Passengers’ duties and the marine safety (domestic commercial vessel) national law on Queensland’s internal waters

Introduction

On 23 February 2014 a Brisbane man deliberately jumped from a moving Brisbane CityCat into the Brisbane River and swam ashore. He was identified by the Queensland Water Police, and subsequently the Australian Maritime Safety Authority (AMSA), in its capacity as the National Regulator for the Marine Safety (Domestic Commercial Vessel) National Law (the National Law), issued the man with an infringement notice for breaching his duty as a passenger of a commercial vessel, pursuant to section 22(4) of the National Law. The fine was a stiff $2040. This was the first infringement notice issued by AMSA for this offence following the commencement of the National Law on 1 July 2013.1 Similarly, on the evening of 29 April 2014 also on the Brisbane River, seven university students disembarked from a commercial cruise boat by jumping overboard and swimming to the bank near the University of Queensland. On 19 May 2014 all seven men were issued with infringement notices for breaching section 22(4) of the National Law.2

A similar offence did not exist in Queensland before the enactment of the National Law. The National Law as it applies in Queensland now operates in conjunction with the Transport Operation (Marine Safety) Act 1994 (Qld) (TOMSA), except where TOMSA is inconsistent with the National Law, whereupon the National Law prevails, pursuant to the Australian Constitution.3 This article raises questions about the validity of the National Law as it applies to inland waters in Queensland.
A new duty for passengers

The National Law regulates all domestic commercial vessels under one regulatory framework throughout the Commonwealth, the States and the Northern Territory with respect to the safe design, construction, operation and equipping of domestic commercial vessels. Notably, section 21 imposes two duties upon passengers of vessels regulated by the National Law. The first duty requires the passenger to take reasonable care for his or her safety. The second duty requires the passenger to comply with any reasonable and lawful directions of the master or a member of the crew of the vessel, as long as the passenger has been advised previously that non-compliance with that direction may constitute an offence. A passenger who does an act, or omits to do an act that breaches either of these two duties, commits an offence.

There is no equivalent offence in Queensland's marine safety regime. TOMSA imposes many general obligations upon masters, crew and owners of ships to operate the ship safely, and for passengers to obey their directions, but it imposes no general duty upon passengers to take care for their own safety. This is why jumping overboard whilst the vessel is underway is not an offence under TOMSA. Controversially though, a passenger who does jump overboard from a ship, whilst not committing an offence, does cause a "marine incident", for which TOMSA imposes mandatory reporting duties upon the operator. A "marine incident" is a defined term in TOMSA, and includes, amongst other things, a collision or a stranding, and "the loss of a person from a ship". When a marine incident occurs TOMSA imposes immediate statutory duties upon the master and crew of the vessel to assess the situation and report the marine incident to a shipping inspector.

The creation of this positive duty for passengers pursuant to the National Law may provide some comfort to commercial operators in the knowledge that unruly passengers are now personally liable for leaving the vessel other than down the gangway. It should be noted though that, in Queensland, masters always had express powers to detain or to remove any passenger from their vessel, or prevent disruptive passengers from boarding, if appropriate to do so and in the interests of the safe operation of the vessel. In addition, a master of a vessel had powers to arrest a person in certain circumstances, before handing them over to the police. Notably section 6(2)(xii) of the National Law expressly states that the National Law does not displace any State laws that apply to the management of passengers and so those State powers noted above remain in force.
What is the constitutional reach of the national law?

In August 2011 an Intergovernmental Agreement (IGA) on Commercial Vessel Safety Reform was signed by all Australian jurisdictions with the aim of regulating all domestic commercial vessels under one regulatory umbrella. Before 1 July 2013 responsibility for domestic commercial vessels was shared by the Commonwealth, each State and the Territories, all of whom had their own government regulator. Foreign commercial vessels were regulated by the Commonwealth’s Navigation Act 1912, now replaced by the Navigation Act 2012. The National Law took effect from 1 July 2013.

The Commonwealth legislated to the limit of its Constitutional powers with respect to domestic commercial vessels and section 5 expressly states the constitutional reach of the National Law. The Constitutional powers relied on by the Commonwealth for the legislation are derived from the Commonwealth’s power to legislate with respect to (1) Australia’s territorial sea from the historical baseline or low water mark\(^\text{13}\), (2) its maritime powers\(^\text{14}\), (3) its corporations power\(^\text{15}\), and (4) the external affairs power.\(^\text{16}\) It was agreed in the IGA and expected that the States and the Northern Territory would pass application legislation to cover any gaps between the Commonwealth’s powers and the powers of the States and Territories.\(^\text{17}\)

The Commonwealth’s powers for the purposes of the National Law do not extend to the regulation of non-incorporated business entities that operate vessels exclusively within the waters on the landward side of the historical base lines (such as in Hervey Bay or Moreton Bay in Queensland), or within the internal waters of a State (such as in harbours and rivers). For example, a cross-river ferry that is owned by a partnership or a scallop trawler that is owned by a family business in Hervey Bay may not be regulated by the National Law if they operated only in those waters.

Not all States have passed mirroring legislation though. Whilst New South Wales has passed the Marine Safety Amendment (Domestic Commercial Vessel National Law) Application Act 2012, Victoria has passed the Marine (Domestic Commercial Vessel National Law Application) Act 2013, South Australia has passed the Marine Safety (Domestic Commercial Vessel) National Law (Application) Act 2013 and Tasmania has passed the Marine Safety (Domestic Commercial Vessel National Law Application) Act 2013. Western Australia and Queensland have not passed similar legislation. In Queensland, at least, this appears to have been for political reasons, rather than based upon legal advice.\(^\text{18}\) It appears though that the government regulators in Western
Australia envisage that the National Law applies to domestic commercial vessels that operate in their waterways.\textsuperscript{19}

**The party boat and Brisbane CityCats**

In returning to the Queensland men who have been fined, if the matter was contested the Commonwealth would have to prove that the National Law actually applied in these two cases. Without all of the relevant facts it is impossible to advance a full analysis, but some provisional comments are appropriate. The Commonwealth (through AMSA) would need to satisfy the court that the National Law (as passed by the Commonwealth) was valid with respect to the regulation of the behaviour of passengers on board domestic commercial vessels operating in the Brisbane River, Queensland. Had these men jumped overboard at sea then the Commonwealth would undoubtedly have jurisdiction, pursuant to the external affairs power.\textsuperscript{20}

It was established in New South Wales v Commonwealth (the Sea and Submerged Lands Case)\textsuperscript{21} that the Commonwealth had jurisdiction from the low water mark or historic boundaries of the States at federation. Given that these acts occurred in the internal waters of Queensland, it may be that the Commonwealth’s external affairs power\textsuperscript{22} does not provide the necessary validity for the National Law. Similarly, the external affairs power, which gives effect to Australia’s obligations with respect to international conventions,\textsuperscript{23} may validate the National Law, although the author is unaware of any provisions in international conventions that cover trivial personal acts such as occurred here. Notably, section 211 of TOMSA already gave local effect to “any treaty, convention or international agreement or document about ships”.\textsuperscript{24} So there remains a State power for this purpose, even if the Commonwealth’s powers do not apply. Likewise, the admiralty and maritime jurisdiction powers\textsuperscript{25} conferred on the High Court could not be characterised as granting the Commonwealth the necessary authority in this situation either. However, the corporations power\textsuperscript{26} may give the Commonwealth the necessary authority, as both vessels were owned by constitutional corporations.\textsuperscript{27}

On the assumption that this brief analysis of the appropriate sources of the Commonwealth’s power is correct, it would appear that the Commonwealth’s strongest ground would be to argue that section 51(xx) of the Constitution\textsuperscript{28} gave it the necessary source of power to have these passengers fined. Whether the duty imposed upon passengers pursuant to section 21 of the National Law and the offence created pursuant to section 22 of the National Law could be characterised as a law with respect to trading or financial corporations is debatable. As the majority judgment of the High Court of
Australia said in Williams (No. 2), the law will be invalid if the law,

is not one authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation [and] it is not one regulating the conduct of those through whom a constitutional corporation acts or those whose conduct is capable of affecting its activities, functions, relationships or business.\textsuperscript{29}

So, at its broadest, it remains to be seen how the corporations power can be relied upon to regulate the behaviour of customers of constitutional corporations or in this case the passengers aboard these vessels.

Fines and enforcement

As a side note, until Queensland passes mirroring legislation enacting the National Law or amends TOMSA, there remains concurrent, but not necessarily inconsistent marine safety legislation with respect to domestic commercial vessels operating in Queensland’s internal waters and offshore from Queensland. It is a matter of policy for the Queensland Minister of Transport and Main Roads whether the relevant marine safety inspectors enforce, to the extent of the State powers, the provisions of TOMSA or that of the National Law.

Commercial operators may well feel somewhat affronted by the significant increase in the value of infringement notices that may be issued under the National Law as compared with infringement notices that may be issued under TOMSA. For example, if the master of a fishing vessel is found to be operating without an EPIRB (safety equipment) on the vessel the master would be fined $220 under TOMSA.\textsuperscript{30} However, the identical offending conduct also breaches section 18(4) of the National Law and the fine in that case is $2040!\textsuperscript{31}

Conclusion

The imposition of a duty upon passengers to take care for their own safety is a welcome development as it equally distributes responsibility for the passenger’s safety between the passengers themselves and the master of a domestic commercial vessel. In Queensland, the absence of a provision creating this positive obligation upon passengers pursuant to TOMSA produced unfair situations whereby a master would be held
accountable for the disembarkation of certain unruly passengers, but not the passengers themselves. However, the continued absence of an application Act by the Queensland Parliament leaves doubt as to the validity of the National Law with respect to passengers’ duties whilst upon certain vessels operating in the internal waters of Queensland.

Significantly though, in these cases from Brisbane, had the men jumped into the water from recreational vessels they would not have committed an offence. No particular circumstance was identified by the enforcement officers or prosecuting agency that identified the unsafe nature of the conduct. It was simply stated that it was unsafe, without providing particulars.

These two cases illustrated two things. First, they illustrate a deficiency in TOMSA with respect to passengers deliberately causing a marine incident, yet not being liable for prosecution. Second, and more importantly, the cases raise the issue that if there is a possibility that a Commonwealth law is not a valid one when applied in a jurisdiction where historically the States have regulated, then the law should not be enforced against individuals who do not have the financial resources to take it to the High Court to test it.

3 Section 6 of the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (Cth), and section 109 of the Constitution of the Commonwealth of Australia.
4 Section 3(a) of the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (Cth).
5 Section 43 of the Transport Operations (Marine Safety) Act 1994 (Qld).
6 The Transport Operations (Marine Safety) Regulation 2004 (Qld) imposes some specific obligations on passengers to wear lifejackets whilst on a personal watercraft or when crossing coastal bars.
7 See section 123(1) of the Transport Operations (Marine Safety) Act 1994 (Qld).
8 Section 123(1)(a) of the Transport Operations (Marine Safety) Act 1994 (Qld).
9 Section 125 of the Transport Operations (Marine Safety) Act 1994 (Qld).
10 Section 188 of the Transport Operations (Marine Safety) Act 1994 (Qld).
12 Section 6(2)(xii) of the Marine Safety (Domestic Commercial Vessel) National Law Act
2012 (Cth).

13 Section 51(xxix) of the Constitution of Australia (the external affairs power), as decided by the High Court in the matter of New South Wales v Commonwealth (1975) 135 CLR 337.

14 Section 76 of the Constitution of Australia.

15 Section 51(xx) of the Constitution of Australia. This does not extend to businesses operating within the confines of a single State.

16 Section 51(xxix) of the Constitution of Australia.

17 Paragraph 46(b) of the Intergovernmental Agreement on Commercial vessel Safety Reform, Council of Australian Governments, 19 August 2011.

18 On 7 May 2013 the Queensland Minister for Transport and Main Roads, the Honourable Scott Emerson issued a press release opposing the commencement of these reforms as it would cause a significant increase in the costs of registration of commercial vessels in Queensland. The Minister noted that he would not endorse the reforms until more details concerning registration fees had been released, http://statements.qld.gov.au/Statement/2013/5/7/commercial-boaties-face-extra-costs-under-gillard (1 September 2014)


20 Section 51(xxix) of the Constitution of Australia.

21 (1975) 135 CLR 337.

22 Section 51 (xxix) of the Constitution of Australia.

23 Section 51(xxix) of the Constitution of Australia.

24 Section 211 of the Transport Operations (Marine Safety) Act 1994 (Qld).

25 Section 76 of the Constitution of Australia.

26 Section 51(xx) of the Constitution of Australia.

27 The CityCat is operated by Brisbane City Council. The council is incorporated pursuant to section 10 of the City of Brisbane Act 2010 (Qld). The students jumped from the Lady Brisbane, which, according to the operator’s website is owned by Brisbane Cruises Pty Ltd – which is registered with ASIC (ACN 088 276 742).

28 The corporations power.

29 Williams v Cth [2014] HCA 23 at [50] per French CJ, Hayne, Keifel, Bell and Keane JJ.

30 Section 44(1) of the Transport Operations (Marine Safety) Act 1994 (Qld) makes it an offence to operate a ship without the regulated safety equipment on board the ship. Section 9A of the Transport Operations (Marine Safety) Regulation 2004 prescribes EPIRBs as prescribed safety equipment. Schedule 3 of the State Penalties Enforcement Regulation 2000 prescribes the fine as 2 penalty units. One penalty unit is $110 pursuant to section 5 of the Penalties and Sentences Act 1992 (Qld).
Schedule 1, division 1 of Marine Order 501 prescribes the fine as 12 penalty units. Section 4AA(1) of the Crimes Act 1914 (Cth) prescribes a penalty unit as $170.