

The background of the slide is an abstract painting with vibrant, expressive brushstrokes. The colors are primarily warm tones like yellow, orange, and red, transitioning into cooler tones like blue and green. The strokes are thick and textured, creating a sense of movement and energy.

HOLMAN FENWICK & WILLAN

The Year in Review

Peter Glover

Year in Review

- *Elbe Shipping SA v Ship 'Global Peace'* [2006] FCA 954.
- *Comandate Marine Corp. v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192.
- *Comandate Marine Corp. v Ship 'Boomerang 1'* (2006) 151 FCR 403.
- *ASP Holdings Ltd v Pan Australia Shipping Pty Ltd* [2006] FCA 1379.
- *ASP Ship Management Pty Ltd v AAT* (2006) 149 FCR 261.
- *Scandinavian Bunkering AS v Bunkers on Board the Ship FV Taruman* (2006) 151 FCR 126.
- *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd* [2006] FCA 1324.
- *Allison Pty Ltd t/as Pilbara Marine Port Services v Lumley General Insurance Ltd* (2006) 200 FLR 394.
- *C V Sheepvaartonderneming Ankergracht v Stemcor (A/sia) Pty Limited* [2007] FCAFC 77.
- *PNSL Berhad v Dalrymple Marine Services Pty Ltd & PNSL Berhad v The Owners of the Ship 'Koumala'* [2007] QSC 101.
- *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* [2007] FCAFC 115.

Year in Review

- And who could forget ...



Year in Review

- Or more positively, prime waterfront real estate ...



Year in Review

- Legislative Developments of Note:
 - Amendments to the *Protection of the Sea (Powers of Intervention) Act 1981* (Cth).
 - Introduction of the Maritime Crew Visa.
- Case Law Developments of Note:
 - *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* [2007] FCAFC 115.
 - *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192.
 - *PNSL Berhad v Dalrymple Marine Services Pty Ltd & PNSL Berhad v The Owners of the Ship 'Koumala'* [2007] QSC 101.

Amendments to the *Protection of the Sea (Powers of Intervention) Act 1981*

- To date, Australia has avoided a major pollution incident.
- Government is alert to the risk of a major event occurring.
- Single incident can have a major consequence.
- AMSA has wide powers under the *Protection of the Sea (Powers of Intervention) Act 1981*.
- Recognised by the Commonwealth, States and NT that a national approach to maritime emergency response was required and of the need to strengthen the *Intervention Act*.
- On 29 March 2006 the Government introduced in the House of Representatives the *Protection of the Sea (Powers of Intervention) Amendment Bill*.
- The Bill was subsequently passed as the *Protection of the Sea (Powers of Intervention) Amendment Act 2006* and commenced on 22 May 2006.
- The *Amendment Act* amends the *Intervention Act* which gives effect to the provisions of the *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969*.

Amendments to the *Protection of the Sea (Powers of Intervention) Act 1981*

- The most important amendments introduced by the *Amendment Act* are:
 - Clarification of AMSA's powers of intervention in the Exclusive Economic Zone.
 - When the *Intervention Act* came into force in Australia there was no concept of an Exclusive Economic Zone ("EEZ").
 - Introduced in s 3(1) of the Act.
 - The *Intervention Act* now makes it clear that AMSA has the power to intervene in incidents which take place within the EEZ.
 - Introduction of the concept of a "tangible asset".
 - It is clear that AMSA now has powers under the *Intervention Act* which extend beyond ships to include land, premises, facilities, structures or installations and goods including aircraft, vehicles, equipment and machinery or any other article, as well as ships.
- The amended *Intervention Act* therefore makes it clear that the Commonwealth has power to take action in relation to "tangible assets" not on the high seas to avert the risk of oil pollution because of a maritime casualty on the high seas.

Maritime Crew Visa

- In December 2005 the Australian Government announced the introduction of a Maritime Crew Visa ("MCV").
- The Maritime Crew Visa was introduced in the *Migration Amendment (Maritime Crew) Act 2007* which amended the *Migration Act 1958*.
- The MCV took effect on 1 July 2007 and replaces the previously issued Special Purpose Visa.
- Six month transitional period until 31 December 2007 to allow time for the industry to comply with the new MCV.
- MCV is only valid for travel to Australia by sea as ships' crew.

Maritime Crew Visa

- MCV is granted for three (3) years.
- Importantly, foreign crew entering Australia from 1 January 2008 must:
 - Hold a valid national passport; and
 - Hold a MCV granted against the same passport; and
 - Be in possession of another document that establishes the crew member's employment on the vessel (i.e. crew list, articles, seaman's book or contract of employment).
- Foreign crew entering Australia who fail to meet the above criteria will be restricted on board the vessel.
- The Master, owner, agent, charterer and operator who bring an undocumented or inadequately documented foreign crew into Australia are each:
 - Guilty of an offence against s 229 of the *Migration Act 1958*; and
 - Liable for a fine of up to \$10,000 for each foreign national who is refused immigration clearance.

United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC [2007] FCAFC 115

- Appeal from decision by Tamberlin J at first instance in *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* [2006] FCA 1141.
- *La Pampa* – 7 year old capesize bulk carrier.
 - Value USD \$20 million
 - Loaded with 160,927mt coal (USD \$5million)
 - Fuel oil 2,993 mt / diesel 163 mt / lubricating oil 80 mt (USD \$390,000)
- Grounded on the northern side of Auckland channel, Gladstone harbour.
- Subsequent to a co-ordinated salvage attempt (common law salvage), the *La Pampa* was refloated.
- Damage to approx. 87% of the hull.
- Salvaged value agreed to be AUD \$37,914,691.
- Salvage claim for AUD \$6.6 million.
- Salvage award AUD \$850,000.

United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC [2007] FCAFC 115

- On appeal in relation to the award, salvors contended:
 - Risk of damage to the environment;
 - Potential liability to third parties;
 - Relevance of costs and expense of salvage;
 - The value of the salvaged fund; and
 - Encouragement of reward.
- Principal Issue – risk of "Global Failure"
 - The *La Pampa* would have remained pinned by the bow with the stern hitting the south bank.
 - As a consequence:
 - bending forces as a result of a falling tide would have exposed the vessel to damage; and
 - blockage of the channel.
- At first instance Tamberlin J found that there was no:
 - 'real probability of global failure, or indeed any danger of global failure.'
- On appeal – upheld as such a situation could only have occurred if no action at all had been taken by the crew.
- All appeal points were subsequently dismissed for want of merit.
- Consequence of decision:
 - Lack of incentive for salvors to respond; and
 - Insistence on Lloyd's Open Form.

Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192

- Time Charter for 24 months.
- At issue: scope of the arbitration clause in NYPE 1993.
- Arbitration clause which provided:
 - *All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator ...*
- Question was whether representations made by Comandate Marine's broker amounted to conduct within the meaning of the *Trade Practices Act 1974*.
- The arbitral clause was sufficiently wide to encompass the claims under the *Trade Practices Act*.

Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192

- 'arising out of the contract' - sufficiently close connection with the making, the terms and the performance of the contract.
- *Distinguish: Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (Kiukiang Career)* 90 FCR 1.
 - Arbitration clause: 'Any dispute arising from this charter or ... '.
 - The alleged contraventions were based on conduct before the contract was executed.
 - Did not concern the words 'arising out of'.
 - Narrow approach is inconsistent with modern authority.
- *Consider: Allergan Pharmaceuticals Inc. v Bausch & Lomb Inc* [1985] ATPR 40-636.
 - ... the statutory causes of action now sued upon exist independently of contract ... in no way depend upon any private agreement for their source.
 - An alleged contravention of Pt V of the *Trade Practices Act* is not, as a matter of characterisation, a "controversy or claim arising out of or relating to (the) Agreement"
...
 - However, to say that a *Trade Practices Act* claim can never be characterised as one 'arising out of a contract' is incorrect.

Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192

- The scope of the arbitration clause was therefore sufficient to capture misleading conduct proscribed by the *Trade Practices Act*.
 - In the context of the NYPE 1993 charterparty and its default arbitration clause, *Trade Practices Act* claims are arbitrable notwithstanding the absence of equivalent consumer protection legislation in the law of the forum chosen by the parties.
- *Fiona Trust & Holding Corporation & ors v Yuri Privalov & ors* [2007] EWCA Civ 20.
 - '... it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed.'
 - 'The words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all" ... '.
 - 'Although in the past the words "arising under the contract" have sometimes been given a narrower meaning, that should no longer continue to be so.'

PNSL Berhad v Dalrymple Marine Services Pty Ltd & PNSL Berhad v The Owners of the Ship 'Koumala' [2007] QSC 101

- Collision between the tug *Koumala* and the vessel *Pernas Arang* in 2005 outside Dalrymple Bay Coal Terminal.
- Question 1 : Did s 74 of the *Trade Practices Act* apply so as to import an implied warranty that the services will be tendered with due care and skill?
- Question 2: Whether the towage contract under the United Kingdom Standard Conditions for Towage and Other Services (1974) was a contract for or in relation to the transportation of goods?

PNSL Berhad v Dalrymple Marine Services Pty Ltd & PNSL Berhad v The Owners of the Ship 'Koumala' [2007] QSC 101

- Considered obiter in *Braverus Maritime Inc v Port Kembla Coal Terminal Ltd & Anor.* (2005) 148 FCR 68.
 - The pilotage services were provided under a contract ... that contract was not for the transportation of goods.
 - Was it a contract *in relation* to the transportation of goods for the purposes identified by ... s 74(3)? We think not.
- Citing with approval the analysis by the *Braverus* Court, Helman J found by the same reasoning:
 - That there is no relevant relationship between a contract to provide towing services and the transportation of goods.
 - The towing contract was to provide those services under the ship's master on the pilot's advice.
 - No reason to conclude that s 74(3) extended to removing towing contracts from s 74.

PNSL Berhad v Dalrymple Marine Services Pty Ltd & PNSL Berhad v The Owners of the Ship 'Koumala' [2007] QSC 101

- Plaintiffs unable to rely on the exemption in s 74(3).
 - Exemption for contracts for or in relation to the transportation or storage of goods for ... commercial or professional purposes.
- Negative to Q.2.
- But in response to Q.1: Does s 74 of the *Trade Practices Act* apply so as to import an implied warranty that the services will be tendered with due care and skill?
 - The contract was subject to the operation of s 74.
 - A contract for harbour towage services was subject to a compulsorily 'implied warranty' of 'due care and skill' under s 74 of the *Trade Practices Act* and the relevant exclusion clauses in the UK Towage Conditions were void.
- Not the last word ... decision is presently under appeal.

Conclusion

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