

## MLAANZ

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#### Session on Ethics

### *Ethical issues for Marine Industry Participants – Future and Present – Examples and Discussion*

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## 1. Australian and NZ uniform expert code of conduct <sup>1</sup>

### 1 APPLICATION OF CODE

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This code of conduct applies to any expert witness engaged or appointed:

- (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings, or
- (b) to give opinion evidence in proceedings or proposed proceedings.

### 2 GENERAL DUTIES TO THE COURT

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An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the court impartially on matters relevant to the area of expertise of the witness.

### 3 CONTENT OF REPORT

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Every report prepared by an expert witness for use in court must clearly state the opinion or opinions of the expert and must state, specify or provide:

- (a) the name and address of the expert, and
- (b) an acknowledgement that the expert has read this code and agrees to be bound by it, and
- (c) the qualifications of the expert to prepare the report, and
- (d) the assumptions and material facts on which each opinion expressed in the report is based (a letter of instructions may be annexed), and
- (e) the reasons for and any literature or other materials utilised in support of each such opinion, and
- (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise, and
- (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications, and
- (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person, and
- (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the court, and

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<sup>1</sup> The code for expert witnesses was approved by the Council of Chief Justices of Australia and New Zealand.

(j) any qualification of an opinion expressed in the report without which the report is or may be incomplete or inaccurate, and

(k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason, and

(l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

#### **4 SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION**

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(1) Where an expert witness has provided to a party (or that party's legal representative) a report for use in court, and the expert thereafter changes his or her opinion on a material matter, the expert must forthwith provide to the party (or that party's legal representative) a supplementary report which must state, specify or provide the information referred to in clause 3 (a), (d), (e), (g), (h), (i), (j), (k) and (l), and if applicable, clause 3 (f).

(2) In any subsequent report (whether prepared in accordance with subclause (1) or not), the expert may refer to material contained in the earlier report without repeating it.

#### **5 DUTY TO COMPLY WITH THE COURT'S DIRECTIONS**

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If directed to do so by the court, an expert witness must:

(a) confer with any other expert witness, and

(b) provide the court with a joint report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing, and

(c) abide in a timely way by any direction of the court.

#### **6 CONFERENCES OF EXPERTS**

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Each expert witness must:

(a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the court and in relation to each report thereafter provided, and must not act on any instruction or request to withhold or avoid agreement, and

(b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

## 2. International Institute of Marine Surveyors - Code of Conduct

The basic principles of the International Institute of Marine Surveying's Code of Conduct, by which all members agree to be bound, are as follows:

### **PROFESSIONALISM**

A Member must have a sound foundation in the general knowledge of his profession in addition to appropriate and adequate experience. He/She must keep up to date in his/her technical training and knowledge.

### **OBJECTIVITY**

A Member must adopt an impartial and objective approach in all aspects of his/her Marine Surveying work.

### **INDEPENDENCE**

A Surveyor will be independent of the client commissioning the survey.

### **INTEGRITY**

A surveyor will –

- not be influenced by outside pressures
- seek to reach agreements based on objective conclusions
- not make personal or illegal profit from the sale of damaged goods or materials

### **CLIENT RELATIONS**

A surveyor will –

- never bias or modify his/her professional opinions for personal gain or in response to any form of pressure from whatever source
- will obtain from a principal clear Terms or reference and confine his/her report to the agreed Terms
- only undertake to carry out assignments for which he/she is properly qualified for a particular assignment
- accept arbitration when all parties involved agree to this method of solving disputes
- recognise that his/her first duty is to his/her clients instructions and endeavour to sustain an open relationship with a client whilst, at all times, observing professional integrity

### **PROFESSIONAL RELATIONS**

A surveyor will:

- co-operate with colleagues to achieve a complete and objective survey
- not allow agreements reached by a surveyor in charge of a case to be modified by the direction of any organisation to which he/she belongs
- not criticise a fellow surveyor or colleague to third parties
- ensure strict confidentiality over information received from third parties whom are not involved with the case in hand
- not carry out free surveys but negotiate fees which seek to achieve full cost recovery
- discuss with other attending surveyors any contradictory statements or differences of opinion before issuing a final report.

**STANDARDS**

Where recognised international, national or local authority standards exist for any type of survey, then these standards shall always be observed. Any variance from these standards, together with the surveyor's reasons for such variance, are to be fully recorded in the survey and the principal's agreement obtained.

**NON-COMPLIANCE**

A Surveyor will bring to the attention to the Institute instances where members of the Institute are not observing this Code of Conduct.

**PERSONAL CONDUCT**

A Surveyor will not practice during a period when his/her judgement is or might be impaired through any cause and will endeavour to avoid actions, which lead to the discredit of the Institute, marine surveyors and his/her own professional reputation.

**RELATIONSHIP BETWEEN THE CODE AND MEMBERSHIP OF THE INSTITUTE**

When the Institute is informed of a member's non-compliance with the Code of Conduct this will be investigated and the Member given the opportunity to offer a defence or appeal. Depending on the extent of non-compliance a Member may have his Membership suspended or permanently withdrawn. Minor failures may be dealt with by written warnings. However, repeated minor non-compliance can be considered grounds for suspension or expulsion from the Institute.

### 3. Australian Pilotage Group – Code of Conduct

#### **OBJECTIVE**

In keeping with the need for the highest standard of Professional performance and responsibility and the need for a truly professional attitude towards Piloting, the following Code of Conduct is to be followed by all Pilots in the interests of Piloting Excellence.

#### **PERFORMANCE OF DUTIES**

- At all times exhibit and exercise a high degree of professional maritime expertise, and shall use local knowledge and experience to safely convey any vessel under their pilotage within the Port, without damage to the vessel or Port installation, to its destination.
- Provide a clear Passage Plan to the Master of the vessel and ensure that prior to proceeding with the pilotage operation, agreement has been reached regarding the proposed course of action.
- Conduct themselves with courtesy, confidence and respect in their dealings with all persons, including the Master of the vessel, port shipping officers, Agents, Helicopter Pilots, and their fellow Marine Pilots.
- Give clear, calm, authoritative unequivocal pilotage orders to the Master of the vessel, ensuring that the order is heeded.
- Maintain a Master and Pilot relationship in accordance with the ICS Bridge Procedures Guide.
- Prepare a contingency plan for any emergency that may occur.

#### **REPORTING FOR DUTY**

- Be responsible for their allocated Pilotage, reporting promptly to the vessel requiring their services, minimizing delays. To this end, close liaison with MPTM crew and the monitoring of prevailing weather conditions is vital.
- Accommodate any changes in movement times required by the Duty Pilot and be available, as required for any emergency work.

#### **HEALTH AND FITNESS**

- Ensure that they are fit to carry out their duties, and should not undertake pilotage duties if it is felt that, due to illness or other circumstances; the safety of the pilotage operation may be compromised.
- Not undertake any pilotage duties whilst under the influence of alcohol or any drugs with the potential to impair judgment and hence compromise the safety of the pilotage operation. Any pilot taking prescribed medication should obtain a written statement from his or her personal physician to confirm that such medication will not in any way affect the ability of the pilot to carry out pilotage duties in a normal manner.
- Ensure they are suitably rested prior to commencing any pilotage.

#### **STANDARD OF DRESS**

- The standard of dress and appearance shall be of such high standard that benefits the profession.

**CONFLICT OF INTEREST**

- Any pilot who is "rostered on" for pilotage duties shall not allow any business or other interests to interfere with his availability for pilotage duties.

**REPORTING**

- When a vessel under pilotage has touched the ground, been in contact with any navigational aid, caused damage to any structure, collided (or nearly collided) with another vessel or has been involved in any unplanned event which caused, or had the potential to cause, injury to persons or damage to equipment, the pilot should report the incident to the CEO or Duty Pilot and the Harbour Master without delay. The pilot should remain available thereafter to assist in any investigation.
- Should a pilot have reasonable cause to believe that a vessel is unsafe or in an unseaworthy condition, the pilot should refuse to pilot the vessel and report the reasons for this refusal as soon as possible to the CEO, who will advise AMSA.

**OTHER**

- Pursuant to IMO Resolution A 485 (XII) pilots should keep up to date in pilotage knowledge, current legislation and any codes, guidelines and procedures applicable to the port.
- The use of illicit drugs is not acceptable at any time for any trainee or licensed Pilot.

## 4. AMSA – Code of Conduct

Our employees are expected to abide by the AMSA Code of conduct.

AMSA Code of conduct requires that employees must:

- Behave honestly and with integrity in the course of their employment with AMSA.
- Act with care and diligence in the course of their employment with AMSA.
- Treat everyone with respect and courtesy, and without harassment when acting in the course of AMSA employment.
- Comply with all applicable Australian laws when acting in the course of AMSA employment.
- Comply with any lawful and reasonable direction given by someone in AMSA who has authority to give the direction (the CEO and any manager or supervisor who holds the appropriate delegation).
- Maintain appropriate confidentiality about commercial matters or any dealings that the employee has with any Commonwealth agency, Department, Minister or Minister's member of staff.
- Disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with their employment at AMSA.
- Use AMSA's resources in a proper manner.
- Not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's employment at AMSA.
- Not make improper use of:
  - inside information
  - the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.
- Behave in a way that upholds the integrity and good reputation of AMSA at all times.
- Behave in a way that upholds the good reputation of Australia while on duty overseas, at all times.
- Comply with any other conduct requirement that is prescribed by AMSA policies.

## 5. SOLAS Convention Chapter V, Reg 33 <sup>2</sup>

### **Regulation 33 - Distress Situations: Obligations and procedures**

#### SUMMARY

- Masters obliged to respond to information that persons are in distress at sea received from any source.
- Ships can be requisitioned by the master of a ship in distress or the search and rescue authorities.
- Rescued persons to be treated humanely and delivered to a place of safety.

#### TEXT OF REGULATION 33

1. The master of a ship at sea which is in a position to be able to provide assistance on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization, to inform the appropriate search and rescue service accordingly.

1.1 Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.

2. The master of a ship in distress or the search and rescue service concerned, after consultation, so far as may be possible, with the masters of ships which answer the distress alert, has the right to requisition one or more of those ships as the master of the ship in distress or the search and rescue service considers best able to render assistance, and it shall be the duty of the master or masters of the ship or ships requisitioned to comply with the requisition by continuing to proceed with all speed to the assistance of persons in distress.

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<sup>2</sup> International Convention for the Safety of Life at Sea.

3. Masters of ships shall be released from the obligation imposed by paragraph 1 on learning that their ships have not been requisitioned and that one or more other ships have been requisitioned and are complying with the requisition. This decision shall, if possible be communicated to the other requisitioned ships and to the search and rescue service.
4. The master of a ship shall be released from the obligation imposed by paragraph 1 and, if his ship has been requisitioned, from the obligation imposed by paragraph 2 on being informed by the persons in distress or by the search and rescue service or by the master of another ship which has reached such persons that assistance is no longer necessary.
5. The provisions of this regulation do not prejudice the Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, signed at Brussels on 23 September 1910, particularly the obligation to render assistance imposed by article 11 of that Convention.\*
6. Masters of ships who have embarked persons in distress at sea shall treat them with humanity, within the capabilities and limitations of the ship.

## 6. Scenarios

These scenarios and the people in them are entirely fictional.

### Scenario One – The Surveyor



A large ship carrying coal suffered stability issues during transit, which damaged the ship. Investigations indicate that the coal liquified in transport. The ship owner sues the cargo owners.

**You're an expert surveyor** for the ship owners.

The cargo owners have put on an expert report saying rainwater likely wet the coal, which, through a complex process, liquified the coal. You believe they're probably wrong, but there is a fair chance that the coal was partly wet when it was loaded but rain may have contributed to the liquification. Your preliminary draft report indicates as such. Also, you know that the other expert has a history of pro-cargo owner reports, and has been criticised for apparent bias in a number of arbitral awards. You have not yet discussed this with the lawyers.

You walk into the room with the lawyers and the client. The lawyers say they are just finishing something else off that is confidential and so ask if you and the client can wait outside.

You sit down next to the client and the client says, 'did you read the other side's report? What a load of crud. Those di^#&@\*&s loaded wet coal onto the vessel and it rubbed together and it liquified, you know that mate, why don't you just say it straight out and not use all these qualified words?'

You then walk into the room with the lawyers and one of the lawyers says to you, 'look you're just not going to be our expert witness in this matter if you can't say hand on heart that this coal liquified because it was wet when it got loaded.'

Has anyone acted unethically and or illegally? What is the expert supposed to say / do?

## Scenario Two – The Lawyer



### You are a lawyer

A client has a number of legitimate, though relatively small, claims for a maritime lien against a single ship, the *Cargo Butterfly*, on behalf of a series of companies in its group. The client comes to you and explains the situation and you instantly recognise that there is a legitimate claim for a maritime lien.

The client wants you to arrest the *Cargo Butterfly*.

The client says “Buddy I want *Cargo Butterfly* arrested. I know it won’t be cheap, but I can walk in to the shipowner’s office and say, ‘sign this new contract about the *Cargo Leopard* or we’re going to keep arresting the *Cargo Butterfly* on stupid little liens wherever it goes”.

You’re about to start talking and the client looks at you and says, “I know you’re going to tell me something about the law or whatever, but I just don’t care about how you do it, and at the end of the day I won’t care one iota about actually getting money ... I will be happy to put pressure on these guys if I get a better deal on the *Cargo Leopard*. Make it happen!”

Your paralegal leans into you and says “I am really worried this is going to be an abuse of process”.

Is there anything wrong with you trying to get the ship arrested in these circumstances?

### Scenario Three – The Director



**You are a director and senior manager at a global shipping company.** You are trying to negotiate the price of a fleet of autonomous ships each of which can carry about 12,000 TEU<sup>3</sup>.

One thing is concerning you. There is an optional extra ‘SOS response feature’ that costs US\$7m per ship. This add-on gives the ship the capability of recognising when a mayday call is made at sea in the vicinity of the ship and can then assist in any rescue, given the usual SOLAS Convention<sup>4</sup> caveats.

The reason for the high cost is the ship must locate the source of the distress call which is apparently harder for a ship than a human being, and must steer towards the vessel in distress without hitting people in the water or the vessel itself and then must have rescue lifeboats on board which can self-deploy. It must also have some food on board and other provisions and so on. It must also be able to respond to the SOS call so everyone knows that assistance will be rendered.

There is a real issue at the Board level of your company about spending such a large amount of money on a feature that, if anything, lowers the profitability and productivity of the ship.

**Question:** Is there a legal obligation to buy the SOS response feature? What is the ethical position?

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<sup>3</sup> TEU: Twenty-Foot Equivalent Unit. This can be used to measure a ship's cargo carrying capacity. One TEU is one standard size 20 foot container.

<sup>4</sup> Safety of Lives at Sea Convention.