p 339.

It remains true, however, that in the assessment of damages Amoco cannot be liable for damages resulting from inept clean-up efforts which in fact exacerbated the harm.

If his statement implied that persons likely to be damnified by an oil spill were under a duty to take prompt preventive measures, it seems logical that whatever reasonable expense incurred should be recoverable.[66]

(3) *United Kingdom's Legislation - Pattern for Commonwealth*? It is clear that under Commonwealth law there are situations where persons who incur clean-up costs and expenses in taking preventive measures as a result of an oil spill may suffer economic loss without a remedy. To remove this serious flaw in the law, legislation should be introduced to confer on such claimants the right to sue shipowners and/or to proceed *in rem* against the ship concerned.[67] Moreover, to alleviate the burden of proof, claimants should be entitled to presume that the oil spill was caused by the negligence of the shipowner or his servant. A related question is whether, in the event that the claims - often financially crippling - prove successful, the shipowner (including the ship and his servants) should be allowed to limit the liability.

It is informative to note how similar problems were dealt with in the United Kingdom. The *Merchant Shipping (Oil Pollution) Act* 1971 (UK)[68] has implemented the International Convention on Civil Liability for Oil Pollution Damage 1969. Section 1(1) provides that, where persistent oil carried in bulk is discharged or escapes from the ship, the owner shall, unless otherwise provided, be liable -

> (a) for any damage caused in the area ... by contamination resulting from the discharge or escape; and
>
> (b) for the cost of any measures reasonably taken after the discharge or escape for the purpose of preventing or reducing any such damage ... ; and
>
> (c) for any damage caused in the area of the United Kingdom by the measures so taken.

With the probable exception of section 1(2), the remaining subsections give effect to the corresponding provisions of the 1969 Convention.[69] The

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[66] As to liability of an oil discharger for removal costs in United States, see DA Bagwell, 'Liability under United States Law for Spills of Oil or Chemicals from Vessels' [1987] 4 LMCLQ 496, p 500.

[67] Ie to treat the claim as for 'damage done by a ship', currently maintainable under *Admiralty Court Act* 1861 (Imp) (24 Vic, c 19), s 7, in Australia.

[68] Cap 59; see s 19(1).

[69] Article 3 paras 1, 3 and 4.

United Kingdom's Parliament rightly foreshadowed that certain claims for clean-up costs and expenses incurred in taking preventive measures are not recoverable under the 1969 Convention. This awkward situation and the difficulty associated with the unlimited liability of shipowners are remedied by the 1971 Act (UK). Section 15(1) reads:

> Where -
>
> (a) after an escape or discharge of persistent oil from a ship, measures are taken for the purpose of preventing or reducing damage ... ;
>
> (b) any person incurs, or might but for the measures have incurred, a liability, otherwise than under section 1 of this Act, for such damage;
>
> then, notwithstanding that subsection (1)(*b*) of that section does not apply, he shall be liable for the costs of the measures, whether or not the person taking them does so for the protection of his interests or in performance of a duty.

Apparently, section 15(1) creates a 'non-convention' liability in favour of any person who has incurred costs for preventive measures taken. The provision appears to confer a new remedy on the claimant. Where a polluter incurs liability within the meaning of section 15(1)(*b*), he is liable to the claimant for the costs of the measures taken, whether for protecting his own interests or in performing a duty. This statutory right available to the claimant seems to be an extension of the protection conferred by the tort of negligence,[70] public nuisance[71] and the rule of strict liability.[72]

Section 15(2) provided that the liability incurred under section 15(1) was limitable under section 503(1)(*d*) in Part VIII of the *Merchant Shipping Act* 1894 (UK). The *Merchant Shipping Act* 1979 (UK)[73] has repealed Part VIII of the 1894 Act (UK) and implemented the Convention on Limitation of Liability for Maritime Claims 1976.[74] Section 15(2) of the *Merchant Shipping (Oil Pollution) Act* 1971 (UK) is substituted by Schedule 5 paragraph 6(2) in the 1979 Act (UK). Thus 'any liability incurred' under section 15 of the 1971 Act (UK) is now limitable under

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[70] *Donoghue v Stevenson* [1932] AC 562. In Australia, the principle has been applied to render purely economic loss recoverable in special circumstances: *Caltex Oil Australia Pty Ltd v The Dredge 'Willemstad'* (1976) 51 ALJR 270.

[71] *Castle v St Augustine's Links Ltd* (1922) 38 LTR 615. As to the right to recover purely economic loss in public nuisance, see also PFP Higgins, *Elements of Torts in Australia*, (1970) Butterworths, Sydney, pp 360-361.

[72] *Rylands v Fletcher* (1868) LR 3 HL 330.

[73] Cap 39. See s50(4) and Schedule 7, Part I.

[74] See the 4th Schedule. This is by far the most recent and most comprehensive international convention on the limitation of shipowners' liability.

Article 2 paragraph 1(*a*) of the Convention on Limitation of Liability for Maritime Claims 1976 in Schedule 4 to the 1979 Act (UK).

The United Kingdom's approach is a step in the right direction for the Commonwealth to adopt. Provision should, however, be made for shipowners' liability incurred in such circumstances to be limited under Article 1 paragraph 1(*b*).[75] This reads:

> The owner of a sea-going ship may limit his liability in accordance with Article 3 of this Convention in respect of claims arising from any of the following occurrences, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner:
>
> > (a) ... ;
> > (b) loss of life of, or personal injury to, any other person ... loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible: Provided however that in regard to the act, neglect or default of this class of person, the owner shall only be entitled to limit his liability when the act, neglect or default is one which occurs in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers.

CONCLUSIONS

We have looked at a number of events in the space of four decades of Australian legal history. Various anomalies and defects in this branch of the law have been brought to light. They show a lack of co-ordinated legislative policy in promoting Australian maritime trade.

The *Sea-Carriage of Goods Act* 1924-73 (Cth) which applies to contracts of carriage covered by bills of lading[76] has not been amended by incorporating the Brussels Protocol 1968 (The Visby Rules).[77] This factor has serious implications for bill of lading holders and cargo consignees in international trade. Claimants seeking compensation for cargo loss or damage under Australian law are disadvantaged in three important ways. The unamended Hague Rules scheduled to 1924-73 Act

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[75] See the 2nd Schedule to *Navigation Amendment Act* 1979 (Cth) and *Navigation Act* 1912 (Cth) s 333, as amended. It seems clear that the reference in the *Protection of the Sea (Civil Liability) Act* 1981 (Cth), 2. 20(6) (*supra*) to the operation of the *Navigation Act* 1912 (Cth) Part VIII does not limit the shipowners' liability for the type of clean-up costs and expenses discussed.

[76] Hague Rules, Article 1 para (*b*).

[77] Incorporated into the *Carriage of Goods by Sea Act* 1971 (UK).

(Cth) do not contain the new container-cargo provision[78], and the compensation recoverable from the carrier for cargo loss or damage is limited to $200 per package or unit.[79] Moreover this limit of liability could equally apply even though the cargo loss or damage was recklessly or intentionally caused by the carrier or his servants.[80] The exclusion of Article 1 paragraph 1(*c*) from operating as part of Commonwealth and State laws deprives shipowners and other persons of the valuable benefit of limiting their liability. This, as we have seen, can arise at common law and under statute. The consequences resulting from salvorial negligence in the case of *The Tojo Maru*[81] reveal the serious *lacuna* in the relief provided by Article 1 paragraph 1(*b*) because of its narrow wording. In the present maritime climate, the persons identified as adversely affected, including cargo interests, will seek protection by taking out marine insurance policies. This is done by transferring the risks of loss or damage, or of incurring third-party liability, to insurers. A cargo consignee may insure a container-load of goods for $10,000 even though, when it is lost due to the carrier's negligence, the former could only recover $200 as compensation. A shipowner, insured under a policy, who negligently damages some harbour works is not entitled to limit his liability. Under Australian law, the insurer can only recover from the carrier, by way of subrogation[82], a small part of the indemnity paid to the cargo consignee, and will have to indemnify the negligent shipowner in full as regards his third-party liability.[83] For the reasons stated, the costs of insuring against cargo loss or damage and third-party liability will invariably be higher. Since the shipping and salvage services provided in such circumstances tend to be more expensive, they will suffer from the lack of competitiveness.

By far the most serious disadvantage currently facing shipowners and others is that, in respect of their liability, they are not protected to the same extent as their counterparts in the United Kingdom. The reason is that the Commonwealth Parliament has not updated the law by giving

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[78] See Brussels Protocol 1968, Article 2 para (*c*); *Carriage of Goods by Sea Act* 1971 (UK), Schedule, Article 4 para 5(*c*).

[79] In Australian currency, unless the nature and value of such goods were declared by the shipper before shipment and inserted in the bill of lading: *Sea-Carriage of Goods Act* 1924-73 (Cth), Schedule, Article 4 para 5.

[80] Unless such reckless or intentional act constitutes an unjustified deviation: *Encyclopaedia Britannica Inc* v *The 'Hong Kong Producer' and Universal Marine Corpn* (1969) 2 Ll L Rep 536. The Brussels Protocol 1968 Article 2 para (*e*) and Article 3 para 4 dealing with reckless or intentional damage are given effect by *Carriage of Goods by Sea Act* 1971 (UK), Schedule, Article 4 para 5(*e*) and Article 4 *Bis* para 4, respectively.

[81] [1971] 1 All ER 1110, *supra.*

[82] Where an insurer pays for the cargo loss or damage, he is subrogated to the rights and remedies of the insured *vis-a-vis* the negligent carrier: *Marine Insurance Act* 1909-73 (Cth), s 85.

[83] An insurer is in no better position than the insured, ie the negligent shipowner who cannot invoke the protection of Article 1 para 1(*c*).

effect to the Convention on Limitation of Liability for Maritime Claims 1976.[84]

Another problem is the anomaly that persons who incur expenses and costs to protect, or minimize damage to, their property or other interests may have no redress against a negligent shipowner. It has been suggested that the remedy to be provided by legislation should be subject to the limitation of liability. Reforms along the lines suggested could resolve the difficulties brought to light.

[84] See *Merchant Shipping Act* 1979 (UK), Schedule 4, Parts I and II, which are given the force of law in the United Kingdom: s 17.