



## MARITIME & TRADE LAW BULLETIN

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### Welcome

It is our great pleasure to present our first news letter from our new merged firm HWL Ebsworth. Ebsworth & Ebsworth, merged with the firm of HWL on 5 May 2008 earlier this year. Some three months down the track the merger, is proving not only to be immensely successful, but also fun.

We are pleased to be able to report that without exception every single member of Ebsworth & Ebsworth's Transport Group joined the new firm.

We are delighted to announce that we now offer nationally a total complement over 105 partners, which has enabled us to be able to become a full service firm in each of our major offices, namely Sydney Melbourne and Brisbane.

We are also delighted to announce the arrival of Maurice Thompson who joins us from Holman Fenwick Willan as a Partner and will head-up our practice in Melbourne. It is also from my perspective pleasing that both Norman Lyall and Tony Scotford are also with our new firm. Although will doubtless raise an eyebrow when he reads this, Norman joined the firm in 1950 as an Articled Clerk, being paid the princely sum of £1.00 per week and rose to become not only Practice Group Head but both Managing and Senior Partner. Tony of course, many of you know from his days as a Maritime lawyer. We feel proud to be able to have two such august lawyers in our midst who we are able to go to with those particularly curly issues where seemingly there is no apparent answer!

We all hope that you enjoy our new newsletter and please feel free to contact any of us if you would like any further information.

Joe Hurley & Anthony Highfield  
Partners - Maritime & Trade

### New South Wales Maritime Safety Laws Overhauled

NSW Minister for Ports & Waterways, Joe Tripodi, has recently announced major changes to New South Wales marine safety laws.

The reforms include the introduction of new penalties for dangerous behaviour on NSW waterways and Water Police and NSW Maritime Officers have been given broader powers to enforce the law and direct boaters to act safety. These new powers will include the power to deregister boats on the spot for breaches of the law, including for insufficient lighting.

Fines have also been dramatically increased for dangerous navigation, overloading a vessel, endangering public safety and driving whilst disqualified and boat operators face up to two years jail for overloading their vessels. The fine for recreational boats guilty of dangerous or negligent navigation will rise from \$1,500 to \$5,000 and the penalty for causing danger and excessive wash has been increased to \$5,500. The maximum fine for operating an overloaded vessel will climb to \$44,000 and a new offence of dangerous driving causing grievous bodily harm has been created and will attract up to two years jail and fines up to \$110,000.

Under the planned changes aspiring skippers will be required to undergo a practical test before being granted a boating licence.

Other elements of the new maritime safety laws include:

- creation of a new offence of operating an unsafe vessel;
- a new system of maritime alerts to warn of dangerous conditions,

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covering bar crossings, rock fishing and alpine boating;

- requiring vessels to display information for passengers on life jackets, maximum passenger numbers, restrictions on alcohol and skipper responsibilities;
- new signage requirements for overhead electrical crossings; and
- changes to training and safety standards for off-shore sailing in New South Wales.

In introducing the new boating laws Minister Tripodi said *"This is the biggest overhaul of marine safety rules and practices in a decade"*.

Written by Anthony Highfield, Partner

### Protection of the sea – levy increase from 1 July 2008

With effect from 1 July 2008, there has been an increase in protection of the sea levy imposed under the Protection of the Sea (Shipping Levy) Act 1981 and the Protection of the Sea (Shipping Levy) Collection Act 1981.

This levy applies to all ships that are visiting or operating in Australian ports and whose length exceeds 24 metres, is carrying in excess of 10 tonnes of oil in bulk whether as fuel or cargo.

The sea levy funds Australian Maritime Safety Authorities ("AMSA") national plan to combat pollution of the sea by oil and other noxious and hazardous substances.

The levy has risen from 7.7 cents to 9.6 cents per net registered tonne per quarter.

Readers requiring more details should review the AMSA website at [www.amsa.gov.au/levies\\_and\\_fees/index.asp](http://www.amsa.gov.au/levies_and_fees/index.asp).

Written by Andrew Pearson,  
Senior Associate

### A day in the life of an HWL Ebsworth Maritime lawyer

I have been asked to do a note on any interesting cases which I conducted on behalf of Ebsworths' clients. There were many. One which is worth recording is the *"Cobargo"*. In that case we were acting for RW Miller who had a contract with a Pioneer Concrete subsidiary to carry aggregate from the south coast to the Pioneer Concrete depot at Blackwattle Bay. To carry out this contract Millers chartered the ship *"Cobargo"* from Heathking Steamships.

The aggregate was mixed with cement at Blackwattle Bay and the concrete was then delivered to building sites all around Sydney. What went wrong was that the concrete did not set at the many sites and failed. Surveyors who were inspecting the damaged sites were puzzled to find a lot of bees present. One of them remembered that he had once been told that when a concrete mixer truck broke down the driver usually went as quick as he could to a nearby shop to buy sugar to put in his load to stop it setting. It was then realised that the failure of the concrete was probably due to sugar and investigation found that the *"Cobargo"* had previously carried sugar on a run from the north coast to the CSR factory at

Pyrmont. It was confirmed that sugar had caused the problem.

Millers were sued by Pioneer for the damages they had to pay and we in turn cross-claimed against Heathking. The case against Millers was that they were in breach of their contract to safely carry the aggregate. We contended that a failure on the part of Heathking to properly clear the bilges had resulted in a residue of sugary water going into the aggregate and thus causing the losses. Our case was that the *"Cobargo"* was not in a fit and proper condition to carry the aggregate under the terms of the charterparty.

The case initially came before Justice Yeldham in the Supreme Court. The plaintiff succeeded against Millers and following an Appeal to the Privy Council which upheld a majority of Yeldham's findings the damages payable by our client to Pioneer were passed on to Heathking.

I often wonder whether the real cause of the failure of the concrete would have been found if someone had not noticed the bees.

Written by Norman Lyall, Consultant

### Australian Coastal and Marine Pollution Regulation & Response

Australia has broad and extensive laws implementing and exceeding IMO conventions combating marine and coastal pollution and concerning maritime environment protection, through measures such as ballast water discharge restrictions, restrictions on the use of toxic anti fouling paint, prevention of sea dumping and discharge of oil, garbage and waste from ships.

Australian regulatory jurisdiction over coastal and marine pollution is shared between the Commonwealth and State (and Territory) Governments, with

the State (and Territories) responsible for Australian inland and coastal waters within three nautical miles. Waters beyond this distance are the Commonwealth's responsibility through its agency, the Australian Maritime Safety Authority.

Australian maritime authorities are typically vigilant in their enforcement of marine environmental protection laws and almost invariably prosecute for breaches of marine environment laws, many of which are strict liability in nature.

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Vessel operators and masters (and in some cases crew members) can face criminal sanction and significant penalties for breach of marine pollution laws and can also be liable for clean up costs and civil liability to affected third parties. For instance, in New South Wales the penalty for oil discharged from a vessel is up to \$500,000 for an individual and as much as \$10 million for the ship operator.

Australian maritime officers are given broad and wide powers to enforce marine environmental protection laws, and to obtain information, documents and evidence necessary to carry out their response and investigative role, including for instance:

- power to go on board vessels and enter premises
- power to request the production of documents and take copies of documents (eg deck logs, oil response plans, SOPEP)
- interview crew members and other witnesses
- take statements and require persons to answer questions
- take samples of plant and equipment (eg an oil sample)
- power to detain vessels.

When responding to a marine pollution incident, in our view:

- ensure that immediate steps are taken to contain and avoid environmental harm
- report the incident and co-operate with maritime response agencies
- ensure that there is in place/on board appropriate maritime/oil pollution preparedness/contingency response plans (SOPEP, ISM Code manual)

and equipment, which the crew are familiar with and are able to implement

- carry out a full investigation into the incident – secure relevant documents, take statements from the master and other relevant crew members, keep a sample of pollution/oil discharged

Following a marine pollution incident, we believe it is important that:

- an internal audit/investigation of the cause of marine pollution incident and response measures taken is conducted to identify any necessary changes that need to be made to ship based operational procedures and pollution response measures, so that steps can be put in place to prevent a repeat of the incident

- industry best practice is adopted and put in place; and
- any necessary crew training or re training in marine pollution response management is carried out.

Following steps along these lines will enable evidence to be called during a prosecution hearing setting out the response and remedial steps taken in connection with a marine pollution incident, which in our experience can have a significant bearing on the severity of the incident leading potentially to a reduction in the size of any financial penalty that may otherwise have been imposed for a marine pollution incident.

Written by Anthony Highfield, Partner

## Harbour Pilots – For whom the bell tolls?

The NSW Legislative Assembly has recently passed amendments to the Maritime Safety Act, which includes provisions for the State Government to ignore rules concerning the operation of marine pilots and the safe navigation of vessels over 30 metres.

In summary, the changes allow any NSW Harbour Master to approve a vessel's entry into a harbour without having a qualified pilot on board the vessel. The Australian Marine Pilots Association has raised grave concerns over the amendments and stressed that pilots are essential in busy ports where their specialist knowledge was essential for safe navigation.

Ships carrying 100,000 tonnes of crude oil regularly travel into Sydney Harbour and the risk of a non-piloted vessel could have disastrous environmental consequences. In almost all cases, any ships that visit the

harbour enter or leave the command of a pilot.

We will keep readers updated with how the changes are implemented in practice.

Written by Andrew Pearson,  
Senior Associate

## Marine Order Part 32

The Australian Maritime Safety Authority (AMSA) has recently published a Marine Notice highlighting the risks associated with restricting the means of access from a ship's cargo hold due to blocks of cargo in the hold ends.

It is compulsory, for loading or unloading at an Australian port or territory of Australia, to provide and maintain a safe and unobstructed means of access to the vessel's cargo holds.

Marine Order 32 provides the following statutory obligations in relation to these issues:

- That all vessels maintain at least one unobstructed and safe means of access from the uppermost deck of the space to the level at which loading or unloading is taking place;
- That there is a protective fence or netting to guard against a fall, if the height at which persons working or transiting exceeds 2 metres

AMSA routinely carries out ship inspections to ensure compliance with Marine Orders Part 32.

Failure to comply with the provisions of Marine Order 32 can result in penal provisions being applied to the Master and in some Operator Company Officers.

The full text of Marine Orders Part 32 – Cargo Handling Equipment - is available from the website [www.amsa.gov.au](http://www.amsa.gov.au).

Written by Andrew Pearson,  
Senior Associate

## Direct Offshore Foreign Insurers (DOFI)

### Regulations commencing 1 July 2008

DOFIs are foreign general insurers currently offering general insurance products to Australians without being authorised in Australia because they are not considered to be "carrying on insurance business in Australia" under the *Insurance Act 1973*. DMFs provide an insurance like product offering discretionary cover alternatives to insurance. The *DMF/DOFI Act* and DOFI Regulations came into effect on 1 July 2008.

The Act requires DOFIs to be authorised insurers and subject to Australia's prudential regime. From 1 July 2008, it will be an offence for a DOFI to carry on insurance business in Australia without being authorised and for an Australian Financial Services Licence (AFSL) holder to deal in general insurance products that are not issued by an authorised insurer or a Lloyd's underwriter, unless an exemption applies.

The Act introduces a limited exemption mechanism to enable insurance business that cannot be appropriately written in Australia to be supplied by a DOFI.

Part 2 of the Regulations, entitled "Insurance contracts that are not insurance business" provide for three categories of exemption:

- (a) insurance contracts for high valued insureds;
- (b) insurance contracts for atypical risks; and
- (c) insurance contracts for other risks that cannot reasonably be placed in Australia.

Categories (a) and (c) above involve sub-regulations which cover financial limits and broker enquiry, recording and certification.

Category (b) above provides, in conjunction with the Act, exemption for the defined atypical risks.

There are 10 atypical risks, meaning contracts of insurance under which the insured is insured against those listed risks.

Regulation 4C (2) (h) provides as follows:

*"liability and expenses arising from a person owning, chartering, managing, operating or being in possession of a vessel other than a pleasure craft (within the meaning given by subsection 9A (2) of the Insurance Contracts Act 1984);"*

Regulation 4C (2) (j) provides as follows:

*"loss or liability incidental to a loss or liability mentioned in paragraphs (a) to (i)."*

The exemption is broadly drafted and intended to cover the liabilities and expenses covered by P&I clubs and other entities. But the exemption does not extend to pleasure craft as defined in the *Insurance Contracts Act 1984*. This means that pleasure craft insurances (as defined) are not exempted as atypical risks and are thus subject to the Act as to authorisation of insurers.

This broad exemption for P&I club cover for liabilities and expenses (h), including incidental liabilities (j) was accepted by the Australian Treasury after lengthy consultations with representatives of the International Group of P&I clubs, marine insurance brokers and agents, Australian marine insurers and industry organisations, including Shipping Australia Limited. The ambit of this exemption (including incidental liabilities)

will be of practical benefit to foreign insurers who write these classes of marine/P&I cover for Australian insureds.

Ebsworth & Ebsworth (now HWL Ebsworth) represented the International Group of P&I Clubs and also assisted Shipping Australia in submissions to and negotiations with the Australian Treasury. Those submissions and negotiations were greatly facilitated by experienced brokers and others in the marine sector.

Written by Tony Scotford, Consultant

## New bulk wheat export marketing system for Australia

For 60 years wheat has been exported from Australia through single desk sales, however, on 1st July 2008, the Federal Parliament established the *New Wheat Export Marketing Act 2008* ("the Act").

The Act was established by the industry regulator Wheat Exports Australia ("WEA") to regulate the export of bulk wheat from Australia through the Bulk Wheat Export Accreditation Scheme, which will be known as the "bulk scheme". The Act has resulted in substantial changes to the regulation of Australian wheat exports and WEA now act as the industry regulator and oversee all Australian wheat exports.

What this means in practice, is that for an exporter to export bulk wheat from

Australia, they must be accredited by the WEA under the bulk export scheme.

At this stage, we understand that in order to receive accreditation, the exporter must be a company which is registered under the *Corporations Act 2001* or a co-operative and must operate as a fit and proper company otherwise accreditation may not be granted, which is discretionary; although as you would expect any discretion has to be experience fairly.

Accreditation is for up to 3 years and once a company is accredited, it is necessary for all exporters to complete an Annual Export Report and an Annual Compliance

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## Environmental Crimes: Increasing Sentencing Certainty

Following a major collaboration between the Land and Environment Court and the Judicial Commission of New South Wales, judges can now access the Court's sentencing statistics for criminal matters on the Judicial Information Research System (JIRS). This will increase the information available to judges making sentencing decisions in cases of environmental crimes, such as oil pollution, and should increase consistency in sentencing.

The publication of sentencing statistics is an important element of upholding public confidence in the criminal justice system. The basic concept is that the same offence in the same circumstance should receive the same treatment. Making information about the ranges of sentences handed down for particular offences, and the factors which underpinned them, is

essential to allowing judges to apply the law consistently and predictably. The JIRS system allows for significant tailoring to the circumstances of particular environmental crimes. In addition to the sentences themselves, the system includes seventeen "sentencing variables" – subjective and objective characteristics of the offence and the offender. This allows judges, when sentencing a defendant, to search for previous cases featuring similar circumstances with a high degree of specificity. For example, a judge can search for penalties levied in a case of accidental oil pollution with foreseeable harm to the environment but only low actual harm, when the defendant was a corporation rather than an individual which had a prior record but which cooperated, expressed remorse and made an early guilty plea. The system will then show sentences in a graphical

format, expressed as dollar amounts or as a percentage of the maximum fine, allowing judges to see how common sentences at particular levels are and to consider what other factors may be relevant. JIRS also allows related aspects of sentencing, such as costs orders and reimbursement of remediation expenses, to be accessed easily.

The use of JIRS in assessing sentences for environmental criminal offences should result in greater transparency and consistency in sentencing. At the appellate level, it may also assist courts in determining whether a sentence is disproportionate to the crime committed. Most importantly, defendants in New South Wales environmental prosecutions, such as oil pollution offences, can expect greater certainty in their likely penalties.

Written by Matthew Burston, Solicitor

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Report. Exporters are also required to report on any notifiable matters during that period of accreditation. A notifiable matter is one that is considered to have a material impact upon the accreditation. This would include, for example, a change in the structure or financial arrangements of a company, which provides financial support to an accredited exporter.

We also understand that all wheat exporters must pay the wheat export

charge for wheat that is produced in and exported from Australia. The export charge is currently fixed at AU \$0.22/tonne. This is payable for all Australian wheat exports (both bulk and non-bulk.) Exporters must pay the export charge within 28 days after the end of the month in which the wheat was exported. This is a compulsory levy and penalties apply for late payments.

In addition, the *Act* regulates the export of bulk wheat, bulk wheat does not apply to wheat exported in a bag or a container that is capable of holding 50 tonnes of wheat or less.

We would be pleased to assist with any questions that readers may have in respect of the new *Act*.

Written by Andrew Pearson,  
Senior Associate

## Safe anchoring on the New South Wales coast

Many bulk Carriers trading to the East coast of Australia, experience lengthy periods at anchor and recent incidents have indicated that some Masters are not applying basic seamanship when anchoring off-shore or at exposed anchorages. This is particularly relevant to the New South Wales coast and Queensland coast that can be affected by extremes of weather. One only has to recall the "Pasha Bulker".

In light of these safety issues, the Australian Maritime Safety Authority ("AMSA") has recently issued a Marine Notice, which reminds Masters of the precautions to be taken when anchoring off Australian ports.

Many admiralty charts provide designated anchorages. However, where anchorages are not designated AMSA strongly advises that Masters must take into account the following factors:

- Good anchoring point holding ground must be sought whenever possible, clear from the vessel. Recommendations may be found in

most Admiralty Sailing Directions and port entry guides.

- In the event that rapidly deteriorating weather is forecast, the Master must make a timely decision to take on heavy weather ballast before conditions deteriorate.
- Masters are reminded of their watch keeping requirements and that it is absolutely essential that routines are in place so the ship's position is regularly checked. This is especially relevant if the weather, tidal streams or proximity of land and traffic congestion are such that these pose a risk to the vessel.
- Masters should also be aware of the particular meteorological conditions, which could affect vessels at anchor. These include intense depressions, which form in the Tasman Sea and generate gale force winds and heavy seas off the southeast coast of Australia.
- AMSA recommends that the main engines, steering gear and windlass must not be dismantled

or immobilised whilst at anchor, as conditions can deteriorate at very short notice. As a matter of safety, if any rectification work is required then the situation should be reported to the Harbour Master for their attention.

- Finally, AMSA also recommends that all vessels actively monitor current weather forecasts and warnings. Weather forecast services are contained in the Admiralty List of Radio Signals Volume III Part 2.

The Australian Bureau of Meteorology makes coastal forecasts and warnings available on the Internet site, [www.bom.gov.au](http://www.bom.gov.au)

Written by Andrew Pearson,  
Senior Associate

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