

'THE PLOT OF THE PILOT': PILOTAGE AND LIMITATION OF LIABILITY IN MARITIME LAW

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1 Introduction

It has been settled that, ultimately, a shipowner is responsible for what happens to his ship.¹ But consider the following scenario. A vessel is heading into a port with compulsory pilotage. The pilot provides an on-shore direction to the master. The master of the vessel follows that direction, and on entry into port, the vessel damages the wharf. Who is responsible for the damage? If the master, following an on-shore direction, enters a compulsory pilotage area without a pilot on board, is he guilty of an offence for proceeding without a pilot? Is the pilot liable for acting outside of pilotage? It is a grey area for many harbour authorities in Australia.² A number of important questions remain unanswered. When does pilotage actually commence? Should the statutory rules regarding limitation of liability for pilots be changed to hold negligent compulsory pilots individually responsible for actions outside of pilotage? If a master follows a radioed direction provided by an on-shore pilot, should he be liable for proceeding without a pilot in a compulsory pilotage area? There is a general assumption that the act of pilotage does not commence until the pilot is on board the vessel.³ Unfortunately, Australia has very limited case authority on these issues, and there is then a tendency to just throw hands up in the air and leave a two hundred-year tradition alone.

At present there is no case law or statute that provides any assistance with a pilot's negligence in cases of on-shore direction. If the legal definition of conduct requires a pilot on board, then on-shore directions are outside of pilotage. An on-shore direction is simply that - a direction. A master will be held liable for proceeding without a pilot on board.⁴ The master is on board the vessel, and remains wholly responsible for its navigation. He can choose how directions (advice) are complied with.

This paper considers the Australian position on pilotage in an attempt to answer these questions. Discussion will focus on Australia's pilotage origins, and the position in the United Kingdom. This is then compared to the pilotage regimes of the United States and Canada. Finally, the introductory questions will be revisited with a look at how Australia's pilotage laws could be changed and the resulting ramifications.

2 Marine Pilotage in Australia

2.1 When Does Pilotage Actually Commence?

The pilot is the 'controller of collisions'. A pilot is the person with the best knowledge of the port; better equipped with requisite local knowledge to get the vessel in and out of port safely. However, this provides no assistance on the question of when pilotage actually commences. The difficulty is that pilotage in Australia is steeped in two hundred years of tradition, dating back to the Imperial Statutes.⁵ Therefore, it is important to first look at Australian statutory instruments. In particular, we need to determine whether these statutes provide any clear answer as to when pilotage actually commences, or more specifically, whether a pilot must be on board for pilotage to be underway.

There is a running theme throughout Australian legislation, which points to pilotage involving conduct of a vessel. Our analysis will focus on the importance of the meaning of 'conduct' and how this affects the various interpretations of the role of a pilot.

* LLB. This paper was written as part of the assessment in the unit Admiralty Law at Murdoch University School of Law (2009) and was highly commended by the Morella Calder Prize committee (2010).

¹ *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626, 641 (Gibbs CJ).

² Email from Susan Fryda-Blackwell to all Australian Port Authorities, 30 July 2009.

³ Michael White, *Australian Maritime Law* (Federation Press, 2nd ed, 2000) 288. See also Justice Hill's comments in *The Andoni* [1918] P 14, 18.

⁴ *Rindby v Brewis* (1926) 25 Ll. L. Rep. 26, 26.

⁵ The *Merchant Shipping Act 1854* (Imp) and *Merchant Shipping Act 1894* (Imp) were a result of the contentious first Statute in 1717.

2.1.1 The General Assumption – Pilotage commences when the pilot boards the vessel

There is a general assumption that has existed for centuries - pilotage commences when the pilot steps on board the vessel. In *The Andoni*,⁶ Justice Hill put it thus:

In my opinion a pilot, prima facie means, to use Lord Tenterden's words, "A person taken on board at a particular place for the purpose of conducting a ship through a river, road or channel or from or into a port." And where you find that pilotage is compulsory, that, prima facie, means that the pilot is entitled, and the master is bound to permit him, to conduct the ship, that is, to take charge of the navigation of the ship.⁷

Australian authority has also assumed the same position. Chris Yuen, when undertaking a Sydney Ports case study,⁸ opined that:

When the master hands over the conduct of the vessel to the pilot, the latter is legally responsible for his own actions. The master's right to interfere is restricted to circumstances where there is clear evidence of the pilot's incapability or incompetence. Unwarranted interference by the master would be treated as the ship not being piloted.⁹

From these statements, the assumption is clear. After all, if a pilot is not on board the vessel, the master is still navigating. Therefore, it makes much more sense to consider pilotage to commence at a master/pilot exchange, which cannot be effected until the pilot steps onto the bridge. Surely, 'conduct' requires physical presence of the pilot. Unfortunately, it is not that simple. Legislation has made the distinction difficult to determine.

2.1.2 Reconciling the Assumption with Statute

Under Commonwealth Legislation: Navigation Act 1912 (Cth)

The *Navigation Act 1912* (Cth) ('*Navigation Act*') is limited in application to fishing and trading vessels on overseas voyages only.¹⁰ Pilotage provisions under the *Navigation Act* have been reinforced in most State jurisdictions.¹¹

The *Navigation Act* regulates pilotage under Part IIIA.¹² It defines a pilot as 'a person who does not belong to, but has conduct of, a ship.'¹³ This restrictive definition is problematic. It fails to describe the wider meaning of the use of the word 'pilot'.¹⁴

The limitation of liability provision in the *Navigation Act* indicates that pilotage commences once the pilot is on board the vessel.¹⁵ Section 410B(1) states that '[a] pilot who has the conduct of a ship is subject to the authority of the master of the ship and the master is not relieved from responsibility for the conduct and navigation of the ship by reason only of the ship being under pilotage.'¹⁶

Under State Legislation

Each State and Territory in Australia has enacted pilotage legislation. Although the jurisdictions are predominantly consistent, there are a number of interesting anomalies regarding what constitutes pilotage. Clear examples are seen in comparing the legislation in New South Wales, South Australia and Western Australia.

⁶ *The Andoni* [1918] P 14.

⁷ *The Andoni* [1918] P 14, 18 (Hill J).

⁸ Chris S. Yuen, 'Marine Pilotage in Australia: Sydney Ports Case Study' (2003) 17 *Maritime Law Association of Australia and New Zealand Journal* 80.

⁹ *Ibid* 86.

¹⁰ *Navigation Act 1912* (Cth) s 2(1).

¹¹ For example, vessels visiting the port of Fremantle, Western Australia, will be subject to the *Port Authorities Act 1999* (WA) and the *Port Authorities Regulations 2001* (WA). These statutes are consistent with the *Navigation Act* provisions.

¹² *Navigation Act 1912* (Cth) ss 186A-186L.

¹³ *Navigation Act 1912* (Cth) s 6.

¹⁴ White, above n 3, 288.

¹⁵ *Navigation Act 1912* (Cth) s 410B(1).

¹⁶ *Navigation Act 1912* (Cth) s 410B(1).

The New South Wales *Marine Safety Act 1998* is clearest:

pilotage means the conduct of a vessel by a pilot as follows:

- (a) inward pilotage, that is, the pilotage of a vessel entering into a pilotage port,
- (b) outward pilotage, that is, the pilotage of a vessel leaving a pilotage port,
- (c) harbour pilotage, that is, the pilotage of a vessel being moved within a pilotage port.¹⁷

Section 74 of the same Act is explicit in assuming pilotage to occur whilst on board the vessel. Section 74(2) states that:

the master of a vessel must not enter, leave or move within a pilotage port with the vessel before taking on board the marine pilot made available by the pilotage service provider to conduct the vessel on its movement into the port, out of the port or within the port.¹⁸

This is consistent with South Australia's definition, which assumes that conduct of a vessel concerns the pilot being on board. In the *Harbours and Navigation Act 1993* (SA), a pilot is defined as '[a] person, who although not a member of the master's crew, temporarily takes control (subject however to the master's overriding authority) of the vessel's navigation.'¹⁹ Pilotage is assumed to commence when the pilot boards the vessel.

Western Australian legislation defines pilotage using 'command'.²⁰ The *Port Authorities Act 1999* (WA) defines pilotage as being, 'in charge or command of, or to have the management of, the vessel.'²¹ Further assistance with this definition is provided in s 98:

An approved pilot who as pilot has control of a vessel in a port is subject to the authority of the master of the vessel, and the master is not relieved from responsibility for the conduct and navigation of the vessel by reason only of those circumstances.²²

This indicates that more than merely providing an on-shore direction is required before a ship is under the control of a pilot. It requires the pilot to be on board, controlling and managing the vessel.

State jurisdictions are as restrictive as the Commonwealth *Navigation Act* in defining pilotage, using either 'command' or 'conduct'. They all follow the general assumption, that pilotage does not commence until the pilot boards the vessel and shows the master all relevant license and competency papers.²³ This is significant. As much as this may illuminate the meaning of the word 'conduct', further clarification is required. It is important, with the apparent face of uncertainty in marine pilotage, for the Australian courts not to take a pragmatic approach. To that end, it is important to elaborate on the question of 'conduct' of a ship.

2.1.3 The Problem - The question of conduct

What is precisely meant by 'conduct' of a ship? Could a pilot have 'conduct' of a vessel simply by providing an on-shore direction? The *Navigation Act* fails to define 'conduct'. Australian courts provide no further assistance. The Federal Court of Australia in *Braverus Maritime Inc v Port Kembla Coal Terminal*,²⁴ simply listed the definition of pilot as it stands in the *Navigation Act*.²⁵ The only (minimal) assistance is provided by Chief Justice Barton in the landmark High Court case of *Fowles v Eastern & Australian Steamship Co*.²⁶ The issue in that case concerned interpretation of the *Queensland Navigation Act (1876)*:

Compulsory pilotage is prescribed by sec. 113: "The master of every vessel not exempt from pilotage, arriving at or off any port whereat any pilot shall have been appointed for the purpose of entering any of the said ports or harbours, shall deliver and give in charge such vessel to the duly qualified pilot who

¹⁷ *Marine Safety Act 1998* (NSW) s 71(1).

¹⁸ *Marine Safety Act 1998* (NSW) s 74(2).

¹⁹ *Harbours and Navigation Act 1993* (SA) s 4(1).

²⁰ *Port Authorities Act 1999* (WA) s 95.

²¹ *Port Authorities Act 1999* (WA) s 3(1).

²² *Port Authorities Act 1999* (WA) s 98.

²³ See, eg, *Marine and Safety (Pilotage and Navigation) Regulations 2007* (Tas) s 19(3); *Ports and Maritime Administration Act 1995* (NSW) s 78(2).

²⁴ (2005) 148 FCR 68.

²⁵ *Ibid* 80 (Tamberlin, Mansfield and Allsop JJ).

²⁶ *Fowles v Eastern & Australian Steamship Company Limited* (1913) 17 CLR 149.

shall first board or go alongside of such vessel in order to conduct the same into port, and such pilot shall if required by such master produce his authority to act as such pilot, and no master of any such vessel shall proceed to sea from any of the said ports or quit his station or anchorage in any port, without receiving on board the harbour master or some pilot appointed as aforesaid to move or conduct the said vessel to sea."²⁷

Chief Justice Barton clarifies further on, when referring to the Government (in a port of compulsory pilotage) owing duties to a shipowner when 'placing a pilot on board a vessel'.²⁸

The literal definition of 'conduct' clearly denotes some form of behaviour. The Oxford Dictionary defines it as an 'activity or manner of directing or managing'.²⁹ However, the issue still remains as to whether an on-shore direction by a pilot can be considered an act of pilotage. This is revisited later in the paper.

2.2 Pilots' Limitation of Liability

Australian legislation provides far more assistance on limitation of liability for pilots, than on the question of when pilotage actually commences. This is supported by a significant body of case law.

2.2.1 Statutory Provisions

Under the Commonwealth Navigation Act

A pilot's exclusion from liability is absolute.³⁰ Section 410B makes it clear that:

(1) A pilot who has the conduct of a ship is subject to the authority of the master of the ship and the master is not relieved from responsibility for the conduct and navigation of the ship by reason only of the ship being under pilotage.

(2) Despite any law of the Commonwealth or of a State or Territory, the owner or master of a ship navigating under circumstances in which pilotage is compulsory under such a law is answerable for any loss or damage caused by the ship, or by a fault of the navigation of the ship, in the same manner as the master or owner would if pilotage were not compulsory.³¹

The overall effect of this provision is that 'a shipowner who through a compulsory pilot is responsible for faulty navigation is responsible for damage to his own ship as well as for injury to the property of another'.³²

Under State Legislation

State legislation on limitation of liability for pilotage is relatively consistent with the *Navigation Act*. In South Australia, pilotage is compulsory for all vessels over 35 metres,³³ and a pilot is excluded from liability for negligence.³⁴

In New South Wales, pilotage is compulsory for all vessels over 30 metres,³⁵ and all pilots, pilotage service providers and the State are excluded from liability for negligence of pilots.³⁶ However, the pilot who knowingly endangers the vessel or crew is guilty of an offence.³⁷

²⁷ Ibid 157-8 (Barton ACJ).

²⁸ Ibid 167 (Barton ACJ).

²⁹ Bruce Moore (ed), *The Australian Pocket Oxford Dictionary* (Oxford University Press, 5th ed, 2002) 216.

³⁰ *Navigation Act 1912* (Cth) s 410B(2).

³¹ *Navigation Act 1912* (Cth) s 410B(1)-(2).

³² "*Tower Field*" (*Owners*) v *Workington Harbour and Dock Board* (1950) 84 Ll. L. Rep. 233, 255 (Porter LJ).

³³ *Harbors and Navigation Act 1993* (SA) s 35(1): 'A vessel 35 metres or more in length must not be navigated within a harbour to which this section applies, unless – (a) the vessel is navigated under the control or at the direction of a licensed pilot; or (b) the master of the vessel holds a pilotage exemption certificate under this Part.'

³⁴ *Harbors and Navigation Act 1993* (SA) s 36(3): 'The liability of the owner or master of a ship for damage resulting from a fault in the navigation of the ship is unaffected by the fact that the vessel is under pilotage or that the pilotage is compulsory.'

³⁵ *Marine Safety Act 1998* (NSW) ss 74-75:

Section 74: '(1) Pilotage is compulsory in every pilotage port. (2) The master of a vessel must not enter, leave or move within a pilotage port with the vessel before taking on board the marine pilot made available by the pilotage service provider to conduct the vessel on its movement into the port, out of the port or within the port.'

Section 75(1)(c): 'Pilotage is not compulsory in a pilotage port, and section 74 does not apply, in respect of ... a vessel less than 30 metres in length.'

In Tasmania, pilots are completely excluded from personal liability for negligence in ‘providing advice with respect to the navigation of vessels.’³⁸ This provision is different from the provisions in other State legislation in attempting to cover the field. It seems to include pilots providing an on-shore direction.

In Victoria, pilotage is compulsory, and it is an offence to navigate in port without a pilot.³⁹ A pilot’s liability is limited under the *Marine Act 1988* (Vic) to \$200 plus the amount of pilotage.⁴⁰

In Queensland, only some ports are subject to compulsory pilotage. For these ports, pilots are required at all times.⁴¹ Pilots are excluded absolutely from liability for negligence or damage.⁴² Because the pilot is always subject to the master’s authority, the owner or master of the ship is liable for any damage that results from the conduct of a pilot.⁴³

Uniquely, Western Australia has a statute totally devoted to a pilot’s limitation of liability for neglect or want of skill.⁴⁴ This Act remains consistent with most States. The pilot’s liability under this Act is limited to \$200.⁴⁵ Additionally, a pilot is excluded from liability for negligence causing damage to the vessel.⁴⁶

2.2.2 *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd*

There is a significant body of case law pertaining to a pilot’s limitation of liability. The leading Australian case is *Oceanic Crest Shipping*.⁴⁷ It concerned damage to a wharf at the port of Dampier, Western Australia. At the time of collision, the vessel was under the control of a negligent compulsory pilot. The pilot was employed by the local harbour authority. Oceanic Crest sought indemnity from the harbour authority as the pilot’s employer. The majority held the owners of the vessel liable for the damage, completely excluding the pilot and harbour authority from liability for negligence.⁴⁸

Chief Justice Gibbs succinctly outlined the implications of this provision on the shipowner’s liability:

[S]o far as the pilot's general employer is concerned, the pilot is executing an independent legal duty conferred on him by law and his powers are not derived from the general employer; on the other hand, it may be said that the pilot's power does derive at least in part from the authority given by the shipowner - in that regard it will be remembered that the master has, though only in exceptional circumstances, power to take control of navigation out of the hands of the pilot, a power confirmed by sub-s. (1) of s. 410B.⁴⁹

³⁶ *Marine Safety Act 1998* (NSW) s 80(1): ‘Neither the State, nor the Minister, nor a pilotage service provider is liable for any loss or damage that is attributable to the negligence of any person made available as a marine pilot by the pilotage service provider while the person is acting as a marine pilot.’

³⁷ *Marine Safety Act 1998* (NSW) s 81: ‘A marine pilot of a vessel who, by any wilful act or omission, endangers the vessel or its crew is guilty of an offence.’

³⁸ *Marine and Safety Authority Act 1997* (Tas) s 35(2E): ‘A person who holds a pilot’s license under the *Marine and Safety (Pilotage and Navigation) Regulations 1997* does not incur any personal liability for any damage or loss caused by his or her neglect or lack of skill in providing advice with respect to the navigation of vessels.’

³⁹ *Marine Act 1988* (Vic) s 96(1): ‘The master of a vessel must not – (a) enter or leave port waters or attempt to enter or leave port waters; or (b) navigate the vessel within port waters or attempt to do so – without using the services of a pilot.’

⁴⁰ *Marine Act 1988* (Vic) s 104: ‘A pilot is not liable in negligence in respect of the voyage on which the pilot is engaged for more than \$200 plus the amount of pilotage in respect of voyage.’

⁴¹ *Transport Operations (Marine Safety) Act 1994* (Qld) s 99: ‘A person must not navigate a ship in a compulsory pilotage area unless the person uses the services of a pilot.’

⁴² *Transport Operations (Marine Safety) Act 1994* (Qld) s 101(1): ‘A conducting pilot is not civilly liable for damage or loss caused by an act or omission of the conducting pilot.’

⁴³ *Transport Operations (Marine Safety) Act 1994* (Qld) s 102(3): ‘The owner and master of a ship being navigated by a pilot because the pilotage is compulsory under this Act or another Act is liable for loss or damage caused by the ship, or by a fault of the navigation of the ship, as if the pilotage were not compulsory.’

⁴⁴ *Pilots’ Limitation of Liability Act 1962* (WA).

⁴⁵ *Pilots’ Limitation of Liability Act 1962* (WA) s 3: ‘Notwithstanding the provisions of any other Act or law, but subject to the *Navigation Act 1912* of the Parliament of the Commonwealth, a pilot is not liable for neglect or want of skill in piloting a ship beyond the amount of \$200 together with the amount payable to him on account of pilotage in respect of the voyage in which he was engaged when he became so liable.’

⁴⁶ *Port Authorities Act 1999* (WA) s 99: ‘The owner or master of a vessel moving under compulsory pilotage in a port is liable for any loss or damage caused by the vessel, or by a fault in the conduct or navigation of the vessel, in the same manner as the owner or master would be liable if pilotage were not compulsory.’

⁴⁷ *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626.

⁴⁸ *Ibid* 642 (Gibbs CJ).

⁴⁹ *Ibid*.

Part 3 of this paper puts the above discussion into perspective, outlining the abolition of the compulsory pilotage defence that resulted in limitation of liability clauses such as s 410B of the *Navigation Act*.⁵⁰

3 Australia's Pilotage Origins: The United Kingdom

The paramount danger to a ship under pilotage is that created by a 'divided authority'.⁵¹ The pilot controls the navigation of the vessel in and out of port, but the master has the power to override the pilot in cases of obvious danger. Because of this divide, and the friction it created, the UK Parliament felt it had to intervene.

3.1 Pilotage in the United Kingdom prior to the Pilotage Acts

Prior to the *Pilotage Acts*,⁵² the shipowner and master had the defence of compulsory pilotage at their disposal. Any damage occasioned to a vessel under compulsory pilotage became the pilot's liability.⁵³ As a result, UK Courts were bombarded with an almost unending array of litigation attempting to attach blame for loss or damage solely on the pilot.⁵⁴ However, with that also came the confusion of the exact authoritative relationship between the master and pilot.

In *The Peerless*,⁵⁵ Dr Lushington succinctly made the maritime world aware of the problems with the interpretation of the master/pilot relationship:

There may be occasions on which the master of a ship is justified in interfering with the pilot in charge, but they are very rare. If we encourage such interfering, we should have a double authority on board, *a divisum imperium*, the parent of all confusion, from which many accidents and much mischief would most surely ensue. If the pilot is intoxicated, or is steering a course to the certain destruction of the vessel, the master no doubt may interfere and ought to interfere, but it is only in urgent cases.⁵⁶

In this case, the pilot was held solely responsible for knowingly getting a ship 'under weigh' in vulnerable conditions, which resulted in a collision. The vessel was under compulsory pilotage.

Justice Bargrave Deane expressed a different view of the master's responsibility in *The Tactician*,⁵⁷ where he stated:

The master cannot be heard to say, "When a pilot is in charge of my vessel I am free from the necessity of calling his attention from time to time to things which, in my opinion, are material and important to him." As the officer in charge of this vessel it was his duty to call the attention of the pilot from time to time to what he believed to be an error of judgment, and he is not entitled to fold his arms and say, "I have no responsibility towards the pilot in charge of my ship."⁵⁸

The master and pilot were held equally responsible for the damage in this case. The pilot was liable for steering the vessel into a collision. The master was liable for failing to advise the pilot of imminent danger.

It became increasingly obvious for the need for abolition of the defence of compulsory pilotage. Hardship was frequently inflicted on innocent persons whose property was damaged.⁵⁹ R G Marsden added fuel to the fire in 1887, prior to the 1894 *Merchant Shipping Act*:

In these days, when so many wild proposals are being made for legislative protection of life at sea, it would be well to consider whether the wholesome doctrine of *respondeat superior* might not be applied with advantage to the shipowner who under cover of compulsory pilotage permits his ship to be carelessly navigated by a pilot whom he is at liberty at any moment to supersede.⁶⁰

⁵⁰ For an in-depth analysis of the development of pilots' limitation of liability and the defence of compulsory pilotage, see Richard Douglas, et al, *Douglas & Geen on the Law of Harbours, Coasts and Pilotage* (LLP, 5th ed, 1997) 249-62.

⁵¹ *Ibid* 299.

⁵² There have been three: *Pilotage Act 1913* (UK), *Pilotage Act 1983* (UK), and the current *Pilotage Act 1987* (UK).

⁵³ Douglas et al, above n 50, 293.

⁵⁴ *Ibid*.

⁵⁵ (1860) 167 ER 16.

⁵⁶ *Ibid* 17.

⁵⁷ *The Tactician* [1907] P 244.

⁵⁸ *Ibid* 247-8 (Bargrave Deane J).

⁵⁹ Douglas et al, above n 50, 293.

⁶⁰ R G Marsden, 'Compulsory Pilotage' (1887) 13 *Law Quarterly Review* 51, 62.

He concluded by indicating that a speedier abolition of the legal defence of compulsory pilotage would be 'doubly beneficial'.⁶¹ Yet, Marsden's comments fell on deaf ears, and the legal defence of compulsory pilotage was not abolished until the *Pilotage Acts*.

3.2 Pilotage under the Pilotage Acts

Australian legislation was effectively adopted from the Imperial Statutes. As discussion above provides a detailed analysis of the Australian position and the history of pilotage laws, it is only necessary to briefly address the scope of the *Pilotage Acts*.

The defence of compulsory pilotage was abolished with the *Pilotage Act 1913* (UK).⁶² However, the Act shed no further light on the legal relationship between the master and the pilot.⁶³ Apart from abolishing the defence of compulsory pilotage, the *Pilotage Acts* of 1913 and 1983 primarily dealt with the licensing and employment of pilots.⁶⁴

3.2.1 Pilotage Today: *Pilotage Act 1987* (UK) and *Merchant Shipping Act 1995* (UK)

The Act of Pilotage

The *Merchant Shipping Act 1995* (UK) completes the definition gap in the *Pilotage Act*.⁶⁵ The *Pilotage Act 1987* (UK) and *Merchant Shipping Act 1995* (UK) work together to form the basis of the United Kingdom's pilotage regime.⁶⁶ A pilot is defined as 'any person not belonging to a ship who has the conduct of a ship.'⁶⁷ This is identical to the Australian Commonwealth definition.⁶⁸ The *Pilotage Act* leaves open to 'competent harbour authorities' to determine whether pilotage is compulsory in their ports.⁶⁹ However, compulsory pilotage only applies to trading vessels over 20 metres in length, and fishing vessels over 47.5 metres.⁷⁰

Limitation of Liability

A pilot's liability is not absolutely excluded under the *Pilotage Act 1987*. However, s 22 limits liability to £1000.⁷¹ Although a miniscule amount, it is a large improvement on the 1983 *Pilotage Act*, which limited liability to £100.⁷²

4 The Plot Across The Pacific: Canada and United States

Now that it is clear Australia's pilotage regime is effectively a creature of Imperial Statute, it is illuminating to move focus across the Pacific and consider pilotage in Canada and the United States.

4.1 Canada

Canada, being a Commonwealth country, has followed the United Kingdom, and enacted a modified version of the UK *Pilotage Act 1987*. All matters pertaining to pilotage in Canada are governed by the *Pilotage Act*, RSC 1985, c P-14.

4.1.1 Commencement of Pilotage in Canadian Law

The Canadian *Pilotage Act* defines a pilot as 'any person who does not belong to a ship and who has the conduct of it.'⁷³ This definition is consistent with both Australian and United Kingdom legislation in utilising the word

⁶¹ Ibid.

⁶² Christopher Hill, *Maritime Law* (Lloyd's of London, 3rd ed, 1989) 383.

⁶³ Douglas et al, above n 50, 256.

⁶⁴ Ibid 255, 259.

⁶⁵ Although not clearly defined, the master-pilot relationship is covered in the *Merchant Shipping Act 1995* (UK) s 137.

⁶⁶ Douglas et al, above n 50, 263.

⁶⁷ *Pilotage Act 1987* (UK) s 31(1); *Merchant Shipping Act 1995* (UK) s 137(9).

⁶⁸ *Navigation Act 1912* (Cth) s 6.

⁶⁹ *Pilotage Act 1987* (UK) s 7(1).

⁷⁰ *Pilotage Act 1987* (UK) s 7(3).

⁷¹ *Pilotage Act 1987* (UK) s 22(2).

⁷² *Pilotage Act 1983* (UK) s 42.

⁷³ *Pilotage Act*, RSC 1985 c P-14, s 1.1.

'conduct'. It is likely to have the same effect in Canadian law as it does in Australia. The Canadian Court of Appeal provided assistance in the case of *The Guy Mannering*.⁷⁴ Two vessels collided in the Suez Canal. The ship responsible for the collision had a compulsory pilot on board. Lord Justice Brett indicated in his judgement that the United Kingdom Acts fail to adequately define the pilot's role.⁷⁵ However, the act of pilotage concerns navigation - an act that requires the pilot to be on board the vessel:

The statutes as to merchant shipping do not accurately define the duty of a pilot; but it is plain that he is to conduct the navigation. On the one hand he has no power to place the crew at particular posts in the ship or to regulate the discipline: on the other hand he is to regulate the course of the ship through the water; he is taken on board in order to control the management of her for this purpose.⁷⁶

This analysis of the role of a pilot is still considered good law in Canada.⁷⁷

4.1.2 Limitation of Liability for Pilots in Canadian Law

The Canadian *Pilotage Act* does not completely exclude pilots from liability for negligence.⁷⁸ However, the liability is substantially limited.⁷⁹ The effect of this is that it would be pointless for a shipowner to prosecute the pilot personally.⁸⁰ To add to the shipowner's predicament, both the Crown and Harbour Authorities are exempt from liability for pilots' negligence.⁸¹

Like Australia and the United Kingdom, the master and owner remain liable for damage, regardless of the vessel being under pilotage.⁸² Justice Dube put the Canadian position in perspective in *The Irish Stardust*,⁸³ stating in obiter:

At first blush it does appear to be harsh for owners of a ship to be liable for damage occurring to their ship while she is being navigated by a pilot who has been imposed upon them and who is not one of their servants. But the role of the pilot is to provide local knowledge about areas foreign to the master of the ship; he does not relieve the master of his responsibilities.⁸⁴

Compared with the United States, Canada's pilotage regime (that of a uniform statute) recognises pilotage as distinct, unique maritime operation. By contrast, pilotage in the US today is primarily based on a contractual relationship.⁸⁵

4.2 The United States

4.2.1 The Act of Pilotage

Unlike both Australian and United Kingdom legislation, which produce difficulties over 'conduct', American law on pilotage is derived from a mixture of both statute and case law. As a result, any person who directs the navigation of the vessel can be said to be 'piloting' the vessel.⁸⁶ That being said, the pilot's role in American law is relatively consistent with other common law jurisdictions:

The pilot's responsibilities are broad and he supersedes the master for the time being in the command and navigation of the ship and his orders must be obeyed in all matters connected with navigation.⁸⁷

⁷⁴ (1882) LR 7 PD 132.

⁷⁵ *Ibid* 134 (Brett LJ).

⁷⁶ *Ibid*.

⁷⁷ Edgar Gold et al, *Maritime Law* (Irwin Law, 2003) 565.

⁷⁸ *Pilotage Act*, RSC 1985 c P-14, s 40(1).

⁷⁹ Section 40(1) limits the pilot's liability to \$1000.

⁸⁰ Gold et al, above n 77, 570.

⁸¹ *Pilotage Act*, RSC 1985 c P-14, s 39.

⁸² *Pilotage Act*, RSC 1985 c P-14, s 41.

⁸³ [1977] 1 Lloyd's Rep 195.

⁸⁴ *Ibid* 205 (Dube J).

⁸⁵ See *Logue Stevedoring Corp v The Dalzellance* (1952) 198 F 2d 369 where the US Court of Appeal had to decide the extent of the shipowner's liability where there was a contract of pilotage. Similar principles were considered as recently as 2001 in *Enterprise Ship Co v Norfolk Southern Railway Company* (2001) 2001 AMC 2602.

⁸⁶ Guy C Stephenson, 'A Pilot is a Pilot - Vessel Owner's Responsibilities for Intervention and Personal Injury' (1996) 70 *Tulane Law Review* 633, 634.

⁸⁷ *Avondale Industries Inc v International Marine Carriers* (1994) 15 F.3d 489, 493 (Parker DJ).

Pilotage is not compulsory in every US port. From the first Congress in 1789, regulation of pilots was completely left to State regulation.⁸⁸ It was not until 1851 that this was challenged, in the landmark case of *Cooley v The Board of Wardens of the Port of Philadelphia*.⁸⁹ The efforts of *Cooley* proved pointless, nonetheless, and pilotage regulation was left in the hands of the States.⁹⁰ However, this was made difficult to enforce, as most pilots required a federal license.⁹¹

This history has had significant legal effect on the liability of pilots in American law.

4.2.2 Liability of Pilots

The United States has rejected the UK (and Australian) principle of exclusion from liability for all marine pilots.⁹² American law has yet to recognise pilotage as a unique maritime occupation independent of a vessel's officers and crew.⁹³

The complex and troubling aspect of America's pilotage regime is compulsory pilotage, in particular its role as a liability shifting device.⁹⁴ Where a compulsory pilot is negligent in navigating a vessel, the shipowner or master will not be liable. This defence was primarily based on a principal/agent relationship:

[I]f it is compulsive upon the master to take a pilot, and, *a fortiori*, if he is bound to do so under a penalty, then, and in such case, neither he nor the owner will be liable for injuries occasioned by the negligence of the pilot; for in such a case the pilot cannot be deemed properly the servant of the master or the owner, but is forced upon them, and the maxim, *Qui facit per alium facit per se*, does not apply.⁹⁵

The focus in American law is on the distinction between an *in rem* and *in personam* relationship. Although the shipowner was free from liability (*in personam*), the ship was liable (*in rem*) - making the shipowner responsible with regards to their property, but not personally.⁹⁶ Where liability gets complicated is that in many instances, American pilotage is subject to a contract. A number of cases illustrate that the contractual relationship determines liability.

In *Logue Stevedoring*,⁹⁷ the US Court of Appeal considered a contract for pilotage in light of a docking pilot. Although the pilot was engaged voluntarily, Chief Judge Swan applied the same principles to compulsory pilotage, where he indicated in obiter that:

Even in the case of a compulsory pilot, the ship is liable *in rem* for a collision resulting from the pilot's fault. *A fortiori* should this be true when the pilot is voluntarily employed as in the case at bar.⁹⁸

Chief Judge Swan relied heavily on the 1932 case of *Sun Oil*,⁹⁹ which cemented the compulsory pilotage defence in American law.¹⁰⁰

Avondale Industries concerned liability for damage to a dry dock.¹⁰¹ International Marine Carriers (IMC), the defendant shipowners, asserted that the Master and crew of their vessel were not responsible for the actions of the pilot. The pilot was subcontracted by Avondale, and because of that contractual relationship, Avondale was liable for the damage. Avondale argued in reply that the pilot was an independent contractor, and as a result, they were entitled to recover damages from IMC. The Fifth Circuit Court of Appeals held that the pilot was Avondale's subcontractor, and this fact precluded them from recovering damages from IMC.¹⁰² Avondale and

⁸⁸ Robert M Jarvis, 'Confusion in the Harbor: Compulsory Pilots Collide with the Motorship *FSIA*' (1985) 6 *Northwestern Journal of International Law and Business* 1010, 1015.

⁸⁹ (1851) 53 U.S. 299.

⁹⁰ *Ibid* 315 (Curtis J).

⁹¹ Jarvis, above n 88, 1017.

⁹² Ormonde Hunter, 'Liability of Vessel for Negligent Act of Compulsory Pilot' (1977) 8 *Journal of Maritime Law and Commerce* 87, 88.

⁹³ Stephenson, above n 86, 634.

⁹⁴ Dana M Shelton, 'The Fifth Circuit Contracts the Compulsory Pilot Defense and Expands the Vessel Master's Duty to Monitor Compulsory Pilots: *Avondale Industries v International Marine Carriers*' (1995) 19 *Tulane Maritime Law Journal* 485, 486.

⁹⁵ *Homer Ramsdell Transportation Company v La Compagnie Generale Transatlantique* (1901) 182 U.S. 406, 416 (Gray J).

⁹⁶ Jarvis, above n 88, 1018.

⁹⁷ *Logue Stevedoring Corp v The Dalzellance* (1952) 198 F 2d 369.

⁹⁸ *Ibid* 371 (Swan CJ).

⁹⁹ *Sun Oil Co v Dalzell Towing Co* (1932) 287 US 291.

¹⁰⁰ Jarvis, above n 88, 1018.

¹⁰¹ *Avondale Industries Inc v International Marine Carriers* (1994) 15 F 3d 489, 495 (Parker DJ).

¹⁰² *Ibid*.

the government were held equally responsible under the contractual arrangement. The Court considered the presence of the contract sufficient to render general maritime law principles irrelevant:

Having found that the contract controls the relationship of the parties in so far as responsibility for the negligence of Avondale's subcontractors, and the master and agents of the United States is concerned, we need not reach the question of how the United States' claim would be decided under general maritime law.¹⁰³

The end result was proportionate liability between Avondale and the US Government to indemnify IMC for its loss.

In *Enterprise Ship Co v Norfolk Southern Railway*,¹⁰⁴ the Virginia District Court had to consider a 'borrowed servant clause'; the pilot became a 'borrowed servant' of the shipowner whilst piloting the vessel.¹⁰⁵ Pilotage in this case, too, was a voluntary arrangement. The shipowner could not hold the pilot or their employer liable for any damage resulting from the pilot's negligence.¹⁰⁶

Because American law is yet to recognise pilotage as a unique maritime operation, liability for pilotage is often left to a construction of contract, and not general maritime law. Further, there are contentious opinions by American academics about the difficulties with a compulsory pilotage regime. One academic even goes so far as to put Australia's pilotage regime in the 'too hard basket':

Although Australia has been successful in having a compulsory pilotage regime accepted, this regime only applies within Australian internal waters. As these waters became "internal" following the drawing of a straight baseline, however, the right of innocent passage remains in place. Australia's experiences with the compulsory pilotage regime demonstrates the difficulty other states will face if they wish to implement such a regime.¹⁰⁷

Perhaps the American courts should consider identifying pilotage as a distinct, unique maritime operation, supported by a statutory framework of liability. The better position for international trading vessels to be in is a uniform pilotage regime, rather than relying on the intricacies of contractual arrangements. Limiting pilotage to a construction of contract is fraught with complications, especially for international trading vessels.¹⁰⁸

5 The Need for Change?

So far, a number of important questions have surfaced, identifying the difficulties with a traditional approach to pilotage. The Courts and governments of two hundred years ago were not confronted with advances in technology such as radio or Vessel Traffic Service (VTS) systems; all giving rise to a pilot effectively being able to control a vessel from on-shore. In the introduction to this paper, the following scenario was introduced. A vessel is heading into a port with compulsory pilotage. The pilot provides an on-shore direction to the master. The master of the vessel follows that direction, and on entry into port, the vessel damages the wharf. Who has broken the law? The Master, for entering port without a compulsory pilot or the pilot, for providing a direction outside of pilotage? At the heart of the problem is what acts constitutes compulsory pilotage and in particular, when the act of pilotage commences.

5.1 Difficulties with the Concept of Compulsory Pilotage

As already discussed, the issue is when pilotage actually commences. Of primary concern is not having a clear definition of 'conduct'. This forms the basis of a pilot's liability for damage caused by a vessel. Pilotage in Australian ports is compulsory. The vessel requires (demands) the continuous availability of dependable pilots at every port. In the absence of such an available pilot the vessel would not make the port.¹⁰⁹

¹⁰³ Ibid.

¹⁰⁴ *Enterprise Ship Co v Norfolk Southern Railway Company* (2001) 2001 AMC 2602.

¹⁰⁵ Ibid 2607 (Jackson DJ).

¹⁰⁶ Ibid.

¹⁰⁷ Donald R Rothwell, 'Navigational Rights and Freedoms in the Asia Pacific following Entry into Force of the Law of the Sea Convention' (1995) 35 *Virginia Journal of International Law* 587, 606.

¹⁰⁸ Jarvis, above n 88, 1019.

¹⁰⁹ Hunter, above n 92, 92.

With compulsory pilotage, a master has no choice but to take on a pilot. Historically, in those circumstances, the master would not be held responsible for the damage.¹¹⁰ Because the compulsory pilotage defence no longer applies in Australia, the United Kingdom or Canada, and pilots are not likely to be able to pay damages in the event of negligence, a shipowner's focus turns to the harbour authority.¹¹¹ However, the law also excludes harbour authorities from liability. Where can the shipowner then go?

The Federal Court of Australia was confronted with this difficulty in *Amarantos Shipping*.¹¹² The owners (Amarantos Shipping) argued that State legislation regarding liability for compulsory pilotage was ineffective.¹¹³ A vessel owned by Amarantos struck a jetty in South Australia, while controlled by a compulsory pilot. Amarantos argued the provisions under the *Harbors and Navigation Act*¹¹⁴ were inconsistent with s 410B of the Commonwealth *Navigation Act*, and therefore sought to invoke s 109 of the *Constitution*. This would make the State law obsolete to the extent of the inconsistency with the *Navigation Act*.

Chief Justice Doyle made it very clear that strict liability for negligence of pilots is completely consistent:

The reference to compulsory pilotage does no more than make it clear that the intention to impose strict liability applies in that situation. That, in any event, is the effect of the application of s 410B. If the owner of a vessel under voluntary pilotage is subject to strict liability for damage done by the vessel, then s 410B requires that the owner will be liable on the same basis if the vessel is under compulsory pilotage. To the extent that the State law in question attempts to regulate that situation, its provisions are unnecessary and can, to that extent, be read down. For those reasons I conclude that the State laws in question are not inconsistent with s 410B.¹¹⁵

5.2 Pilot's Liability for Acts while not on Board

The logic of pilotage works like an 'if then' statement. If pilotage concerns the conduct of navigation,¹¹⁶ which cannot be achieved unless the pilot is *navigating*, then pilotage does not commence until the pilot boards the vessel. Christopher Hill comments that, 'what a pilot is not, purely and simply, is an adviser'.¹¹⁷ Such a description is both inconsistent with the statutory definition of a pilot, and the practical concept of a pilot.¹¹⁸ The pilot is a 'stranger to the ship he has conduct of'.¹¹⁹

5.3 What Needs to Happen

The discussion so far has attempted to flesh out the grey areas of Australia's pilotage regime. What has come to light is the increasing need for a re-assessment of Australia's pilotage regime, particularly to clarify some crucial definitions. The lack of uniform structure to State legislation results in mixed definitions of the pilot's role.

One starting place is to identify and adopt one clear, precise definition for the act of pilotage. The mixture of 'conduct',¹²⁰ 'command'¹²¹ and 'control'¹²² has clouded the understanding of when pilotage commences. Australia would also be open to having one uniform pilotage regime which covers State inconsistencies. However, the adoption of such a regime would need to be done by agreement between the States.¹²³ A uniform pilotage regime is likely to have a positive effect on Australia's international trade.

There is a further question: should the statutory rules regarding limitation of liability for pilots consider acts outside of pilotage? Unfortunately, there is no guidance in case law or statute that even gets close to an answer.

¹¹⁰ *Townsville Harbour Board v Scottish Shire Line Ltd* (1914) 18 CLR 306, 316 (Griffith CJ).

¹¹¹ Justine Wene and Jeffrey Hardy, 'Apportioning Blame: The Liability of Port Authorities in Light of the *Sea Empress* Incident' (2004) 18 *MLAANZ Journal* 170, 172.

¹¹² *Amarantos Shipping Co Ltd v State of South Australia and Others* (2004) 183 FLR 98.

¹¹³ *Ibid* 101.

¹¹⁴ *Harbors and Navigation Act 1993* (SA).

¹¹⁵ *Amarantos Shipping Co Ltd v State of South Australia and Others* (2004) 183 FLR 98, 115 (Doyle CJ).

¹¹⁶ *Marine Safety Act 1998* (NSW) s 74(2).

¹¹⁷ Hill, above n 62, 376.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*.

¹²⁰ *Navigation Act 1912* (Cth) s 6.

¹²¹ *Port Authorities Act 1999* (WA) s 3(1).

¹²² *Port Authorities Act 1999* (WA) s 3(1).

¹²³ There is no express Constitutional power for the Commonwealth to make such a change to Australia's pilotage laws. Also, such inconsistencies between the various states would need to be modified (or replaced altogether) to reflect a uniform regime.

5.4 Ramifications of Changes to Australia's Pilotage Regime

Consequences of change to pilotage regulations in Australia lie mainly in expense. Removing the limitation of liability from pilots has the likely effect of increasing pilotage fees, which are already quite high.¹²⁴ However, this paper has highlighted the need for a re-assessment of the current pilotage regime, particularly in defining important (and often ambiguous) terms. With advances in technology and the increasing use of VTS systems,¹²⁵ it is becoming increasingly important to identify the intricacies of the master/pilot relationship.

Consider the effect of clarifying the meaning of the word 'conduct'. Realistically, it will only set in stone the general assumption that a pilot is only a pilot when he steps on board the vessel. The domino effect is increased liability on the part of the shipowner and/or master when confronted with a pilot providing an on-shore direction.¹²⁶

6 Conclusion: The problems surface

This paper has identified the problems facing pilots and mariners alike by comparing Australia's pilotage regime with that of the United Kingdom, Canada and the United States. Although applied differently, each jurisdiction fails to adequately identify when pilotage actually commences. The result raises the introductory questions at the beginning of this paper. It would appear from the ambiguous definitions that Ports Australia is warranted in asking these questions.¹²⁷

When does pilotage actually commence? The general assumption is when the pilot boards the vessel. A pilot provides an on-shore direction to a Master. The Master follows the direction. A wharf is damaged in a port subject to compulsory pilotage. Who is the liable party? A pilot is excluded from liability, so the master or shipowner bears the cost of damage, being in control of the vessel at the time. Should the statutory rules regarding limitation of liability for pilots be changed to hold negligent compulsory pilots individually responsible for actions outside of pilotage? Lack of authoritative material makes the latter question difficult to answer, especially without a precise definition of the master/pilot relationship. These are all matters for further exploration. Perhaps it is the time to give a two hundred year tradition a facelift.

¹²⁴ See, eg, *Port Authorities Regulations 2001* (WA) sch 2.

¹²⁵ Rothwell, above n 107, 600.

¹²⁶ Entering a compulsory pilotage area without a pilot is an offence in most states in Australia. See, e.g. *Port Authorities Act 1999* (WA) s 97(2).

¹²⁷ Email from Susan-Fryda Blackwell, above n 2.