HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

IAN WAYNE GIBBS & ANOR APPELLANTS

AND

MERCANTILE MUTUAL INSURANCE
(AUSTRALIA) LTD RESPONDENT

Gibbs v Mercantile Mutual Insurance (Australia) Ltd
[2003] HCA 39
5 August 2003
P63/2002

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation:

N J Mullany with P J Hannan for the appellants (instructed by Unmack & Unmack)

D F Jackson QC with G R Hancy for the respondent (instructed by Srdarov Richards Burton)

CATCHWORDS

Gibbs v Mercantile Mutual Insurance (Australia) Ltd

Insurance – Contracts – Insurance cover against liability to third parties arising from use of marine pleasure craft for commercial paraflying – Where paraflying to be conducted in estuarine waters – Whether policy a contract to which *Marine Insurance Act* 1909 (Cth) applied – Whether policy a contract of marine insurance.

Words and phrases – "contract of marine insurance", "incident to marine adventure", "maritime perils", "sea", "ship".

Insurance Contracts Act 1984 (Cth), s 9(1)(d).
Marine Insurance Act 1909 (Cth), ss 7, 8, 9.
Marine Insurance Act 1906 (UK).
Merchant Shipping Act 1894 (Imp).

1 GLEESON CJ. The respondent issued a policy of insurance which indemnified the appellants if, by reason of their interest in the vessel "Lone Ranger", they incurred legal liability to third parties. The question in this appeal is whether the policy was a contract to which the *Marine Insurance Act* 1909 (Cth) applied. If the answer to that question is in the affirmative, two things follow. First, the contract was not one to which the *Insurance Contracts Act* 1984 (Cth) applied[1]. Secondly, and in consequence, the failure of the appellants to give timely notice of an occurrence giving rise to such third party liability was fatal to any entitlement to indemnity, and could not be relieved under the provisions of the *Insurance Contracts Act*.

2 The facts are set out in the joint judgment of Hayne and Callinan JJ. The *Marine Insurance Act* applies to contracts of marine insurance, subject to certain presently immaterial exceptions (s 6). A contract of marine insurance is defined as a contract whereby the insurer undertakes to indemnify the assured against marine losses, that is to say, losses incident to a marine adventure (s 7). The definition is elaborated in ss 8 and 9.

3 A policy of insurance, described as a "marine pleasurecraft policy", was entered into in 1986. It was signed on behalf of the respondent by its agent, Anchorage Marine Underwriting Pty Ltd. It covered the appellants and a "Mr Sodaberg", as insured, in relation to the vessel "Lone Ranger". It was entered into in contemplation of the use of the vessel in a business described in the policy as "commercial paraflying". The vessel was described as a "runabout ski boat", constructed of fibreglass, and 17 feet in length. The insurance covered the hull, motor and a trailer for specified amounts. It also provided "third party liability cover" to $1 million. It contained a warranty that the commercial paraflying would take place within "Protected Waters of WA as per permit".

4 The 1986 policy expired. In February 1988, a renewal certificate was issued, identifying the same parties and signed by the same agent. That is the policy in question in these proceedings. It did not cover the hull, motor or trailer, but covered third party liability in the same amount, and on the same terms, as the original policy. Perhaps for reasons of economy, the insured wished to maintain only the third party cover. As in the 1986 policy, that cover was expressed in terms of an undertaking by the insurer to pay the insured if "by reason of your interest in the Vessel you become LEGALLY LIABLE to pay any sum or sums in respect of any liability, claim, demand, damages and/or expenses for liabilities to third parties".

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1 s 9(1)(d).

5 The Full Court of the Supreme Court of Western Australia (Kennedy, Murray and Owen JJ) held that this was a contract of marine insurance[2]. The appellants contend that this conclusion was in error for two reasons. The first relates to the scope of the cover provided by the policy; the second relates to the locality in which, in the contemplation of the parties to the contract, the vessel was to operate. By reason of either or both of those matters, it is said, the contract was not a contract of marine insurance, but was a contract of general insurance. If that is so, it is the *Insurance Contracts Act*, and not the *Marine Insurance Act*, that applies, and the failure to give timely notice was not necessarily fatal to a claim for indemnity.

6 The identification of a contract as one of marine insurance sometimes gives rise to difficulty because of the mixed nature of the cover provided. In *Leon v Casey*[3], Scrutton LJ said:

> "In the time of Sir James Mansfield insurance was almost entirely marine. As time went on insurance of other kinds came into use, and large companies grew up which dealt with a bulk of insurance which was not marine in any sense, and where the adventure never involved any marine risk. But Lloyd's confined themselves to marine insurance until enterprising underwriters began insuring all sorts of risks which their predecessors never thought of, such as risks of loss through frauds of servants or of cricket matches being spoilt by rain, and I know not what."

7 In that case, and in the more recent case in this Court of *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*[4], a policy of insurance covered a number of risks which included, but were not limited to, risks of a kind ordinarily regarded as incident to a marine adventure. In both cases it was held that the problem is to be resolved as one of characterisation, viewing the policy in its entirety. That is somewhat different from the problem that arises in the present case. Here, it is the singular nature of the cover that is relied upon by the appellants for one part of their argument. The insurance was related to the interest of the insured in a vessel (which, for the reasons explained by Hayne and Callinan JJ, was relevantly a ship), but it is only against legal liability to third parties.

8 The indemnity clause in the policy was expressed to extend, subject to certain qualifications, "to any person navigating or in charge of the Vessel who is legally competent to do so and who has [the insured's] permission". It is clear

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2 *Mercantile Mutual Insurance (Australia) Ltd v Gibbs* (2001) 24 WAR 453.

3 [1932] 2 KB 576 at 581.

4 (1986) 160 CLR 226.

that the ambit of the cover provided by the policy was primarily against liability arising out of events occurring in the course of navigation of the vessel. The vessel was to be used for commercial purposes, including, in particular, "commercial paraflying". Liability to third parties might include liability to customers or other passengers on the vessel, to people engaged in water sports or other activities on or near the water, or to the owners or users of other vessels. Putting to one side for the moment the argument as to locality, s 9 of the *Marine Insurance Act* provides that every lawful marine adventure may be the subject of a contract of marine insurance. It also provides that there is a marine adventure where any liability to a third party may be incurred by the owner of, or another person interested in or responsible for, insurable property, by reason of maritime perils (s 9(2)(c)). Maritime perils is an expression defined to mean the perils consequent on, or incidental to, the navigation of the sea. On the assumption that the "Lone Ranger" was to operate in waters which were part of the sea, then the vessel was to be exposed to maritime perils, and liability to third parties could be incurred by reason of maritime perils. The simplest example would be if the vessel capsized, or struck a submerged object, and sank. That would not necessarily occur in circumstances giving rise to liability to a third party, and a claim for indemnity under the policy; but it well might. It was not, and could not have been, suggested on behalf of the appellants that the cover provided by the policy was illusory. Indeed, it was claimed that the cover applied to the event described in the joint judgment, and the resulting legal liability.

9 Providing indemnity against legal liability to third parties is a form of marine insurance, reflected in what Lord Brandon of Oakbrook, in *Firma C-Trade SA v Newcastle Protection and Indemnity Association*[5], described as "the long-established practice of shipowners to enter their ships in Protection and Indemnity Associations ('P & I Clubs') for the purpose of insuring themselves against a wide range of risks not covered by an ordinary policy of marine insurance". In the present case, the original policy, written in 1986, covered hull and machinery, and third party liability. Subject to the argument about "sea", it was plainly a contract of marine insurance. When, upon renewal in 1988, the cover was reduced to third party liability, the character of the policy was not thereby transformed. The scope of the losses incident to marine adventure covered by the policy was reduced, but they remained primarily losses arising out of events occurring in the course of the navigation of the vessel.

10 The terms of s 9(2)(c) of the *Marine Insurance Act* make it clear that the incurring of liability to a third party by reason of maritime perils can involve a loss incident to a marine adventure. If the particular form of maritime activity in contemplation is the operation of a commercial vessel carrying passengers for the purpose of engaging in water sports, then liability to a passenger may result from

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5 [1991] 2 AC 1 at 23.

perils incident to the navigation of the vessel. It was against such liability that the original policy provided such cover, in addition to other cover. It was solely against such liability that the renewal policy provided cover. The present dispute is not as to whether such cover existed, or whether it included the liability incurred by the appellants to their injured passenger. It is as to whether the provision of such cover, in a policy worded as the policy in question, could constitute marine insurance. In my view, it could. Whether it did requires consideration of the appellants' second point.

11 The appellants submit that neither the original 1986 policy, nor the renewed 1988 policy, was a contract of marine insurance because of the locality in which, in the contemplation of the parties, the vessel was to operate. It was common ground that the vessel was seaworthy. However, the policy, against the words "Navigation Warranties", stated "Protected Waters of WA as per permit". The word "permit" was a reference to the certificate of survey for the vessel required under the *Western Australian Marine Act* 1982 (WA). That certificate recorded the geographical limits of operation of the vessel as "smooth water only". In fact, as was intended, the vessel's commercial paraflying activities were conducted in the Swan River near the Narrows Bridge site, and near Heirisson Island. There was much debate as to whether those waters were part of the sea. In the Full Court, Kennedy J, with whom Murray and Owen JJ agreed, held that they were. Before coming to his Honour's reasons, three points should be made.

12 First, the application of the *Marine Insurance Act* to policies of insurance in respect of navigation in inland waters which do not form part of the sea is a subject of some uncertainty, as was recognised by the Australian Law Reform Commission in its 2001 review of that Act[6]. Leaving aside pleasure craft, it is common in Australia for commercial vessels, some of substantial size, to operate in Australian rivers, some of which extend for great distances inland. Accepting that a marine adventure, within the purview of the *Marine Insurance Act*, primarily involves navigation of the sea, it may be argued that vessels of the kind just mentioned are engaged in an "adventure analogous to a marine adventure" within the meaning of s 8 of the Act. In the present case, reference was made to that possibility, but senior counsel for the respondent accepted that it was common ground that the policy presently in question was not a policy to which the *Marine Insurance Act* applied unless the locality in which it was contemplated by the parties to the insurance contract that the vessel would operate was part of the sea.

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6 Australian Law Reform Commission, *Review of the Marine Insurance Act 1909*, Report No 91, (2001).

13 Secondly, after the time relevant to this case, the *Insurance Contracts Act* was amended to provide that the *Marine Insurance Act* does not apply to contracts of insurance in respect of pleasure craft[7]. However, that expression was defined so as to exclude a vessel that is used for reward, such as the "Lone Ranger".

14 Thirdly, it would be an error to assume that, historically, the exclusive concern of the law of marine insurance was with adventures undertaken by great ships on the high seas. In *Mountain v Whittle*[8], the House of Lords considered a policy of marine insurance that covered a houseboat in the river Hamble, which was "a creek off Netley". (*The New Shorter Oxford English Dictionary* defines "creek" as "[a]n inlet on a sea-coast or in the tidal estuary of a river". The colloquial meaning of "creek" in Australia is somewhat different.) The houseboat was being towed by a tug to a yard for cleaning. She took on water, and sank, because the tug's bow wave raised the water to the level of some defective seams. The loss was held to be caused by perils of the seas. The fact that there was negligence in the management of the vessel did not alter the case[9]. It was not doubted that the policy of insurance by which the houseboat was covered came within the purview of the *Marine Insurance Act* 1906 (UK).

15 As Kennedy J pointed out, paraflying is not an activity that is feasible on a narrow river. It requires a relatively broad expanse of water.

16 The areas in the Swan River in which the appellants operated their vessel were part of a broad expanse of water, properly described as an estuary, near the conjunction of the Swan River and the Indian Ocean. Kennedy J said:

> "An estuary is described as the interface between the ocean and a river, in which salinity changes are found. The waters of the Swan River around South Perth, Heirisson Island and Burswood, being affected by tidal movements of the ocean, are properly described as estuarine. The river has a permanent opening to the ocean and is tidal as far upstream as Woodbridge, near Guildford. At some times of the year the estuary is salty and at other times it is fresh, the saltiness coming from the connection with the Indian Ocean."

17 He went on to consider various statutory definitions of "sea", and English authorities relating to the jurisdiction of the High Court of Admiralty. These are of some interest, but are not determinative of this case. An estuary, where the

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7 *Insurance Laws Amendment Act* 1998 (Cth), s 77.

8 [1921] 1 AC 615.

9 [1921] 1 AC 615 at 627.

tide ebbs and flows, would be included within the definition of sea in s 3 of the *Admiralty Act* 1988 (Cth) and s 6 of the *Navigation Act* 1912 (Cth). Kennedy J said that the two sites in which the "Lone Ranger" operated "were estuarine, being waters within the ebb and flow of the tide and, in my opinion, they are to be regarded as the 'sea'". I see no reason to differ from that opinion. The "sea" is not limited to the open ocean.

18 Some point was made of the fact that the Swan is called a "river", not a "sea". The Swan River is, for most of its length, relatively narrow; but where it meets the ocean it takes the form of a broad estuary. That is the locality with which this case is concerned. The Full Court did not misdirect itself on any point of law, and no error has been shown in its factual judgment.

19 The appeal should be dismissed with costs.

20 McHUGH J. The *Marine Insurance Act* 1909 (Cth) ("the Marine Act") – whose provisions are generally more favourable to insurers than the *Insurance Contracts Act* 1984 (Cth) – applies to policies indemnifying the insured against losses that are incidental to a "marine adventure"[10]. The respondent agreed to indemnify the appellants against any sum payable for liabilities to third parties by reason of the appellants' interest in a boat that was engaged in parasailing activities in the estuary of the Swan River, Western Australia. The question in this appeal is whether the Marine Act applies to a policy covering liabilities to third parties arising out of parasailing activities on a section of a river that is an estuary.

21 In my opinion, given the way that the case was conducted in this Court and the District[11] and Supreme[12] Courts of Western Australia, the Marine Act does not apply to the policy because it did not insure against the risks of a marine adventure. Primarily, a policy of insurance will not insure in respect of a marine adventure unless the ship the subject of the policy will be used for voyages that involve *traversing the open sea*. An adventure involving a ship that is not intended to leave a river is not a marine adventure for the purpose of the Marine Act. That does not mean that an insurance policy insuring the risks involved in a marine adventure cannot cover risks that occur in rivers, creeks, bays, inlets, harbours, dry docks or ports. A policy insuring against the risks of a marine adventure may even cover a risk occurring on land. But before a risk qualifies as a risk of a marine adventure, and comes within the primary scope of the Marine Act, it must be incidental to or a consequence of a voyage or intended voyage on the open sea. In form, a policy may be identical with a marine policy and insure against the same kind of risks as a marine insurance policy. But, unless the risk involves, or is incidental to, or a consequence of, a voyage on the open sea, it will not be insuring the risks of a marine adventure so as to come within the primary operation of the Marine Act.

22 The Marine Act has a secondary operation. It extends to any policy "in the form of a marine policy" that covers "any adventure analogous to a marine adventure"[13]. The respondent might have argued that the "adventure" insured against in the present case was "analogous to a marine adventure". But it did not do so in the Western Australian courts and expressly refused to do so in this Court. Perhaps it thought that, if parasailing is not a marine adventure, it cannot be analogous to a marine adventure. At all events, it accepted that the Marine

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10 Marine Act, s 7.

11 *Morrell v Harford* unreported, 21 April 1999.

12 *Mercantile Mutual Insurance (Australia) Ltd v Gibbs* (2001) 24 WAR 453.

13 Marine Act, s 8(2).

Act did not apply to the policy unless the estuary of the Swan River was the "sea" for the purpose of that Act.

23 It follows that, because the insured's enterprise was not a marine adventure, and was not argued to be analogous to such an adventure, the Marine Act did not apply to the policy.

Statement of the case

24 Mrs Helen Morrell sued Paraglide Pty Ltd, Ian Gibbs and Rod Soderberg in the District Court of Western Australia for damages for negligence after being seriously injured in a parasailing accident. The accident occurred in January 1989 when a boat driven by Gibbs came too close to land causing Mrs Morrell to crash into trees. The trial judge, Kennedy DCJ, held Gibbs liable for the damage that Mrs Morrell suffered because his negligent navigation caused the accident. Her Honour held Paraglide liable because it was the owner of the parasailing business, had an interest in the boat and had undertaken for reward to take Mrs Morrell parasailing. Her Honour held that Mrs Morrell had not proved any liability on the part of Soderberg.

25 In third party proceedings brought by Paraglide and Gibbs against Mercantile Mutual Insurance (Australia) Ltd, the learned trial judge held that Mercantile was obliged to indemnify them under a contract of insurance made between Mercantile, Paraglide and Gibbs. Her Honour rejected Mercantile's argument that the policy was a marine insurance policy covered by the Marine Act and that under that Act it was entitled to deny liability because the defendants had failed to disclose material matters when renewing the policy. The learned judge held that, although the defendants had failed to disclose such matters, the *Insurance Contracts Act* applied – not the Marine Act – and prevented Mercantile from denying liability.

26 The Full Court of the Supreme Court of Western Australia allowed an appeal by Mercantile. Kennedy J, with whose judgment Murray and Owen JJ agreed, held that the Marine Act governed the policy because it indemnified the defendants against risks that were incidental to a marine adventure within the meaning of s 9(2)(c) of the Marine Act. That paragraph provides that there is a marine adventure where "any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils." The Full Court held that the relevant section of the Swan River was the sea for the purpose of that Act and that the risk insured against was a peril of the sea. The Full Court entered judgment for Mercantile.

27 Subsequently, this Court granted special leave to appeal against the order of the Full Court.

The material facts and findings

28 In 1986, Paraglide commenced to operate a parasailing business from a beach, slightly downstream from the Narrows Bridge, on the estuary of the Swan River in Western Australia, an estuary being "the interface between the ocean and a river, in which salinity changes are found."[14] The business used a 17ft fibreglass runabout ski boat called the "Lone Ranger" to tow parasailers. The boat was insured with Mercantile through its agent Anchorage Marine Underwriting Pty Ltd. The policy described Gibbs, Soderberg and Paraglide as the insured.

29 The initial policy – headed "Marine Pleasurecraft Policy" – was issued on 5 December 1986 and covered a period of one year from 10 October 1986. It provided hull and motor insurance, together with insurance over a trailer and certain other equipment. The policy also included third party liability cover to a limit of $1 million. The third party liability clause provided:

> "SECTION 3 – LEGAL LIABILITY TO THIRD PARTY
>
> If by reason of your interest in the Vessel you become LEGALLY LIABLE to pay any sum or sums in respect of any liability, claim, demand, damages and/or expenses for liabilities to third parties, we will pay to you or on your behalf all such sums up to the limit specified in the Schedule in respect of any one accident or series of accidents arising out of the same event."

30 The policy did not state where the parasailing would be conducted. However, the proposal stated that the vessel would operate on the "Protected Waters of WA as per permit". This phrase was also included in the policy against the sub-heading "Navigation Warranties". The parties accepted that the reference to the "permit" was a reference to a Certificate of Survey issued by the Department of Marine and Harbours of Western Australia. This conclusion is supported by the amendment to Warranty 1 of the policy to allow commercial paraflying "in accordance with Survey".

31 The Certificate of Survey recorded the geographical limits of operation of the vessel as "smooth waters only". Section 3(1) of the *Western Australian Marine Act* 1982 (WA) states that "smooth waters" means "waters within the geographical limits prescribed for the purposes of this definition". Schedule 1 of the WA Marine (Certificates of Competency and Safety Manning) Regulations 1983 (WA) provides that "smooth waters" includes "[a]ll rivers and inland

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14 *Mercantile Mutual Insurance (Australia) Ltd v Gibbs* (2001) 24 WAR 453 at 483 [106].

waterways with the exception of Lake Argyle." Fremantle Inner Harbour and the Fremantle fishing boat harbour are also among the places designated as "smooth waters".

32 The insured did not renew the policy when it expired. Gibbs advised Anchorage that he now required only third party liability insurance. He no longer required "boat insurance". Mercantile issued a new policy with cover from 9 February 1988 to 9 February 1989, a period that included the day of the accident. The policy contained section 3 of the original policy. The policy declared that "Legal Liability to Third Party Extensions" included "Commercial Paraflying". It also included:

> "Warranted: That Warranty 1 of the policy is amended to permit Commercial Paraflying operations as per relevant authority approvals."

It contained a statement: "Navigation Warranties: Protected Waters of WA as per permit" and a statement: "Road Transport Risks Extension: Included."

33 In September 1988, Mrs Morrell's husband bought two tickets from Paraglide to go parasailing with that company. The tickets were not used until January 1989, when Paraglide's business was virtually moribund. Instead of using the beach near the Narrows Bridge, Gibbs took the Morrells to the northern tip of Heirisson Island, an island in the Swan River. He used this area as the base for the parasailing. When he endeavoured to land Mrs Morrell on the island, he came too close to the shore and dragged Mrs Morrell through trees on the island. She suffered severe injuries.

34 The trial judge said:

> "The accident was entirely Gibbs' fault. This was an avoidable accident: Gibbs was too close to the land, he brought Mrs Morrell in too close to land and when she was heading for the trees had he powered on he could have pulled her clear, but he did not."

35 In the third party proceedings, Mercantile alleged numerous breaches of the policy of insurance, including the failure by Gibbs and Paraglide to notify it of the accident until four years after the event.

36 Her Honour's judgment suggests that she thought marine insurance was confined to cover for loss by perils of the sea. She said that the insured vessel was never going to encounter perils of the sea, as it was restricted to protected waters. In addition, her Honour said that third party liability insurance was "accepted as not being included" in marine insurance contracts. Accordingly, as the *Insurance Contracts Act* applied to the policy, the defendants were entitled to an indemnity.

37 The Full Court of the Supreme Court of Western Australia held that the Marine Act applied. It rejected the argument that, because the policy covered only liability to a third party, it was not a contract of marine insurance. The Full Court also held that the relevant parts of the Swan River were to be regarded as the "sea", as the waters were estuarine and within the ebb and flow of the tide. But the Court said that if it erred in its characterisation, it appeared to be probable that the liability imposed on the respondent pursuant to the *Insurance Contracts Act* should be reduced to nil. This finding is now the subject of a notice of contention in this Court.

The legislation

38 The Marine Act is virtually identical to the *Marine Insurance Act* 1906 (UK) from which it was copied. Sir Mackenzie Chalmers, the draftsman of the UK Act, said that the object of the *Marine Insurance Act* was to reproduce as exactly as possible the existing law, without making any attempt to amend it[15]. On the second reading of the Bill that became the Marine Act, the Attorney-General, Mr Groom, expressed the hope that such codification would clarify and make definite and certain the highly technical law of marine insurance[16]. This aim failed in some respects. The definition of "marine insurance" is "both elliptical and circular."[17] Provisions of the Marine Act central to this appeal are:

> "**7 Marine insurance defined**
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> A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.
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> **8 Mixed sea and land risks**
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> (1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.
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> (2) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is

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15 Hardy Ivamy, *Chalmers' Marine Insurance Act 1906*, 10th ed (1993) at vii.

16 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 6 October 1908 at 764.

17 Davies and Dickey, *Shipping Law*, 2nd ed (1995) at 470.

covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

9 Marine adventure and maritime perils defined

(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

(2) In particular there is a marine adventure where:

(a) any ship, goods or other movables are exposed to maritime perils. Such property is in this Act referred to as 'insurable property';

(b) the earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;

(c) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

'Maritime perils' means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind, or which may be designated by the policy."

39 Rule 7 in the Second Schedule to the Marine Act declares:

"The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves."

40 Where the Marine Act does not apply to a risk, the default regime is that contained in the *Insurance Contracts Act*[18]. The distinction between the

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18 *Insurance Contracts Act*, s 9(1)(d).

insurance covered by the two Acts is not arbitrary; it is largely based on the commercial or non-commercial nature of the insured activities. The *Insurance Contracts Act* is largely intended to apply to non-commercial activities. It gives greater protection to the insured than the Marine Act does[19].

41 Subject to public policy – particularly in respect of gaming, illegality and enemies – or statutory prohibitions, an insurer can insure against any risk. If the risk eventuates, the insured is entitled to an indemnity in accordance with the terms of the policy. Classification of a policy as a marine or non-marine policy is of practical importance only where legislation adds to or detracts from the terms of the policy or adds to the obligations of a party. Early in the history of marine policies, for example, classifying a policy as a marine policy meant that stamp duty was payable on it, and such policies were a large source of revenue for the United Kingdom government. In Australia today, classifying a policy as a marine policy has important consequences. It means, in the absence of an indication to the contrary in the policy, that non-disclosure of material matters may entitle the insurer to set aside the policy in circumstances that are not available if the policy is governed by the *Insurance Contracts Act*. Another matter of great practical importance arising from classification is that the Marine Act imposes warranties concerning seaworthiness. Important also are the provisions of the Marine Act concerned with salvage, particular average loss and general average loss.

42 Marine policies take many forms, but in broad terms they fall into the following categories: voyage, time or time and voyage. A voyage policy insures the subject matter of the policy against risks occurring while the ship is at or between ports. It insures the relevant subject matter "at and from" specified places. In contrast, a time policy insures the subject matter against risks occurring during a particular period. A time and voyage policy limits the risk to particular voyages during a particular period. These policies may also be valued or unvalued policies or floating policies.

Meaning of "marine adventure"

43 A contract indemnifying the insured against losses that are not substantially incidental to a marine adventure, or an adventure analogous to a marine adventure, is not a contract of marine insurance within the meaning of the Marine Act[20]. So the critical question in the present appeal is whether the losses

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19 See discussion in Australian Law Reform Commission, *Review of the Marine Insurance Act 1909*, Report No 91, (2001), pars 1.16, 3.12-3.18, 8.14-8.16.

20 *Leon v Casey* [1932] 2 KB 576 at 590; *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 243.

against which Mercantile agreed to indemnify Gibbs and Paraglide were losses arising from, or consequent on, or incidental to, a marine adventure. That is, was parasailing on the Swan River a marine adventure? No question arises, for the reasons I have stated, whether the losses arose from an adventure analogous to a marine adventure.

44 The question is not one to be determined by using a dictionary to ascertain the meaning of the words of the Marine Act and then applying those meanings to the policy and the facts of the case. Still less is it a question of giving the words of the Act meanings that they have in contexts different from legislation concerned with marine policies. Rather, the question must be answered by regard to the purpose of the legislation, in the light of the long history and development of maritime law governing marine policies, and the light that it throws on the text of the Act. That history and development, as well as the text of the Marine Act, shows that the law of marine insurance is and was principally concerned with the risk ("the perils of the sea") to ships and goods (hence the famous Lloyd's SG policy) involved in international or coasting trade[21]. When insurers and insured spoke or wrote of "the perils of the sea" – a phrase at the heart of traditional marine insurance policies – they were not speaking of the risks that might be encountered by ships that never left the safety of inland waters – rivers, creeks and lakes. They were referring to the hazards that ships encountered on the open sea – shipwrecks, foundering, stranding collisions, pirates, capture, seizure and the treachery of crews (barratry) and similar perils. The enumeration of these matters in the traditional Lloyd's policy contained in the Second Schedule of the Marine Act and the definition of "maritime perils" strongly indicates that the Act is also concerned with voyages across the open sea.

45 Most of the enumerated perils in the definition of "maritime perils" are not perils that are likely to be encountered by boats that never leave the safety of the rivers of a country. Boats on rivers are not likely to be seized by pirates, captured by the vessels of other nations, detained by the rulers of other countries or sunk by enemy vessels. In *Hamilton, Fraser & Co v Pandorf & Co*[22], Lord Bramwell and Lord Macnaghten, respectively, thought that the definition given by Lopes LJ sitting in the Queen's Bench Division of "dangers or accidents of the sea" – which they equated with "perils of the sea" – was "very good"[23] and

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21 cf the policy in *Magnus v Buttemer* (1852) 11 CB 876 [138 ER 720].

22 (1887) 12 App Cas 518.

23 (1887) 12 App Cas 518 at 526.

could not "be summed-up better"[24]. Lopes LJ said[25]: "it is sea damage *occurring at sea* and nobody's fault." (emphasis added) Similarly, Professor Sutton has written[26] that "the definition ... of maritime perils as 'perils consequent on, or incidental to, the navigation of the sea ...' etc implies that the vessel must either be on a sea voyage or at least be waterborne on the sea". For that reason, he expressed[27] the view that "pleasure craft (or commercial craft for that matter) used exclusively on lakes and rivers would appear to come within the provisions of the *Insurance Contracts Act* 1984 and not the *Marine Insurance Act* 1909."

46 No doubt boats used on inland waters were and frequently are insured against risks similar to some of those falling under the label "perils of the sea". But I do not think that policies insuring against these risks can be regarded as marine policies. Nor was the Marine Act intended to apply to them. Conversely, marine policies today frequently insure against risks commonly encountered by vessels that never enter the open sea. But for the risk to be a marine risk for the purpose of the Act, it must be incidental to or consequent on a sea voyage. Thus, marine policies may cover risks involved in loading and unloading cargo, may cover the hazards of docks, ports, harbours and rivers, may cover even the risks associated with the building of a ship. And in the course of time, marine policies have come to cover the risk of liability to third parties caused by the perils of the sea. But all these extended risks are risks that are incidental to, or consequent on, the use or intended use of ships engaged in the international or coasting trade or at all events risks incidental to ships on voyages across the open sea.

The history of marine insurance law

47 The history of marine insurance shows that marine policies were concerned primarily with ships engaged in international and coasting trade. Maritime law and marine insurance law originated in the southern European trading centres – particularly the Italian cities of Genoa, Venice and Florence – the term "policy" being derived from the Italian word "polizza" meaning promise or undertaking[28].

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24 (1887) 12 App Cas 518 at 530-531.

25 *Pandorf v Hamilton* (1885) 16 QBD 629 at 635.

26 Sutton, *Insurance Law in Australia*, 3rd ed (1999) at 29 [1.25].

27 Sutton, *Insurance Law in Australia*, 3rd ed (1999) at 30 [1.25].

28 Parks, *The Law and Practice of Marine Insurance and Average* (1988), vol 1 at 7; Bernstein, *Against the Gods: The Remarkable Story of Risk* (1996) at 95.

48 By the Middle Ages, the customs of the sea were codified and applied as law in most European countries with sea ports and a coasting trade. A number of laws formed "a series of codes which governed all the various maritime states of Europe."[29] The conditions of sea trade involving, as it did, journeys over long distances to a limited number of ports gave rise to essentially similar rules, a matter of considerable importance to foreign merchants[30]. Perhaps the most important of these codes were "the laws of Oleron"[31] which regulated the "duties of the mariners, the power of the master, jettison, contribution, average, salvage, collision, loading, freight"[32]. The laws of Oleron and other codes were included in the Black Book of the English Admiralty around 1350[33].

49 From Italy, maritime law and marine policies found their way to the Northern European cities that became the centre of trade with the Americas and the Indies. Lombard merchants, who settled in London, introduced maritime policies into English commerce[34]. Until the middle of the 14th century, the maritime part of the law merchant including the law of insurance was generally administered in England in the local courts of the seaport towns. That law was almost certainly based upon the laws of Oleron[35]. Upon the rise of the Admiralty Court in the middle of the 14th century, however, jurisdiction over maritime law passed to that Court. There were three reasons[36] why the Admiralty Court obtained this jurisdiction. First, a close connection existed between cases involving merchant shipping – its primary jurisdiction – and those arising out of foreign trade. Second, as I pointed out in *Commonwealth v Yarmirr*[37], the common law rules as to venue prevented the common law courts having jurisdiction over actions arising outside the realm. It was only later by the use of fictions that the common law courts gained jurisdiction over such matters. Third, the procedures of the Admiralty Court, based as they were on the civil law, were

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29 Holdsworth, *A History of English Law*, 3rd ed (1945), vol 5 at 100.

30 Holdsworth, *A History of English Law*, 3rd ed (1945), vol 5 at 100.

31 Oleron is an island in the Bay of Biscay.

32 Holdsworth, *A History of English Law*, 3rd ed (1945), vol 5 at 100.

33 O'May and Hill, *Marine Insurance Law and Policy* (1993) at 208.

34 Soyer, *Warranties in Marine Insurance* (2001) at 9.

35 Holdsworth, *A History of English Law*, 3rd ed (1945), vol 5 at 100.

36 Holdsworth, *A History of English Law*, 3rd ed (1945), vol 5 at 128.

37 (2001) 208 CLR 1 at 92-93 [182]-[186].

more intelligible to foreigners than the common law rules of procedure. The Admiralty Court retained this jurisdiction for several centuries. But it is almost certain that the law applied was foreign law. As late as the 16th century, a petition to the Council asserted that insurance "is not grounded upon the lawes of the realme, but [is] rather a civill and maritime cause, to be determined and discided by civilians, or els in the highe courte of the Admiraltye."[38]

50 But eventually, after a struggle between the common law courts and the Admiralty Court, the common law courts by the use of fictions and their general jurisdiction triumphed and absorbed the rules and practices of marine insurance into the common law as part of the law merchant[39]. The procedures of the common law courts were unsuited to the trial of insurance claims – a major difficulty being the common law's insistence that a separate action must be brought against each underwriter[40]. Moreover, the common law judges and counsel were ignorant of many technical terms used by merchants and seamen, with the result that judges tended to leave matters to juries with no judicial guidance as to the principles applicable[41]. To make matters worse, cases involving points of law were often argued in private chambers so that the decisions gave no guidance for future cases[42]. This lamentable state of affairs continued until the 18th century when "Lord Mansfield evolved from mercantile custom and foreign precedents the principles of our modern law."[43] Significantly, as Sir William Holdsworth has pointed out, at this time nothing resembling the modern contract of life or accident insurance existed because the "statistical knowledge, which has rendered those contracts possible in modern times, was wholly wanting"[44]. Underwriters lacked the statistics and the statistical techniques to make judgments concerning public risk liability. For that and other reasons, clauses concerning public risk liability were not found in marine policies until well into the 19th century.

51 The combination of the foreign origins of insurance law, the growth of the United Kingdom's sea trade, especially with the Indies and the Americas, and the

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38 Holdsworth, *A History of English Law*, 2nd ed (1937), vol 8 at 283.

39 cf Holdsworth, *A History of English Law*, 7th ed (1956), vol 1 at 552-559.

40 Holdsworth, *A History of English Law*, 2nd ed (1937), vol 8 at 292.

41 Holdsworth, *A History of English Law*, 2nd ed (1937), vol 8 at 292.

42 Parks, *The Law and Practice of Marine Insurance and Average* (1988), vol 1 at 10.

43 Holdsworth, *A History of English Law*, 2nd ed (1937), vol 8 at 293.

44 Holdsworth, *A History of English Law*, 2nd ed (1937), vol 8 at 295.

lack of modern accident insurance all point to the marine policy being concerned with the risks involved in the international and coasting trades. It is no accident that the first of the leading cases on the construction of insurance policies concerned "goods, in a Dutch ship, from Malaga to Gibraltar, and at and from thence to England and Holland, both or either"[45].

52 By the end of the 17th century, England had come to rival Holland as the great commercial power of the time. The risks of loss arising from this growing import and export trade gave rise to the marine insurance policy whose basic form is in the Second Schedule to the Marine Act. The form of that policy arose from the undertakings given to merchants and shipowners by the underwriters and brokers who first gathered at Mr Edward Lloyd's Coffee House which he opened in 1687 on Tower Street near the river Thames. In 1696, he launched Lloyd's List "and filled it with information on the arrivals and departures of ships and intelligence on conditions abroad and at sea."[46] As one writer, Peter L Bernstein, has pointed out[47]:

> "Lloyd's coffee house served from the start as the headquarters for marine underwriters, in large part because of its excellent mercantile and shipping connections. 'Lloyd's List' was eventually enlarged to provide daily news on stock prices, foreign markets, and high-water times at London Bridge, along with the usual notices of ship arrivals and departures and reports of accidents and sinkings. This publication was so well known that its correspondents sent their messages to the post office addressed simply 'Lloyd's'."

53 Nearly a century later, in 1771, 79 of the underwriters who did business at Lloyd's subscribed to the unincorporated Society of Lloyd's which became, and has remained, the leader of the insurance industry[48].

Lloyd's of London

54 Despite the corporate monopoly given to two chartered insurance companies, individual Lloyd's underwriters wrote most marine policies. A

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45 *Tierney v Etherington* (1743) referred to in *Pelly v Royal Exchange Assurance Co* (1757) 1 Burr 341 at 348 [97 ER 342 at 347]. See also Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (1876) at 123-125.

46 Bernstein, *Against the Gods: The Remarkable Story of Risk* (1996) at 89-90.

47 Bernstein, *Against the Gods: The Remarkable Story of Risk* (1996) at 90-91.

48 Bernstein, *Against the Gods: The Remarkable Story of Risk* (1996) at 91.

number of sources[49] indicate that those policies were concerned with insuring goods and ships involved in international and coasting trade, rather than the pleasure-craft, ferries, lighters and barges that travelled the canals, rivers and creeks of England and other countries.

55 In 1746, the Parliament enacted a law prohibiting insurance policies being used for gambling. The Act was entitled "An Act to regulate insurance on ships belonging to the subjects of Great Britain and on merchandizes or effects laden thereon."[50] Its preamble recited:

> "by introducing a mischievous kind of gaming, or wagering, under the pretence of assuring the risk on shipping and fair trade, the institution and laudable design of making assurances hath been perverted, and that which was *intended for the encouragement of trade and navigation* has, in many instances, become hurtful and destructive to the same." (emphasis added)

56 This legislation suggests that marine insurance was concerned with ships engaged in trade.

57 In 1810 in the House of Commons, a speech by Mr Joseph Marryat gave a detailed description of what was involved in marine insurance. He opposed a motion to repeal legislation that prohibited the incorporation of insurance companies but excepted two chartered companies from the prohibition. Much of his speech is set out by Mr Frederick Martin in his book, *The History of Lloyd's and of Marine Insurance in Great Britain*[51]. It is impossible to read the speech without concluding that Lloyd's marine policies were concerned with the insuring of ocean-going ships and their cargoes.

58 Speaking of underwriters, Mr Marryat said[52]:

> "In addition to this, he must be well versed in geography; must be informed of the safety or danger of every port and roadstead, in every part of the world; of the nature of the navigation to and from every country;

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49 See, for example, Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (1876) at 239-240 and Bernstein, *Against the Gods: The Remarkable Story of Risk* (1996) at 88-90.

50 19 Geo II c 37 as cited in Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (1876) at 139-140.

51 (1876) at 234-241.

52 Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (1876) at 239-240.

> and of the proper season for undertaking different voyages. He should also be acquainted, not only with the state, but the stations of the naval force of his own country and of the enemy; he should watch the appearance of any change in the relations of all foreign powers, by which his interests may be affected; and, in short, he has constantly to devote his mind, and give much time and attention to the pursuit on which he is engaged."

59 In giving evidence before the Select Committee set up to inquire into whether the legislation should be repealed, Mr John Angerstein, "The Father of Lloyd's", said that "the increased means of effecting marine insurances have fully kept pace with the increase of trade and commerce in this country."[53] Mr Angerstein described to the Committee the difference between "regular risks" and "cross risks". He explained[54] that the regular risks:

> "are from this country direct to a port in America, or to different ports of the continent of Europe, and from thence back; and the voyages of regular traders are called regular risks in general. On the other hand, cross risks are from foreign countries to other foreign countries, or from different ports in foreign countries."

60 Mr Angerstein's evidence, so far as it is outlined in Mr Martin's book, suggests that marine insurance at Lloyd's concerned only ships engaged in coasting or foreign trade.

61 Significantly, the Report of the Select Committee under the heading "Amount of Property coming within Marine Insurance" itemised three categories[55]:

- Imports and exports
- Estimated value of coasting trade
- Estimated values of freights, foreign tonnage, etc, etc.

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53 Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (1876) at 241-242.

54 Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (1876) at 242.

55 Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (1876) at 250.

62 The Committee noted that these items totalled £320,927,121 and that the amount of property actually insured was £162,538,900. This led the Committee to state that little more than one-half of the property that might have been insured was in fact subject to marine insurance. As a result, the Committee resolved that "property requiring to be insured against sea and enemies' risk, should have all the security which can be found for it"[56]. It also resolved that "the exclusive privilege for marine insurance of the two chartered companies should be repealed"[57].

63 Thus, this Report also suggests that marine insurance was perceived as the insurance of ships and cargo engaged in foreign and coasting trade. Nothing in the Report or Mr Martin's account of the evidence suggests that marine insurance, properly so called, was seen as involving risks to boats and cargo that were not engaged in these trades. Indeed, the very name "marine" implies that the insurance was concerned with risks arising from sea voyages.

The case law

64 I have not seen any case in the law reports of British Commonwealth countries where a court has held that a policy was a marine policy or was covered by the Marine Act (or equivalent legislation) where it was not contemplated that the ship was or might be used as a sea-going vessel or would have to traverse the open sea. Nor did the research of the Australian Law Reform Commission uncover any such case[58]. Indeed, the reasoning in *Joyce v Kennard*[59] indicates that policies insuring river risks that are not incidental to a sea voyage are not marine policies. In *Joyce*, the Divisional Court held on a case stated that the insured could recover on a policy insuring goods and merchandise "at any ports and places whatsoever and wheresoever in the river Thames"[60]. Mellor J said[61] that the policy "is not strictly a marine insurance; it is a contract by which the defendant indemnifies the plaintiffs against any liability which they may incur as

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56 Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (1876) at 251.

57 Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (1876) at 251.

58 Australian Law Reform Commission, *Review of the Marine Insurance Act 1909*, Report No 91, (2001).

59 (1871) LR 7 QB 78.

60 (1871) LR 7 QB 78 at 79.

61 (1871) LR 7 QB 78 at 82.

carriers to the owners of the goods entrusted to them". Similarly, Lush J said[62] that it was "not an ordinary marine policy, but a policy of a mixed nature, the object of which was to secure to the plaintiffs an indemnity to the extent of the sum subscribed for, for any loss ... which they might sustain". Hannen J concurred with both judgments. Unless these statements are wrong, this appeal must be allowed. If a policy insuring against risks to merchandise at any place in the river Thames is not a marine policy, how can a policy insuring against the risks involved in parasailing on the Swan River be a marine policy?

65 Nothing in *Mountain v Whittle*[63] or in *Cunard Steamship Co v Marten*[64] supports the view that "maritime perils" include risks to ships that are not used or intended to be used on the open sea. *Mountain* concerned a time policy for a houseboat "anchored in a creek off Netley". But the risks insured included the risk of changing docks and going on graving docks and gridirons. There were no docks or gridirons "in any creek off Netley."[65] So the policy must have contemplated a coastal voyage to such a dock or gridiron. The House of Lords upheld a finding that the insured could recover for the loss of the houseboat when, in moving to a dock, it sank on "a voyage of 7 or 8 miles to a different part of the coast."[66] In *Cunard* the policy concerned a journey from New Orleans to Cape Town. So it was a voyage policy across the open sea. On the facts and the terms of the policy, the insured failed to recover under the "suing and labouring clause" of the policy. The case is of no assistance in determining whether the present policy is a marine policy. At its highest, *Cunard* recognised that a policy on the ordinary Lloyd's printed form may be confined to insurance against third party liability. Moreover, in neither case did any issue arise as to whether the *Marine Insurance Act* applied to the policy in question. Each case turned on the terms of the policy issued in respect of the particular ship. Whether that Act did or did not apply was irrelevant.

66 Nor does *Continental Illinois National Bank & Trust Co of Chicago v Bathurst (The "Captain Panagos DP")*[67] support the view that maritime perils include risks to ships that are not used or intended to be used on the open sea. That case concerned insurance over a mortgagee's interest in the insured

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62 (1871) LR 7 QB 78 at 83.

63 [1921] 1 AC 615.

64 [1903] 2 KB 511.

65 [1921] 1 AC 615 at 621.

66 [1921] 1 AC 615 at 620.

67 [1985] 1 Lloyd's Rep 625.

property. Mustill J held that the risk of loss was not one covered by the term "perils of the sea" in the traditional policy. He held, however, that it was a risk that was "consequent on or incidental to the navigation of the sea". He said, in relation to the provisions of the *Marine Insurance Act*[68]:

> "... I am confident that the draftsman cannot have intended by sub-s 2 to create an exclusive definition of maritime perils. The words 'that is to say' must, to my mind, be given the rather special meaning of – 'which may include, by way of example'.
>
> ...
>
> The question is not whether the risks covered are what may be called 'SG risks', dominated as these are by the very restricted interpretation given by the Courts to 'perils of the seas', but whether they are 'consequent on or incidental to the navigation of the sea' ...
>
> Thus, one turns to ask in the present case, not whether the insurance created by the ... policy looks like a traditional marine insurance (which it does not); nor whether the cover resembles the list at the end of s 3 (which again it does not); but rather, whether the perils insured under that policy are, at least in the main, 'consequent on or incidental to the navigation of the sea'."

67 Whether or not this reasoning is correct, the case says nothing as to whether a maritime peril requires that the ship be, or is intended to be, a sea-going vessel. The *Captain Panagos DP*, the ship involved in that case, caught fire after being grounded in the Red Sea.

68 The only other British Commonwealth case that is arguably relevant is *Hansen Development Pty Ltd v MMI Ltd*[69], a case concerned with liability to a third party as the result of an accident on Cugden Lake in New South Wales. Meagher JA (with Priestley JA and Stein JA agreeing) said[70] in relation to the definition of marine insurance:

> "The whole Act appears to assume that the established English law of marine insurance still exists, and supplies the answer to the question. If so, the answer to the question whether the *Marine Insurance Act* applies must be in the negative. English law seems to have proceeded on the

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68 [1985] 1 Lloyd's Rep 625 at 631-632.

69 [1999] NSWCA 186.

70 [1999] NSWCA 186 at [11].

> basis that any policy in or to the effect of an 'SG' policy (or its later replacements) was a 'marine' policy ... A marine policy, so understood, covered all sorts of misadventures which might be sustained by a vessel: storm, tempest, fire, collision, average, damage to cargo etc, in fact almost everything except death or injury to third parties. Indeed, in some policies, they were specifically excluded ... In the whole of Arnould's work I have not located a single example of a public liability risk being treated as a marine insurance risk, let alone a policy dealing with nothing but public liability being treated as a marine policy."

69 The statement by Meagher JA that "any policy in or to the effect of an 'SG' policy (or its later replacements) was a 'marine' policy" is correct only if it is referring to the form of voyage policy set out in the Second Schedule to the Marine Act. Otherwise, it is contrary to *Joyce v Kennard*[71]. It is also contrary to the terms of s 8(2) of the Marine Act which requires either a marine adventure or an adventure that is *analogous to a marine adventure* and which is subject to a policy in the form of a marine policy. Moreover, with great respect to his Honour, a policy may be a marine policy even though it insures against public liability. It will be so characterised if the liability arises by reason of maritime perils and is incurred by the owner of, or other person interested in or responsible for, insurable property[72]. The maritime peril must, of course, be the proximate cause of such a person's liability. But the words of s 9(2)(c) are wide enough to cover what in other contexts would be regarded as public risk insurance. If the maiden voyage of the *Titanic* was the subject of a s 9(2)(c) risk under the policy issued by Lloyd's in respect of that ship, White Star Line Ltd would have been entitled to indemnity for its liabilities to the survivors and the relatives of the deceased.

70 It is true that for a time a marine policy did not cover what is now described as public liability risk. In *De Vaux v Salvador*[73], the King's Bench held that, under the ordinary marine policy, an underwriter was not liable in respect of damages arising from a collision, which the owner of a ship had to pay to another owner, where both ships were blamed for the collision. Lord Denman CJ (delivering the judgment of the Court) said[74]:

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71 (1871) LR 7 QB 78.

72 Marine Act, s 9(2)(c).

73 (1836) 4 Ad & E 420 [111 ER 845].

74 (1836) 4 Ad & E 420 at 432 [111 ER 845 at 850]. See also *The General Mutual Insurance Co v Sherwood* 55 US 351 (1852).

> "[It] is neither a necessary nor a proximate effect of the perils of the sea; it grows out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the Revenue laws of any particular State, which was rendered inevitable by perils insured against."

71 The decision in *De Vaux* led to the introduction of what is known as the "running down clause" or "collision clause" in insurance policies[75]. This clause operates as a separate contract over and above the contract of insurance on the vessel, whereby the underwriter agrees to accept the risk of liability to third parties as a result of a collision[76]. Initially, the extent of indemnity provided was only three-fourths of the insured's liability. The rationale behind this limitation was that by making the insured bear one-fourth of the loss, they would be more inclined to take greater care in the navigation of the vessel[77].

72 In the 19th century, the increase in the size and value of vessels and their cargo, together with the passing of *Lord Campbell's Act*, led to an increased potential liability for shipowners as a result of collisions with other vessels. This was particularly the case in relation to liability for loss of life or personal injury, which was usually expressly excluded from the ambit of the running down clause/collision clause[78]. As Kennedy J pointed out in the present case[79], shipowners overcame the consequences of *De Vaux* by forming Protection and Indemnity Associations (P & I Clubs) that took contributions from members to cover their individual liabilities[80]. The rationale and operation of P & I Clubs

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75 Mustill and Gilman, *Arnould's Law of Marine Insurance and Average*, 16th ed (1981), vol 2 at 664 [799]; O'May and Hill, *Marine Insurance Law and Policy* (1993) at 212-215.

76 *Adelaide Steamship Co v Attorney-General* [1926] AC 172 and see Lambeth, *Templeman on Marine Insurance*, 5th ed (1981) at 415.

77 Lambeth, *Templeman on Marine Insurance*, 5th ed (1981) at 416; O'May and Hill, *Marine Insurance Law and Policy* (1993) at 221.

78 O'May and Hill, *Marine Insurance Law and Policy* (1993) at 215. See *Excelsior Co v Smith* (1860) 2 LT 90 (SC) and *Taylor v Dewar* (1864) 5 B & S 58 [122 ER 754].

79 (2001) 24 WAR 453 at 479 [92].

80 Mustill and Gilman, *Arnould's Law of Marine Insurance and Average*, 16th ed (1981), vol 1 at 85 [130]; Lambeth, *Templeman on Marine Insurance*, 5th ed (1981) at 415-416.

was outlined by Lord Brandon of Oakbrook in *Firma C-Trade SA v Newcastle Protection and Indemnity Association* as follows[81]:

> "It is the long-established practice of shipowners to enter their ships in Protection and Indemnity Associations ('P & I Clubs') for the purpose of insuring themselves against a wide range of risks not covered by an ordinary policy of marine insurance ... Clubs operate on a system of mutual insurance under which the successful claim of one member is paid out of the contributions of, and the calls made on, all the members including himself. Each member is accordingly both an insurer and an insured. Among the wide range of risks covered by P & I Clubs is liability incurred by members to cargo owners for loss of or damage to cargo carried in an entered ship."

73 Mutual insurance covered the remaining liability not borne by the ordinary insurance market[82], chiefly third party liability. Mutual insurance is recognised by s 91 of the Marine Act.

74 After the decision in *De Vaux*, the ordinary marine policy often annexed a running down clause – an approved Institute Clause[83] – that insured the owner of a ship against liabilities for damages payable to any person as the result of a collision between the ship and another ship[84]. And independently of a running down clause, the risk might be defined in terms that included what is now called public liability risk. In two cases decided before the Marine Act and its United Kingdom counterpart were enacted, common law courts recognised that a policy might insure solely against public liability arising out of the use of a boat. In *Joyce v Kennard*[85], where the policy was not a marine policy, Lush J said:

> "This is an exceptional policy ... The object of the plaintiffs was to secure an indemnity against any loss in whole or in part which they might sustain as carriers, and it is not a mere policy on goods."

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81 [1991] 2 AC 1 at 23.

82 Mustill and Gilman, *Arnould's Law of Marine Insurance and Average*, 16th ed (1981), vol 1 at 85 [130]; Brown, *Marine Insurance*, 5th ed (1986), vol 1 at 74.

83 A clause agreed to and authorised for adoption by the Institute of London Underwriters. See Lambeth, *Templeman on Marine Insurance*, 5th ed (1981) at 4.

84 See, for example, *Tatham, Bromage & Co v Burr* [1898] AC 382.

85 (1871) LR 7 QB 78 at 82.

75 Similarly, in *Cunard Steamship Co v Marten*[86], where the policy was a marine policy, Romer LJ said:

> "It is admitted on behalf of the appellants that this policy of insurance is not upon the mules or goods or ship at all; it is what it purports to be, solely an insurance to *cover the shipowner's liability of any kind* to the owners of mules or cargo up to 20,000*l*, owing to the omission of the negligence clause in the contract of affreightment." (emphasis added)

76 This statement confirms that the language of s 9(2)(c) – which codifies the common law – does not require a marine policy to cover peril of the sea risks to physical property before such a policy can cover public liability risks. But, for a "pure" third party liability insurance policy to come within the Marine Act in s 9(2)(c), the risk must, as the terms of that paragraph show, be a peril consequent on or incidental to the navigation of the sea.

The Marine Act analysed

77 Many provisions of the Marine Act indicate that it, like the traditional Lloyd's policy, is primarily concerned with voyages involving the international and coasting trade. The Explanatory Memorandum[87] to the Insurance Laws Amendment Bill 1997 (Cth) declared, correctly in my opinion, that the Marine Act was "primarily designed to cover insurance contracts relating to the international carriage of goods". When the Bill that became the Marine Act was before the House of Representatives, Mr William Knox MHR, a director of a marine insurance company, spoke of "the value of insurances effected upon our oversea and coastal risks."[88] This statement indicates that in Australia marine insurance was perceived as concerned with international and coasting trade. Indeed, it is difficult to read the Act without coming to the conclusion that it is dealing with time and voyage policies in respect of the international and coasting trade. This does not mean that a policy is not a marine policy unless it involves trade or voyages between different ports. Marine policies cover private yachts and motor cruisers, passenger liners and fishing boats as well as cargo ships. But a policy will not be a marine policy unless substantially – perhaps principally – the risks covered are risks involved in sea voyages[89].

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86 [1903] 2 KB 511 at 515.

87 At 30.

88 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 6 October 1908 at 783.

89 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 243.

78 Rules concerning voyages, ports and destinations make up a good deal of the Act. Other provisions of the Act imply that a voyage across the open sea under a time or voyage policy is the concern, and the only concern, of the Act. Thus, the phrase "the navigation of the sea"[90] – a key expression in the definition of "maritime perils" – indicates a voyage. Section 11(2) refers to the "due arrival of insurable property". Section 22 refers to the ship being fit "for the voyage or adventure contemplated by the policy", to a "ship engaged in a special trade" and to "insurance on freight". Section 29 states that the policy must specify "the voyage, or period of time, or both, as the case may be, covered by the insurance". Similarly, s 31(1) declares that, where the contract is to insure the subject matter "at and from", or from one place to another place or places, the policy is called a "voyage policy". Section 31(2) extends the duration of a policy "in the event of the ship being at sea or the voyage being otherwise not completed on the expiration of the policy".

79 Section 36 states that a policy may be in the form in the Second Schedule. The form of policy in the Second Schedule is a valued voyage policy in the traditional Lloyd's form in use since 1779[91]. It insures "any kind of goods and merchandises" and the ship and its equipment "at and from", "for this present voyage" until the ship etc "shall be arrived at ...". It states that it shall be lawful for the ship "to proceed and sail to and touch and stay at any ports or places whatsoever". The policy identifies the risks as:

> "Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods, and merchandises, and ship, etc".

80 The rules for the construction of the policy that are set out in the Second Schedule also contain a number of references to voyages and ports.

81 Section 42 declares that where insurable property is expressly warranted "neutral", there is an implied condition that the property shall have a neutral character at the commencement of the risk. Section 43 declares that there is "no implied warranty as to the nationality of a ship, or that her nationality shall not be

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90 Marine Act, s 9.

91 Parks, *The Law and Practice of Marine Insurance and Average* (1988), vol 1 at 40.

changed during the risk." Section 45(1) declares that in a voyage policy "there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured." Section 45(2) declares that, where the policy attaches "while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port." Section 45(5) declares that in a time policy "there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is *sent to sea* in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness." (emphasis added) Sections 46(2), 48-55 and 65 all lay down rules for voyages, ports of departure, deviations from contemplated voyages and changes of destination or voyages.

82 Other provisions of the Act, dealing with missing ships[92], particular average loss[93], general average loss[94] and salvage[95], are also more indicative of policies insuring against the risks in the international and coasting trade and sea voyages than policies concerned with the risks attached to the navigation of inland waters.

83 Finally, the reference in s 91 to mutual insurance acknowledges the Protection and Indemnity Associations that shipowners created to cover risks – particularly third party risks – that fell outside the standard Lloyd's policy.

84 Thus the Marine Act is directed to sea voyages. Where it is concerned with risks arising on inland waters or land, it expressly says so, but makes it clear that such risks must be incidental to a sea voyage[96].

Is the Swan River estuary the sea?

85 The issue formulated by the parties is whether the Swan River estuary can properly be called the "sea" for the purposes of the Marine Act. However, on this part of the case the true issue is whether the Marine Act, an Act whose language appears to be aimed at ships engaged in voyages on the open sea, also applies to a small boat operating solely on a river. Both parties correctly accepted that the policy issued by Mercantile was not a policy to which the

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92 Section 64.

93 Sections 70, 82.

94 Sections 72, 79, 84.

95 Sections 71, 79, 84.

96 Marine Act, s 8(1).

Marine Act applied unless the locality in which the vessel would operate was part of the sea. That is because the definition of maritime perils, as "perils consequent on, or incidental to, the navigation of the sea", implies that the risk to the ship, which is the subject matter of the policy, must be consequent on or incidental to a sea voyage[97]. That does not mean that each risk must be a risk that arises on the open sea. A voyage policy, for example, will cover all risks incidental to the voyage, and under the Marine Act they may include risks in a port or in a river that has to be navigated to get to the open sea. For instance, under a voyage policy insuring cargo "at and from" a port, the risk commences as soon as the cargo is loaded[98]. In addition, the Marine Act expressly draws a distinction between the "sea", "sea voyage", "land" and "inland waters". Section 8(1) expressly states that a marine insurance contract may be "extended" to protect the insured against "losses on inland waters or on any land risk which may be incidental to any sea voyage." The terms of this sub-section are wide enough to permit a marine policy to cover risks arising from the carriage of goods on inland waters or land as long as the carriage of those goods is incidental to their carriage on a sea voyage.

Are risks arising from navigating the Swan River within the definition of maritime perils?

86 Contrary to the Full Court's holding in the present case, however, the risks involved in a vessel navigating the Swan River do not fall within the Marine Act's definition of "maritime perils". The accident in this case occurred on Heirisson Island in the Swan River estuary. An estuary is described as the interface between the ocean and a river, in which salinity changes are found. The Swan River has a permanent opening to the Indian Ocean and is tidal as far upstream as Woodbridge, near Guildford. The tidal effects can often be found further up the system than the salt effects. The tidal movements in the Swan River, however, are not identical to those found in the ocean. Seasonal variability in salinity levels also means that at some times of the year the Swan River is salty and at other times it is fresh.

87 In the District Court, Kennedy DCJ held that the "Lone Ranger" was never going to encounter a peril of the sea, as it was restricted to protected waters. However, the Full Court held that the "sea" means not only the open ocean, but also the arms of the sea within the ebb and flow of the tide. Kennedy J (with Murray and Owen JJ agreeing) said[99]:

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97 Sutton, *Insurance Law in Australia*, 3rd ed (1999) at 29 [1.25].

98 *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1886) 12 App Cas 128.

99 (2001) 24 WAR 453 at 485 [117].

> "With the exception of the occasion on which Mrs Morrell sustained her injuries at Heirisson Island, 'The Lone Ranger' was used for commercial parasailing at the Narrows site only. Both sites were estuarine, being waters within the ebb and flow of the tide and, in my opinion, they are to be regarded as the 'sea'."

88 Accordingly, the Full Court held that the navigation risks consequent on parasailing on this part of the Swan River were "maritime perils", being perils consequent on or incidental to the navigation of the sea.

89 The Marine Act does not provide a definition of the "sea". There are no Australian cases dealing with the meaning of the "sea" in the Marine Act[100]. Other Acts of the federal and State legislatures contain definitions of the "sea"[101], but none of these Acts is *in pari materia* with the Marine Act. Moreover, the definitions vary substantially as a result of the differing purposes and subject matters of these Acts. The majority of the definitions refer to the sea as including waters within the "ebb and flow of the tide".

90 Dictionary definitions[102] of the "sea" are not helpful. Although they provide a broad notion of what the sea is, they do not define the geographical limits of the sea, other than to declare that it is the expanse of salt water that surrounds a land-mass. In *Risk v Northern Territory*[103], members of this Court noted that the distinction between land and sea is as difficult to ascertain as the distinction between night and day, as "[i]n each case, the legal geometer who seeks to define the line may find it blurred and indistinct."

91 In ordinary parlance, however, a river is not the sea. It is a natural stream of water flowing into the sea or into a lake or in some cases into another river. I doubt that any Perth resident who had spent a day picnicking by the shores of the Swan River would regard him or herself as having spent a day at the sea-side. In

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100 In *Hansen Development Pty Ltd v MMI Ltd* [1999] NSWCA 186 Cugden Lake was held not to be the sea, however the indicia of the sea was not discussed.

101 See, for example, *Navigation Act* 1912 (Cth), s 6; *Historic Shipwrecks Act* 1976 (Cth), s 3(1); *Environment Protection (Sea Dumping) Act* 1981 (Cth), Sched 1, Art 1(7); *Western Australian Marine Act* 1982 (WA), s 76; *Admiralty Act* 1988 (Cth), s 3(1).

102 See *The Macquarie Dictionary*, 3rd ed (1997) at 1914 and *The New Shorter Oxford English Dictionary*, (1993), vol 2 at 2742.

103 (2002) 76 ALJR 845 at 850 [26]; 188 ALR 376 at 382.

Overseers of Woolwich v Robertson[104], the Queen's Bench Division upheld a finding that the river Thames at Woolwich was not the "sea" although at that place it was "a navigable tidal river where great ships go."[105] The issue in *Woolwich* was whether bodies washed up on the bank of the river as the result of a collision in the Thames were "cast on shore from the sea". Lindley J said[106] that the particular legislation involved was a remedial measure – it imposed duties on overseers to cause bodies "cast on shore from the sea" to be buried. Despite its remedial nature, however, he said he could not bring himself "to think that the river Thames at Woolwich, from which these bodies came, is within the meaning of the word 'sea'." His Lordship said[107]:

> "When we look at other statutes, we find that the sea is always contrasted with river. In the Act 15 Rich 2, c 3, defining the limits of the jurisdiction of the Admiralty, rivers are mentioned by name, and I am not aware that in any statute the word 'sea' is used as synonymous with the word 'river'."

92 Mathew J, the other member of the Court, said[108] that he could "find nothing in the Act to shew that the word 'sea' was intended to comprise navigable tidal rivers."

93 Similarly, there is nothing in the Marine Act to show that "sea" was intended to include navigable tidal rivers or parts of them. Indeed, the reference to "inland waters" suggests that the term "sea" is referring to waters below the high water mark of the coastal sea.

94 In determining the meaning of the term the "sea", great weight must be attached to the statement of Sir Mackenzie Chalmers that the object of the *Marine Insurance Act* was to reproduce as exactly as possible the existing law, without making any attempt to amend it[109]. Thus, in determining the meaning of the term, it is necessary to give weight to the fact that the term "perils of the sea" was a contractual term used in marine policies, the vast majority of which on any view dealt with ships engaged in the international or coasting trade. Great weight must also be given to the fact that the insured were frequently foreigners

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104 (1881) 6 QBD 654.

105 (1881) 6 QBD 654 at 655.

106 (1881) 6 QBD 654 at 658.

107 (1881) 6 QBD 654 at 659.

108 (1881) 6 QBD 654 at 659.

109 Hardy Ivamy, *Chalmers' Marine Insurance Act 1906*, 10th ed (1993) at vii.

and, as the evidence of Mr John Angerstein, "The Father of Lloyd's"[110], to the Select Committee of the House of Commons showed, the risks insured included "cross risks" as well as "regular risks". He explained[111] that "cross risks are from foreign countries to other foreign countries, or from different ports in foreign countries." These considerations make it highly unlikely that doctrines of the common law concerned with the prerogative rights of the Crown over the sea or the jurisdiction of the Admiralty Court throw any light on the meaning of the term "perils of the sea". A European trader – still less an Asian merchant after Commodore Perry's venture into Japan – would have been astonished to be told that the meaning of the term "perils of the sea" depended in part on such esoteric and insular doctrines. After all, maritime law and the rules, terms and practices concerning marine policies were the invention of the Italians, not Englishmen, and it was the Lombard merchants who introduced marine policies into England. Moreover, as the Australian Law Reform Commission has pointed out[112], the terms of the Marine Act operate "by custom or contractual incorporation in numerous countries, not only those that have inherited the English legal system generally." Accordingly, the Act should not be given a construction that is incomprehensible to nations with a legal system different from the Anglo-Australian legal system.

95 I do not think that it can be contended that any guidance concerning the meaning of the "sea" in a marine policy can be found in the law concerning the Crown's dominion and ownership over the British sea. In this regard, Hall said[113]:

> "This dominion not only extends over the open seas, but also over all creeks, arms of the sea, havens, ports, and tide-rivers, as far as the reach of the tide, around the coasts of the kingdom. All waters, in short, which communicate with the sea, and are within the flux and reflux of its tides, are part and parcel of the sea itself, and subject, in all respects, to the like ownership."

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110 Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (1876) at 241.

111 Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (1876) at 242.

112 *Review of the Marine Insurance Act 1909*, Report No 91, (2001), par 5.14.

113 Loveland, *Hall's Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm*, 2nd ed (1875) at 3. See also *Gann v The Free Fishers of Whitstable* (1865) 11 HLC 192 at 208 [11 ER 1305 at 1312].

96 On the same topic, Hale said[114]:

> "The sea is either that which lies within the body of a county or without.
>
> That arm or branch of the sea which lies within the *fauces terrae*, where a man may reasonably discerne between shore and shore, is or at least may be within the body of a county ...
>
> The part of the sea which lies not within the body of a county, is called the main sea or ocean."

97 Hale said that an arm of the sea is "where the sea flows and reflows"[115].

98 What is the sea for the purpose of a Crown prerogative is not necessarily the sea for the purpose of an insurance policy, particularly when many of these policies protect the interests of foreign nationals in respect of voyages between foreign ports. Neither Hall's nor Hale's definition of the sea could apply – could make any sense – in respect of a voyage between two foreign ports. Sir Hardinge Giffard QC, who appeared for the overseers, relied on both Hale's and Hall's definitions in *Overseers of Woolwich v Robertson*[116]. But the Queen's Bench Division obviously thought that they threw no light on the meaning of the "sea" in the legislation involved in that case.

99 Mercantile contended that, to be the "sea", the body of water must be great in size and tested in part by the phrase "where great ships go". But the common law has never recognised this test as defining the sea. The reference to "where great ships go" is a remnant of the limitations on the admiralty jurisdiction. It was not an element of the "sea" either at common law or within the admiralty jurisdiction. The jurisdiction of the admiralty courts was defined by reference to the "sea" but, as the judgment of Lindley J in *Woolwich* shows, it was statute – not the ordinary meaning of "sea" – that brought parts of certain rivers within the admiralty jurisdiction. In 1389 and 1391, legislation was passed limiting the jurisdiction to things done upon the "high seas" and excluding those done within the body of a county[117]. The 1391 Act provided:

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114 Hale, "De Jure Maris", in Moore, *A History of the Foreshore and the Law Relating Thereto*, 3rd ed (1888) at 376.

115 Hale, "De Jure Maris", in Moore, *A History of the Foreshore and the Law Relating Thereto*, 3rd ed (1888) at 378.

116 (1881) 6 QBD 654 at 657.

117 13 Ric II st 1 c 5; 15 Ric II c 3.

> "... of the death of a man, and of a mayhem done in great ships, being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the Admiral shall have cognizance"[118].

100 Thus, by statute the admiralty courts had jurisdiction in navigable rivers within the ebb and flow of the tide, below all bridges[119] and where great ships went[120]. But it is a mistake to think that this delineation of jurisdiction defines or constitutes what the "sea" was for the purpose of admiralty jurisdiction, still less for the purpose of a marine policy.

101 It is true that United States courts hold that risks arising from adventures on rivers and lakes are maritime risks[121]. But the decisions in the United States either turn on the terms of the policies or hold that, because, in the United States, maritime jurisdiction covers lakes and rivers, insurance in respect of voyages and their incidents on rivers and lakes are marine risks[122]. They do not assist in determining whether the Lloyd's marine policy or the term "maritime perils" in the Marine Act cover risks in respect of the navigation of boats that never leave the waters of a river.

102 In my opinion, the Swan River estuary was not part of the "sea" for the purposes of the Marine Act and that Act does not cover insurance policies in respect of the risks to or arising out of ships never intended to go on voyages on the open sea. The policy issued by Mercantile was not a policy governed by the Marine Act. Recent changes to marine policies confirm that this is so. The "Institute Time Clauses (Hull)" has made radical changes to insurances under the

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118 See Holdsworth, *A History of English Law*, 7th ed (1956), vol 1 at 548.

119 *R v Anderson* (1868) LR 1 CCR 161 at 169. See also *The Tolten* [1946] P 135 at 156-157.

120 *R v Carr* (1882) 10 QBD 76 at 86; *The Mecca* [1895] P 95.

121 *Continental Insurance Co of City of New York v Patton-Tully Transport Co* 212 F 2d 543 (1954); *Russell Mining Co v Northwestern Fire & Marine Insurance Co* 207 F Supp 162 (1962), rev on another point *Russell Mining Co v Northwestern Fire & Marine Insurance Co* 322 F 2d 440 (1963).

122 *The Propeller Genesee Chief v Fitzhugh* 53 US 443 (1851); *The Hine v Trevor* 71 US 555 (1866); *Garrett v Moore-McCormack Co* 317 US 239 at 244 (1942); *Wilburn Boat Co v Fireman's Fund Insurance Co* 348 US 310 at 313 (1955).

old SG form[123]. It added risks from "rivers lakes or other navigable waters."[124] As a result, the old "perils of the sea" clause is a thing of the past[125].

Order

103 The appeal must be allowed with costs and the notice of contention remitted to the Full Court. This Court should not determine the notice of contention. The matters involved are not matters that can be defended by a notice of contention. They concern the effect of a different statutory regime. Although the Full Court expressed a tentative view about these matters, it did not decide the issue that gives rise to them.

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123 Parks, *The Law and Practice of Marine Insurance and Average* (1988), vol 1 at 93.

124 Parks, *The Law and Practice of Marine Insurance and Average* (1988), vol 1 at 96.

125 Parks, *The Law and Practice of Marine Insurance and Average* (1988), vol 1 at 272.

104 KIRBY J. In *Risk v Northern Territory*[126] four members of this Court[127] reflected on the distinction, often made for legal purposes, between "land" and "sea". The differentiation was said to be "attended by the same kind of difficulty as arises in distinguishing between 'night' and 'day'". "In each case", it was pointed out, "the legal geometer who seeks to define the line may find it blurred and indistinct. But that is not to deny … that there is a distinction"[128]. Nor is it to deny that ordinary usage of language provides a basis for defining the distinction when the law renders it necessary to do so.

105 In this appeal, which comes from a judgment of the Full Court of the Supreme Court of Western Australia[129], a number of questions arise concerning the meaning and application of the *Marine Insurance Act* 1909 (Cth) ("the MIA"). The provisions of that Act[130], as its title implies, are concerned with insurance contracts providing cover against losses incident to "marine adventures". A "marine adventure" includes a risk where "any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils"[131]. "Maritime perils" are defined in the MIA by reference to "navigation of the *sea*" and "perils of the *seas*". In this way, it is necessary, in judging whether the particular insurance contract propounded is governed by the MIA, to determine whether the peril against which the policy afforded cover is of the defined character. If it is not, the policy is not governed by the MIA. With few exceptions, it is then governed by a later federal statute containing important provisions generally more protective of the insured. That later Act is the *Insurance Contracts Act* 1984 (Cth) ("the ICA").

106 The primary judge in the District Court of Western Australia (Kennedy DCJ) held, relevantly, that the subject insurance contract was not a policy of marine insurance. It was therefore not a policy governed by the MIA but by the ICA[132]. This was an important conclusion. As her Honour

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126 (2002) 76 ALJR 845; 188 ALR 376.

127 Gleeson CJ, Gaudron and Hayne JJ and myself.

128 (2002) 76 ALJR 845 at 850 [26]; 188 ALR 376 at 382.

129 *Mercantile Mutual Insurance (Australia) Ltd v Gibbs* (2001) 24 WAR 453 per Kennedy J (Murray and Owen JJ concurring).

130 The relevant provisions are set out in the reasons of McHugh J at [38]-[39].

131 MIA, s 9(2)(c).

132 *Morrell v Harford* unreported, District Court of Western Australia, 21 April 1999 ("reasons of the primary judge") at 77.

acknowledged, if she was wrong and the subject policy was one of marine insurance under the MIA, the insured's delay in notifying the insurer of the subject accident, outside the fourteen days required by the terms of the policy, would be "fatal"[133]. The provisions of the ICA, on the other hand, if it applied, would afford the insured relief against default for immaterial breaches. The ICA would also provide possible relief against other contentions which the insurer raised to resist the demand for indemnity under the policy, subject to the insurer establishing prejudice to its interests as a result of such default[134].

107 The Full Court reversed this aspect of the primary judge's decision. Giving the reasons of that Court, Kennedy J concluded that the policy in question was one of marine insurance governed by the MIA[135]. Upon that basis, the insured were in breach of a condition requiring immediate notice of the subject accident[136]. They were also in breach of a warranty which, by virtue of a provision of the MIA[137], was one that had to be exactly complied with, whether it was material to the risk or not. Although such breaches were not found to be material to the risk, Kennedy J held that, by the operation of the MIA, the insurer was discharged from liability under the policy from the date of the breaches. In consequence, the claim upon the policy failed. The appeal was allowed. The relevant parts of the primary judge's judgment were set aside. The third party proceedings to enforce indemnity under the policy were dismissed.

108 The central issue in the appeal to this Court is whether the Full Court's view that the MIA applied to the subject policy was correct, or whether the decision of the primary judge on the issue of insurance indemnity should be restored. A subsidiary question potentially arises as to whether the insurer was entitled to succeed in any case under the ICA, upon grounds, including breaches of the subject policy by the insured, not finally resolved by the Full Court in light of its conclusion that the MIA applied to the policy.

The facts and issues in the case

109 *The background facts*: The background facts in the appeal are described in the reasons of McHugh J[138] and of Hayne and Callinan JJ ("the joint

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133 Reasons of the primary judge at 86-87.

134 ICA, s 54.

135 *Gibbs* (2001) 24 WAR 453 at 485 [118].

136 *Gibbs* (2001) 24 WAR 453 at 486 [120]-[121].

137 MIA, s 39(3).

138 Reasons of McHugh J at [28]-[33].

reasons")[139]. I will not repeat the detail that is set out there. Suffice to say that on 30 January 1989 Mrs Helen Morrell was injured in a descent from paraflying near Burswood, a suburb to the north of Heirisson Island within the City of South Perth in Western Australia. The primary judge found that Mrs Morrell's injuries were "entirely" the fault of Mr Ian Gibbs (the first appellant in this Court)[140]. He was in charge of the vessel used to tow Mrs Morrell so as to achieve lift off and flight. Paraglide Pty Ltd (the second appellant) was Mr Gibbs' company through which he operated his paraflying business.

110 The appellants' proceedings against Mercantile Mutual Insurance (Australia) Ltd ("the insurer"), the respondent in this Court, concerned the demand for indemnity arising out of Mrs Morrell's claim against them. It was because the insurer denied indemnity that the appellants joined it as a third party in the proceedings in the District Court. In this way the issues concerning the liability of the appellants to Mrs Morrell and their entitlement, if liable, to indemnity from the insurer came to be decided by the courts below. Mrs Morrell was very seriously injured. It can be inferred that, as a practical matter, the decision in this appeal will have important consequences for Mrs Morrell's prospects of actual recovery from the appellants.

111 The "Vessel" referred to in the insurance policy issued by the insurer was a 17 foot (5.2 metres) Ranger speed boat, described by the primary judge as a "runabout, restricted to protected waters, [which] was never going to encounter a peril of the sea"[141]. In the notification of the premium details for the first policy of insurance, the insurer's agent described the cover in the policy as "Commercial Paraflying Insurance Cover" and "Marine Pleasurecraft Insurance Cover". The printed proposal form itself was described as a "Proposal for Pleasurecraft Insurance". The policy was similarly so described.

112 A preliminary note to the printed policy stated that the MIA "shall be deemed to apply to this insurance". This note appeared above the words "The Policy" and before the governing provisions of the policy were set out. Of course, the application of the MIA involves a question of law, having regard to the terms of that Act and the nature of the risks for which the policy provides. It is not simply a matter of agreement between the parties nor of the nomenclature of their documents. If the ICA and not the MIA applies to the policy, no assertion in an insurance policy to the contrary would be legally effective.

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139 Joint reasons at [158]-[163].

140 Reasons of the primary judge at 65.

141 Reasons of the primary judge at 76.

113 On 9 March 1988, a "renewal certificate" was issued to the appellants by the agent of the insurer. The renewed policy operated for one year from 9 February 1988. Mrs Morrell was injured in that period. In the schedule to that certificate, setting out the items insured, all of the items for "Hull", "Motor(s)", "Auxiliary Motor", "Masts, spars, sails, rigging", "Trailer" and "Equipment" that appeared in the printed form were left blank. The sole item in respect of which the "sums insured" were stated was "Third Party Liability Cover to $1,000,000". The renewal certificate contained an entry for "Navigation Warranties". This was answered "Protected Waters of WA as per permit". The "Road Transit Risks Extension" was shown as "Included". The "Legal Liability to Third Party Extensions" was answered "Commercial Paraflying included". The "Racing Risks Extension" was "Excluded". There were then typewritten warranties expressing that "Warranty 1 of the policy is amended to permit Commercial Paraflying operations as per relevant authority approvals. Further Sections 1 and 2 of the policy are deleted in full. Notwithstanding all other terms and conditions." Effectively, these endorsements on the printed form of the policy left only one operative part of the policy applying to provide indemnity to the appellants, namely, "Section 3 – Legal Liability to Third Party".

114 *The issues*: Two issues arise in this appeal and, contingently, a third. They are:

(1) Given the choice that must be made between the application of the MIA and the ICA as competing and potentially applicable federal laws, is the subject policy properly characterised as one of business insurance in respect of liability to third parties falling within the ICA rather than a contract of marine insurance falling within the MIA? (The character of policy issue);

(2) Assuming a question remains as to whether the subject policy was a contract of marine insurance within the MIA, do the "losses" "adventure" and "perils" contemplated by the policy relevantly involve (and did the accident to Mrs Morrell happen on or incidentally to) the "navigation of the sea"? Were the losses "marine" losses and was the adventure a "marine adventure" within the meaning of s 9 of the MIA? (The ambit of the sea issue); and

(3) The insurer's notice of contention in this Court asserts, in effect, that if the Full Court should have found that the policy of insurance was not one of marine insurance (so that the ICA not the MIA governed it) the orders of the Full Court should still be confirmed. This result would follow, so the insurer contended, because of breaches of the policy by the appellants, pursuant to which the insurer had lost the opportunity to cancel or not renew the policy. Accordingly, the third (contingent) issue is, was the

insurer entitled, in accordance with the ICA[142], to reduce its liability to the appellants under the policy to nil[143], meaning that the appellants still failed in their claim for indemnity? (The s 54 of the ICA issue).

The character or classification of the policy

115 *The legislative context*: The passage of the ICA in 1984 presented to Australian insurance law a new paradigm that had not existed in general insurance[144] in the preceding years of federation. Until the ICA came into force, if a contract of general insurance was propounded as falling within the MIA, the issue was simply one of ascertaining whether that Act applied or not. There was no potentially competing comprehensive Act of the Federal Parliament to afford an alternative federal legal regime to govern the contract of insurance in question. Depending upon the State or Territory in or in respect of which the question arose, a policy of insurance falling outside the MIA before the commencement of the ICA would be governed by a mixture of Imperial, colonial and State legislation and unwritten law.

116 That situation changed radically with the passage of the ICA. Thereafter, one of two federal statutes applied to most Australian contracts of general insurance. Between them, they prescribe significantly different legal regimes. The Federal Parliament attempted to deal with the potential problems of uncertainty and inconsistency in the provisions of these two federal laws. In the ICA it enacted that: "Except as otherwise provided … [the ICA] does not apply to or in relation to contracts and proposed contracts … to or in relation to which the [MIA] applies"[145]. Nevertheless, after the commencement of the ICA, the characterisation of a contract of insurance as one of "marine insurance" had to be performed within a completely new legal setting. Thereafter, a decision that a policy was, according to its character, not a contract of marine insurance would mean, in virtually every case, that it was governed by the ICA with its more

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142 ICA, s 54.

143 The insurer relied on *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1993) 176 CLR 332 affirming *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389.

144 The *Life Insurance Act* 1945 (Cth) contained specific federal provisions in relation to "life polic[ies]" as defined, including some protective of the insured or beneficiary under such policies. See for example s 83 (mis-statement of age), s 84 (immaterial statement), s 100 (non-forfeiture for non-payment of premium). See also the *Insurance Act* 1932 (Cth); *Insurance Act* 1973 (Cth); *Life Insurance Act* 1995 (Cth) and see now ICA, ss 25, 29, 30.

145 ICA, s 9(1)(d).

contemporary provisions adopted by the Parliament substantially to give effect to recommendations of the Australian Law Reform Commission ("ALRC")[146].

117 Allocating contracts of insurance to one or other of the statutory systems (or in rare cases to neither) was thus a task to be performed, in the first instance, by reference to the text of the MIA. However, in Australia, after the enactment of the ICA, the task of allocation according to the characterisation of a propounded policy of insurance could not be performed without regard to the fact that the same legislature had enacted a significantly different statute which was expected to operate in the Australian insurance market, side by side with the MIA. The new legal paradigm obliges a court, in giving effect to the MIA, to take into account the later enactment of the comprehensive ICA and the need to implement its provisions too, where they are applicable, to the full extent of the ICA's purposes as revealed in its text. This change to the legal setting of insurance law in Australia cannot be explained solely by reference to the bare language of the two Acts in question. It is necessary to have some notion of how the two federal laws are intended to operate together, applying to insurer and insured alike so as to avoid needless clashes and uncertainties between the two laws of the same polity.

118 *The ALRC report*: In 1997, the problem of the potential intersection of the ICA and the MIA was investigated by a federal departmental committee[147]. Thereafter, it was further examined as a new project by the ALRC[148]. In 1998, in advance of the ALRC's report on marine insurance, the Federal Parliament enacted an amendment of the ICA to insert into its provisions s 9A. By that section, "the insurance of pleasure craft was moved from the MIA to the ICA"[149]. The 1998 amendment had no retrospective operation. In any event, according to its terms, it would not apply to the policy in issue in this appeal.

119 The ALRC delivered its report on marine insurance in 2001. It recommended that contracts for the transportation of goods for non-commercial purposes should also be removed from the MIA to the ICA "consistent with the overall approach that consumer contracts of insurance should be covered by the ICA (although that Act also covers many forms of commercial insurance)"[150].

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146 See below at [118].

147 Australia, Attorney-General's Department, Issues Paper, *The Marine Insurance Act 1909*, (March 1997).

148 Australian Law Reform Commission, *Review of the Marine Insurance Act 1909*, Report No 91, (2001) ("ALRC 91").

149 ALRC 91 at 12 [1.15].

150 ALRC 91 at 12 [1.15].

The ALRC further recommended that the coverage of the MIA should extend that Act to include adventures on inland waters"[151].

120 The ALRC expressed a conclusion that[152]:

> "At present, the Act's operation is confined to maritime adventures (that is, sea voyages) and incidental non-maritime risks. There is some difficulty in determining the point at which a contract covering numerous and varied insurance risks ceases to be covered by the MIA and is therefore covered by the ICA."

The ALRC suggested that it was important to ensure that the "distinction between insurance covered by the two Acts is not arbitrary but is based on" a discernible principle[153]. As a result of its two year inquiry into marine insurance law in Australia and overseas, the ALRC expressed an opinion that the MIA did not at present extend, as such, to include adventures solely confined to Australia's inland waters. This conclusion conformed to similar opinions expressed by respected scholars[154].

121 *The task of characterisation*: In deciding whether a particular policy of insurance fell within the MIA, even before the ICA came into force it was necessary, in case of a dispute, to characterise or classify the propounded policy to decide whether it was a "contract of marine insurance" or not.

122 Such an issue of characterisation arose in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*[155]. There, the policy of insurance covered a variety of risks described as "transit risk – road, rail, *sea*, air, parcel, post"[156]. The appellant in that case submitted that, because the contract of insurance contemplated, or at least included, the insurance of goods during their transit by sea, it was a marine policy within the meaning of the MIA. It therefore

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151 ALRC 91 at 13 [1.16].

152 ALRC 91 at 13 [1.16].

153 ALRC 91 at 13 [1.16].

154 eg Sutton, *Insurance Law in Australia*, 3rd ed (1999) at 30: "[P]leasure craft (or commercial craft for that matter) used exclusively on lakes and rivers would appear to come within the provisions of the [ICA] and not the [MIA]." See reasons of McHugh J at [45].

155 (1986) 160 CLR 226.

156 *Con-Stan* (1986) 160 CLR 226 at 242 (emphasis added).

asserted that it was entitled to rely on the provisions of that Act, with the consequence that the insurer had no recourse to the insured where the broker had (as there) defaulted on payment of the premium for which case the MIA specifically provided. The appellant in that case argued that "a policy which includes the insurance of marine risks is a 'marine policy' and does not cease to have that character merely because it may also be characterised as a non-marine policy"[157].

123 In rejecting that argument, this Court emphasised that what was critical was the characterisation of the policy for the purpose of the MIA. This required consideration of the policy viewed as a whole[158]:

> "[A] contract indemnifying the assured against losses which are not substantially incident to marine adventure is not a contract of marine insurance: *Leon v Casey*[159]. No evidence has been led to illustrate the importance of such part of the transit risk as involved the carriage of goods by sea in the context of the whole policy. An examination of the terms of the policy indicates that it is but one small part of one section of the cover afforded. It cannot be said, therefore, that the policy, *viewed in its entirety*, is one which indemnifies the assured against losses that are substantially incident to marine adventure. Accordingly, the policy does not fall within the ambit of [the MIA]."

124 Applying the same approach to the contract of insurance in the present case, constituted by the second policy evidenced by the renewal certificate of 9 March 1988, I would arrive here at the same conclusion as this Court reached in *Con-Stan*. I approach the question to be resolved as one of characterisation. I decide it by reference to the substance of the policy, not merely its form. I look at the policy and view it in its entirety. I consider the types of losses against which it promised to afford indemnity to the insured.

125 Approaching the subject policy in this way, read together with the proposal form that led to the certificate of renewal, it is clear that although items of a vessel were mentioned in the printed form (that might otherwise give the policy something of a maritime flavour), the actual substance of the insurance contract, as agreed, was that which was stated on the face of the certificate. It was one confined to the provision of indemnity to the insured with respect to "Third Party Liability Cover". That was all that was left in the policy after the deletions. Such indemnity was granted only in respect of the promise contained

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157 *Con-Stan* (1986) 160 CLR 226 at 242.

158 *Con-Stan* (1986) 160 CLR 226 at 243 (emphasis added).

159 [1932] 2 KB 576 at 590.

in Section 3 of the subject policy. The other sections of the policy, involving physical loss or damage to the vessel and salvage charges and other charges (such as the "expense of sighting the bottom after stranding" of the vessel), were specifically excluded from the policy as issued. What remained, and all that remained, was a promise to provide indemnity in respect of the named business' "liabilities to third parties".

126 It is true that Section 3 of the policy was expressed to apply "by reason of your interest in the Vessel". However, this was not, as such, an "interest" defined by reference to a "marine adventure" as that phrase is used within the MIA[160]. On the contrary the "adventure" to which the subject policy was addressed was made clear on its face. It was confined by the proposal for insurance and elaborated by the anterior correspondence of the appellants with the insurer through its agent. Substantially, it was the "adventure" inherent in the appellants' business of providing paying customers with facilities of paraflying over "Protected Waters of WA" using what the policy described as a "Runabout Ski Boat" restricted to "smooth waters only" on and from the Swan River in the City of South Perth. The last mentioned descriptions defined the venue of the risk but the risk itself was third party business liability for "paraflying", which is an aerial and not a maritime activity.

127 Subject further to whether this insured "adventure" took place on a "river" that is an "inland water", and was therefore not a peril "consequent on, or incidental to, the navigation of the *sea*", the attempt to bring the policy within the "contract of marine insurance", as that phrase is used in the MIA, fails. Properly characterised, the policy was, and was stated to be, one of third party liability insurance for a business for which any maritime connection was inessential to the risk. In short, it was a third party liability policy not a marine policy. Although marine policies might in accordance with s 9(2)(c) of the MIA include liability to a third party, the essential character of the subject policy was not given by that supplementary provision. Its essential character was that of a business third party liability policy – not marine.

128 To the extent that this was a conclusion that I would have reached in the absence of the ICA, it is one that is reinforced – and certainly not thrown into doubt – by the passage of that Act into law. A decision that the subject policy was not a "contract of marine insurance" can now more comfortably be arrived at given that the consequence is not that the contract is unregulated by federal law, thrust into an uncertain mixture of other legal sources, but that it is regulated by a different federal law, namely the comprehensive Act (the ICA) containing detailed provisions applicable outside the exceptional category of marine policies of insurance for sea and sea-related risks.

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160 MIA, ss 7, 9(2).

129 In characterising an insurance policy in contemporary Australian legal conditions, weight must now be given to the existence of the ICA. Its provisions are engaged where they are applicable, as they were here. The conclusion that the MIA did not apply did not now have the consequence of placing the parties beyond the federal legislative pale. It simply engaged another more comprehensive and relevant federal law to govern their dispute.

130 *A policy falling outside the MIA*: It follows that the appellants were entitled to succeed upon the first issue concerning the essential character of the indemnity provided to them under the subject policy. The mere fact that some use of the vessel in question might hypothetically have attracted the MIA, should it ever have proceeded onto the open seas, does not alter the *type* of insurance that was effected in this case. When properly classified within the dual regime now provided by federal law, it was a business third party liability insurance policy for the appellants' notified business. Viewed in its entirety, it fell outside the MIA. In the circumstances, it therefore fell within the ICA. The primary judge was correct to so conclude.

131 Assuming that this conclusion about the true character or classification of the subject insurance policy is incorrect – or is not determinative of whether the MIA or the ICA applies[161] – it is appropriate for me to address more closely the ambit of the sea issue. As will appear, it affords an alternative route that takes this judicial voyage to the same safe harbour.

The ambit of the sea

132 *Significance of "the sea" to the proceedings*: The joint reasons[162] are, with respect, correct in stating that whether the precise place at which the accident to Mrs Morrell occurred was "the sea" for the purposes of the MIA does not resolve, as such, the issue arising in this appeal. The insurer did not deny indemnity to the appellants because of the location of the accident to Mrs Morrell. Rather it did so, relevantly, because of its view as to the legal character of the policy, the law then applicable to that policy and the suggested consequences of breaches of the policy under that law.

133 Because of the language of the policy, and of the MIA which the insurer contended was applicable to the risks for which it afforded the promise of indemnity, it is necessary (on this hypothesis) to decide whether the contract of

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161 cf reasons of Gleeson CJ at [10], reasons of McHugh J at [76].

162 Joint reasons at [194].

insurance involved an obligation on the part of the insurer to indemnify the appellants in respect of a "marine adventure" within the MIA[163].

134 In the case of "liability to a third party"[164] – being liability arguably of the kind provided by the subject policy of insurance – the MIA accepts that such liability may be the subject of a "contract of marine insurance", in particular where the owner of, or other person interested in or responsible for, insurable property (in this case the vessel) incurs such liability "by reason of maritime perils"[165]. In the "cascading definitions"[166] provided by the MIA, that expression is, in turn, defined by that Act to "mean" the perils "consequent on, or incidental to, the navigation of the *sea*"[167]. This latter expression is, in its turn, elaborated, relevantly, by the phrase "that is to say, perils of the *seas* … either of the like kind, or which may be designated by the policy".

135 It can be seen that the MIA is focussed, relevantly, upon an identified place on the earth's surface, namely, "the sea" and "the seas". It is therefore pertinent to ask whether the place where, by its terms, the policy in question in these proceedings applied, involved a risk defined, in a relevant way, by reference to "the sea". Necessarily, that question presents the issue as to where the boundary of "the sea" or "the seas", as so described, finishes – giving way, for example, to other geographical places on the earth's surface, such as "land" or "inland waters".

136 *Discerning the ambit of the sea*: The Full Court answered the ambit of the sea question by reference to considerations of salinity and tidal flow in the Swan River at the point where the accident occurred and also at the Narrows site where the appellants' commercial parasailing was normally intended to occur and did in Mrs Morrell's case occur[168]. At each of those points the river was subject to the rise and fall of the tide and, depending on the time of year, to varying degrees of salinity. The Full Court considered that that part of the river was therefore to be regarded as part of "the sea" for the purposes of the MIA. The joint reasons express the opinion that this is the preferable way to locate the boundary between

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163 MIA, s 7.

164 MIA, s 9(2)(c). See also s 9(1).

165 MIA, s 9(2)(c). See also ss 9(2)(a) and (b).

166 ALRC 91 at 54 [4.6].

167 MIA, s 9(2) (definition).

168 *Gibbs* (2001) 24 WAR 453 at 485 [117].

"the sea" and "the river" if that should be important to the decision in the case[169]. I disagree.

137 Intuitively, the argument that the Swan River, in either area of its length where the appellants carried on their business of paraflying, is part of "the sea" or "the seas" exposed to the "perils of the seas", appears incorrect. Unlike certain other Australian statutes, the MIA does not define "sea" for its purposes. Little assistance is to be obtained by looking at the definition of "sea" in other Acts, federal[170] or State[171]. There is no authoritative decision of this or any equivalent court that determines the issue, whether in relation to the MIA or to the United Kingdom Act ("the UK Act") upon which it was originally based[172] or any of the many statutes of other Commonwealth countries which copied the UK Act[173].

138 In *Hansen Development Pty Ltd v Mercantile Mutual Insurance (Australia) Ltd*[174], the New South Wales Court of Appeal rejected the proposition that a wave sled accident on Cugden Lake in New South Wales attracted the MIA so that the relevant insurance policy was governed by that Act and not by the ICA. In the course of his reasons in that case, Meagher JA, after referring to *Arnould's Law of Marine Insurance and Average*[175] and to the Lloyd's "SG" Policy[176], remarked[177]:

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169 Joint reasons at [203]. See also reasons of Gleeson CJ at [17].

170 eg *Admiralty Act* 1988 (Cth), s 3(1); *Environment Protection (Sea Dumping) Act* 1981 (Cth), Sched 1, Art III(3). See ALRC 91 at 115 [8.79]-[8.81].

171 eg *Western Australian Marine (Sea Dumping) Act* 1981 (WA), Sched 1, Art III(3); *Western Australian Marine Act* 1982 (WA), s 76.

172 *Marine Insurance Act* 1906 (UK). See joint reasons at [173]-[184] and reasons of McHugh J at [38], [44] where some of the history is collected.

173 eg *Marine Insurance Act* 1908 (NZ); *Marine Insurance Ordinance* 1964 (HK).

174 [1999] NSWCA 186. See also *Raptis (A) & Son v South Australia* (1977) 138 CLR 346.

175 Mustill and Gilman, *Arnould's Law of Marine Insurance and Average*, 16th ed (1981), vol 1.

176 The wording of the Lloyd's "SG" Policy appears in the MIA, Second Schedule.

177 [1999] NSWCA 186 at [11].

> "In the whole of Arnould's work I have not located a single example of a public liability risk being treated as a marine insurance risk, let alone a policy dealing with nothing but public liability being treated as a marine policy. Particularly must this be so when no 'sea' is involved: Cugden Lake can hardly be said to be a 'sea'."

Special leave to appeal to this Court was refused in *Hansen*. However, the decision is not precisely in point. There were differences in the respective policies. And it can hardly be said that a lake is comfortably analogous to a river at a point where it is affected by tides and salinity emanating from the sea[178].

139 As there is no statutory definition or binding decision to settle the ambit of the sea issue, it is necessary for this Court to consider the boundaries of the sea in the context of the instant policy, and of the MIA, taking into account the usual sources for resolving such questions. These involve a close study of the language of the MIA; a consideration of any implications to be derived from the use of language in the Act that throws light on the meaning of "the sea" and "the seas" as these words are there used; a reflection on the apparent purpose of the Act as ascertained from its language; and the derivation of any guidance that may be drawn from earlier judicial authority on the definition of "the sea" or "the seas", in similar contexts, together with any applicable considerations of legal principle and legal policy.

140 So far as the statutory language is concerned, it is important to note that the MIA allows for a contract of marine insurance to extend to protect the insured "against losses on inland waters … which may be incidental to any sea voyage"[179] and to any adventure analogous to a marine adventure[180]. As the ALRC observed in its report on the MIA: "It seems to follow from the definition of maritime perils that to constitute a marine adventure the vessel must either be on a sea voyage or at least be waterborne on the sea."[181] Professor Sutton in his text reached a similar conclusion[182]:

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178 A point noted by Kennedy J in the Full Court: *Gibbs* (2001) 24 WAR 453 at 483 [106].

179 MIA, s 8(1).

180 MIA, s 8(2).

181 ALRC 91 at 114 [8.74].

182 *Insurance Law in Australia*, 3rd ed (1999) at 29-30 (original emphasis).

> "Admittedly, the definition refers to perils *of* the seas, not perils *on* the seas[183] and such dangers as collision, fire, grounding and foundering, are met with on inland waters as well as at sea, but they are not perils *consequent* on or *incidental* to the navigation of the sea."

141 The distinction between "the sea" or "the seas" and "inland waters" in the MIA is important to this appeal because it indicates that, as such, "inland waters" were not viewed by the Parliament as part of "the sea" for the purposes of the MIA nor perils upon them as "perils of the seas". Nor are inland waters regarded as part of "the sea" in common speech in Australia. A river, even a tidal and sometimes partly salinated river, is not ordinarily described as "the sea", still less "the seas". At least this is so where the part of the river that is in question is some distance from its mouth to the sea and especially where (as here) the river flows through a city or suburban area, populated by people who regard the waterway in question as an identified river – something quite different from "the sea" in common speech. Unsurprisingly, this is the way the ALRC regarded the MIA and its intended scope. Only on that basis can the ALRC's suggested solution to the dilemma of differentiation between the sea and other ("inland") waters be understood. The ALRC proposed that, instead of trying to define "the sea" for the purpose of the MIA, the opportunity should be taken, by amendment of that Act, to make it clear that the MIA "clearly covers risks on inland waters"[184]. By inference, it accepted that the MIA, as applicable to this appeal, did not do so. The ALRC's report is still under consideration but I regard its analysis as accurate and helpful to the resolution of the issue before this Court.

142 The Canadian[185] and Indian[186] legislation on marine insurance appears now to include inland waters within marine insurance law by express statutory provisions that do not relate such coverage to accidents incidental to sea risks[187]. In this respect, the Australian MIA to this day adheres to the original Imperial language. It continues to draw the distinction between "the sea" or "the seas" on the one hand and "inland waters" on the other. Such "inland waters" would ordinarily include rivers, including navigable rivers separated from the sea, lakes, enclosed bays, inlets, estuaries and other waters not as such constituting part of "the sea" or "the seas".

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183 *Wilson Sons & Co v Owners of Cargo per the "Xantho"* (1887) 12 App Cas 503 at 509.

184 ALRC 91 at 116 [8.82].

185 *Marine Insurance Act* 1993 (Can), s 6(1).

186 *Marine Insurance Act* 1963 (India), s 4(2).

187 ALRC 91 at 117 [8.85].

143 In *Raptis (A) & Son v South Australia*[188], a fisheries case, Stephen J drew attention to the difficulty which the common law had traditionally experienced in distinguishing "the sea" from "inland waters". His Honour said[189]:

> "The common law has always recognized that coastal waters in the form of bays enclosed within the jaws of the land form part of the inland waters of the littoral State. However, difficulty has always been experienced in defining with any precision what must be the attributes of such waters before they may be regarded as sufficiently landlocked to qualify as inland waters."

144 Whatever such difficulties may be, in the context of the MIA and the distinctions it draws, the kind of notion encompassed by the waters beyond the "*fauces terrae*"[190] (jaws of land), seems closer to the ordinary concept of "the sea" or "the seas" than the attempt that the insurer urged on this Court to turn the relevant section of the Swan River within the City of South Perth into part of "the sea". I doubt if any resident of Perth or any visitor for whom English was a native language, would describe the area of the Swan River near the Burswood Casino (or near the Narrows Bridge) as "the sea" or part of "the sea". Asked to identify the stretch of water in question, the observer would call it part of "the river"[191]. If pressed with statutory alternatives, he or she might describe it as a section of one of the "inland waters" of Western Australia. In giving meaning to the MIA, an Australian statute, this Court should be careful not to stray too far from the perceptions and use of language of the ordinary person. After all, the basic task before the Court is to give meaning to the provisions in a statute of the Federal Parliament speaking to us today.

145 What then is the basis upon which it is suggested that the Court would be warranted as treating that part of the river as part of "the sea" or "the seas", contrary to the ordinary understanding of those words in daily Australian usage? Had the Parliament in 1909 (or the United Kingdom Parliament in enacting the UK Act in 1906) intended to adopt an artificial, unusual and technical meaning of "the sea" (as by reference to the susceptibility of a river or other internal water to tides or salinity) it could have said so. Later Australian legislation has

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188 (1977) 138 CLR 346.

189 (1977) 138 CLR 346 at 376.

190 Hale, "De Jure Maris", in Moore, *A History of the Foreshore*, 3rd ed (1888) at 376; cf Coke, *Fourth Institute*, c 22 at 140: see O'Connell and Shearer (ed), *The International Law of the Sea*, (1982), vol 1 at 342-343.

191 See reasons of McHugh J at [91].

sometimes (but not uniformly) adopted such a definition to expand the ordinary meaning of the word "sea" and its analogue "seas" to include other "waters within the ebb and flow of the tide"[192]. However, without such an expanded definition, expressly included in the Act, this Court should give the word "sea" in the MIA its ordinary meaning according to common usage. It should especially do so here in a context in which the legislation has expressly drawn the distinction between "the sea" or "the seas" and "inland waters".

146 *The legal geometer in the context of this appeal*: The insurer's attempt to import into the MIA tidal or salinity concepts contained in special statutory definitions adopted in later and other legislation, enacted for different purposes, should be rejected. Apart from anything else, such an expanded definition is unnecessary to carry into effect the purposes of the MIA. This is because provision is made for express extensions of a policy for application to losses on inland waters (or land risk) but only where such losses are "incidental to any sea voyage"[193]. As McHugh J explains in his reasons, no such "sea voyage" was contemplated in this case as that phrase would ordinarily be understood. Nor was there any "navigation of the sea" giving those words their normal meaning. Nor were there any consequences of the "perils of the seas" or other perils of the kind listed in the definition of "maritime perils"[194] as those words are commonly used in the English language.

147 The statutory setting therefore reinforces, and confirms, the inference that the MIA is addressed to sea perils properly so understood and certain other perils incidental thereto. It is not, as such, addressed to disconnected perils upon Australia's "inland waters" such as a river flowing through metropolitan suburbs in a large Australian city. The latter perils are different and typically involve smaller risks. Exposure to the elements is ordinarily more confined; the length of the journey is more restricted; and rescue is normally closer at hand in the event of mishap.

148 Furthermore, none of the features of the subject policy suggested, still less provided, that it extended in any way to "navigation of the sea" in the ordinary

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192 eg *Navigation Act* 1912 (Cth), s 6(1); *Historic Shipwrecks Act* 1976 (Cth), s 3(1); *Admiralty Act* 1988 (Cth), s 3(1); cf *Western Australian Marine Act* 1982 (WA), s 76. In United Kingdom legislation, an expanded definition of "the sea" has sometimes been adopted: eg *Prevention of Oil Pollution Act* 1971 (UK), s 29(1); *Protection of Wrecks Act* 1973 (UK), s 3(1); *Food and Environment Protection Act* 1985 (UK), s 24(1).

193 MIA, s 8(1).

194 MIA, s 9(2)(c).

sense of that term. On the contrary, the nature of the business as described, the capacity of the nominated vessel and the specified limitations of the applicable waters indicated that the policy of insurance was wholly one confined to "inland waters" of the State, namely a limited section of the Swan River in the City of South Perth, several kilometres from the mouth of that river to the sea. So confined, the policy excluded any cover in respect of a "sea voyage" or "perils of the seas" as those words are used in the MIA.

149 We are not in this case concerned with a contract of insurance issued to insure a vessel whose primary deployment involves navigation upon the high seas and which incidentally, from time to time, visits the internal waters of Australia and might then expect its policy of marine insurance to apply to it in such waters, whether in a harbour, bay, estuary or navigable river or when docking, anchored or being repaired in such a place. Here, with this particular insurance policy, no navigation of "the sea" or "the seas" in the normal sense of those words was contemplated. On the contrary, it was denied in multiple ways by the terms used in the policy. The only way a different conclusion could be reached would be by assigning a wholly artificial and unnatural meaning to the expressions "the sea" and "the seas" in the MIA. In the absence of clear textual or decisional authority obliging such an artificial meaning, I would not adopt it.

150 *A policy falling outside the MIA*: In applying the foregoing linguistic and conceptual dichotomy derived from the MIA to the facts of the present case, the space of water on the Swan River envisaged by the subject policy was an inland water. It was not part of the sea or the seas. The insured adventure therefore fell outside the ambit of the sea. It did not extend to "perils of the seas". The policy fell outside the MIA. It was accordingly governed by the ICA. The Full Court erred in giving effect to the contrary view.

The insurer's contention raising s 54 of the ICA

151 The foregoing conclusions leave only the insurer's fall-back position. In its notice of contention the insurer argued that if, contrary to its primary submission, the Full Court erred in finding that the subject policy was one of marine insurance, "then by reason of the breaches of the policy the respondent lost the opportunity to cancel or not renew the policy and pursuant to [s 54 of the ICA] was entitled to reduce its liability to nil".

152 In support of this proposition, the insurer relied upon breaches of the policy found in the courts below and, in addition, submitted that, by reason of errors of fact and law, those courts should have found that additional breaches of the policy conditions had occurred relevant to the application of s 54 of the ICA to this case. The appellants answered these contentions with detailed submissions. These raised a procedural objection to the issues presented under s 54 of the ICA and, alternatively, sought to respond to the contentions on their factual merits.

153 In the Full Court, Kennedy J dealt with the s 54 issue in very brief terms amounting to a single paragraph[195]. However, it is clear from what was said, and the way it was said, that his Honour's remarks about the application of s 54 to the case represented only a hypothetical expression of opinion, unnecessary to the Full Court's decision.

154 It would not be appropriate for this Court, effectively for the first time, to endeavour to sort out the merits of the procedural objection now advanced by the appellants. The only way by which the matters raised in the notice of contention could be disposed of fairly, together with the procedural and substantial objections to the contentions of the appellants, would be for this Court to remit all such matters to the Full Court. That is what should be done.

Orders

155 The appeal should be allowed with costs. The judgment of the Full Court of the Supreme Court of Western Australia should be set aside. The notice of contention should be remitted to the Full Court so that that Court might dispose of all remaining issues which the parties may properly raise and enter judgment consistently with the reasons of this Court.

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195 *Gibbs* (2001) 24 WAR 453 at 486 [123].

156 HAYNE AND CALLINAN JJ. The *Insurance Contracts Act* 1984 (Cth) provides[196] that it does not apply to, or in relation to, contracts "to or in relation to which the *Marine Insurance Act* 1909 [(Cth)] applies". The *Insurance Contracts Act* assumes, therefore, that a distinct boundary can be identified between contracts to which the *Marine Insurance Act* applies and other forms of contracts of insurance. This appeal requires the location of that boundary.

157 After the events which are relevant to the litigation leading to this appeal, the *Insurance Contracts Act* was amended[197] to provide, in effect, that the *Marine Insurance Act* does not apply to a contract of marine insurance made in respect of a pleasure craft[198] unless the contract is made in connection with the pleasure craft's capacity as cargo. This amendment did not apply to the contract in issue in this litigation[199].

The underlying facts

158 The second appellant, Paraglide Pty Ltd, conducted a business offering paraflying, sometimes called parasailing, to the adventurous. The first appellant, Mr Gibbs, was a principal of the company. The company operated a 17 foot run-about ski boat, powered by a 160 horsepower sterndrive motor, called the "Lone Ranger". When paraflying, the boat towed a person wearing a parachute who could ascend to the length of the tow rope while the boat made sufficient speed to generate enough lift under the canopy of the parachute.

159 On 30 January 1989, Mrs Helen Morrell went paraflying with the appellants. Her husband had bought her a ticket as a birthday present. The ticket said that she would go paraflying at "The Narrows Bridge" on Perth's Swan

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196 s 9(1)(d).

197 *Insurance Laws Amendment Act* 1998 (Cth), s 77.

198 Defined by s 9A(2) of the *Insurance Contracts Act* as "a ship that is:

(a) used or intended to be used:

(i) wholly for recreational activities, sporting activities, or both; and

(ii) otherwise than for reward; and

(b) legally and beneficially owned by one or more individuals; and

(c) not declared by the regulations to be exempt from this subsection."

199 *Insurance Laws Amendment Act* 1998, s 82.

River. In fact, by arrangement, she met Mr Gibbs, who was to operate the boat, and some others who were to go paraflying on that day, at a point a few kilometres upstream of the Narrows Bridge, near the Burswood Casino. They were to use the "Lone Ranger". From the place where they met, the party went a short distance downstream, to the northern tip of Heirisson Island in the Swan River. After some instruction, an attempt was made to launch Mrs Morrell into the air. For reasons that do not matter, that attempt failed and the party moved further to the south east and, after another abortive attempt, Mrs Morrell took off. All went well until an attempt was made to land her towards the north east end of the island. She hit trees on the island, and was dragged through them, suffering serious injuries as a result.

160 Mrs Morrell sued a number of persons, including Mr Gibbs, who had been operating the "Lone Ranger", and Paraglide Pty Ltd. Mr Gibbs and Paraglide sought indemnity from the respondent under a policy of insurance called a "Marine Pleasurecraft Policy" which the respondent had issued to "R Sodaberg [sic] & I Gibbs T/as Paraglide Pty Ltd". Each of those named has been treated in the litigation as an insured.

161 The respondent denied liability to indemnify Mr Gibbs or Paraglide. Mr Gibbs and Paraglide therefore joined it as third party to the proceeding brought by Mrs Morrell.

The contract of insurance

162 In 1986, the appellants (with Mr Soderberg) had sought and obtained insurance of the "Lone Ranger". The proposal was submitted through Anchorage Marine Underwriting Pty Ltd. It sought cover for the hull and motor of the "Lone Ranger", its trailer, together with equipment described as parachutes, rope and harness. In addition, the policy extended to indemnify the insured (up to $1 million) against legal liability to third parties. It provided that:

> "If by reason of your interest in the Vessel you become LEGALLY LIABLE to pay any sum or sums in respect of any liability, claim, demand, damages and/or expenses for liabilities to third parties, we will pay to you or on your behalf all such sums up to the limit specified in the Schedule in respect of any one accident or series of accidents arising out of the same event."

It went on to provide (among other things) that the indemnity granted "shall extend to any person navigating or in charge of the Vessel who is legally competent to do so and who has your permission". Certain exclusions were then provided, including an exclusion of liability for claims in respect of death or bodily injury arising out of paraflying unless the policy was expressly extended. The policy schedule issued to the appellants did extend cover to include

commercial paraflying. Certain further conditions of that extension of cover were then engaged, but their detail is not important. Nothing turns on them.

163 When Mrs Morrell suffered her injury, the contract no longer covered any risk to the named craft, or its equipment. It provided only for third party liability cover, extended to include commercial paraflying. The policy schedule said, as had earlier policy schedules, under the heading "Navigation Warranties": "Protected Waters of WA as per permit". It also said:

> "Warranted: That Warranty 1 of the policy is amended to permit Commercial Paraflying operations as per relevant authority approvals. Further Sections 1 and 2 of the policy are deleted in full. Notwithstanding all other terms and conditions."

(Sections 1 and 2 of the policy dealt with physical loss or damage to the craft, and salvage charges and other expenses.)

164 In the third party proceedings brought by the appellants, the respondent contended that the insured had not disclosed matters that they were bound to disclose and that they had made certain material misrepresentations. It is not necessary to notice the detail of those allegations. It is enough to say that, if the policy under which the appellants sought indemnity from the respondent is governed by the *Marine Insurance Act*, the rights of the respondent, as insurer, differ from, and are greater than, the rights which it would have if the policy is governed by the *Insurance Contracts Act*.

165 Was the contract a contract of marine insurance? In the District Court of Western Australia, Kennedy DCJ held that it was not. On appeal, the Full Court of the Supreme Court of Western Australia (Kennedy, Murray and Owen JJ) held[200] that the contract was a contract of marine insurance.

The appellants' contentions

166 The appellants submitted that the contract and the events that could, or in this case did, give rise to the liability against which they sought indemnity had insufficient connection with the sea for the insurance contract to be one to or in relation to which the *Marine Insurance Act* applies. The submission was put in various ways but there were two principal branches of the argument. First, the appellants submitted that the incident neither happened at sea nor as an incident of any actual or intended voyage on the sea. Secondly, they submitted that the

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200 *Mercantile Mutual Insurance (Australia) Ltd v Gibbs* (2001) 24 WAR 453.

cover provided by the policy was "public liability" cover, not a contract to indemnify the insured against marine losses: losses incident to marine adventure.

167 Before dealing with the particular arguments advanced it is necessary to consider a number of particular aspects of the *Marine Insurance Act*. It is only against that background that the appellants' arguments can be considered.

The *Marine Insurance Act*

168 Division 1 (ss 7 to 9) of Pt II of the *Marine Insurance Act* deals with what the Division's heading refers to as the "limits of marine insurance". Section 7 provides:

> "A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure."

Section 9(1) provides that, subject to the provisions of the Act, "every lawful marine adventure may be the subject of a contract of marine insurance". The meaning of "marine adventure" is explained, but not exhaustively defined. Section 9(2) provides that:

> "In particular there is a marine adventure where:
>
> (a) any ship, goods, or other movables are exposed to maritime perils. Such property is in this Act referred to as 'insurable property';
>
> (b) the earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;
>
> (c) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.
>
> '**Maritime perils**' means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind, or which may be designated by the policy."

169 If attention is confined to ss 7 and 9 of the *Marine Insurance Act* it is evident that the typical contract of marine insurance contemplated by the Act provides indemnity against losses occasioned by "perils consequent on, or

incidental to, the navigation of the sea". It is those perils that are "maritime perils". The three types of marine adventure specified in s 9(2) of the Act are concerned with the consequences of exposure to such perils.

170 Section 8(1) of the *Marine Insurance Act* makes plain, however, that a contract of marine insurance may be extended so as to protect the assured against certain other kinds of losses, namely, "losses on inland waters or on any land risk which may be incidental to any sea voyage". Further, and no less importantly, s 8(2) provides that:

> "Where a ship in course of building, or the launch of a ship, *or any adventure analogous to a marine adventure*, is covered by a policy *in the form of a marine policy*, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined." (emphasis added)

171 The *Marine Insurance Act* therefore applies in at least some cases where the loss is not occasioned by exposure to a maritime peril if "maritime perils" are treated as limited to "the perils consequent on, or incidental to, the navigation of the sea". A ship in course of building is not exposed to "the perils consequent on, or incidental to, the *navigation* of the sea". Yet if that ship is covered by a policy "in the form of a marine policy" the *Marine Insurance Act* applies to it.

172 Further, a contract of marine insurance which is expressly extended to protect the assured against a "land risk ... incidental to any sea voyage" may cover the assured against losses not occasioned by maritime perils. Yet the contract of insurance remains a contract of marine insurance. So too a contract of insurance may be extended to cover certain losses on inland waters[201] and an adventure analogous to a marine adventure may be covered by a marine policy[202]. What is meant by "losses on inland waters ... incidental to any sea voyage" or what is an "adventure analogous to a marine adventure" was not explored in argument. There is no evident reason, however, to conclude that the reach of these various provisions extending the operation of the *Marine Insurance Act* is in some way to be confined to losses occasioned by exposure to maritime perils, that is, "the perils consequent on, or incidental to, the navigation of the sea". If there is a boundary to be identified between contracts of insurance governed by the *Marine Insurance Act* and those that are not, the definition of "maritime perils" cannot provide the complete limits of that boundary line. Account must

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201 s 8(1).

202 s 8(2).

be taken of the various provisions extending the reach of the *Marine Insurance Act*.

The history of the *Marine Insurance Act*

173 The *Marine Insurance Act* is, of course, based wholly on the *Marine Insurance Act* 1906 (UK) ("the UK Act"). It is appropriate and necessary, therefore, in considering the *Marine Insurance Act*, to take account of whatever guidance the UK Act may provide in construing its Australian counterpart.

174 The UK Act was intended, as its long title revealed, "to codify the Law relating to Marine Insurance". Until the UK Act came into force on 1 January 1907 the "Law of Marine Insurance was derived mainly from the decisions of the Courts and the treatises of text-writers"[203]. The UK Act therefore took its place against that legal history and against a particular statutory and commercial background. Two important aspects of the statutory background were the legislation providing for stamp duty on policies of "sea insurance" and provisions limiting the liability of shipowners.

175 From the end of the 18th century[204], revenue was raised in Great Britain by stamp duties on sea insurances. When the UK Act was passed, the *Stamp Act* 1891 (UK)[205] levied duty on policies of sea insurance. That Act defined[206] a policy of sea insurance as:

> "any insurance (including re-insurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in or relating to, any ship or vessel, and includes any insurance of goods, merchandise, or property for any transit which includes not only a sea risk, but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance."

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203 De Hart and Simey (eds), *Arnould on the Law of Marine Insurance and Average*, 9th ed (1914), vol 1 at 1.

204 35 Geo III c 63.

205 ss 92-97.

206 s 92(1).

Not all contracts of sea insurance were subject to taxation in this way. Under the *Stamp Act* 1891 a contract for sea insurance (other than insurance referred to in s 55 of the *Merchant Shipping Act Amendment Act* 1862 (UK), and later, s 506 of the *Merchant Shipping Act* 1894 (Imp)) was invalid unless expressed in a written policy of sea insurance[207] and duly stamped[208]. Insurance of the kind dealt with in the identified provisions of the merchant shipping legislation need not have been expressed in a written policy of insurance. Insurance of that kind was often provided through various co-operative and other measures such as protection and indemnity clubs.

176 The exception made in the *Stamp Act* for insurance against risks referred to in s 55 of the *Merchant Shipping Act Amendment Act* 1862 and s 506 of the *Merchant Shipping Act* 1894 reflected another relevant aspect of statutory background – the background provided by merchant shipping legislation. It is convenient to refer to the provisions that were in force at the time of the enactment of the UK Act – Pt VIII of the *Merchant Shipping Act* 1894. Under that Part, limitations were placed on the liability of shipowners in certain cases of loss of or damage to goods[209] and in certain cases of loss of life, injury or damage[210]. Section 506 of the *Merchant Shipping Act* 1894 provided that:

> "An insurance effected against the happening, without the owner's actual fault or privity, of any or all of the events in respect of which the liability of owners is limited under this Part of this Act shall not be invalid by reason of the nature of the risk."

It was, therefore, open to the owners of a ship to effect insurance (without a stamped policy of sea insurance) covering, among other things: liability for loss of life, injury or damage, without the owner's actual fault or privity, to any person being carried in the ship[211]; or where any loss of life or personal injury was caused to any person carried in any other vessel by reason of the improper navigation of the ship[212].

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207 s 93.

208 s 95.

209 Section 502, which applied to the owner of a British sea-going ship or any share in such a ship.

210 Section 503, which applied to the owners of a ship, whether British or foreign.

211 s 503(1)(a).

212 s 503(1)(c).

177 By s 509 of the *Merchant Shipping Act* 1894, Pt VIII of that Act was extended, unless the context otherwise required, "to the whole of Her Majesty's dominions". Accordingly, at the time the *Marine Insurance Act* was enacted in Australia, the Imperial *Merchant Shipping Act* 1894 applied in this country.

178 It is not necessary to consider any particular aspects of the way in which particular provisions of the *Merchant Shipping Act* 1894 operated. For present purposes, what is important is that it reinforces the conclusion that would otherwise follow from s 9(2)(c) of the *Marine Insurance Act* that a contract of insurance providing indemnity against liability for death of, or injury to, a third party could, in some circumstances, be a contract of marine insurance. Those cases included at least some circumstances where loss of life or injury was caused to a person being carried in the ship or was caused to a person carried in another vessel by reason of the improper navigation of the ship.

179 The *Marine Insurance Act* (and its progenitor, the UK Act) use the word "ship" but do not define that term. "Ship" was defined in the *Merchant Shipping Act* 1894[213] as including "every description of vessel used in navigation not propelled by oars"; "vessel" was defined as including "any ship or boat, or any other description of vessel used in navigation". By these definitions the "Lone Ranger" was an example of the species of "vessel" referred to in the *Merchant Shipping Act* 1894 as a "ship".

180 It may greatly be doubted that it is necessary or appropriate to read the word "ship", when used in the *Marine Insurance Act* or in the UK Act, as necessarily limited to what the *Merchant Shipping Act* 1894 meant by that term. Even so, the word "ship" should not be given a narrow meaning when used in the *Marine Insurance Act*. Although "ship" is now used[214] to refer to a large sea-going vessel, as opposed to a "boat", the word should not be read as used in the *Marine Insurance Act* as drawing such a distinction. Rather, it should be read as encompassing a powered craft like the "Lone Ranger". Perhaps the word extends to some other forms of water-borne craft, but it is not necessary to explore that question.

181 The UK Act was enacted to codify the law of marine insurance. It therefore reflected a long and elaborate commercial history. The references in both the UK Act and the *Marine Insurance Act* to "usage of trade"[215] or

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213 s 742.

214 *The Oxford English Dictionary*, 2nd ed (1989),"ship", meaning 1a.

215 *Marine Insurance Act*, s 8(1).

"usage"[216] expressly acknowledge the importance of commercial practice. Both the UK Act and the *Marine Insurance Act* adopted the statutory form of policy for which provision had been made in 35 Geo III c 63 and 30 Vict c 23. That form of policy is found in the Second Schedule to the *Marine Insurance Act*. The courts have often criticised this policy[217]. It has been said[218] to have "always been regarded by our courts of law as an absurd and incoherent instrument, yet length of time and a variety of decisions have now given it such a degree of certainty that it is likely to be retained among the chief instruments of English commerce" (footnote omitted).

182 Again, it is not necessary to explore the nature or extent of these difficulties. What is important is that the UK Act was enacted to codify the law regulating dealings in a particular commercial market. It did that, no doubt taking account of the importance of both the maritime trade and the marine insurance market to Great Britain. That being so, it may be doubted that the UK Act was intended to preclude any expansion of the marine insurance market as marine technology developed, and smaller powered craft like the "Lone Ranger" came into use. The conclusion that the UK Act was not intended to prevent the emerging of new forms of marine insurance (whether on or in relation to new forms of water-borne craft, or on or in relation to new forms of marine adventure) would follow from the provisions of the UK Act that are equivalent to s 8 of the *Marine Insurance Act*. Those provisions expressly contemplate not only the *extension* of a contract of marine insurance to, among other things, certain land risks but also the application of the provisions of the Act to adventures *analogous* to marine adventures, if covered by a policy in the form of a marine policy.

183 No doubt the market to which the UK Act was directed was the London market for marine insurance. By adopting the language of the UK Act, the *Marine Insurance Act* can be understood as having a similar focus. The chief concern of the London market was the international shipping trade. There was some trade on the inland waters of Great Britain, particularly by canal, but much of that trade was directed to the export market. If cargo was to be insured while in transit on inland waters, it could be insured by a policy covering the risk from

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216 *Marine Insurance Act*, s 93(1).

217 See, for example, *Marsden v Reid* (1803) 3 East 572 at 578-579 per Lawrence J [102 ER 716 at 719]; *Le Cheminant v Pearson* (1812) 4 Taunt 367 at 380 per Mansfield CJ [128 ER 372 at 377].

218 Mustill and Gilman (eds), *Arnould's Law of Marine Insurance and Average*, 16th ed (1981), vol 1 at 17-18.

warehouse to warehouse. The vessels which transported the cargo on those inland waters may or may not have been insured by a policy in the form of a marine policy, the operation of that vessel being an adventure "analogous to a marine adventure"[219].

184 Unlike some other insurance markets, there was not the same scale of shipping operations on the inland waters of Great Britain as, for example, on the Mississippi or other great rivers of the world. There was, therefore, no occasion to develop a body of commercial practice in Great Britain in insuring vessels or goods engaged in such trade. By contrast, as 19th century texts like Phillips[220] reveal, the marine insurance markets of the United States developed a body of practice[221] that applied to ventures on inland waters. So far as Phillips' work reveals, insurance of these ventures was not seen as something distinct from the general subject of marine insurance. It was simply a particular kind of marine insurance, although, in the trade on the Mississippi and Ohio, for example, the phrase "perils of the river" was substituted for, or added to, "perils of the seas"[222].

A contract of marine insurance?

185 The ultimate legal question in this appeal is whether the contract of insurance on which the appellants sued the respondent was a contract to or in relation to which the *Marine Insurance Act* applies. Thus, the issue is the nature of the insurance contract in question. It is that which determines whether the *Marine Insurance Act* applies. Sections 7, 8 and 9 of that Act are therefore the critical provisions. Those sections require consideration of the risks that are covered under the contract of insurance. A contract is a marine insurance contract if it covers marine losses. They include losses incident to the incurring of liability to a third party by the owner of, or other person interested in, or responsible for, a ship "by reason of maritime perils"[223].

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219 cf *Marine Insurance Act*, s 8(2).

220 Phillips, *A Treatise on the Law of Insurance*, 4th ed (1854).

221 See, for example, the clauses from the Buffalo and Philadelphia forms of insurance referred to in Phillips, *A Treatise on the Law of Insurance*, 4th ed (1854), vol 1 at 42-43.

222 Phillips, *A Treatise on the Law of Insurance*, 4th ed (1854), vol 1 at 647; *Perrin v Protection Insurance Co* 11 Ohio R 147 (1842); *Citizens Insurance Co of Missouri v Glasgow Shaw & Larkin* 9 Missouri Rep 411 (1845).

223 s 9(2)(c).

186 In the present case, the contract covered the owner of the "Lone Ranger" and any person navigating or in charge of that vessel, if by reason of that person's interest in the vessel he or she became legally liable to a third party. Was the kind of liability incurred by the appellants in this case liability "by reason of maritime perils"? (As recognised earlier in these reasons, the *Marine Insurance Act* may have application where the contract of insurance does not relate to maritime perils but for present purposes it is useful to consider what are maritime perils.)

Maritime perils

187 The first of the phrases used in explanation of the general expression "the perils consequent on, or incidental to, the navigation of the sea" found in the definition of "maritime perils" in s 9(2) of the *Marine Insurance Act* is "perils of the seas". Over the years, much attention has been given to what is meant by "perils of the seas". The discussion of that expression, in cases decided after the passing of the UK Act and the *Marine Insurance Act*, has necessarily given close attention to r 7 of the rules for construction of the policy found in the Second Schedule to the *Marine Insurance Act*. In this case the operation of that rule may be put to one side.

188 In earlier decisions considering what are "perils of the seas"[224], much attention was given to distinguishing between the fortuitous or unexpected and the inevitability of a ship's decay. The former kinds of event might be caused by perils of the seas; the inevitable decay of the ship was not. Often, the discussion of such issues embraced distinctions between proximate and other causes[225]. Sometimes, the discussion in the cases reflected the way in which the claim was pleaded. So, for example, in *Phillips v Barber*[226], the court considered whether damage to a ship lying in a graving dock in the harbour of St John, New Brunswick, when blown on its side, was a loss by the perils of the seas or a loss "by other perils and misfortunes".

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224 *Wilson Sons & Co v Owners of Cargo per The "Xantho"* (1887) 12 App Cas 503; *Hamilton Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518; cf *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161.

225 De Hart and Simey (eds), *Arnould on the Law of Marine Insurance and Average*, 9th ed (1914), vol 2 at 1019.

226 (1821) 5 B & Ald 161 [106 ER 1151].

189 Attention to particular provisions of policies, especially to the common provision concerning perils of the seas, should not distract attention from the more general questions that are presented by the expression "maritime perils". It is an expression that includes more than "perils of the seas". Perils of the seas are but one species of that genus. Reference to the cases about what are perils of the seas is important, but only to the extent that those cases reveal the nature of the perils embraced by the words "maritime perils".

190 The emphasis given in early cases to identification of the proximate cause of the loss caused some uncertainty in cases where the vessel's master or crew were negligent. By the early 19th century[227], the better view was that underwriters were answerable for perils insured against, however the operation of those perils may have been affected by the measures taken by the vessel's master or crew. So, the insured recovered under policies of marine insurance in cases where vessels were burnt through the negligence of the master or crew[228], where a vessel was stranded in a river because the cargo was loaded carelessly[229], and where the vessel was blown over in consequence of the master's discharging ballast[230]. The negligence of the master or crew did not preclude recovery. What mattered was whether an insured risk had occurred. That did not turn on *where* the event occurred but on *what* happened and *why*. Was what happened a peril consequent on, or incidental to, the navigation of the sea – a fortuitous or unexpected event consequent on, or incidental to, the operation of the vessel?

191 As pointed out earlier in these reasons, the appellants sought to attribute particular significance to where the incident occurred. The appellants submitted that the incident did not happen at sea or as an incident to any intended voyage on the sea. They submitted that the policy was not a policy of marine insurance because not only was the "Lone Ranger" never intended to go out into those open waters that would ordinarily be referred to as the sea, the policy limited the insured's cover to their operating the craft while it was in Western Australian waters gazetted under the *Western Australian Marine Act* 1982 (WA) as "smooth waters only". The respondent sought to counter these contentions by submitting that the incident had occurred at a point in the Swan River that was properly found by the Full Court to be part of the sea.

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227 *Idle v The Royal Exchange Assurance Co* (1819) 8 Taunt 755 [129 ER 577].

228 *Busk v Royal Exchange Assurance Co* (1818) 2 B & Ald 73 [106 ER 294].

229 *Redman v Wilson* (1845) 14 M & W 476 [153 ER 562].

230 *Sadler v Dixon* (1841) 8 M & W 895 [151 ER 1303].

"Smooth waters only"

192 Against the words "Navigation Warranties" in the policy schedule appeared "Protected Waters of WA as per permit". No permit using that expression was identified in the evidence. Certificates of survey of the vessel required under the *Western Australian Marine Act* 1982 recorded the geographical limits of operation of the vessel as "smooth waters only". Those waters were further identified in the WA Marine (Certificates of Competency and Safety Manning) Regulations 1983 (WA) and included inland waters of the State and that part of the Swan River where Mrs Morrell suffered her injuries.

193 It is unnecessary to trace the operation of these provisions or decide whether the reference in the policy schedule should be construed as picking up such definitions. The respondent did not submit that the accident occurred at a place where the appellants were not insured. Rather, it was the appellants who sought to rely on these provisions, submitting that the place where the vessel was always intended to be operated revealed that the policy was not a policy covering liability to a third party incurred by reason of maritime perils.

194 As cases like *Phillips v Barber* illustrate, events occurring when a vessel is not at sea may not be caused by perils of the seas, but may be events consequent on exposure to maritime perils. Once it is accepted that maritime perils are not limited to perils occurring while the vessel is *at sea*, the fact that the "Lone Ranger" was never intended to operate in the open ocean is not determinative. What is, is the nature of the risk. The question is not where did the event happen but what was the risk against which the insurer agreed to indemnify the insured. Under the contract of insurance did the respondent undertake to indemnify the appellants against marine losses: the losses incident to marine adventure?

The nature of the risk covered

195 The appellants emphasised the limited extent of the cover provided by the contract: cover which the appellants described as "public liability" cover. For some purposes, the description of the contract on which the appellants sued as a "public liability policy" may not be inappropriate. But a contract of insurance indemnifying a shipowner against liability for death or injury to a passenger might likewise be called a form of "public liability insurance". The application of the name "public liability" was intended by the appellants to suggest the existence of some taxonomy of insurance in which marine policies stood apart from public liability policies. Section 9(2)(c) of the *Marine Insurance Act* demonstrates that that is not so. There is a marine adventure where liability to a third party may be incurred by the owner of, or other person interested in, or responsible for, a vessel by reason of maritime perils.

196 Under the present contract, the insurer agreed to indemnify the insured against liability to third parties which the insured incurred "by reason of" their interest in the "Lone Ranger". The liability against which the appellants sought indemnity was liability owed to Mrs Morrell as operators of that craft: in the case of Mr Gibbs by his having personally operated it, and in the case of Paraglide Pty Ltd as the owner vicariously liable for the conduct of its employed operator. Mrs Morrell claimed against each on the basis that the craft had been operated carelessly, thus causing her injuries, loss and damage.

197 The careless operation of the craft causing injury to the person being towed by the vessel was a peril of a kind properly described as a peril "consequent on, or incidental to, the navigation of the sea". What happened was that, because the craft was operated carelessly, the person being towed by that craft was injured. Collision of a vessel, or something (or, in this case, someone) being towed by the vessel, as a result of the negligent operation of the vessel is a peril consequent on, or incidental to, the navigation of the sea. It is no different from a case of grounding or stranding a vessel where that does not happen in the ordinary course of navigation[231].

198 That Mrs Morrell's injury happened when she was being towed by the "Lone Ranger", rather than when she was on board the craft, neither requires nor permits any different conclusion. Those operating the craft incurred liability to her because they operated it carelessly, causing her, while in tow, to strike trees on the island. That is a form of maritime peril. Neither the way the injury was sustained nor the place where it happened detract from that conclusion.

199 Because the contract insured the appellants against the consequences of negligent operation of the craft causing injury to a person being towed by the craft, it was a contract to indemnify the insured against losses incident to marine adventure. The relevant marine adventure was exposing the owner of, or other person interested in or responsible for, the craft to liability by reason of maritime perils. Accordingly, the contract on which the appellants sued was a contract of marine insurance and the *Marine Insurance Act* applied; the *Insurance Contracts Act* did not apply.

200 For these reasons it is, in our opinion, unnecessary to found the decision on the proposition advanced by the respondent, namely, that the incident occurred in a part of the Swan River properly regarded as part of the sea. It is as well, however, to say something briefly about this aspect of the matter.

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231 See, for example, *Fletcher v Inglis* (1819) 2 B & Ald 315 [106 ER 382]; cf *Magnus v Buttemer* (1852) 11 CB 876 [138 ER 720].

The sea

201 Argument about what is meant by "the sea" ranged far and wide. Reference was made to questions of Admiralty jurisdiction[232] and to cases decided in very different contexts in which reference was made to the sea[233].

202 In the present case, the Full Court concluded that[234] tidal flow was the determinative consideration. The Swan River was, at the point where the accident occurred, estuarine, subject to the tides' rise and fall. Accordingly, the Court held that it should be regarded as part of the sea.

203 The difficulty of identifying the criterion of distinction between the sea and river is itself reason enough to doubt that the boundary which must be drawn between the *Marine Insurance Act* and the *Insurance Contracts Act* depends upon the location of the limits of the sea. For the reasons given earlier, we do not consider that, in this case, the boundary must be located in this way. Nonetheless, if a distinction had to be drawn in the present case, the criterion adopted by the Full Court is to be preferred to a criterion founded in the jurisdictional history of English courts or criteria developed in other contexts.

204 It is not necessary to consider the questions raised by the respondent's notice of contention. The appeal should be dismissed with costs.

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232 *R v Forty-nine Casks of Brandy* (1836) 3 Hagg 257 at 273-276, 291 [166 ER 401 at 407-408, 413]; *Direct United States Cable Co Ltd v Anglo-American Telegraph Co Ltd* (1877) 2 App Cas 394 at 416-420; *The Fagernes* [1926] P 185.

233 *R v Anderson* (1868) LR 1 CCR 161 at 169; *R v Carr* (1882) 10 QBD 76 at 84, 86-87; *The Mecca* [1895] P 95 at 107; *The Tolten* [1946] P 135 at 156; *R v Liverpool Justices; Ex parte Molyneux* [1972] 2 QB 384; *United States v Rodgers* 150 US 249 (1893).

234 (2001) 24 WAR 453 at 485 [117].