sparke HELMORE LAWYERS

Maritime and Aviation Transport Update

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IN THIS ISSUE

03 **WELCOME**
By Michelle Taylor & Mark Sainsbury, Partner, Commercial Insurance

04 **MARITIME:** Navigating serious risks to the preservation of the ship, the safety of crew and the marine environment whilst under arrest

08 **AVIATION:** High Court decision on dangerous recreational activity defence and application to aviation claims

10 **MARITIME:** Russian and Ukrainian conflict, impact on shipping

12 Overview, opportunities, and issues, with the use of blockchain technology in the logistics/transport industry

17 **UPDATES** - NATIONAL, NSW, VIC, QLD, SA

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Welcome to the first edition of the Sparke Helmore Maritime and Aviation Transport Update.

The aim of this publication is to offer you a variety of articles ranging from case studies to essential updates, which provide macro and micro perspectives on events, changes and challenges that shape the Maritime and Aviation Transport industry.

In this issue, we provide insight into recent and current developments, including:

- making waves – a story of a ship navigating serious risks while under arrest
- potential implications of proposed amendments to the *Transport Safety Investigation Regulations 2021* (**TSIR**)
- case studies regarding the application of the "dangerous recreational activity" defence in aviation-related claims
- an analysis of the impact of the Russian-Ukrainian conflict on shipping and associate challenges arising, and
- the use of blockchain technology in the logistics/transport industry.

In addition to the feature articles, we have included a collection of national and state-based legal developments, which may be of interest.

We hope this issue has been beneficial to you and look forward to sharing more in the next edition in late 2022. If there are any industry-related topics you would like Sparke Helmore to cover in the future, or you have any specific maritime, aviation or transport queries, contact **Michelle Taylor** or **Mark Sainsbury**.

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UNDER ARREST: NAVIGATING SERIOUS RISKS TO THE PRESERVATION OF THE SHIP, THE SAFETY OF CREW AND THE MARINE ENVIRONMENT

Authors: Partner Michelle Taylor and Lawyer Stefanie Andrensek

On 8 May 2022, Stewart J in the Federal Court of Australia made urgent orders that the ship "AG Neptune", a 244-metre product tanker laden with 62,000 metric tonnes of diesel anchored under arrest off the Port of Newcastle, New South Wales, be

> *"permitted whilst under arrest as soon as practical with all dispatch and without deviation and at all times remaining the territorial sea to sail to Gladstone, Queensland and proceed directly to a designated lay up berth, buoy or other anchorage, stem LSMGO and VLSFO and remain there until further order of the Court."*

Within a matter of hours of the orders being made in *Viva Energy Australia Pty Ltd v MT "AG Neptune"* [2022] FCA 522, the "AG Neptune" commenced its urgent voyage to Gladstone for bunkering.

Moving a ship whilst under arrest

It is not unusual that a ship under arrest may be permitted to sail by order of the Court, for the purpose of retaining the safe custody, control and preservation of that ship[1] by the Admiralty Marshal. In fact, ships under arrest have been permitted to sail to avoid safety hazards associated with remaining at berth, such as running aground due to seasonal falling tides, to discharge and load various cargoes, and even remain trading whilst under arrest in circumstances where it was considered preferable to the shipowner putting up security for the ship.

But what facts and circumstances led to the "AG Neptune", described by the Court as a "*large, specialised and unwieldly vessel*" to be ordered to urgently sail some 700 nautical miles (1300 kilometres) to obtain critical fuel whilst under arrest?

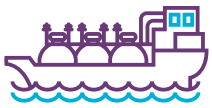
Ship arrested at Newcastle anchorage

The "AG Neptune" was arrested in an action in rem brought by cargo interests off the Port of Newcastle on Tuesday, 3 May 2022.

By Saturday, 7 May 2022, it became clear that the MARPOL Annex VI-compliant low sulphur fuels required to keep the cargo-stabilising inert gas system working, low sulphur marine gasoil (LSMGO) and very low sulphur fuel oil (VLSFO), were in precariously low supply. Once those fuels were used up, the heavy fuel oil (HFO) used to run the engine would cool, the main engines would not be able to be started, and the vessel would face a grave risk of becoming a "dead ship".

1 See rule 47(2)(d) of the *Admiralty Rules 1988* (Cth) (**Admiralty Rules**).

A "dead ship" condition means that the main source of power is out of operation and not able to be restored, rendering the auxiliary and propulsion operations of the ship unusable.



Without a working inert gas system, the pressure required to safely stow a cargo of diesel cannot be maintained, creating a risk of ignition, and presenting a severe safety hazard to a ship, its crew, and the surrounding marine environment.

Ship permitted to sail to Gladstone, Queensland to stem bunkers

In his Honour's reasons for making the orders permitting the "AG Neptune" to sail to Gladstone for bunkers whilst under arrest, the following material considerations were taken into account:

1. There was a "*considerable, even overwhelming, public interest*" in avoiding the "AG Neptune" becoming a dead ship, or in the alternative, burning fuel that was not compliant with Annex VI of MARPOL.
2. The required bunkers were available at the Port of Gladstone at short notice, the owners had accepted the costs of sailing to Gladstone and bunkering there and this was not opposed by the Plaintiff.
3. The ship could not enter the Port of Newcastle.
4. Out of the alternative bunkering options, Gladstone was the most preferable because port charges were not payable; and even though Sydney and Brisbane were closer, the costs of maintaining the ship there were likely to be far higher.
5. The ship could sail to Gladstone without leaving territorial waters and at all times remain in the custody of the Admiralty Marshal.
6. It was reasonably convenient for both parties to attend on the ship while in Gladstone to undertake court ordered inspections.

The Court also considered that there was little risk the ship would sail out of the jurisdiction, given it had not done so in the time since its arrest, and that there were "*limited measures that could be taken to reduce that risk still further*".

Navigational hazards

Shortly after the "AG Neptune" commenced its two-day voyage to Gladstone for bunkering, it became apparent that the ship would need to leave the territorial sea for approximately two hours to avoid running aground in shallow water on Breaksea Spit, located north of Sandy Cape, Fraser Island Queensland.

By an urgent application made by the Defendants, the Court varied its previous orders to permit the ship to leave the territorial sea. The "AG Neptune" was ordered to follow a course identified in the evidence tendered by the Defendants, marked on an admiralty chart and a screenshot of the ship's Electronic Chart Display and Information System (ECDIS).

In making the variation, his Honour remarked that leaving the territorial sea would not invalidate the arrest, and that while s 22 of the *Admiralty Act 1988* (Cth) (**Admiralty Act**) provides that while a ship may be arrested at any place within the territorial sea, there is no provision to the effect that a ship must remain within the territorial sea for the arrest to be valid.

In addition, the Court was assured by an undertaking provided by the demise charterer of the "AG Neptune" that no point would be taken in the proceedings about the validity of the arrest on account of the ship leaving territorial waters, as well as an undertaking from the registered owner of the ship that it would not instruct or permit the demise charterer to breach its undertaking.

The state of the law

By its unique circumstances, the "AG Neptune" matter constitutes a development to the law regarding the movement of ships whilst under arrest.

In the 1996 Federal Court decision of *Martha II*,[2] a vessel arrested in the Port of Melbourne was permitted to sail to Port Botany to discharge cargo and then load cargo. Justice Olney's orders included permission for a representative of the Plaintiff, and a representative of the Marshal, for the retaining the safe custody and preservation of the ship, to be on board for the voyage. Following the discharge of cargo, Justice Sheppard varied the orders by consent of the parties to remove the orders to take on new cargo, and the vessel was instead directed to berth, buoy or anchorage nominated by the Admiralty Marshal at Port Jackson. It then arose that, in preparation for judicial sale of the vessel, the remaining cargo would have to be discharged, some in Port Botany, and the remainder at the Port of Newcastle, which was alleged to be the be only suitable discharge location for cargo of that type.

2 Den Norske Bank (Luxembourg) SA v The Ship 'Martha II' [1996] FCA 136.

Justice Sheppard refused to allow the vessel to proceed to Newcastle. He distinguished the matter from his earlier decision in the *Iron Shortland*,[3] where his Honour made orders to permit a ship to sail from Port Hedland, Western Australia, to Port Kembla, New South Wales. In that case, allowing the ship to continue trading would prevent a "grave shortage of iron ore" at Port Kembla, which was considered a matter involving the public interest. In addition, in the *Iron Shortland*, the orders were made by consent, and an undertaking was provided by Australian third-party charterers.

Returning to the first "AG Neptune" judgment, in permitting the ship to steam to Gladstone to take bunkers, his Honour Justice Stewart distilled the material considerations discerned from *Martha II*, including the risk to the Plaintiff's security in the vessel by a voyage on the open sea, and risk to the cargo, convenience and cost, the risk of the ship absconding even with a representative of the Marshal on board, the importance of not leaving the jurisdiction, and whether appropriate undertakings are given for costs of the moving the vessel.

His Honour then provided his own evaluation of the material considerations at hand, with particular regard to the public interest in the ship not becoming a dead ship, leading to the ultimate conclusion to permit the "AG Neptune" to move. In this way, the reasoning of the first "AG Neptune" decision reflects the *Myrto II* decision, as well as the *Tai Hawk*,[4] a case where a ship was permitted to leave Port Hedland to sail to the Port of Dampier, the overriding factor being the significant public policy consideration of preventing a ship from running aground. These cases provide a synthesis of material considerations, with overarching consideration given to any public interest factor that may be at play.

Jurisdictional issues

The "AG Neptune" considers two important live jurisdictional issues regarding the custody of the Admiralty Marshal of ships that move while under arrest pursuant to s 47(2) of the Admiralty Rules.

The first issue concerns a distinction that has been drawn between allowing a vessel to move, versus continuing to trade, whilst under arrest. The former situation has concerned applications made by cargo interests (who may or may not be party to proceedings) to the Marshal to have cargo discharged from the vessel in a different port to the one the ship is arrested in, or to move the ship for other reasons, such as safety. The latter situation concerns applications made to enable a ship to continue trading between ports within the jurisdiction whilst under arrest.

In the first "AG Neptune" decision, his Honour remarked that allowing a vessel to trade whilst under has been the subject of criticism.[5] This is because it cannot be said that the Marshal's duty to retain the safe custody of a ship and to preserve it extends to operation of a ship for purpose of generating an operational profit.[6] In the "AG Neptune" matter, this issue was raised but not developed, as the ship was moved for bunkering rather than for trade.

The second **jurisdictional issue** raised involves whether, once under arrest, a vessel must remain at all times within the territorial sea for that arrest to remain valid, and to remain within the custody of the Admiralty Marshal.

The circumstances before the Court in the second "AG Neptune" judgment resembles those in the *Tai Hawk*, in that the ship was permitted to leave territorial waters, albeit briefly, in the interests of safety. In handing down the second "AG Neptune" decision, the Court took a similar pragmatic approach to Justice McKerracher in the *Tai Hawk*, considering practical considerations of safety to the ship.

In addition, his Honour remarked, the power to arrest a vessel within the Australian jurisdiction, contained in s 22 of the Admiralty Act, does not state that once arrested, a vessel is required to remain at all times within the territorial sea.

3 Malaysia Shipyard and Engineering Sdn Bhd v The Iron Shortland (1995) ALR 738, (1995) 59 FCR 535.
4 Tai Shing Maritime CO SA v The Ship 'Samsun Veritas' as surrogate for the Ship 'Tai Hawk' [2008] FCA 1546.
5 Derrington SC and Turner JM, The Law and Practice of Admiralty Matters (2nd ed, OUP, 2015).
6 See Derrington and Turner at [7.30].

Along with the pragmatic considerations of safety, his Honour was assured by the ongoing contact between the Marshal and Master of the Ship that the risk of absconding was low. In addition, an unconditional appearance had been entered by the defendants. Taken together, his Honour considered that the vessel will remain under arrest, and in the custody of the Marshal, despite the "minor deviation" outside the territorial sea.

Lessons learned

The "AG Neptune" matter is a prime example of a situation where understanding the systems and operation of a specialised vessel is crucial to ensuring that serious risks to the ship, crew and marine environment are prudently managed, and ultimately avoided, whilst under arrest.

Other insights gained include:

- arresting parties and the owner of arrested ships all have a responsibility to ensure that issues with respect to the preservation of vessels in custody are raised with the Court promptly, to avoid risks to the ship, crew and environment
- in deciding whether to permit a ship to move whilst under arrest, the Court will carefully consider the risks of it absconding the jurisdiction against other relevant factors, including safety and the public interest, and
- in arrest matters, the utilisation and pairing of legal knowledge with an in-depth operational knowledge of the ship in question is an advantage to ensuring the safety of the ship whilst in the custody of the Admiralty Marshal.

ENDNOTE

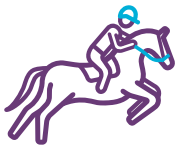
Sparke Helmore appeared on the record as solicitors for the defendants in *Viva Energy Australia Pty Ltd v MT "AG Neptune"* [2022] FCA 522 and *Viva Energy Australia Pty Ltd v MT "AG Neptune" (No 2)* [2022] FCA 533. The "AG Neptune" matter is ongoing, under the carriage of Michelle Taylor, Partner, Sparke Helmore Brisbane office.

DANGEROUS RECREATIONAL (TRANSPORT) ACTIVITIES – REVISITED

Author: Partner Mark Sainsbury

The defence arising from the "dangerous recreational activity" (DRA) provisions in the civil liability legislation (CLA) enacted around Australia (see Table 1.) has been relied on by defendants in many claims involving different modes of recreational transport including power boats, jet skis, ultralight and sports aircraft, race cars, motorbikes, horse riding and various other forms of transport.

At times, the DRA defence has been treated by courts as a "liability defeating defence" and has been examined and decided at the outset of trial in order to defeat a plaintiff's claim in its entirety. However, the recent High Court decision in the case of *Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited* [2022] HCA 11 has provided clear confirmation of how a court should determine the risk associated with the DRA defence and when the DRA defence should be considered during the course of trial.



In *Tapp*, the Plaintiff (aged 19) was competing in a **campdrafting event** when her horse slipped on the arena surface causing her to fall from the horse; she suffered a catastrophic spinal injury.

First and foremost, the High Court did not assess the merits of the liability defeating defence first but rather opted to consider the DRA defence after considering the merits of the Plaintiff's claim. In that regard, the High Court majority judgment (to which Kiefel J and Keane J dissented) outlines the following steps:

a. It must be determined whether the activity in question is in fact a dangerous recreational activity pursuant to the CLA.

b. Determine the obvious risk that will apply to the defence by first considering a defendant's liability for negligence as pleaded by a plaintiff in their case.

c. Identify the risk utilising the facts of the case and at the same level of generality as a plaintiff does (in other words the risk should not be identified using parameters promoted by a defendant).

d. *Then* determine if the risk was an obvious risk for the purposes of applying the DRA defence.

In *Tapp*, the subject risk was identified from consideration of the Plaintiff's pleaded claim and after determining that the Defendant was in fact negligent. The Court then turned its mind as to whether the DRA defence and the relevant risk could be applied to the Defendant's negligence. The majority found the identified risk that manifested during the examination of the Plaintiff's claim was in fact not an obvious risk and therefore the DRA defence did not succeed.

The manner prescribed by the High Court in *Tapp* for determining the application of the DRA defence is at odds with how some courts have elected to apply the defence in prior decisions. This raises the interesting (albeit moot) question of whether some of those decisions may have been decided differently had the High Court methodology been applied.

One such decision involves a personal injury claim arising out of injuries suffered in an ultralight aircraft accident. In the decision of *Campbell v Hay* [2014] NSWCA 129 the Plaintiff was a student pilot (Campbell) who sued the instructor pilot (Hay) for compensation for injuries suffered following an accident.

The primary judge in *Campbell* found the Defendant was negligent in the way he had responded to engine vibrations that occurred just prior to the accident, however, was not liable for that negligence because the Plaintiff's injuries arose out of a materialisation of an obvious risk of the dangerous recreational activity (flying an ultralight aircraft) he was engaged in.

On appeal, the Court disagreed with the primary judge's finding of negligence and determined the instructor was not negligent in his actions and confirmed that the ultralight aircraft training flight qualified as a dangerous recreational activity.

The primary judge and the Court of Appeal were both satisfied to consider the obvious risk relating to the DRA defence to be a broad risk of accident generally arising from engaging in ultralight aircraft flight and training activities. However, the Plaintiff's claim pleaded a narrower characterisation of the risk faced, alleging the harm suffered was a materialisation of irrational and/or negligent behaviour of the instructor pilot, which was not an obvious risk to the Plaintiff because a student pilot would not consider it obvious that an instructing pilot would fail to respond adequately to an inflight emergency that would result in him suffering harm.

Had the Court in *Campbell* followed the High Court's approach from *Tapp*, it is possible (and perhaps probable) that the relevant risk relating to the ultralight aircraft flight would have been identified in a more specific manner based on the Plaintiff's claim. Had that approach been adopted, it is arguable (and perhaps likely) that the risk would not have been considered obvious and, consequently, the DRA defence would have failed.

A narrower, more specific characterisation of the relevant risk for the purposes of applying the DRA defence has been seen and considered in prior high profile decisions such as *State of Queensland v Kelly* [2014] QCA 27 (involving the Plaintiff suffering spinal injury when running down a sand dune and diving into a lake) and *Stewart v Ackland* (ACTCA) 1 (involving the Plaintiff who broke his neck when performing a back-somersault on a jumping pillow).

There are many research articles and legal case summaries that discuss the varying methods used by courts around Australia to assess the risk relevant to the DRA defence both in relation to the cases referred to in this article and in many other case examples. It is also suggested that the varying methods of assessment leads to inconsistent outcomes with respect to the success or failure of the DRA defence.

There is no doubt the DRA defence will continue to be relied upon by defendant individuals, sporting associations and their insurers in defence of claims arising from personal injury caused by various modes of transport. Therefore, it is hoped that the High Court's method spelt out in *Tapp* will provide guidance for those defendants and the courts in these types of decisions moving forward.

Table 1. Civil Liability Acts in place around Australia and relevant provisions:

State/ Territory	Statute	Obvious risk	DRA
NSW	*Civil Liability Act 2002* (NSW)	ss 5F to 5I	ss 5J to 5N
QLD	*Civil Liability Act 2003* (QLD)	ss 13 to 16	ss 17 to 19
TAS	*Civil Liability Act 2002* (TAS)	ss 15 to 17	ss 18 to 20
WA	*Civil Liability Act 2002* (WA)	ss 5E to 5F & 5M to 5P	ss 5E to 5J
VIC	*Wrongs Act 1958* (VIC)	ss 53-56	n/a
SA	*Civil Liability Act 1936* (SA)	ss 36-39	n/a
ACT	n/a	n/a	n/a
NT	n/a	n/a	n/a

THE CONFLICT IN UKRAINE – GLOBAL AND LOCAL IMPACTS ON SHIPPING

Author: Lawyer Richard Howard

In the early hours of 24 February 2022, the Russian Federation invaded Ukraine. In addition to the humanitarian crisis the conflict continues to impact global shipping and trade through crewing challenges, disruption to supply chains, impacts on commodities and increased vessel operating costs.

Crewing challenges

With well-developed marine training institutes and strong seafaring histories, Ukraine and Russia collectively account for about 14.5% of the world's 1.89 million merchant seafarers. In relation to the global merchant workforce, Ukraine accounts for about 76,400 seafarers and Russia for about 198,000.

Adding further to the existing pressures that COVID-19 has placed on the shipping industry, particularly with respect to border restrictions and crew changes, the conflict in Ukraine has restricted the number of individuals in Ukraine's seafaring workforce. The imposition of martial law has resulted in the closure of Ukrainian borders to most males aged 18 to 60 years, with this cohort representing the majority of Ukraine's seafaring workforce.

Border closures also pose a significant dilemma for Ukrainian seafarers currently working abroad who have to decide whether to return home or remain outside Ukraine in order to protect their access to employment.

For those wishing to return home the travel arrangements are complex. Air connections between Ukraine and other countries are suspended depriving returning seafarers easy passage.

A Ukrainian affiliate to the International Transport Workers' Federation, the Marine Transport Workers Trade Union of Ukraine issued a statement on 26 February 2022 providing an update to returning seafarers:

> *"Those seafarers whose maximum duration of contracts have expired and who were or are supposed to be repatriated - it is recommended to remain on board for as long as it becomes possible and safe to return. Companies are advised to prolong Seafarers' Employment Agreements (SEA) as appropriate.*
>
> *For those seafarers willing to return home upon expiry of their employment contracts / terminating their employment, flight tickets to neighbouring friendly countries of Ukraine shall be purchased by the Company, as well as amounts to cover costs of transportation to Ukrainian land border/checkpoints shall be reimbursed. In this case Companies are advised to settle the seafarers' wage balance in cash, upon their request, prior to disembarkation from the vessel."*

In response, the Australian Maritime Safety Authority (**AMSA**) National Operations Manager – Regions, Greg Witherall advised that during the period of conflict:

"During this period of conflict as with the COVID-19 pandemic, seafarer welfare remains a high priority for AMSA and a practical and pragmatic approach in being encouraged by AMSA Port State Control Officers. This mean the individual circumstances of the seafarers affected are being considered.

AMSA's expectation is:

- *where contracts are extended beyond contract expiry this should be supported with a valid SEA or extensions and in agreement with the individual seafarer;*
- *where the seafarer wants to return home at the end of their contract, then the shipowner will need to provide evidence of travel and destination to a friendly neighbouring country close to the boarder of the seafarer's permanent residence and with sufficient monies for land transport to the seafarer's country of residence. In situations where the seafarer's family were forced to leave their country of citizenship or country of permanent residence then shipowners should take a pragmatic approach for repatriation to where the seafarer can reunite with his family;*
- *in the event of expiring Certificate of Competency or Certificate of Recognition which cannot be temporarily replaced due to the conflict, the seafarer's qualifications should be accepted, provided that recent seagoing service would fulfil the STCW regulations and the vessel's flag state have provided agreeance; and*
- *sanctions in response to the conflict may affect payment due to seafarers. It is expected in such circumstances that the company will have undertaken an analysis of any impact which may affect pay transactions and acted in advance to mitigate any effect on seafarers.*

  Additionally, it is possible that some seafarers may wish to exercise their right to terminate their SEA in hope of getting home. MLC regulation 2.5 – Repatriation, does mention repatriation when SEA is terminated by the seafarer for 'justified reasons and no longer able to carry out their duties or cannot be expected to carry out in the specified circumstances'. This will be dealt with according to facts of each situation and in consideration of the requirements in MLC standard 2.1."

Despite Russian borders remaining open, significantly reduced international airline services have hampered the movement of Russian seafarers. A further complicating factor for crewing companies employing Russian seafarers is the removal of Russian banks from the Society for Worldwide Interbank Financial Telecommunication (SWIFT) framework. This has made the payment of wages, other than by cash, problematic.

Reduced availability of Ukrainian and Russian seafarers is likely to have commercial and operational impacts on ship owners both in terms of vessel operations and rising labour costs.

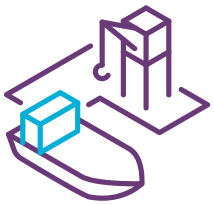
Supply chain impacts

The conflict has seen the suspension of new bookings to Russia by container lines for fear of carrying sanctioned cargo, accessibility issues to Russian ports and the heightened risk of vessel detention. Major container ports, particularly in Western Europe, are reeling from congestion associated with the slow movement of laden containers consigned to Russia.

The closure of the Sea of Azov and the north-western region of the Black Sea to shipping, which is being enforced by the Russian Navy, has resulted in the Ukrainian government designating all ports MARSEC level 3 and closed for entry and exit. Ongoing safety issues for crew and vessels stranded in Ukrainian ports as well as the underlying charter party and insurance consequences is undoubtedly preoccupying vessel owners and P&I Clubs at present.

Commodity markets

Major energy companies have been observed reducing their reliance on Russian oil in recent months. Coupled with the ongoing tensions surrounding Russia's gas supply to Western Europe these complexities are influencing global energy markets, the transport of energy commodities and the demand, availability and costs of bunker fuels, all of which impact the availability of vessel fixtures and operating costs.



The situation in Ukraine remains uncertain. Due to the region's significant influence on shipping, **impacts will continue to be felt** by the shipping industry and global supply chains due to crewing challenges, impacts on commodities and increased vessel operating costs.

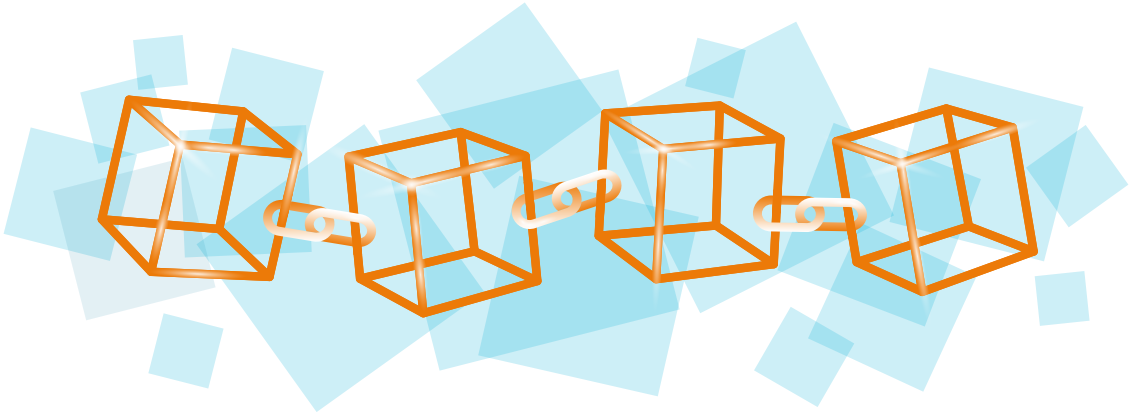
UNLOCKING THE POTENTIAL OF BLOCKCHAIN TECHNOLOGY WITHIN THE LOGISTICAL INDUSTRY

Authors: Partner Dalvin Chien and Lawyer Alex Bainbridge

Many cannot help but feel uneasy when hearing the words 'blockchain technology'. In this article, we address the unease by providing the 'basics' of what blockchain technology involves and in particular, how blockchain technology could be utilised within the logistical industry. We also discuss some of the legal challenges facing blockchain technology.

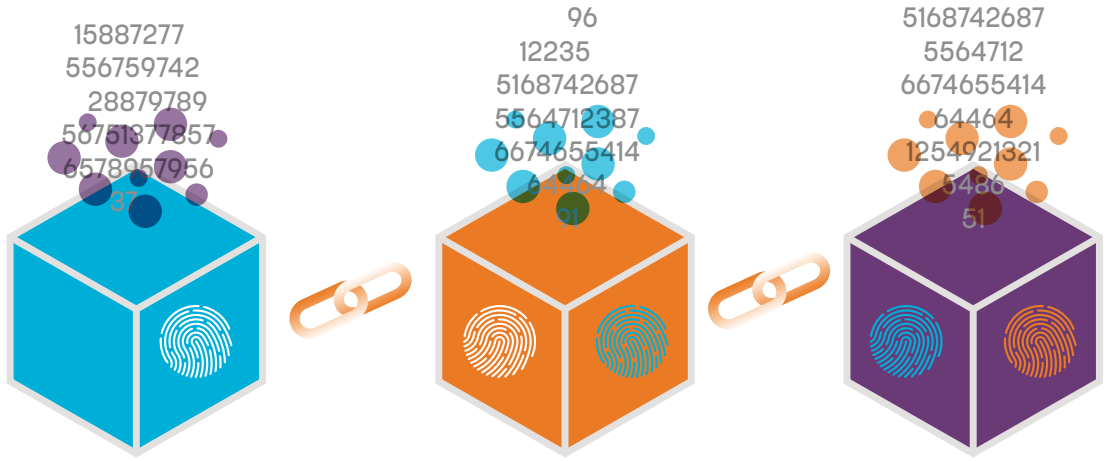
Part 1: Blockchain Technology- what is it?

Think in the literary sense and imagine a set of physical blocks. (Figure 1)



To answer Brad Pitt's famous long-standing question "What's in the box?", what is in the block... are three essential elements.

These are (1) data, (2) hash (or unique identifier) and (3) hash of previous block. (Figure 2)



1. **Data**

Any type of data may be incorporated on a block. In the context of the logistical industry, data may involve information regarding a shipping container, like the path it will go on and checkpoints it must pass before reaching its destination.

2. **Hash (or unique identifier)**

The hash, or unique identifier, is known as the block's 'fingerprint'. Looking at Figure 2—in particular the first block—that 'fingerprint' is the block's hash .

The hash is used to identify the other blocks on the chain. The more participants who store data on the chain, the stronger the block becomes. If you are to change the data on the block, you must first gain approval and validation from every other participant in the chain.

3. **Hash of previous block**

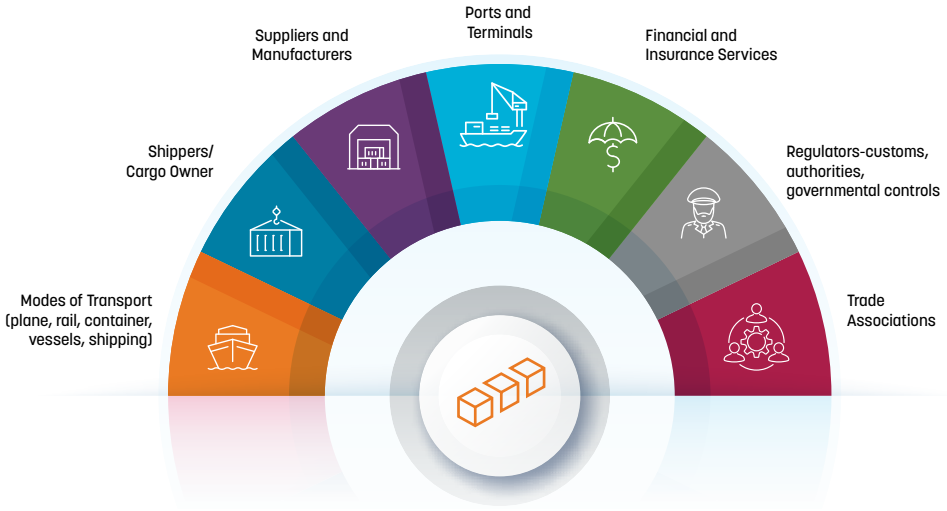
Once you have your own 'fingerprint', the final element is the 'fingerprint' of the previous block.

After you bring all the elements together you are left with the b-word. See, it's not so scary after all! So why is this technology becoming so popular? Mainly due to being almost impossible to hack. With cyber-attacks becoming more frequent and increasingly serious, it is no surprise organisations are turning to blockchain technology as an effective way of securing data.

So, how can the logistical industry utilise this technology?

Part 2: Transport logistics and the blockchain

Generally speaking, in the logistics industry, when an issue arises an organisation will build its own solution to fix it based on the role it plays within the logistical ecosystem. Working in this way can create isolated data silos. This is where blockchain technology can assist. Essentially, blockchain technology can help with efficiencies in the logistics industry by allowing organisations to move away from isolated systems, to a platform of synchronised and standardised data sharing as shown in Figure 3.



Effective of Blockchain Technology within the Logistical Industry (Figure 3)

Through the sharing of critical information, the entire ecosystem can become connected. Blockchain technology creates the opportunity of true information sharing. For example, if we are moving a good from point A to point B via an ocean carrier, the blockchain will allow information to be shared to the key participants who then best know how to conduct the logistics of the movement.

All key participants will have access to the same data—which may include the shipping cargo arrival, shipping milestones, and trade documents—all with the goal of making this process much more efficient and cost effective.

What about when things don't go to plan? Let's say a shipment was due in Australia however an unforeseen circumstance (such as a delay at customs) arose and the shipment is delayed a week. This delay could not only impact the containership travel participants, but could also impact other key participants, such as

- additional customs officers
- port authorities, or
- inland transporters.

Blockchain technology could allow the key participants to immediately update the system, notifying the shipment change, allowing for other participants in the supply chain to coordinate their actions. Simply put, through exercising near instant logistical amendments the participants are able to reduce disputes by a substantial amount.

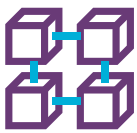
How about when a product needs to be recalled? Blockchain technology could make finding the batch much simpler and faster due to the blockchain's ability to trace products in real time.

Remember, data that is stored on the blockchain is generally considered more difficult to hack. This creates data that can be trusted and in turn, anchors consensus among all within the chain to comply, add to and make the logistical process as efficient as possible.

Part 3: Challenges surrounding blockchain technology

What about the challenges blockchain technology faces within the logistical industry? Many key participants are hesitant to invest time and money into a process they find difficult to understand and may not necessarily need. This is exacerbated through the fact that currently, in Australia, there are no transport and logistical industry-wide standards and practices when it comes to utilising blockchain technology. There is also a lack of governance, including with respect to the provision of clear guarantees to users regarding privacy.

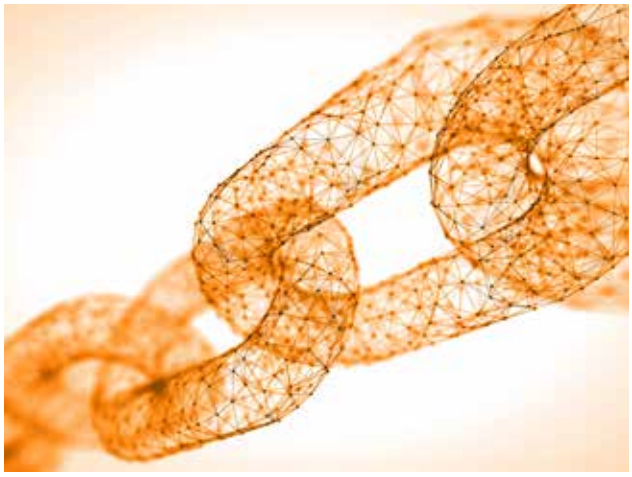
For blockchain technology to be fully incorporated in Australia, it would need to make use of its tools, such as smart or self-executing contracts. Smart contracts help enable logistical companies to enter agreements that will automatically trigger actions, such as payments, when certain terms within the contract have been met. They also dissolve if agreed upon terms have not been met. Currently, in Australia, the law surrounding these types of contracts is largely untested. This is an issue that is currently being considered in the International Organisation for Standardisation (**ISO**), a body that seeks to develop and publish international standards.[1] The ISO is currently creating standards for legally binding smart contracts and is looking at the impact of smart contracts on security and its application in banking as well as in other fields. As at the date of this article, the ISO standards have passed the preparation stage and are currently with the committee, where there will be a vote and comment period on the ISO standard(s). This means that it is still quite early in the life cycle of a standard being created, and as such, we would not expect there to be any definitive standards with regard to the legality of smart contracts in the immediate future.



Businesses involved within the logistical industry could be hesitant to commence utilising this technology until it has recognition in Australian law, which is understandable; a **business would like to know that it can enforce a contract should a breach or any contractual issue arise**.

In Australia, privacy is governed by the *Privacy Act 1988* (Cth).[2] As there is no general right to privacy in Australia, the task of upholding privacy and security become increasingly important. People grow concerned when they realise that because blockchain technology operates using a decentralised system, there are often times when there is no responsible party to seek remedy if there has been a privacy breach. Further, it is very difficult to remove personal information once it has been entered and validated onto the ledger. If a user was to reveal their pseudonym (unique identifier) to other users, then those users could have access to all of this person's transactions including personal information such as health records, stored on the blockchain. What makes blockchain technology secure also results in difficulties when it comes to privacy regulation. Once a user's pseudonym has been revealed, the entirety of a user's transactions will be permanently exposed and linked directly to that user. An option could be to utilise a specific platform that uses a distributed hash that is able to break the blockchain up, allowing the user to verify data without disclosing all of the details permanently on the chain. There are still issues at play with this approach, namely, there are unanswered questions regarding how this method, which may be more in line with Australian Privacy Laws, affects the long-term viability of the chain.

Currently, there is a regulatory gap and challenge emerging between privacy and the blockchain. With this gap there are issues arising as to how to combat these privacy issues. The important step the blockchain industry must take, before industries like the logistical industry may begin to use it, would be to develop a clear definition of what privacy is (before developing standards) to ensure that privacy requirements are met across the board. This could provide security that a user's privacy will be exactly that, private. This is very much 'watch-this-space' as we await further standards from ISO and regulated implementation within Australian practises.



1 Iso.org/home.html
2 Privacy Act 1988 (Cth)

What stems from these issues is an inherent lack of trust in the technology. The Australian Trusted Digital Identify Framework (TDIF) sets out requirements applicants need to meet in order to achieve verification and accreditation within the digital identity ecosystem. Whilst not currently being used for blockchain systems, it is an example of what users may wish to require as to the kinds of standards needed in order to trust the identifying participants who transact using a blockchain based system. Identifying participants in blockchain systems, maintaining trust and balancing transparency with privacy are all challenges the logistical industry would have to tackle prior to utilising the technology. There will be a need for the industry to build a skill base that can translate into capability whilst simultaneously driving innovation and education regarding blockchain technology.

Conclusion

With its increasing use in other countries such as the US, the UK, China, Singapore and Netherlands, and with industries being encouraged to trial blockchain technology, it is a matter of not if but when we will see this technology being used within the logistical industry. Turning your mind to the concept of blockchain technology is a must, so it is important to start taking the b-word seriously.

If you need any assistance with reviewing, preparing or implementing this technology or with understanding the legal issues, please contact:

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UPDATES

NATIONAL, NSW, VIC, QLD, SA

NATIONAL

PROPOSED AMENDMENTS TO THE AUSTRALIAN TRANSPORT SAFETY INVESTIGATION REGULATIONS

Author: Associate Taylor Crydon

In February to March 2022, the Australian Transport Safety Bureau (ATSB) held a consultation process for stakeholders in the transport industry on its proposed amendments to the *Transport Safety Investigation Regulations 2021* (TSIR).

The TSIR provides the framework for reporting of aviation, marine and rail occurrences to the ATSB. TSIR came into effect in September 2021 and the Unofficial Compilation of the current TSIR with the proposed changes can be accessed here.

Some of the key proposed amendments include:

1. categorisation of aircraft operations to align with the *Civil Aviation Safety Regulations*, to prioritise them in four distinct categories:
    - Category A (passenger transport) aircraft operation
    - Category B (commercial non-passenger) aircraft operation
    - Category C (non-commercial) aircraft operation
    - Category D (type 2 RPA and certain unmanned balloons) aircraft operation
2. revised definitions for aircraft accidents, aircraft incidents and includes new definitions for a fatal and serious aircraft-related injury
3. new prescriptions of what occurrences need to be immediately reported, or routinely reported, for each category of operation, with certain categorisations bearing a stricter reporting standard
4. extend the persons who are responsible to report occurrences in the aviation and marine industries:
    - in aviation, it is proposed to extend to sport aviation bodies and insurers of aircraft
    - in marine, it is proposed to extend to pilotage providers and vessel traffic service authorities
5. prescribing the format for written reports for the Chief Commissioner, and
6. changes to align the TSIR's language with other Australia's Transport Safety Investigation legislation.

Whilst the ATSB propose to broaden the definition of persons responsible for reporting aviation occurrences, those persons (such as an insurer) only have to report an occurrence if they have a reasonable belief that no other responsible person has reported it. Separately to these proposed amendments, there is discussion that the ATSB will seek to extend the written reporting timeframes from within 72 hours of an occurrence to within seven days for all operators (as defined in the TSIR).

An increased timeframe for reporting would seem logical so as to permit entities such as insurers sufficient time to gather information and form the reasonable belief that the occurrence is unlikely to have been reported by another person.

For aviation and marine insurers, the significant takeaway from these proposed amendments is the obligation that will be placed on insurers to either gain assurance a reportable matter has been notified or make the notification itself.

Upon receipt of a notification from an insured regarding an occurrence, the insurer will have to determine if the occurrence is a reportable matter and if so:

- obtain assurance from the insured the occurrence has been reported, or
- request any appointed loss adjuster ensure the occurrence has been or is reported; or
- notify the occurrence to the ATSB itself.

Whilst the consultation period has now closed, it will be important for our clients in the aviation and marine industries to note and be mindful of the implications the proposed amendments may have on them (including their handling of notifications and claims management processes) if the amendments are implemented. We will publish a further alert following any developments.

NATIONAL IMPACTS THE CRITICAL INFRASTRUCTURE ACT NOW HAS ON TRANSPORT AND INSURANCE

Author: Partner Suzy Cairney

The *Security Legislation Amendment (Critical Infrastructure) Act 2021* (**SLACI Act**) received royal assent on 2 December 2021 and amends the *Security of Critical Infrastructure Act 2018* (Cth) (**SCI Act**).

The SCI Act creates a government framework aimed at managing risks relating to critical infrastructure and its focus is on cyber risks.

Cyber-attacks are becoming more common and impactful on businesses considering many industries now operate from online systems as a result of the COVID-19 pandemic. Given the interconnectedness of infrastructure assets across Australia, the Commonwealth Government has sought to protect and secure assets, which if compromised could have material adverse effects on the Australian economy.

The issue for some is how governmental control is being achieved.

The SLACI Act has been one of the most contentious pieces of legislation tabled in the last year, mainly because of the potentially onerous obligations imposed on owners and operators of critical infrastructure.

This legislation was fast-tracked due to the cyber threats globally, and on 31 March 2022 the Commonwealth Government passed the *Security Legislation Amendment (Critical Infrastructure Protection) Act 2022* (**SLACIP Act**), which implements the final package of amendments to the SCI Act. The SLACIP came into effect on 2 April 2022.

Who does it impact?

The SLACIP impacts owners and operators of specific "*critical infrastructure assets*". Critical infrastructure assets are defined in the SCI Act as "*those physical facilities, supply chains, information technologies and communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would significantly impact the social or economic wellbeing of the nation or affect Australia's ability to conduct national defence and ensure national security*".

The SCI Act initially applied this test to the electricity, gas, water and ports sectors. The list of assets has been significantly broadened by the SLACI Act.

The SLACI Act (that commenced on the day following assent being 3 December 2021) expanded the definition of what constitutes "*critical infrastructure*" so that, in addition to electricity, gas, water and ports, the industries captured by the legislation now also include:

- communications
- data storage and processing
- financial services and markets, including but not limited to insurance;
- water and sewerage
- energy
- healthcare and medical
- higher education and research
- food and grocery
- transport, including but not limited to, aviation, public transport and distributors;
- space technology, and
- defence.

In other words, large parts of the Australian economy are covered by the SCI Act, including sectors that are not usually regarded as infrastructure, for example insurance.

Register of critical infrastructure

Since 2018, owners and operators of critical infrastructure assets in the electricity, gas, water and ports sectors have had six months from the acquisition of the relevant assets, or the start of the asset operation, to register ownership and operational information on the Register of Critical Infrastructure Assets (**Register**).

The Register is designed to give the Government a more detailed understanding of who owns and controls critical infrastructure.

For the newly captured industry sectors, there is likely to be a steep learning curve. For instance, insurers and transport operators.

In addition to appearing on the Register, the SCI Act provides that relevant critical infrastructure owners and operators must also comply with the following:

1. **Mandatory cyber incident reporting** to the Australian Signals Directorate and Australian Cyber Security Centre. "*Critical cyber security incidents*" must be reported orally or in writing within 12 hours of the owner or operator becoming aware of the incident. Other time limits apply for less serious incidents, but all timings are relatively short given the significant time and resources required to manage any security incident, even a minor one. The SLACI Act allows penalties of up to 250 penalty units ($52,500) per offence for companies that fail to report properly. These new reporting requirements need to be considered in the context of other reporting requirements that may apply to the same security incident—for example the requirement for APRA-regulated entities to notify APRA within 72 hours (see Prudential Standard CPS 234) and the obligations under the notifiable data breaches scheme in the *Privacy Act* for any personal information that may be affected.
2. The **'Government assistance measures'** cyber incident response regime designed to work as a default mechanism where there is no other regulatory system to provide a response to a cyber incident impacting critical infrastructure. This is intended to enable "last resort" Government assistance powers to deal with serious cyber-attacks. In practice, this regime also increases the information gathering power of the Department of Home Affairs.

These new Government response powers include:

a. An **information gathering direction**, requiring the responsible entity to provide information on the cyber-attack.

b. An **action direction**, whereby the Home Affairs Minister can direct an entity to do or not do any action deemed reasonably necessary, proportionate and technically feasible, but only if the responsible entity is unwilling or unable to resolve the cyber security incident. (It is unclear how the requirement for action direction will be established.)

c. Provision for "**intervention requests**", which amount to step in rights enabling the Australian Signals Directorate to take control of an asset in limited circumstances.

As noted above the SLACI Act came into effect on 2 April 2022 and has the following effect:

1. Requires entities to adopt risk management programs for critical infrastructure assets (there is some concern that some regulated entities might be subject to several cyber security regimes with inconsistent obligations, which was one reason for the on-going consultation, see here). Sector-specific rules are to be developed in consultation with industry to provide entities with guidance on how to meet the obligations of the risk management program.
2. Introduces a regime for declaring some assets to be 'systems of national significance', which will be subject to additional obligations including maintaining incident response plans, carrying out cyber security exercises and even allowing ASD reporting software to be installed on their systems.
3. Allows for a set of Asset Definitions Rules and Asset Application Rules to be produced:
    a. The Asset Definitions Rules came into effect as of 14 December 2021 and set thresholds and circumstances where an asset is a critical infrastructure asset, for example Aldi, Coles and Woolworths are critical to the food industry.
    b. The consultation period for the draft Asset Application Rules ended on 1 February 2022. These Rules are meant to propose the asset classes to which one or both of the mandatory reporting of cyber-attacks obligation, and the obligation to provide information to the Register will apply.

It assumes that all of a responsible entity's assets will be critical infrastructure assets, which is not always the case. However, until the sector-specific rules are released, the safest course is probably to assume the legislation applies to all of a responsible entity's assets considering the broad definitions in the SLACI Act.

Transport industry participants should be aware that transport is also being dealt with under a separate Bill, the *Transport Security Amendment (Critical Infrastructure) Bill 2022*. This is at least partly to shift the focus of the legislation as it applies to transport away from cyber risks and towards addressing all possible hazards, including weather and natural disasters. (Note: The transport-specific Bill will be the subject of a separate article once it has progressed further as the Bill has only been subject to its second reading in the house of representatives on 17 February 2022.)

Industry generally has expressed concern at the scope of these new Government powers, claiming they pose additional risks to assets and systems, especially where a Government intervention in an asset could have significant adverse effects on the responsible entity and maybe even the third parties it transacts business with.

What do you need to do?

Given the expanded remit of the legislation, owners and operators of "*critical infrastructure assets*" should consider:

a. Reviewing the status of your asset (which can include a computer or online system) under the legislation as it is and confirm whether the asset is likely to be a "*critical infrastructure asset*".

b. If you are already subject to a cyber security reporting regime under other legislation or regulations (for example, telecommunications or APRA), consider if and how this new regime might impact those obligations.

c. Adapt your cyber-attack response and recovery plans to ensure they can comply with the mandatory reporting obligations in the SLACI Act—those plans will need to be proactive and comprehensive in regard to cyber security incidents. The plans also should be continuously reviewed against the current legislative and regulatory requirements given the amount of law reform in this area (for example, proposed amendments to the *Privacy Act 1988*), increase in data sharing capabilities and requirements (for example, the introduction of the Consumer Data Right) and the everchanging technology in this space.)

d. Update your training programs for directors, who now have far greater accountability for cyber breaches.

e. The requirements of the SLACI Act could have significant implications for the way cyber security teams investigate cyber-attack incidents, as well as how they report on them, which means your cyber security teams may need additional or updated training.

f. Owners and operators of critical infrastructure assets may have customers who are themselves owners or operators of critical infrastructure assets. You might need to consider whether some of the reporting information required to satisfy the mandatory reporting obligations needs to be passed down the contractual chain, to ensure you can comply.

g. If you have not already done so, it might be prudent to implement a training program so that all staff of affected entities are aware of what needs done and by when.

h. Because the SLACI Act has amended the critical infrastructure sectors, this is expected to widen the scope of "national security business" under the *Foreign Acquisitions and Takeovers Act 1975*, resulting in more transactions possibly being subject to FIRB approval. The costs and timings of FIRB Applications will therefore need to be considered in any purchase / sale transition involving "*critical infrastructure assets*".

i. Participate in the development of sector-specific rules to help refine the cope and content of the obligations for your industry.

j. Monitor any delegated legislation for your industry that implements the risk management program and defines which particular critical infrastructure assets or classes of critical infrastructure assets this obligation will actually apply to, and the nature of the obligation. See the draft Security of Critical Infrastructure (Critical Infrastructure Risk Management Program) Rules as a guide.

We would like to acknowledge the contribution of Taylor Crydon.

NEW SOUTH WALES & VICTORIA

THE HIGH COURT AFFIRMS A PLAINTIFF'S ENTITLEMENTS TO AN EQUIVALENT HIRE CAR

Authors: Partner Adrian Kemp and Lawyer Maral Manoukian

To date, there has been much uncertainty in respect of a plaintiff's entitlements when hiring a replacement vehicle while their damaged vehicle is being repaired (particularly if it is a luxury vehicle).

In question is whether a plaintiff is entitled to an equivalent vehicle to their own damaged vehicle, or whether any standard vehicle that satisfies their need to travel from A to B is sufficient.

Court of Appeal

In June 2020, the NSW Court of Appeal, in four concurrent appeals, found that where a plaintiff can demonstrate a need for a vehicle during the repair period, they are entitled to claim the cost of hiring a similar vehicle to their own rather than that of a standard vehicle.

The appeal challenged two 2019 judgments in the Supreme Court of New South Wales, which found that a special purpose had to demonstrated to claim the hire costs of a prestige vehicle.

The Supreme Court favoured the view that a plaintiff's loss, where there was no special need, was the mere inconvenience of being without a vehicle, which could be met by hiring a standard vehicle rather than a prestige vehicle.

On appeal, the majority of the Court of Appeal found that a plaintiff was entitled to hire a vehicle similar to their own, rather than a standard vehicle, regardless of whether a special purpose was proved. The Court found that a plaintiff's loss was not just of inconvenience, but of being without their vehicle that provided tangible and intangible benefits to a plaintiff, which could not be met by a standard vehicle.

High Court

On 8 December 2021, the High Court unanimously agreed that where a plaintiff is entitled to a replacement vehicle, they are entitled to a vehicle that is broadly equivalent to their damaged vehicle.

The High Court set out the following heads of damage to assist in measuring the loss suffered by a plaintiff:

- physical inconvenience of not being able to utilise their damaged vehicle, and
- loss of amenity or enjoyment of use (i.e. not being able to use the functions and features of their damaged vehicle).

"Need" takes a back seat

In previous decisions of the NSW Court of Appeal (*Lee v Strelnicks and Anthanasopoulos v Moseley*), the Defendants in both cases argued that the onus was on the Plaintiff to prove they had a "need" for a replacement vehicle, and a need for a particular type of vehicle, before they could claim the hire cost. The High Court has now clarified that the loose concept of "need" should be eschewed.

How is the loss measured under these two heads of damage?

The threshold for proving inconvenience and loss of amenity or enjoyment is low and can be inferred from:

- proving ownership of the damaged vehicle
- past usage/enjoyment of any feature of the vehicle, and
- but for the damage, the Plaintiff's ability to continue to use the vehicle during the repair period.

Test for a plaintiff's mitigation of loss:

The recovery of damages under the two heads of damage are necessary to restore a plaintiff to the position they would have been in but for a defendant's actions that caused the collision.

Once a plaintiff acts to mitigate that loss by hiring a replacement vehicle, the onus of proof will lie upon a defendant to show that the costs incurred in mitigation were unreasonable.

The factors that a Court considers in assessing mitigation of loss under these heads of damage include the hire of a broadly equivalent replacement vehicle at a reasonable price and the extent to which:

- the vehicles are broadly equivalent
- particular hire expenses, such as credit hire charges, have been incurred in mitigation of the losses, and
- the quantum of hire costs is shown to be unreasonable.

How does this decision affect insurers?

Indemnity insurers now face greater exposure in settling claims for hire car where the claimant's damaged vehicle is a prestige vehicle. To decrease this exposure insurers should:

- Offer not at fault drivers broadly equivalent replacement vehicles where liability is not in dispute. If a plaintiff chooses to hire a more expensive vehicle, the offer can be relied upon to demonstrate a plaintiff's failure to reasonably mitigate its loss.
- Consider if the vehicle hired is broadly comparable to the damaged vehicle. Some factors to consider include the make/model, any special features/ options, luxury and prestige associated with the vehicle, and what it represents.
- Maintain a database of rates for different vehicle classes, categorised by month and year to be used in assessing the reasonableness of third-party hire car claims.

QUEENSLAND

THE HURDLES TO EXTENDING THE LIMITATION PERIOD FOR PERSONAL INJURY CLAIMS

Author: Partner Mark Sainsbury

In a recent article (published in our December 2021 Health Care Update), we discussed two Queensland decisions involving claimants trying to commence personal injury claims outside of the limitation period. In those cases, outlined below, the courts examined what constitutes material facts of a decisive character in order to extend the limitation period:

- In *Wilson v Mackay Hospital and Health Service* [2021], the Court accepted the Claimant satisfied the "material facts" test. She was permitted to proceed with a claim against the Hospital after her diagnosis of PTSD and the impact of this on her ability to work provided material facts of a decisive character within her means of knowledge.
- In *Magarey v Sunshine Coast Hospital and Health Service (Nambour Hospital)* [2021] QSC 240, the Applicant obtained a favourable medical opinion on liability but the application was denied by the Court on the basis that she did not take reasonable steps to follow up her lawyers to ensure her claim was being progressed. The Applicant failed to discharge the onus that the material fact was not within her means of knowledge before the relevant date for the purposes of extending the limitation period. The Court noted that the Applicant's solicitor could be exposed to a professional negligence action if her inability to proceed with the claim was caused by their delay.

The limitation extension question has been examined again in the recent decision of *Cottee v Eastern Australia Airlines Pty Ltd* [2022] QDC 112. In this Brisbane District Court application heard by Justice Barlow, the Applicant sought the Court's discretion to commence a personal injury claim against Cobham Aviation Services Australia Pty Ltd, Cobham Aviation Services Engineering Pty Ltd (together **Cobham**) and Rolls-Royce Deutschland Ltd (**Rolls Royce**) arising from a mid-flight engine failure on a commercial flight on 10 March 2018, on which the Applicant was a first officer. Easten Australia Airlines (**EAA**) was already a party to the Applicant's PIPA claim.

Following the incident, the Applicant was involved with an investigation into the engine failure, was subsequently diagnosed with PTSD and received workers' compensation benefits. She then engaged a solicitor in 2020 and discussed making a personal injury claim.

In seeking the limitation extension, the Applicant submitted that the material fact not within her knowledge until after 10 March 2020 was the companies responsible for maintaining the aircraft and its engines. The Applicant asserted that the material fact came within her knowledge when she was provided with contribution notices issued by EAA's solicitors seeking to join Cobham and Rolls Royce to the PIPA claim.

The Respondents asserted that the Applicant had the ability to ascertain the identity of the relevant companies from her involvement in the post-incident investigation and the Cobham Incident Report (**Cobham Report**) provided to her by September 2018. Under cross examination, the Applicant described reading the Cobham Report as "highly triggering" and so she "shelved it".

Barlow J considered the material facts issue in light of the Applicant's personal circumstances and psychiatric condition at the relevant time and accepted her evidence that the Cobham Report was "triggering" and she had set it aside. Therefore when the Applicant provided the Cobham Report to her solicitor, prior to expiry of the limitation period, she did not hold knowledge of the material facts. Barlow J found that the Applicant only came to hold this knowledge after being advised by her solicitor of the expiration of the limitation period.

Accordingly, the application was granted in favour of the Applicant.

As seen in *Margaray v Sunshine Coast Hospital*, Barlow J was critical of failures by the Applicant's solicitors to take steps prior to the limitation period expiring and went so far as to say that it "*beggars belief*" that the Cobham Report did not cause the solicitor to identify a cause of action against the entity responsible for maintaining the aircraft engine and take appropriate steps to commence a claim. However, Barlow J was careful to note that information within the means of knowledge of the solicitor should not be considered information within the means of knowledge of the Applicant, unless it is expressly communicated by the solicitor.

The deciding factor in this decision was probably the Applicant's mental state and her response to evidence that could have identified the Respondents at an earlier date but she was largely prevented from doing so by her PTSD. The Court accepted that PTSD prevented the Applicant reading and acting on that evidence.

The important takeaway for insurers and defendants is the longtail nature of claims that might arise from significant incidents in the transport industry, which require periods of investigation and may cause a claimant to suffer mental ill-health adversely impacting their ability to promptly bring a claim. Even when a limitation date is safely passed, it does not mean a potential claimant is without options to proceed with a civil action and any mitigating health condition at that time will be an important consideration. If these circumstances arise, the claimant's "means of knowledge" can be put to proof at a hearing of the s 31 application.

ENDNOTE

Sparke Helmore acted for Cobham in the application and continues to act in the ongoing personal injury claim.

SOUTH AUSTRALIA

RECENT PROSECUTIONS BY THE NATIONAL HEAVY VEHICLE REGULATOR IN SOUTH AUSTRALIA

Author: Partner Luke Holland

The matters recently prosecuted in court by the National Heavy Vehicle Regulator (NHVR) indicates that the NHVR continues to have a strong focus on driver fatigue in South Australia.

This reflects the position in the other states under the Heavy Vehicle National Law (**HVNL**) regime, namely Queensland, New South Wales, Victoria, ACT and Tasmania. Since June 2021, actions brought by the NHVR in South Australia have resulted in numerous prosecutions against transport corporations and directors for fatigue related offences. These offences have included false or misleading entries in a work record, critical risk breaches of requirements for working hours and failing to comply with maximum working times. Prosecutions were also recorded for non-compliant emission control systems and possession of a device that enables tampering with a speed limiter.

Notably, the NHVR brought its first successful action in South Australia under ss 26C and 26G of the HVNL in March of this year. Section 26C imposes a proactive primary duty on each party in the chain of responsibility for a heavy vehicle to ensure, so far as is reasonably practicable, the safety of the party's transport activities relating to the vehicle and this includes eliminating public risks. This shifts liability from the traditional owner/operator paradigm to a shared responsibility on all parties in a supply chain who have control or influence over a heavy vehicle transport task. That is, the safety of transport and logistics activities is a shared responsibility by all parties in the chain of responsibility. Under s 26G, a person commits an offence if they contravene their s 26C duty and exposes an individual or class of individuals to a risk of death or serious injury or illness.

The defendant company in that matter was issued with a fine of $217,500.00, although the fine was reduced to zero due to the company's insolvency.

Recent enforceable undertakings agreed to by the NHVR have mainly focussed on safe mass limits and ensuring safe transport activities.

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