THE SHIPPING LAW REVIEW

EIGHTH EDITION

Editors
Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

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CONTENTS

PREFACE

The aim of the eighth edition of this book is to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. We have again invited contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals, offshore shipping, marine insurance, environmental issues, decommissioning and ship finance.

Each jurisdictional chapter gives an overview of the procedures for handling shipping disputes, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered. Contributors have summarised the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims. We have also asked the authors to address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, security and counter-security requirements, and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are examined, and contributors set out the current position in their jurisdiction. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction during the coming year. This year, we welcome Costa, Albino & Lasalvia Sociedade de Advogados as the new contributors of the chapter focusing on maritime law within Brazil. There are also two new jurisdictions in this edition – Israel (Harris & Co) and Mexico (Adame Gonzalez De Castilla Besil) – and Portugal makes a return, with Andrade Dias & Associados as the new contributors.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development (UNCTAD) estimating that the operation of merchant ships contributes about US$380 billion in freight rates within the global economy, amounting to about 5 per cent of global trade overall. Between 80 per cent and 90 per cent of the world's trade is still transported by sea (the percentage is even higher for most developing countries) and, as of 2019, the total value of annual world shipping

trade had reached more than US$14 trillion. Although the covid-19 pandemic has had a significant effect on the shipping industry and global maritime trade (which plunged by an estimated 4.1 per cent in 2020), swift recovery is anticipated. The pandemic truly brought to the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself and the contributions to this book continue to reflect that.

Finally, mention should be made of the environmental regulation of the shipping industry, which has been gathering pace this year. At the International Maritime Organization's (IMO) Marine Environment Protection Committee, 72nd session (MEPC 72) in April 2018, it was agreed that international shipping carbon emissions should be cut by 50 per cent (compared with 2008 levels) by 2050. This agreement will now lead to some of the most significant regulatory changes in the industry in recent years, as well as much greater investment in the development of low-carbon and zero-carbon dioxide fuels. The IMO's agreed target is intended to pave the way for phasing out carbon emissions from the sector entirely. The IMO Initial Strategy, and the stricter sulphur limit of 0.5 per cent mass/mass introduced in 2020, has generated significant increased interest in alternative fuels, alternative propulsion and green vessel technologies. Decarbonisation of the shipping industry is, and will remain, the most important and significant environmental challenge facing the industry in the coming years. Unprecedented investment and international cooperation will be required if the industry is to meet the IMO's targets on carbon emissions. The 'Shipping and the Environment' chapter delves further into these developments.

We would like to thank all the contributors for their assistance in producing this edition of *The Shipping Law Review*. We hope this volume will continue to provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

Andrew Chamberlain, Holly Colaço and Richard Neylon
HFW
London
May 2021

Chapter 12

AUSTRALIA

Gavin Vallely, Simon Shaddick, Alexandra Lamont and Tom Morrison[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Ten per cent of the world's sea trade passes through Australian ports and 99 per cent of Australian exports are transported by sea.[2] In terms of its ocean freight requirement, Australia has the 'fifth-largest shipping task in the world – a task that is forecast to double over the next 15 years'.[3] Notwithstanding the global economic downturn as a consequence of the covid-19 pandemic, some areas of the mining resources sector have maintained strong export levels, and China reopening to trade will inject confidence into the mining and agricultural export sectors. The catastrophic drop in oil prices in March 2020 was short-lived. Having stabilised, prices are now well above levels prior to the covid-19 pandemic. In recent years, Australia has had 'the world's fastest-growing cruise industry',[4] with passenger numbers increasing by an average of almost 20 per cent per year since 2008.[5] Per capita, Australia has more cruise passengers than any other nation, making it the fourth-largest cruise market in the world.[6] However, since March 2020, cruise ships have been banned from entering Australia from foreign ports and there is no permanent end to this ban in sight. Owing to the increased cost of operating Australia-flagged tonnage relative to international-flagged vessels, the national fleet has continued to decline, with only a small number of large cargo vessels flagged on the Australian Register, the majority of which are employed on Australian coastal trading services, access to which is restricted by federal cabotage legislation. Notwithstanding the cabotage restrictions, about 65 per cent of Australian coastal trading cargo is carried on international-flagged vessels.

1 Gavin Vallely and Simon Shaddick are partners, Alexandra Lamont is a senior associate and Tom Morrison is an associate at HFW.

2 https://nationalindustryinsights.aisc.net.au/industries/transport/maritime.

3 Angela Gillham, Acting Executive Director of the Australian Shipowners Association, 8 April 2014.

4 PwC Australia, 'The economic contribution of the Australian maritime industry', prepared under instruction for the Australian Shipowners Association, February 2015.

5 Cruise Lines International Association, 'Cruise Industry Source Market Report', 2017.

6 https://nationalindustryinsights.aisc.net.au/industries/transport/maritime.

i Vessels registered on Australian shipping registers

As at March 2020, 12,266 vessels were listed as being entered on the Australian shipping registers.[7] In terms of vessel types, they can be grouped generally as follows: 224 cargo vessels, 325 passenger-carrying vessels, 8,500 pleasure craft, 1,914 fishing vessels and 504 specific purpose-type vessels.[8]

Of those vessels, only 737 hold International Maritime Organization (IMO) numbers,[9] comprising approximately 68 cargo vessels, 59 passenger-carrying vessels, 32 pleasure craft, 189 fishing vessels and 325 specific purpose-type vessels.[10]

ii Australian coastal trading

Australia has a substantial coastal sea freight task, which, in 2016–2017, was reported to be 103.9 million tonnes, a 0.2 per cent increase from 2015–2016.[11] To date, petroleum and dry bulk products remain the largest tonnage component of coastal freight. As at March 2021, there were approximately 91 vessels operating with a temporary licence[12] and, as at February 2021, there were 113 vessels operating under a general licence.[13]

All vessels that had transitional general licences granted have since surrendered their licences or the licence has expired.[14]

iii Foreign-registered vessels in the offshore oil and gas industry

The safety of marine operations in the immediate vicinity of Australian offshore oil and gas facilities is regulated through the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA).

A substantial number of offshore facilities and vessels, including foreign-registered floating production, storage and offloading vessels, floating storage units, accommodation vessels, drilling vessels, construction vessels and pipe-laying vessels, also form part of the Australian shipping industry and are regulated by NOPSEMA.

NOPSEMA reported that, in 2019–2020, it conducted 218 inspections of offshore facilities in Australia, which is an increase of almost 25 per cent in the number of inspections

7 Australia Maritime Safety Authority [AMSA], 'List of Registered Ships', www.amsa.gov.au/vessels/shipping-registration/list-of-registered-ships/. All 12,266 vessels are on the Australian General Shipping Register and there are no vessels listed on the Australian International Shipping Register.

8 Note that approximately 288 of these vessels are tugs.

9 Indicating that these vessels have in the past been, or are capable of being, employed on international voyages.

10 Of these, seven are floating production storage and offloading vessels, 243 are tugs and seven are dredgers.

11 Bureau of Infrastructure, Transport and Regional Economics, 'Australian Sea Freight 2016-2017' (2019), page v, available at www.bitre.gov.au/publications/2019/australian-sea-freight-2016-17. (No update is yet available for 2017–2018.)

12 Department of Infrastructure, Regional Development and Cities, available at https://infrastructure.gov.au/maritime/business/coastal_trading/licencing/granted/temporary/2019/index.aspx.

13 Department of Infrastructure, Regional Development and Cities, available at https://infrastructure.gov.au/maritime/business/coastal_trading/licencing/granted/general/index.aspx.

14 https://infrastructure.gov.au/maritime/business/coastal_trading/licencing/granted/transitional/files/TGL_Granted_20190206.pdf.

it carried out in 2018–2019. According to NOPSEMA, this was for a variety of reasons, including the decommissioning of offshore platforms due to wells' exhaustion or profitability and reflected the introduction of covid-19 inspections during 2020.[15]

iv Foreign-registered vessel calls to Australia

Data in relation to the exact number of foreign ships visiting Australia is limited; however, the Australian Maritime Safety Authority (AMSA) indicates that, in 2018, 5,981 foreign-registered vessels (an increase of 1.4 per cent) called at Australian ports. The average age of foreign-flagged ships calling at Australia was 10 years old.[16]

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

An important characteristic of the Australian legal system is the distinction between federal and state or territory laws, both of which are relevant to shipping. From a constitutional perspective, the Commonwealth (i.e., the federal level of Australian government) has the power to make laws with respect to trade and commerce, which extends to laws relating to navigation and shipping.[17] However, this does not preclude the six states[18] and two territories[19] from also making laws relating to shipping; the primary constraint is that, in the event of inconsistency between Commonwealth and state or territory law, Commonwealth law prevails to the extent of the inconsistency.[20]

From a territorial perspective, Australia has ratified the United Nations Convention on the Law of Sea 1982 (UNCLOS) and the Commonwealth exercises sovereign jurisdiction with respect to the territorial sea (i.e., 12 nautical miles seaward of the low-water mark or any proclaimed territorial sea baseline).[21] Again, this does not preclude the states and territories from legislating with respect to their coastal waters[22] and adjacent territorial sea, provided there is no inconsistency with Commonwealth law. The Commonwealth also exercises jurisdiction with respect to Australia's exclusive economic zone (EEZ).[23]

At the Commonwealth level, the primary legislation regulating shipping in Australia is the Navigation Act 2012 (Cth), which was redrafted and re-enacted in place of the 1912 Act that preceded it. One of the main functions of the 2012 Act is the restructuring of the regulation of Australian vessels and seafarers, and accommodating the removal into new legislation of the overhauled cabotage scheme for coastal trades in Australia.[24] The Navigation Act 2012 and other Commonwealth legislation also give effect to a wide range

15 NOPSEMA, Annual Report 2019-2020, page 7, https://www.nopsema.gov.au/assets/Corporate/A751334.pdf.

16 AMSA, 'Port State Control Australia: 2019 Report', page 7, https://www.amsa.gov.au/vessels-operators/port-state-control/port-state-control-australia-2019-report.

17 Commonwealth of Australia Constitution Act, Sections 51(i) and 98.

18 Victoria, New South Wales, Queensland, Tasmania, Western Australia and South Australia.

19 The Northern Territory and the Australian Capital Territory.

20 Commonwealth of Australia Constitution Act, Section 109.

21 See further the Seas and Submerged Lands Act 1973 (Cth).

22 Being the area within three nautical miles of the declared Territorial Sea Baseline.

23 See footnote 21.

24 The Coastal Trading (Revitalising Australian Shipping) Act 2012 (Cth).

of international maritime conventions and treaties to which Australia is party. State and territory laws typically regulate recreational vessels, ports and harbours, and other maritime infrastructure located within state boundaries.

III FORUM AND JURISDICTION

i Courts

As with federal and state and territory legislation, there is also a distinction between courts exercising jurisdiction at the federal level, and those at the state and territory levels. In broad terms, federal courts exercise jurisdiction in relation to Commonwealth legislation, whereas state and territory courts exercise plenary jurisdiction with respect to persons and other subject matter situated within their territorial boundaries, as well as in relation to state and territory legislation. State and territory courts have primary jurisdiction with respect to common law proceedings (both civil and criminal), and may also exercise federal jurisdiction in some circumstances.

In practice, however, most shipping and maritime disputes are litigated in the Federal Court of Australia. One of the main reasons for this is that the Federal Court has jurisdiction with respect to much of the shipping-related legislation in Australia, such as the Navigation Act 2012, and other Commonwealth legislation giving effect to international conventions.[25] The Federal Court also frequently exercises jurisdiction in admiralty, pursuant to the Admiralty Act 1988 (Cth). That Act provides for the commencement of proceedings *in personam* and *in rem* with respect to a wide range of categories of 'maritime claim'.[26] It is also fair to note that the Federal Court has developed greater experience in dealing with maritime litigation.

With regard to choice of law and jurisdiction, it is important to appreciate that there is no single common law of Australia, rather a separate common law in each state and territory. Accordingly, it is not appropriate for parties to stipulate that an agreement is governed by 'Australian law' and the law of a particular state or territory should be selected. Similarly, should contracting parties wish to submit to the jurisdiction of Australian courts, they should specify the courts of a particular state or territory. Finally, two shipping cases have confirmed that Australian courts will exercise jurisdiction over appropriate subject matter unless a party can positively establish that Australia is a 'clearly inappropriate forum'.[27]

ii Arbitration and ADR

Contracting parties are at liberty to agree to resolve their disputes by arbitration or other means of alternative dispute resolution, and Australian courts will give effect to such agreements. In particular, there is comprehensive legislation at both the Commonwealth and state or territory levels aimed at encouraging and facilitating the arbitration of commercial disputes. These laws regulate matters such as the commencement of arbitration, composition of tribunals, arbitral procedure, awards, appeals and enforcement. The legislation also addresses the extent to which Australian courts may intervene in the arbitral process, including an obligation to stay court proceedings in favour of arbitration in certain circumstances.[28]

25 For example, the Limitation of Liability for Maritime Claims Act 1989 (Cth).

26 Admiralty Act 1988 (Cth), Section 4. Admiralty jurisdiction is discussed further in Section V.

27 See *CMA CGM SA v. The Ship 'Chou Shan'* (2014) 311 ALR 234 and *Atlasnavios Navegacao LDA v. The Ship 'Xin Tai Hai'* (No. 2) (2012) 301 ALR 357.

28 See, for example, International Arbitration Act 1974 (Cth), Section 7(2).

Maritime arbitration in Australia is usually conducted pursuant to the International Arbitration Act 1974 (Cth), which regulates commercial arbitration in Australia between parties with places of business in different states. That Act gives effect to the most recent version of the UNCITRAL Model Law on International Commercial Arbitration.[29] It is noted that Australian courts generally recognise the related arbitration law principles of separability and competence,[30] and this has been confirmed in a shipping decision concerning an arbitration clause in a draft bill of lading.[31]

Although there is no provision for maritime-specific arbitration under Australian law, parties may agree to resolve their disputes pursuant to the arbitration rules and procedures of the Australian Maritime and Transport Arbitration Commission.[32] Those rules are intended to supplement the UNCITRAL Model Law.

There is also legislative provision for domestic arbitration in Australia, that is, arbitration between parties that have their place of business within Australia.[33] However, because of the large number of foreign participants in the Australian shipping industry, there is unlikely to be any significant amount of domestic maritime arbitration.

Mediation is frequently used as a means of alternative dispute resolution in Australia, including in shipping cases, and court case management procedures often require parties to mediate before the hearing of a dispute.

iii Enforcement of foreign judgments and arbitral awards

Certain foreign judgments may be enforced in Australia pursuant to the Foreign Judgments Act 1991 (Cth). A judgment creditor must apply to court to have a foreign judgment registered and the requirements for registration include that the judgment is 'final and conclusive' and, generally, that it is a money judgment and not for payment of foreign taxes, fines or penalties.[34] Registration is usually available in respect of judgments made in the countries listed in the Foreign Judgments Regulations 1992 (Cth), which include, for example, the United Kingdom but not the United States.

The Australian courts will generally recognise foreign arbitral awards and do so without significant delay. Australia is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), which is given local effect in the International Arbitration Act 1974 (Cth). Accordingly, foreign awards to which the New York Convention applies are generally recognised by and enforceable in Australian courts. The court may refuse to enforce a foreign award in certain circumstances, including the usual reasons (for example, relating to a defect in the composition of the

29 As adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, and amended on 7 July 2006.

30 Or 'severability' and kompetenz-kompetenz. See, e.g., Hancock Prospecting Pty Ltd v. Rinehart (2017) 350 ALR 658.

31 *Degroma Trading Inc v. Viva Energy Australia Pty Ltd* [2019] FCA 649, in which HFW acted for the successful shipowners.

32 The Australian Maritime and Transport Arbitration Commission is an industry association affiliated with the Australian Centre for International Commercial Arbitration; see further at www.amtac.org.au.

33 Uniform Commercial Arbitration Act legislation was enacted in each state and territory between 2010 and 2012.

34 Foreign Judgments Act 1991 (Cth), Section 5.

tribunal)[35] as well as where an award concerns a dispute that would not be capable of resolution by arbitration under Australian law or where enforcement of the award would be contrary to public policy.[36]

In particular, an Australian court may refuse to enforce a foreign arbitral award where the award itself, or the underlying contractual agreement, is considered invalid under Australian law, notwithstanding that it is valid under the law governing the substantive dispute. This was the case in a first instance decision of the Federal Court of Australia, which refused to enforce a London arbitration award on a claim under a voyage charter party on the basis that the charter party in respect of which the award had been obtained was subject to mandatory Australian choice-of-law and jurisdiction provisions under federal legislation that rendered the award otiose in Australia.[37]

IV SHIPPING CONTRACTS

i Shipbuilding

There is no substantial shipbuilding industry in Australia, although there are some small and medium-sized shipyards that are predominantly involved in the construction and repair of naval, high-speed aluminium-hull passenger and roll-on/roll-off vessels, and recreational vessels. Accordingly, there is no significant local jurisprudence, specific local laws or regulations concerning shipbuilding contracts.

ii Contracts of carriage

The Carriage of Goods by Sea Act 1991 (Cth) (COGSA) contains important, mandatory provisions concerning choice of law and jurisdiction in relation to contracts of carriage. Certain contracts for the carriage of goods from places in Australia to places outside Australia (outbound carriage) are deemed subject to Australian law (i.e., that of the state of the port of shipment). Any agreement to the contrary is invalid, as is any agreement that seeks to restrict the jurisdiction of Australian courts with respect to such a contract.[38] COGSA also invalidates any agreement that seeks to restrict jurisdiction with respect to carriage from places outside Australia to places in Australia (inbound carriage).[39] However, these mandatory provisions do not apply to sea carriage between Australian ports, with the somewhat curious consequence that parties are free to contract pursuant to foreign law and jurisdiction for such voyages (but not for outbound carriage).

The purpose of these provisions is to give local cargo interests the protection of Australia's laws and judicial system. The provisions are regularly relied on by parties who may otherwise have to pursue a carrier in a less favourable jurisdiction or under a less favourable

35 International Arbitration Act 1974 (Cth), Section 8(5).

36 ibid., Section 8(7).

37 This was on the basis that the underlying arbitration clause was found to be in contravention of the Carriage of Goods by Sea Act 1991 (Cth). The decision in *Dampskibsselskabet Norden A/S v. Beach Building & Civil Group* (2012) 292 ALR 161 was later reversed on appeal on a separate point; see [2013] FCAFC 107. The relevant federal legislation is discussed in Section IV.ii.

38 Carriage of Goods by Sea Act 1991 (Cth), Section 11(2), Paragraphs (a) and (b).

39 ibid., Section 11(2)(c).

cargo liability regime. As discussed in Section III.iii, they can also be relied on, for example, to resist local enforcement of a foreign judgment or arbitration award obtained pursuant to an agreement that contravenes the mandatory provisions.[40]

An important consequence of these mandatory provisions is that, when a contract of carriage is subject to Australian law through the operation of COGSA and in certain other cases in which an Australian court has jurisdiction, cargo liability may be regulated by a modified version of the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules) (the Modified Rules).[41] These Rules primarily apply to contracts for outbound carriage.[42] They also apply in respect of sea carriage between Australian ports, except when carriage is between ports within the same state or territory.[43] Further, the Modified Rules apply in respect of inbound carriage if another international cargo liability regime does not otherwise apply by agreement or law.[44]

The Modified Rules regulate cargo liabilities in respect of 'sea carriage documents' (defined as including bills of lading and certain types of consignment note, sea waybills and ship delivery orders),[45] which need not necessarily be documents of title. The Modified Rules apply, therefore, to a broader range of shipping documents than the Hague-Visby Rules. A decision of the Full Court of the Federal Court of Australia, however, has held that a voyage charter party is not a sea carriage document, thereby largely resolving a point of law that had given rise to considerable uncertainty in Australian maritime law.[46]

The Modified Rules adopt the basic cargo liability regime of the Hague-Visby Rules. There are a number of important differences in the Modified Rules, however, some of which are explained in the context of cargo claims in Section IV.iii.

iii Cargo claims

The question of title to sue under bills of lading, sea waybills and ship delivery orders is the subject of uniform legislation in each Australian state and territor,y[47] based on the Bills of Lading Act 1855 (UK). In the case of a bill of lading, for example, a cargo interest will need to prove that it is the lawful holder of the bill to have title to sue the carrier under the contract of carriage evidenced by the bill.[48]

A cargo interest with title to sue must establish, based on the proper construction of the contract of carriage and the mandatory provisions of COGSA, which cargo liability regime

40 See, for example, the decisions referred to in footnote 37.

41 Carriage of Goods by Sea Act 1991 (Cth), Section 8. The unamended Hague-Visby Rules appear in Schedule 1 of the Act. The Modified Rules appear in Schedule 1A of the Act.

42 ibid., Section 10, and Schedule 1A, Article 10(1).

43 ibid., Section 10, and Schedule 1A, Article 10(4).

44 ibid., Schedule 1A, Article 10(2).

45 ibid., Schedule 1A, Article 1(1)(g).

46 See *Dampskibsselskabet Norden A/S v. Beach Building & Civil Group* [2013] FCAFC 107.

47 For example, the Sea-Carriage Documents Act 1997 (NSW). In the State of Victoria, the legislation is contained in Part IVA of the Goods Act 1958 (Vic).

48 Sea-Carriage Documents Act 1997 (NSW), Section 8, Paragraphs (1) and (2) . Section 5 sets out a detailed definition of 'lawful holder'.

regulates its claim. This can be a complex inquiry that will depend on the circumstances of each case. However, there is a range of circumstances in which the Modified Rules will apply to a cargo claim brought in Australia.[49]

The obligations and immunities of the carrier under the Modified Rules are generally consistent with the Hague-Visby Rules, with three important qualifications. First, the period of the carrier's responsibility under the Modified Rules commences when goods are delivered to the carrier within a port, and ends with delivery to the consignee within the destination port.[50] This extension is most relevant to containerised cargo, which is generally delivered to and by the carrier at the container terminal. If cargo is shipped on a free in/free out basis, delivery to and by the carrier at both ends occurs on board, in which case the mandatory period of responsibility is limited to the 'tackle-to-tackle' period. Second, the Modified Rules apply generally to the carriage of goods on or above deck.[51] Third, the Modified Rules contain additional provisions that render the carrier liable for delay in certain situations.[52]

With regard to the carrier's right to limit liability, the Modified Rules incorporate the amendments to the Hague-Visby rules effected by the Protocol of 1979 to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the SDR Protocol 1979). Accordingly, the carrier is generally entitled to limit its liability to the greater of 666.67 special drawing rights (SDRs) per unit or 2 SDRs per kilogram, unless the nature and value of the goods is declared.[53] As with the Hague-Visby Rules, the Modified Rules incorporate a one-year time bar for bringing suit against the carrier.[54] Finally, in the event that the Modified Rules apply, the carrier is not usually permitted to contract out.[55]

iv Limitation of liability

Australia is party to, and has incorporated into domestic legislation, the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) and the Protocol to amend the LLMC Convention 1996 (the 1996 LLMC Protocol) (the Limitation Convention).[56] The 2012 Amendment to the 1996 Protocol (which increases the limits of liability) entered into force in Australia on 8 June 2015.[57]

Accordingly, an owner, charterer, manager, operator and salvor of a ship are entitled to limit liability with respect to certain maritime claims in accordance with the Limitation Convention, including the increased limits of liability under the 2015 amendments. Australia is also party to, and has incorporated domestically, the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention),[58] which preserves the right to limit liability under the Limitation Convention with respect to certain claims concerning bunker oil pollution damage.[59]

49 The application of the Modified Rules is discussed generally in Section IV.ii.

50 Carriage of Goods by Sea Act 1991 (Cth), Schedule 1A, Article 1(3)-(6).

51 ibid., Schedule 1A, Article 2(2). However, in some cases, the shipper and carrier may agree to contract out of this: see Article 6A.

52 ibid., Schedule 1A, Article 4A.

53 ibid., Schedule 1A, Article 4(5).

54 ibid., Schedule 1A, Article 3(6).

55 ibid., Schedule 1A, Article 3(8). See, however, Articles 6 and 6A.

56 See the Limitation of Liability for Maritime Claims Act 1989 (Cth).

57 See the Limitation of Liability for Maritime Claims Amendment Bill 2015 (Cth).

58 See the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 (Cth).

59 International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, Article 6.

There have been a number of Australian court decisions concerning the application and interpretation of the Limitation Convention. In one decision, for example, the Federal Court of Australia decided (apparently, for the first time in relation to the Limitation Convention) that claims for pure economic loss are subject to limitation.[60] In another decision, the same Court determined that the facts of a marine casualty gave rise to two 'distinct occasions', with the result that a shipowner was required to constitute two limitation funds in respect of the casualty.[61] It should be added that shipping incidents have generated some controversy surrounding a shipowner's right to limit liability, and the issue may be the subject of further political and media attention in the event of a serious casualty in Australian waters.[62]

If a claimant seeks to argue that a shipowner is guilty of conduct barring limitation under Article 4 of the Limitation Convention, the shipowner may be required to provide security for claims in excess of the limitation amount, even if the claimant's argument is very unlikely to succeed.[63]

Australia is also party to, and has incorporated into domestic legislation, the International Convention on Civil Liability for Oil Pollution Damage 1969 (the CLC Convention) and the Protocol of 1992 and the further amendments of 2000 (the Civil Liability Convention).[64] A shipowner is therefore entitled to limit liability with respect to certain claims for oil pollution damage in accordance with the Civil Liability Convention, including the increased limits of liability under the 2000 amendments.[65]

An important issue arising under both the Limitation Convention and the Civil Liability Convention concerns the application of these conventions to a ship. The former contains no definition of 'ship' and the latter contains a definition that is often regarded as convoluted and ambiguous.[66] The vexed question of exactly what amounts to a ship in these conventions, and in other maritime legislation, is especially relevant in Australian waters, where a range of unique offshore craft is engaged in the exploration and production of oil and gas. The issue creates considerable uncertainty for many participants in the offshore marine sector and remains the subject of debate.[67] For instance, in the context of ship arrest, which is addressed in Section V.i, the Federal Court of Australia has held that a remotely operated vehicle was not a ship and, therefore, could not be subject to arrest.[68]

V REMEDIES

i Ship arrest

Australia is an 'arrest-friendly' jurisdiction, in which ships can be arrested quickly and efficiently. Although Australia is not a signatory to the international conventions on ship arrest, the Admiralty Act 1988 (Cth) largely gives effect to the regime of the International

60 See *Qenos Pty Ltd v. The Ship 'APL Sydney'* (2009) 260 ALR 692. Claims for pure economic loss are *prima facie* recoverable in tort in Australia.

61 See *Strong Wise Ltd v. Esso Australia Resources Pty Ltd* (2010) 267 ALR 259.

62 As with, for example, the case of *The 'Pacific Adventurer'* in the State of Queensland in 2009.

63 See *Barde AS v. ABB Power Systems* (1995) 69 FCR 277.

64 See the Protection of the Sea (Civil Liability) Act 1981 (Cth).

65 IMO Resolution LEG.1(82) adopted on 18 October 2000.

66 See Protocol of 1992 to the Civil Liability Convention, Article 2(1).

67 See further www.hfw.com/FPSO-legal-and-regulatory-issues-Sept-2012.

68 *Guardian Offshore AU Pty Ltd v. Saab Seaeye Leopard 1702 ROV Lately On Board The Ship 'Offshore Guardian'* [2020] FCA 273.

Convention Relating to the Arrest of Sea-Going Ships 1952 (the Brussels Convention). The Act also provides for the admiralty jurisdiction of certain Australian courts, and sets out other rules for arrests and *in rem* proceedings. It is widely accepted, however, that the Act does not permit the arrest of bunkers separately from the ship on which they are loaded.[69]

The Admiralty Act permits the arrest of a ship in the case of:

a a common law maritime lien in respect of the ship;[70]

b a defined 'proprietary maritime claim' concerning the ship, which includes claims relating to possession, title, ownership and mortgage;[71] and

c a defined 'general maritime claim', where, in most cases, the owner of the ship must be the same when the claim arises and when *in rem* proceedings are commenced.[72]

The 'general maritime claims' listed in the Admiralty Act are broader in scope than the claims set out in the Brussels Convention. For example, the Admiralty Act permits arrest for claims in relation to services supplied to a ship[73] and claims for insurance premiums or protection and indemnity club calls in relation to a ship.[74] The Federal Court of Australia, however, has decided that a claim under a forward freight agreement was insufficiently connected to the carriage of goods to permit an arrest.[75]

Further, although a claim in respect of bunkers supplied to a ship would fall within the definition of 'general maritime claim',[76] it would be necessary for the claimant to establish a cause of action directly against the shipowner (rather than against a time charterer). In a decision of 2016,[77] the Full Court of the Federal Court unanimously rejected a physical bunker supplier's arrest based on a foreign law maritime lien for necessaries, although no such lien exists under Australian law. Four of the five judges adopted the majority's approach in *Bankers Trust International Ltd v. Todd Shipyards Corporation (the Halcyon Isle)*,[78] in which it was held that the foreign right should be 'classified and characterised by reference to the law of the forum'. This decision confirms that the Australian law position in respect of maritime liens arising under foreign law is in line with English and Singaporean law.[79]

The Admiralty Act also provides for the arrest of a sister ship in the event of a 'general maritime claim'.[80] To proceed against a sister ship, a claimant must establish that the interest in the ship on which the claim arises is also the owner of the sister ship at the time of arrest. Although 'owner' is not defined, it has been decided that the term is not restricted to the registered owner and may extend to a beneficial owner in certain circumstances.[81] However,

69 See *Scandinavian Bunkering AS v. Bunkers on board the ship 'FV Taruman'* (2006) 151 FCR 126.

70 Admiralty Act 1988 (Cth), Section 15. These include liens for salvage, damage done by a ship, wages of the master or crew, and master's disbursements, but not for bunkers supplied to a ship.

71 ibid., Sections 4(2) and 16.

72 ibid., Sections 4(3) and 17.

73 ibid., Section 4(3)(m).

74 ibid., Section 4(3)(s).

75 See *Transfield ER Futures Ltd v. The Ship 'Giovanna Iuliano'* (2012) 292 ALR 17.

76 Admiralty Act 1988 (Cth), Section 4(3)(m).

77 See *'Sam Hawk' v. Reiter Petroleum Inc* [2016] FCAFC 26.

78 [1981] AC 221.

79 See further: www.hfw.com/Arrest-of-the-SAM-HAWK-October-2016.

80 Admiralty Act 1988 (Cth),Section 19, in which the term 'surrogate ship' rather than 'sister ship' is used.

81 See *Malaysia Shipyard v. 'Iron Shortland' as surrogate for the 'Newcastle Pride'* (1995) 131 ALR 738.

beneficial ownership cannot be established simply by reason of a company being a subsidiary or related company of another and, accordingly, the concept of 'associated ship arrest' that exists in some jurisdictions does not apply in Australia.[82]

An arresting party is not required to pursue its substantive claim in Australia, and so an arrest can be effected purely to obtain security for a claim.[83] However, an arresting party must give full and frank disclosure of all known facts material to the arrest,[84] provide a deposit up front and give an undertaking in respect of the Admiralty Marshal's costs and expenses relating to the arrest.[85] The level of deposit to be provided depends on the place of arrest but is usually in the region of A$10,000. Finally, an arresting party may be liable in damages for 'unreasonably and without good cause' demanding excessive arrest security, obtaining an arrest or failing to consent to release from arrest.[86]

ii Court orders for sale of a vessel

The Admiralty Rules 1988 (Cth) empower the court, at any stage during *in rem* proceedings, to order that an arrested ship be valued or sold (or both).[87] Usually, the order is made on the application of a party to the proceeding; however, the Admiralty Rules also provide that the court may, *ex officio*, order the sale of an arrested ship that is 'deteriorating in value'.[88] Experience suggests that the Federal Court, which most frequently exercises *in rem* jurisdiction, is generally amenable to granting prompt orders for the valuation and sale of an arrested ship.[89]

The Court has a wide general discretion to make an order for valuation or sale,[90] and may order a sale by auction, public tender or any other method, in each case to be conducted by the Admiralty Marshal.[91] To obtain an order for valuation or sale, the applicant must give an undertaking in respect of the Admiralty Marshal's costs and expenses relating to the order made.[92]

82 The court will only pierce the corporate veil when there is evidence of fraud. See further *Comandate Marine Corp v. The Ship 'Boomerang I'* (2006) 234 ALR 169, *Safezone Pty Ltd v. The Ship 'Island Sun'* (2004) 215 ALR 690, and the decision in *Korea Shipping Corporation v. Lord Energy SA* [2018] FCAFC 201, in which HFW acted for the successful appellant.

83 Admiralty Act 1988 (Cth), Section 29.

84 See *Atlasnavios Navegacao LDA v. The Ship 'Xin Tai Hai'* (No. 2) (2012) 301 ALR 357.

85 Admiralty Rules 1988 (Cth), Rule 41.

86 ibid., Section 34.

87 ibid., Rule 69.

88 ibid., Rule 69(5).

89 See, for example, *Bank of China Ltd v. The Ship 'Hai Shi'* (No. 2) [2013] FCA 225.

90 See *Marinis Ship Suppliers Pty Ltd v. The Ship 'Ionian Mariner'* (1995) 59 FCR 245.

91 Admiralty Rules 1988 (Cth), Rule 70.

92 ibid., Rule 69(4).

VI REGULATION

i Safety

The marine safety regulation regime in Australia is based on the International Convention for the Safety of Life at Sea 1974 (SOLAS) and other international conventions that adopt various international maritime safety standards.[93] Australia's obligations under SOLAS extend to the 'verified gross mass' regulations, which are implemented through Marine Order 42 (carriage, stowage and securing of cargoes and containers) 2016, which commenced on 1 July 2016.

In particular, Australia's marine safety regime incorporates IMO codes,[94] industry-recognised codes[95] and other relevant marine safety convention requirements. In some cases, however, a higher degree of safety regulation compliance is required under Australian law and those requirements are expressly implemented by way of specific regulations.

In 2013, the marine safety regulatory regime in Australia was restructured.[96] AMSA at that point became the national marine safety regulator for all commercial vessels and now regulates a much greater number of coastal vessels than previously.[97] The state and territory marine regulators have retained responsibility for marine safety regulation of recreational vessels only.

The legislation implementing the marine safety regulation structure are the Navigation Act 2012 (Cth) and the Marine Safety (Domestic Commercial Vessel) National Laws Act 2012 (Cth). This legislation enables marine safety regulations and marine orders[98] to be created for regulatory purposes. Although marine safety compliance provisions can be found in both Acts and their associated regulations, specific safety compliance details are generally prescribed by way of marine orders.

The definitions of 'regulated Australian vessel' and 'foreign vessel' under the Navigation Act 2012 (Cth) are fundamental to determining which Act or safety regime applies to any particular vessel.

ii Port state control

AMSA is the authorised Australian authority responsible for performing port state control inspections under Chapter 1, Part B, Regulation 19 and Chapter 11-1, Regulation 4 of SOLAS.

93 See, for example, the International Convention on the Tonnage Measurement of Ships 1969 and the International Convention on Load Lines 1966.

94 Examples include the International Maritime Dangerous Goods Code 2004 (the IMDG Code), the International Maritime Solid Bulk Cargoes Code 2011 (the IMSBC Code), the Code of Safety for Special Purpose Ships, the International Safety Management Code 1998 (the ISM Code) and the International Code of Signals.

95 See, for example, the ICS Guide to Helicopter/Ship Operations.

96 Previously, owing to the federal structure of Australia's states and territories, there was a risk that marine safety regulations for commercial vessels could be inconsistently implemented across the various state and territory marine authorities and AMSA.

97 Before the reorganisation, AMSA only regulated: vessels travelling to (or from) Australia from (or to) a place outside Australia; non-SOLAS trading vessels on interstate coastal voyages; SOLAS-certificated ships on interstate coastal voyages; and all other ships that were not excluded by the Act.

98 Marine Safety (Domestic Commercial Vessel) National Laws Act 2012 (Cth), Section 163; Navigation Act 2012 (Cth), Section 342.

The legislative provisions empowering AMSA to inspect foreign ships, issue notices for deficiencies and detain foreign vessels as a result of marine safety issues are found in Chapter 8, Part 4 of the Navigation Act 2012 (Cth).[99]

Australia has a rigorous system of port state control. In 2019, of the 28,584 ship visits to Australia (by 5,981 foreign-flagged vessels), AMSA performed 3,222 port state control inspections.[100] As a result, 5,281 deficiencies were found (a decrease of 0.7 per cent on the previous year); 163 vessels were detained because of the severity of those deficiencies.[101] In general, the deficiencies on detained vessels concerned international safety management, emergency systems, life-saving appliances, fire safety, water-tight or weather-tight conditions and increasingly public examples of underpayment of crew.[102] AMSA used its power to ban two vessels from entering Australian ports for a minimum of 12 months for underpayment of crew.

AMSA also publishes monthly detention lists on its website.[103] These lists identify the particulars of a detained vessel: its registered owner, the International Safety Management Code (the ISM Code) manager and classification society, and a description of the deficiencies found. In some cases, images of deficiencies are provided.

Australia has entered into port state control memoranda with the Indian Ocean Memorandum of Understanding (IOMOU) and the Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region 1994 (the Tokyo MOU).

In maintaining its rigorous port state control inspection strategies, AMSA also participates in 'focused inspection campaigns' in cooperation with port state control MOU groups. Industry is advised publicly of any planned focused inspection campaign one month before it commences through the issuance of an Australian notice to mariners.[104]

iii Registration and classification

The primary legislation governing ship registration in Australia is the Shipping Registration Act 1981 (Cth) (SRA), with its associated regulations.[105] The SRA sets out the conditions for ship registration and the granting of Australian nationality to ships. Once registered, the SRA imposes obligations on the owner or registered agent to ensure the register remains current.

The SRA also established the Australian Shipping Registration Office (located within the Canberra office of AMSA), the responsibilities of which include the establishment of the ownership of ships, the granting of certificates, the issuing of continuous synopsis records to ships required to carry them and providing public access to the information held in Australia's ship registries.[106]

99 Environmental enforcement powers are dealt with separately.

100 AMSA, 'Port State Control Australia, 2019 Report', https://www.amsa.gov.au/sites/default/files/p200204-port-state-control-annual-report-2019_digital.pdf.

101 ibid.

102 ibid., page 6.

103 See www.amsa.gov.au/vessels-operators/port-state-control.

104 Notices to mariners are available on the AMSA website.

105 The Australian Shipping Registration Regulations 1981 (Cth).

106 Extract from the AMSA website: www.amsa.gov.au/vessels-operators/ship-registration.

Australia has two registers: the Australian General Register (AGR) and the Australian International Shipping Register (AISR). The AGR is primarily used for domestic vessels and internationally certified Australian vessels. The AISR is intended to record international trading ships that meet specific criteria.

A guide to registering ships in Australia can be found on the AMSA website.[107] All Australian-owned commercial ships of 24 metres or more in tonnage length capable of navigating the high seas must be registered.[108] All other craft, including government ships, fishing and pleasure craft need not be registered, but may be if the owners desire.[109]

Any ship demise chartered to an Australian-based operator, or any craft under 12 metres in length, owned or operated by Australian residents, nationals or both, can be registered if the owner or operator wishes.[110]

It is important to note that the AGR and the AISR only contain matters required or permitted by the SRA to be entered in the register. Registers no longer include details regarding mortgages, liens and other financial or security interests in a vessel. Any financial or security interests must be registered on the Personal Property Securities Register (PPSR), which is an entirely separate register operated by a separate government body.[111] The interest of an owner or bareboat charterer may also be registered on the PPSR.[112]

The classification societies that operate in Australia are listed on the AMSA website and are members of the International Association of Classification Society. Not all classifications societies have offices in Australia.

iv Environmental regulation

Regulation of environmental matters in the context of shipping is extensive and, at times, complex as a result of the interplay between Commonwealth and state or territory jurisdictions within Australia. Depending on the location of the vessel and any pollution originating from the vessel within Australian waters, Commonwealth or state or territory marine environmental legislation (or both) may be applicable.

The principal marine environmental convention enacted into Australian law is the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78)). Other relevant environmental legislation prohibits pollution by ship anti-fouling paint[113] and the introduction of invasive marine species from contaminated ballast water.[114]

107 AMSA, 'Guide to the Registration of a Ship'; see also www.amsa.gov.au/vessels-operators/ship-registration/australian-international-shipping-register.

108 Shipping Registration Act 1981 (Cth), Sections 12 and 13.

109 ibid., Sections 13 and 14.

110 ibid., Sections 9 and 14.

111 The Personal Property Securities Act 2009 (Cth) is the relevant legislation governing the Personal Property Securities Register and the handling of security interests in Australia.

112 See Personal Property Securities Act 2009 (Cth), Section 13, relating to a 'PPS Lease'.

113 Protection of the Sea (Harmful Anti-fouling Systems) Act 2006 (Cth) and Marine Order 98, which give effect to the International Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001.

114 Quarantine Act 1908 (Cth). The 'Australian Ballast Water Management Requirements' information is available from the Department of Agriculture and Water Resources.

Ship operational pollution prevention obligations under MARPOL are enacted in Australia under the Navigation Act 2012 (Cth) and Marine Orders.[115] These obligations are applicable to Australian vessels anywhere in the world, as well as foreign vessels within Australian waters. The federal enforcement legislation relevant to pollution events is the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth) (MARPOL legislation), which has been amended to include provisions giving effect to components of the IMO 2020 regulations. From September 2019 to November 2019, AMSA participated in a concentrated inspection campaign on MARPOL Annex VI compliance and conducted 479 inspections. No detentions were recorded as a result of this inspection campaign.

Each state or territory also has its own applicable enforcement legislation used for ship operational pollution events.[116]

In its 2014–2015 annual report, AMSA indicated that within the reporting year it had secured one successful prosecution for breach of the MARPOL legislation.[117] However, since then, no successful MARPOL prosecutions have been reported by AMSA.

Similarly, state and territory prosecutions have been few in number. Marine pollution prosecutions under the aforementioned Acts are generally commenced in inferior courts and information about successful prosecution proceedings is limited. However, the prosecutions include:

a the container carrier ANL *Kardinia*, prosecuted under the MARPOL legislation for offences concerning disposal of rubbish near the Townsville coast;[118]

b the container carrier MSC *Carla*, prosecuted under the Marine Pollution Act 1987 (NSW) for oil pollution in the port of Botany Bay; and[119]

c the container carrier *Pacific Adventurer*, prosecuted under the Transport Operations (Marine Pollution) Act 1995 (QLD) for oil pollution off the shore of Moreton Island, Queensland.[120]

In Australia, as in other countries, the new global upper limit on the sulphur content of ships' fuel oil set out in IMO 2020: Consistent Implementation of MARPOL Annex VI has come into effect. In 2020, one vessel, the MV *Chiyotamou*, received a formal warning letter from AMSA for a defective exhaust gas cleaning system and insufficient compliant fuel for

115 Marine Order 91 – Oil; Marine Order 93 – Noxious liquids substances; Marine Order 94 – Packaged hazardous substances; Marine Order 95 – Garbage; Marine Order 96 – Sewage; and Marine Order 97 – Air pollution.

116 Legislation includes: the Marine Pollution Act 2012 (NSW), the Protection of Marine Waters (Prevention of Pollution from Ships) Act 1987 (SA), the Pollution of Waters by Oil and Noxious Substances Act 1987 (WA and Tas), the Pollution of Waters by Oil and Noxious Substances Act 1986 (VIC), the Environment Protection Act 1970 (VIC), the Transport Operations (Marine Pollution) Act 1995 (QLD) and the Marine Pollution Act 1999 (NT).

117 AMSA, 'Annual Report 2015–2016', page 33. The prosecution was in relation to the *ANL Kardinia* for disposal of food waste into the sea in the Great Barrier Reef Marine Park, February 2015.

118 https://www.amsa.gov.au/news-community/news-and-media-releases/master-and-owner-found-guilty-illegal-garbage-disposal-great.

119 (1 September 2009) *Filipowski v. Hermania Holdings SA*; *Filipowski v. Rajagopalan (No. 2)* [2009] NSWLEC 104.

120 (14 October 2011) Indictment No. 2355 of 2010, *The Queen v. Bernardino Gonzales Santos and Ors*.

the voyage. This is despite the vessel reporting the failure through a Fuel Oil Non-Availability Report. Other examples include AMSA's inspections uncovering high-sulphur fuel being stored on board vessels after the 1 March 2020 carriage ban.

v Collisions, salvage and wrecks

Collisions

Australian Commonwealth and state or territory maritime legislation give effect to the International Regulations for Preventing Collisions at Sea 1972 (COLREGs).

A peculiarity that arises from Australia's federal legal system is that the Commonwealth application of the COLREGs is restricted on the high seas[121] to regulated Australian vessels,[122] domestic commercial vessels[123] and recreational craft[124] (collectively, Australian vessels), and Australian vessels and foreign vessels[125] in:

a the Australian EEZ;[126]

b the Australian Territorial Sea;[127] and

c internal waters.[128]

Domestic commercial vessels and recreational craft must comply with the COLREGs that apply to them through state or territorial legislation when a vessel is within the legislative jurisdiction[129] of that state or territory.[130]

Wrecks

Legislation relating to wrecks and salvage is set out in Chapter 7 of the Navigation Act 2012 (Cth) and in various pieces of state or territory legislation that confer miscellaneous powers on port authorities and harbour masters in relation to wrecks and salvage. Part 2 of Chapter 7 of the Navigation Act 2012 (Cth)[131] applies only to regulated Australian vessels and foreign vessels, and places a mandatory obligation on the owner and master to notify AMSA of a wreck.[132]

121 As defined in UNCLOS.

122 As defined in Navigation Act 2012 (Cth), Section 15.

123 As defined in the Marine Safety (Domestic Commercial Vessel) National Laws Act 2012 (Cth).

124 As defined in Navigation Act 2012 (Cth), Section 14.

125 id.

126 As defined in UNCLOS.

127 id.

128 id.

129 Note that this is to be distinguished from the geographical (maritime) state limit.

130 By way of example, the COLREGs are applied in Queensland to ships 'connected with Queensland' wherever they are (including overseas and outside Queensland waters) pursuant to Section 11 of the Transport Operations (Marine Safety) Act 1994 (Qld) and Transport Operations (Marine Safety) Regulation 2004 (Qld). By way of further example, in Victoria, the COLREGs are enacted through the Marine Safety Act 2010 (Vic) and Part 6, Division 5 of the Marine Safety Regulations 2012 (Vic), with the regulations disapplying COLREGs in limited circumstances.

131 Relating to wrecks.

132 Navigation Act 2012 (Cth), Section 232.

For domestic commercial vessels, the Marine Safety (Domestic Commercial Vessel) National Laws Act 2012 (Cth) does not contain a provision expressly for wrecks but confirms the continuing application of state or territory laws on this matter.[133]

Following the loss of containers off the New South Wales coast from the YM *Efficiency* in 2018 and the APL *England* in 2020, the Department of Infrastructure, Transport, Regional Development and Communications commenced a consultation process that will continue during the coming year with select stakeholders to determine whether Australia would benefit from adopting the Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi WRC 2007).

AMSA has brought proceedings against the owners of the YM *Efficiency*[134] in the Federal Court of Australia, which is a test case on the jurisdictional reach of AMSA's powers to recover costs arising from combating pollution, including container retrieval operations in relation to the containers that are lost overboard in Australia's EEZ. Among other things, the circumstances of the case have highlighted potential complications resulting from the differences between the Nairobi WRC 2007 and the Navigation Act 2012 (Cth), in particular how the definition of 'wreck' in the Act does not extend to goods or cargo that have been lost overboard from a ship, unless the ship is also 'wrecked, derelict, stranded, sunk, abandoned, foundered or in distress', whereas the Nairobi WRC 2007 includes 'any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea'[135] where there has been a 'maritime casualty', which is defined as 'a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it, resulting in material damage or imminent threat of material damage to a ship or its cargo'.[136]

Salvage

Australia has adopted the International Convention on Salvage 1989 (the 1989 Salvage Convention) into Australian law but not all its articles. At present, only certain Articles are adopted through marine regulations permitted by Part 3 of the Navigation Act 2012 (Cth). The adopted Articles are listed in Regulation 17 of the Navigation Regulation 2013 (Cth), which also adopts the Convention's common understanding for Articles 13 and 14.[137]

vi Passengers' rights

In November 2017, the Australian government released a discussion paper concerning the Carriage of Passengers and their Luggage by Sea. This discussion paper was prepared as part of a consultation process on Australia's possible ratification of the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention). The matter was under consideration as a consequence of, among other things, a significant increase in the number of international cruise passengers visiting Australia in recent years. The purpose of the consultation process was to assess the adequacy of the current legal framework regarding the international carriage of passengers by sea, particularly the compensation and liability

133 Marine Safety (Domestic Commercial Vessel) National Laws Act 2012 (Cth), Section 6(2)(b)(viii).

134 *Australian Maritime Safety Authority v. The 'YM Eternity' as a surrogate ship*, Federal Court No. NSD121/2020

135 Nairobi International Convention on the Removal of Wrecks 2007, Article 1(4).

136 ibid., Article 1(3).

137 Navigation Regulation 2013 (Cth), Schedule 1 – the tribunal is under no obligation to fix a reward up to the maximum value of the saved vessel or property.

regime for passengers, and the commercial implications if Australia were to ratify the Athens Convention. After a lengthy consultation with relevant stakeholders, on 28 October 2020, the government decided that Australia would not accede to the Athens Convention.[138] It appears, therefore, that Australia is unlikely to become a party to the Convention in the near future.

A shipowner is obliged to report to AMSA any incident that involves the death or serious injury of a person, including a passenger, and failure to do so is an offence.[139]

A passenger's passage money is treated as being equivalent to freight. Therefore, the master has a lien on the passenger's luggage for unpaid passage money. If the ship is lost before the contracted voyage commences, the passage money is returnable. Once a voyage has commenced, passage money is generally not returnable. If the voyage is a pleasure cruise, however, the loss of a ship may give rise to a claim for breach of contract on the basis of the distress and disappointment caused by the loss.

Claims for death or personal injury sustained in consequence of a defect in a ship or its equipment, or arising out of an act or omission by the shipowner (or any person for whose actions the shipowner or charterer is vicariously liable) are general maritime claims for the purposes of federal jurisdiction. Alternatively, claims for loss of life or personal injury may be brought in the Australian state courts. These claims are generally claims in contract or in tort in favour of the affected passenger or his or her estate. The carrier owes a duty to passengers to take reasonable care in respect of their safety.

Passenger claims for loss of life or personal injury brought by a person carried in a ship under a contract of passenger carriage[140] are subject to a limitation of liability in the amount of 175,000 units of account multiplied by the number of passengers the ship's certificate authorises it to carry.[141]

vii Seafarers' rights

The Maritime Labour Convention 2006 (MLC) came into force in Australia on 20 August 2013.

Pursuant to the Navigation Act 2012 (Cth), Marine Order 11 (among other Marine Orders, which are legislative instruments under the Navigation Act) and the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (Cth), many aspects of the MLC are mandatory for regulated Australian vessels.[142]

The MLC applies to all seafarers with few exceptions.[143] When the MLC is not applicable, the provisions of the Fair Work Act 2009 (Cth) operate to require minimum terms and conditions for seafarers.

AMSA is the relevant authority responsible for inspections and enforcement of the MLC. AMSA surveyors are empowered to inspect most ships at Australian ports to ensure

138 See https://ris.pmc.gov.au/2020/11/18/athens-convention.

139 Navigation Act 2012 (Cth), Section 185(2).

140 LLMC Convention 1976, Article 7(2)(a). Or who, with the consent of the carrier, is accompanying a vehicle or live animals covered by a contract for the carriage of goods (Article 7(2)(b)n).

141 ibid., Article 7(1) (as varied by Article 4 of the 1996 Protocol). See also www.infrastructure.gov.au/maritime/business/liability/claims.aspx.

142 As defined by the Navigation Act 2012 (Cth), Section 15.

143 As defined by the Navigation Act 2012 (Cth), Section 14.

they comply with the MLC. All foreign-flagged vessels within Australian waters may be subject to port state control inspections by AMSA, which will include checks to ensure that MLC requirements for working and living conditions are being met.

AMSA has the power to detain vessels or refuse access to Australia for failure to comply with the MLC[144] and has done so as recently as 13 September 2019, when the Panama-flagged bulk carrier MV *Xing Jing Hai* was refused access to Australia for 18 months. The investigation, which revealed that several seafarers had not been paid in full at monthly intervals in accordance with employment agreements, on repeated occasions, caused AMSA to require that seafarers be paid in full.[145]

VII OUTLOOK

On 13 September 2017, the federal government introduced the Coastal Trading (Revitalising Australian Shipping) Amendment Bill 2017 (the Coastal Trading Bill) into Parliament,[146] which aimed to create a simpler and more flexible coastal shipping industry that carries an increased share of Australia's freight. However, in late 2018, the proposed reforms were debated in Parliament and the Coastal Trading Bill was rejected. The Liberal/National Party coalition was elected to form a government in the 2019 election and so the policy proposed by the Australian Labor Party of seeing 'more Australian seafarers crewing more Australia-flagged ships carrying more Australian goods around our coastline and to overseas markets' is not likely to occur for the foreseeable future.[147] If such a change were to occur in any future government, it will probably involve either major amendment or the repeal and replacement of the current cabotage legislation to impose greater regulatory impediments or cost burdens on foreign-flagged vessels performing Australian coastal voyages.[148]

Despite becoming the world's largest producer and exporter of liquefied natural gas (LNG) in 2019, parts of Australia are still experiencing significant energy supply issues, with consequent increases in both wholesale and retail domestic energy prices. To address this growing problem, some local energy companies have been considering the possibility of importing cheaper foreign products, such as LNG and liquefied petroleum gas, for domestic use. In addition to an increase in shipping activity, such projects would require the construction and operation of appropriate import terminals, with connections to existing distribution networks. At least three operators have been actively considering using a floating storage and regasification unit (FSRU). Construction for an FSRU to be berthed in Port Kembla (NSW) is due to commence in 2021 and other FSRUs have been proposed for Newcastle (NSW), Port Kembla (NSW), Corio Bay (VIC), Port Phillip Bay (VIC) and a further unit is all but

144 A list of all vessels detained by AMSA is available at www.amsa.gov.au/vessels-operators/inspection-non-australian-ships/ship-detention-list-september-2017.

145 www.amsa.gov.au/news-community/news-and-media-releases/two-bulk-carriers-banned-australian-ports-one-day.

146 See HFW Australia's Briefing Note, 'Coastal Trading (Revitalising Australian Shipping) Amendment Bill 2017', www.hfw.com/Coastal-Trading-Revitalising-Australian-Shipping-Amendment-Bill-2017-September-2017.

147 See Anthony Albanese MP, 'Labor Will Revive Australia's Shipping Industry And Create A Strategic Fleet', 24 February 2019, https://anthonyalbanese.com.au/media-release-labor-will-revive-australias-shipping-industry-and-create-a-strategic-fleet-sunday-24-february-2019.

148 At the time of writing, the result of the consultation process was yet to be concluded.

confirmed for Crib Point (VIC). These projects, if they proceed, are expected to give rise to a range of novel operational, regulatory and commercial considerations, since no FSRU has previously operated in Australia.

In relation to maritime safety, AMSA continues to exercise its powers to ban vessels that experience repeated breaches resulting in detentions from Australian ports, on the basis that they pose an increased risk to seafarers, vessels or the environment.[149] We expect this practice to continue. Five vessels were banned in 2020 for at least three months and already in 2021, one vessel has been banned for 24 months. Foreign-flagged vessels will need to ensure that they remain in compliance with all relevant regulations, including MLC requirements as discussed in Section VI.vii, to avoid significant delays and the associated cost implications. It is also expected that the government and the International Transport Workers' Federation will continue to take a strict approach against vessels that underpay foreign crew while working in Australian waters, in accordance with Australia's Coastal Trading rules.[150]

With an election scheduled to occur some time in the last quarter of 2021 and the second quarter of 2022, it should be expected that stakeholders and political aspirants will again float possible changes to a yet to be defined 'strategic shipping fleet'.

IMO 2020, which is prescribed in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983, came into effect in Australia on 1 January 2020. AMSA has powers of enforcement and they have indicated that Australia will adopt a strict approach to fulfilling its obligations to enforce compliance with IMO 2020.

At the time of writing, the covid-19 pandemic appears to be under control in Australia. With vaccines beginning to be rolled out to the citizenry and community transmission rates virtually non-existent, domestic travel has slowly been returning to normal, which has brought a much-needed boost to the tourism industry. Australia nonetheless continues to impose a general ban on non-residents and non-citizens coming to the country, and it is not immediately clear when or how this restriction will be removed. This policy has also adversely affected the cruise sector and the government will take an equally conservative approach to opening up Australia to international cruise vessels for the foreseeable future. Although reports indicate a strong interest within the community to book cruises, which reflects the enormous growth that was experienced in the Australian sector prior to the pandemic, it is likely to be some time before there will be a return to pre-covid levels.

149 AMSA, Annual Report 2015–2016, page 33. AMSA banned one vessel for periods of three or 12 months, namely, the *ANL Kardinia*.

150 'Shipping company in court for allegedly underpaying seafarers by $255,000', Fair Work Ombudsman (April 2017), www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/april-2017/20170408-transpetrol-litigation.

Appendix 1

ABOUT THE AUTHORS

GAVIN VALLELY

HFW

Gavin Vallely has more than 25 years' experience in advising on contentious and non-contentious matters concerning commercial shipping, offshore oil and gas, and international trade. His work in the shipping sector includes advising on all forms of charter parties, ship sale and purchase and construction, Australian regulatory schemes (including HSE, coastal shipping, customs and tax) and port and terminal operations. He has acted for the operators of vessels, offshore installations and terminals in respect of numerous casualty and pollution incidents, managing the response to investigations by government authorities and the defence of any related criminal and civil proceedings. He has also acted in several major claims in respect of damage to cargo (including petroleum products, chemicals, fertiliser and grain cargoes), berth damage, International Transport Workers' Federation boycotts, occupational health and safety prosecutions and port state control issues.

SIMON SHADDICK

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Simon Shaddick deals with contentious shipping and marine matters, with a particular focus on disputes in the offshore energy sector, and he has broad experience in maritime dispute resolution. He has handled a wide range of shipping and offshore cases, including claims relating to marine casualties, charter parties, shipbuilding contracts, marine insurance, bills of lading, cargo damage and pollution. He has represented a variety of domestic and international shipping and offshore energy interests in litigation, arbitration, mediation and commercial negotiations. Simon is qualified in both Australia and England, and worked for several years in HFW's London office.

ALEXANDRA LAMONT

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Alexandra Lamont specialises in shipping, with a particular focus on disputes arising from charterparties, bills of lading, marine insurance, personal injury and marine causalities. She also provides advice in relation to ship arrests and regulatory issues including pollution, licensing and safety. She commonly acts for shipowners, charterers, P&I Clubs and local authorities.

Alexandra is qualified in New South Wales (Australia).

TOM MORRISON

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Tom Morrison specialises in the shipping and insurance and reinsurance sectors. His work spans a variety of maritime issues, such as charterparty, bill of lading and insurance coverage disputes. He has experience of advising on contentious matters across various sectors, ranging from marine and non-marine insurance, charterparty and bill of lading disputes, shipbuilding and ship arrest. Tom acts for owners, charterers, H&M underwriters, and P&I clubs in both arbitration and court-related matters.

He also has experience of providing advice on non-contentious matters, including stevedoring contracts, charterparties and service agreements.

Prior to joining HFW, he worked in the operations department of a Hong Kong-listed shipping company, where he gained invaluable commercial experience of the Asian bulker market.

Tom speaks English and Swedish and is qualified in New South Wales, Australia.

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