Confronting British Bullies: Shipping Law Reform in Australia and New Zealand, 1888–1907

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This article examines shipping law reforms enacted in 1903 and 1904 by New Zealand and Australia, respectively, which pushed against the interests of British shipowners, who preferred to flex their commercial muscle by excluding as much liability as possible in their contracts of carriage. Spurred on by chambers of commerce cooperating across the Tasman, the colonial parliaments sought a fairer deal for their exporters by adopting regimes on bills of lading based on the United States' Harter Act 1893*. The Australasian legislation received a hostile reception in London and was of limited success in practice, but it nonetheless set in motion a chain of events that led to a better outcome for exporting nations around the world.*

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In 1901, Benjamin Cowderoy, former President of the Melbourne Chamber of Commerce, looked back on fifty years' work and concluded that:

> The controversy between shippers and shipowners … upon the subject of the form of a bill of lading which would be acceptable by shipowners, and regarded as equitable on the part of shippers and consignees, has given more disquietude among commercial bodies, and extended itself over a more lengthened period without a satisfactory solution being arrived at, than any other single question that has occupied the attention of Chambers of Commerce during the last half-century.[1]

1 B. Cowderoy, *Melbourne's Commercial Jubilee: Notes from the Records of Fifty Years' Work of the Melbourne Chamber of Commerce* (Melbourne: Mason, Firth & M'Cutcheon, 1901), 104.

At first blush, a dispute over bill of lading terms, no matter how long-running, is unlikely to pique the interest of the general reader.[2] Fortunately, the legislation New Zealand and Australia enacted in 1903 and 1904, respectively, following an American precedent of 1893, has more to tell us than whether a shipowner of the time was liable for pilferage or refrigerated hold malfunctions.[3]

This article provides the first in-depth exploration of these reforms, which lie at the intersection of Australia and New Zealand's legal, economic and maritime histories. Cutting through the dry shipping terminology, it tells a story of two increasingly confident dominions standing up to British shipowners' unfair market practices. Against the background of improving navigational and refrigeration technology, the Australasian neighbours were laying the foundations for commercial laws and trading terms that better suited two geographically remote countries with growing agricultural exports. Although their efforts would be overshadowed by international developments in the decades that followed, this largely unexamined period of legal development provides an insight into the priorities and approach to lawmaking adopted by these dominions in the early years of the twentieth century.[4]

From the perspective of maritime history, this article provides an alternative angle to more widely discussed examples of Australasian dependence on, and disputes with, British shipowning interests in the decades leading up to World War I. For those interested in the law of empire, it adds to the growing body of literature that emphasises the complex and dynamic interactions within empire, notably the role of the periphery in influencing developments at the centre.

2 Bills of lading are commercial documents used in contracts for the carriage of goods. They serve three important functions: they provide evidence of the terms of the contract of carriage, a receipt for the goods that went on board a ship and a negotiable document representing title to the goods. The first function is the most important for the purposes of this article. See Martin Davies and Anthony Dickey, *Shipping Law* (Sydney: Thomson Reuters, fourth edition, 2016), chapter 12.

3 *Shipping and Seamen Act 1903* (NZ); *Sea-Carriage of Goods Act 1904* (Cwlth).

4 The New Zealand component of this research was hampered to some extent by the accidental destruction by fire of virtually all the Marine Department's records of the time.

The Colonists' Dilemma

The challenge of striking a fair balance between the interests of shippers (cargo interests) and carriers (shipowners) arose the first time someone placed their goods aboard another's vessel. Centuries later, the essential nature of the issue remains unchanged. Sending cargo across the sea is risky. Ships can founder, items go missing, goods arrive in a damaged condition. Such cargoes are often worth more than the ships that carry them. Carriers, who form a distinctive and closely connected commercial sector, tend to be in a stronger position for setting terms than shippers, who tend to come from a wide range of backgrounds and are not necessarily familiar with shipping. The carrier's temptation has always been to contract out of liability to the greatest extent possible. Insurers sit in the wings, watching closely and striking their own deals with both sides.

Despite all the conferences, meetings and summits one could hope for, the world has not yet found a response to this challenge that is acceptable to all parties. Current discussions tend to centre on agreements like the Hague–Visby Rules (1968),[5] but at the turn of the twentieth century, such international agreements remained in the dreams of enthusiasts.[6]

English common law had done its best to hold carriers to a base level of responsibility via the rules on common carriers. Essentially, a common carrier (whether on land or sea) was strictly liable for loss or damage to goods, with the exception of some limited defences (namely, damage by the king's enemies, inherent vice, act of God or shipper's neglect).[7] During the period under discussion, this was still seen by many as a reasonable position on liability, as reflected in New Zealand's *Carriers Act 1866*, for example, where the common carrier regime was applied to domestic coastal voyages.[8] However, in an age when freedom of contract was a celebrated concept in maritime circles, the temptation for carriers was to exclude more and more liability using broad contractual terms.[9]

5 *Hague–Visby Rules Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924*, 1412 UNTS 121 (opened for signature 23 February 1968, entered into force 23 June 1977).

6 Michael F. Sturley, 'The History of COGSA and the Hague Rules', *Journal of Maritime Law and Commerce* 22 (1991): 6-9.

7 Sturley, 'The History of COGSA and the Hague Rules', 4-5.

8 *Carriers Act 1866* (NZ).

9 Vivian Vale, *The American Peril: Challenge to Britain on the North Atlantic 1901–1904*

In 1891, a Dunedin newspaper reported the chairman of the chamber of commerce's lengthy remarks to the effect that the 'Shipowners' Association of London … seemed to attempt to contract themselves out of all liability whatsoever in connection with the goods they carried', with particular reference to shipments of frozen meat.[10] This position becomes clearer when one considers some of the clauses to which Australasian exporters were signing up. Take, for example, this extraordinarily expansive exclusion clause from a 1903 'homeward trade' bill of lading contract:

> The Act of God, the King's Enemies, Pirates, Robbers or Thieves by land or sea, Arrests or Restraints of Princes, Rulers or People, Riots, Strikes, Lock-outs, or other Labour Disturbances, or delay or hindrance caused directly or indirectly thereby, and loss or damage resulting therefrom or from any of the following causes or perils are excepted, viz.:- Insufficiency in packing or in strength of packages, loss or damage from coaling on the voyage, rust, vermin, breakage, leakage, drainage, sweating, evaporation or decay, or from the leakage or flow of or from contact with the urine, manure water, or drainage from animals carried on the said ship or from their stalls however caused or otherwise howsoever; injurious effects of other goods; effects of climate, *insufficiency of ventilation or temperature of holds; risk* of craft, of transhipment, and *of storage afloat or on shore;* fire on board, in hulk, in craft, or on shore; rain, hail, snow, frost or ice; explosion, barratry, jettison; collision, whether with another ship or any other obstacle; stranding, lying upon or touching the ground; perils of the seas, rivers or navigation of whatsoever nature or kind, and howsoever caused; whether or not any of the perils, causes, or things above mentioned, or the loss or injury arising therefore, be occasioned by or arise from any act or omission, negligence, default or error in judgment of the master, pilot, officers, mariners, engineers, crew, stevedores, ship's husband or managers, or other persons whomsoever in the service of the Owners or Charterers whether on board the said Ship, or on shore, or on

(Manchester: Manchester University Press, 1984), 191.

10 'Chamber of Commerce', *Otago Daily Times* (Dunedin), 1 May 1891, 2.

> board any other ship belonging to or chartered by them, or for whose acts they would otherwise be liable, whether such an act, omission, negligence, default, or error in judgment shall have occurred before or after the commencement of or during the voyage, or any other causes beyond the control of the Owners or Charterers; or *by or from any accidents to or defects latent or otherwise in* hull, tackle, boilers or *machinery, refrigeration or otherwise, or their appurtenances* (whether or not existing at the time of the goods being loaded, or the commencement of the voyage), or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defences and unseaworthiness. Accidents, loss, damage, delay or detention from any act or default of the Egyptian Government or the administration of the Suez Canal, when proceeding via Suez Canal, or of the Argentine Government when proceeding via Cape Horn and River Plate are also excepted. It is expressly agreed that all the exceptions and liberties in this Bill of Lading shall equally apply to any other Vessel into which the goods are shipped (*emphasis added*).[11]

In other words, 'a mass of fine type … not read by one shipper in a thousand'.[12]

The sections emphasised above highlight an area of particular tension. The economies of New Zealand and Australia expanded considerably over the latter half of the nineteenth century, with both countries exporting greater volumes of agricultural cargoes, such as meat, grain, fruit, dairy products, flax and wool.[13] The volume of shipping tonnage available was

11 S. J. Jacobs, John Sawers and J. Maitland Paxton, *Reports on Bills of Lading and the Navigation Bill* (Sydney: The General Council of Chambers of Commerce of the Commonwealth of Australia, 1903), 6-7.

12 Australian Department of Trade and Customs memorandum to Prime Minister's Office, 'Sea Carriage of Goods Act – Statute Bill of Lading', 29 September 1920, National Archives of Australia (hereafter NAA), A595, BT1924/375, 5. Many of these exclusions still apply in the carrier liability regimes now applicable in Australia, New Zealand and indeed much of the world: *Carriage of Goods by Sea Act 1991* (Cwlth); *Maritime Transport Act 1994* (NZ), pt. 7.

13 Frank Broeze, *Island Nation: A History of Australians and the Sea* (Sydney: Allen & Unwin, 1998), 90; Geoffrey Blainey, *The Tyranny of Distance: How Distance Shaped Australia's History* (Sydney: Pan Macmillan, 2001 edition), 282.

growing to meet this need but was dominated by British tonnage.[14] Economic progress was aided by developments in steam power and refrigeration technology, which expanded the range of perishable goods that could be sent to distant markets.[15] However, the technology was not yet fully reliable. If a cargo such as meat was sent in a refrigerated hold, and that hold's mechanism malfunctioned during the voyage, the cargo would quickly become worthless. This was entirely beyond the shipper's control, but shipowners would similarly argue that they had no control over what happened at sea. In a time when it was still common for shipowners to have no contact with their vessels for long periods, it was no foregone conclusion that they should accept the commercial risks posed by the new technology on board.

The combination of broad exclusion clauses, unreliable technology and growing economic power in the colonies meant that conditions were ripe for a showdown between Australasian cargo interests and the primarily British shipowners on whose vessels they were relying. That showdown must also be set against the long-running fight between shippers and shipowners — particularly in Australia — over the shipping services offered by anticompetitive liner conferences, through which groups of shipowners would cooperate in fixing freight rates.[16] Colonists already feeling exploited by the levels of freight they were paying these shipowners were hardly going to sit by and meekly accept a lack of responsibility for their goods once the money had been prised from their hands.

On occasion, the showdown manifested in court proceedings, as in the case of the *Maori King.* A ship taking frozen mutton from Melbourne to London was forced to offload the cargo in Sydney when the refrigeration machinery broke down. Despite a broadly worded exclusion clause, the English Court of Appeal was prepared to imply a term that the machinery

14 G. R. Hawke, *The Making of New Zealand: An Economic History* (Cambridge: Cambridge University Press, 1985), 87; Broeze, *Island Nation*, 89, 95.

15 Hawke, *The Making of New Zealand*, 57-60, 90; Blainey, *The Tyranny of Distance*, 275-80; John Bach, *A Maritime History of Australia* (Sydney: Book Club Associates, 1976), 176-77; David Greasley, 'Industrialising Australia's Natural Capital', in *The Cambridge Economic History of Australia*, ed. Simon Ville and Glenn Withers (Cambridge: Cambridge University Press, 2015), 157-58, 164-65.

16 Bach, *A Maritime History of Australia*, chapter 8; Broeze, *Island Nation*, 95-97.

would at least be in working order at the *commencement* of the voyage.[17] That a shipowner was prepared to argue that it did not even need to provide working equipment to begin with gives a taste of what the cargo interests were up against.

The refrigeration issue was just one part of a wider struggle to make shipowners responsible for careful cargo handling. At the time, the carrier's most common response to a complaint about cargo loss or damage was (and, a cynic would say, remains) to disclaim liability and suggest the shipper contact their insurer. Shippers did not expect miracles from shipowners — they were even prepared to exclude liability for the negligent actions of crew members in handling the ship — but they did expect care to be taken with their cargo.[18]

Nonetheless, in many cases there was no remedy available for the cargo owner, despite blatant negligence on the carrier's part, or even theft by its servants.[19] One Australian writer gave the example of a dried fruit shipment damaged by coal dust from a temporary reserve bunker set up in the hold alongside the fruit. The shipowner refused to pay compensation on the basis that the bill of lading excluded damage by coal dust.[20] In some cases, a court might be prepared to interpret the exclusion clause in a manner that favoured the cargo interest,[21] but the majority of cargo interests most likely cut their losses and moved on. Even where a court victory was achieved, shippers complained bitterly of the lost revenue, time and legal costs.

17 *Owners of Cargo on Ship 'Maori King' v Hughes* [1895] 2 QB 550 (CA).

18 See J. H. Storey, 'Bills of Lading, General Average, and Average Deposits', in *Report of Proceedings Australasian Commercial Congress Melbourne November 1888* (Melbourne: Mason, Firth & M'Cutcheon, 1889), xciv; F. S. C. Driffield, 'Bills of Lading', in *Report of Proceedings Australasian Commercial Congress Melbourne November 1888*, civ-cv.

19 *Neill and Company Ltd v The Shaw-Saville and Albion Company Ltd* (1890) 8 NZLR 331 (SC) (tobacco missing from shipment to Dunedin via London); *Parsons v The New Zealand Shipping Company* [1901] 1 QB 548 (CA) (154 frozen lamb carcasses missing on arrival in London).

20 See Storey, 'Bills of Lading, General Average, and Average Deposits', xcvii; see similarly Driffield, 'Bills of Lading', civ-cv.

21 *Borthwick v Elderslie Steamship Company* [1905] AC 93 (HL) (cargo of Australian meat tainted by carbolic acid left in the ship's hold); *Owners of Cargo on Board SS Waikato v New Zealand Shipping Company Ltd* [1899] 1 QB 56 (CA) (cargo of wool spoiled after being stored in a refrigerated hold).

Towards Australasian Reform

The idea of striking a fairer deal between colonial exporters and British owners on shipping terms was not a new one. In late 1872, the *Otago Daily Times* reported that seventeen British shipping firms had provided merchants operating in the Australasian trades with an ultimatum: adopt their new standard-form bill of lading or find other carriers. The contract contained clauses 'more or less obnoxious to the interests of shippers', such as one providing the carrier could deliver the cargo as near to the port for which the ship was bound as it was able to get.[22] The London-based merchants, many of them commercial agents for Australasian companies, decided to form a committee and begin negotiations.

The best means of addressing the shippers' concerns was not immediately clear. Most initially felt that a negotiated outcome was feasible, as the shipowners would eventually see the justice of the shippers' position; or that, if legislation were necessary, it was a matter for the Imperial Parliament to address. Nonetheless, the idea of Australasian legislation was also floated early on and gained greater support as it became clear that nothing was likely to be achieved in London.

In the mid-1880s, Australian merchants, underwriters and chambers of commerce tried to convince the London Chamber of Commerce to promote a fairer bill of lading for ocean shipping. Draft legislation to give effect to this was even prepared for the Imperial Parliament at an 1886 conference of chambers of commerce in London. However, nothing came of the resolution to put the legislation forward, which was carried by a bare majority.[23]

The first congress of Australasian chambers of commerce took place in Melbourne in late 1888.[24] Debate over shipping terms — namely, bills of lading and general average — was the sixth and final topic on the agenda. By this time, participants were already referring to the significant number of papers, reports and resolutions relating to 'the bill of lading question' that had failed to yield any positive results for the colonists. In his opening remarks, Robert Reid, chair of the Melbourne chamber and president of the congress, highlighted the 'gradual increase of unjust clauses in bills of

22 'Colonial Bills of Lading', *Otago Daily Times*, 4 January 1873, 2.

23 See Storey, 'Bills of Lading, General Average, and Average Deposits', xcv.

24 New Zealand was represented by delegates from Wellington, Christchurch and Invercargill.

lading, by shipowners practically contracting themselves out of all liability', noting that Australasian concerns had been raised repeatedly in London but had failed to gain any traction.[25]

It was at this congress that a proposed 'Australian and New Zealand Trade Bill of Lading' was presented by the Sydney Chamber of Commerce.[26] This would have made a shipowner liable for ensuring the vessel was properly equipped and seaworthy and for the faults of the crew in relation to the handling and stowage of cargo.[27] It was hardly a one-sided document: the terms still contained a broad exclusion of liability for nautical fault,[28] along with more common exceptions, such as perils of the sea.[29] Unanimous resolutions were passed, endorsing this form of bill and encouraging legislation in both Australia and London to 'neutralise the effect' of unreasonable clauses.[30]

Just two years later at the Australasian congress in Dunedin, a resolution put forward by Cowderoy of Melbourne was carried unanimously, to the effect that efforts to negotiate a better bill of lading had failed and legislation would be needed.[31] His view was that each colony in Australasia would need to pass legislation setting out an approved bill of lading contract and prohibiting clauses that detracted from its terms.[32] The Melbourne chamber began actively campaigning for such

25 Australasian Commercial Congress, *Report of Proceedings Australasian Commercial Congress Melbourne November 1888*, 14.

26 A copy is attached to B. Cowderoy, 'Bills of Lading and Average Deposits', in *Report of Proceedings of a Conference of Chambers of Commerce Held in Dunedin (NZ) on the 28th of January 1890* (Dunedin: Dunedin Chamber of Commerce, 1890), Hocken Library (hereafter HL), MS3903-038, appendix, 24-26.

27 Australasian Commercial Congress, *Report of Proceedings Australasian Commercial Congress Melbourne November 1888*, 57-58.

28 The concept of negligent navigation or management of the ship (as opposed to cargo handling) by its master or crew.

29 For contemporary but still current definitions, see *Marine Insurance Act 1908* (NZ), s. 4(3); *Marine Insurance Act 1909* (Cwlth), s. 9.

30 Australasian Commercial Congress, *Report of Proceedings Australasian Commercial Congress Melbourne November 1888*, 61-65.

31 *Report of Proceedings of a Conference of Chambers of Commerce Held in Dunedin (NZ) on the 28th of January 1890*, 58.

32 Cowderoy, 'Bills of Lading and Average Deposits', appendix, 23.

legislation.[33] However, not everyone agreed it was the best option: Dunedin's subcommittee on the subject ultimately decided that imperial legislation would be the answer.[34]

While the Australasians slowly deliberated, a new standard 'Australia and New Zealand Steam Trade Bill of Lading' was sent out from the London Chamber of Commerce in 1893. The Sydney chamber wrote to other chambers, urging them to reject London's offering as 'a one sided document in favour of the Steam Ship owners'.[35] Dunedin's chamber meekly confessed that it had already approved the bill, before retracting that approval and telling London the Sydneysiders' objections were justified.[36]

Further correspondence was exchanged between London, Australia and New Zealand in 1894, as various parties attempted to promote an acceptable compromise. Unlike in Sydney, for example, Dunedin cargo interests failed to agree on a way forward. This was partly because many leading Dunedin shippers were themselves agents for the shipping lines. It was also pointed out that, unlike in Sydney, the Otago shippers could not turn to competing carriers with more favourable terms.[37] Nonetheless, Dunedin continued to reject London's overtures in support of the Sydney chamber.[38]

By the autumn of 1896, the Dunedin chamber was tired of the 'apparently endless correspondence' on the 'vexed question of the form of Bills of

33 Dunedin Chamber of Commerce, Meeting of 21 November 1890, Minute Book 28 June 1887 to 5 October 1899, HL, UN-022, OCC/3/1.

34 Dunedin Chamber of Commerce, Meeting of 4 November 1892, Minute Book 28 June 1887 to 5 October 1899, HL, UN-022, OCC/3/1; reproduced in *Evening Star* (Dunedin), 5 November 1892, 2.

35 Dunedin Chamber of Commerce, Meeting of 14 July 1893, Minute Book 28 June 1887 to 5 October 1899, HL, UN-022, OCC/3/1.

36 Dunedin Chamber of Commerce, Meeting of 26 October 1893, Minute Book 28 June 1887 to 5 October 1899, HL, UN-022, OCC/3/1. See also *Annual Report of the Dunedin Chamber of Commerce* (July 1893), 6-7; *Annual Report of the Dunedin Chamber of Commerce* (July 1894), 5; *Annual Report of the Dunedin Chamber of Commerce* (July 1897), 4-5, HL, Pamphlets 96.

37 Dunedin Chamber of Commerce to Sydney Chamber of Commerce, 22 January 1894, Letter Book 17 November 1893 to 29 January 1900, HL, UN-022, OCC/10/1, 12-13.

38 *Report of the Committee of the Dunedin Chamber of Commerce for the Year Ended 30th June, 1894*, Minute Book 28 June 1887 to 5 October 1899, HL, UN-022, OCC/3/1.

Lading',[39] and its agent in London, John Ross, suggested no further concessions could be gained from the Shipowners' Society. It was time to accept the Londoners' terms.[40] While hoping for some further technical changes, the Otago merchants were of the same mind: 'Half a loaf is better than no bread'.[41] For this, they were again upbraided by Sydney, who accused Dunedin of breaking the unanimity of the Australasian chambers' protest, instead of awaiting the result of the congress to be held in London.[42]

However, Sydney, too, soon cracked. The 1896 Australasian Congress reluctantly approved the 1893 bill of lading but recommended that shipowners' liabilities be the subject of legislation introduced to 'the various parliaments'.[43] By early 1898, the Sydney chamber was promoting a draft New South Wales Carriage by Water Bill and suggesting to chambers of commerce in Dunedin, Wellington and Christchurch that New Zealand should also introduce such legislation.[44]

Although legislation at the local level had already been discussed to some extent, several obstacles confronted the Australasians. First, any legislation would have to account for the differences between the international 'homeward' trades and Australasian coastal and intercolonial trading practices. Second, there was a risk of a patchwork of differing enactments across the various Australian colonies. Third, there was the question of dealing with European shipping lines, such as those from Germany, whose legal systems might not accommodate the

39 *Report of the Committee of the Dunedin Chamber of Commerce for the Year Ended 30th June, 1896*, Minute Book 28 June 1887 to 5 October 1899, HL, UN-022, OCC/3/1.

40 Dunedin Chamber of Commerce, Meeting of 19 March 1896, Minute Book 28 June 1887 to 5 October 1899, HL, UN-022, OCC/3/1.

41 Dunedin Chamber of Commerce to Sydney Chamber of Commerce, 24 April 1896, Letter Book 17 November 1893 to 29 January 1900, HL, UN-022, OCC/10/1, 150, 154-55.

42 Dunedin Chamber of Commerce, Meeting of 8 July 1896, Minute Book 28 June 1887 to 5 October 1899, HL, UN-022, OCC/3/1. This was the Congress of the Chambers of Commerce of the Empire, London, June 1896.

43 Dunedin Chamber of Commerce, Meeting of 29 October 1896, Minute Book 28 June 1887 to 5 October 1899, HL, UN-022, OCC/3/1.

44 Dunedin Chamber of Commerce, Meeting of 9 March 1898, Minute Book 28 June 1887 to 5 October 1899, HL, UN-022, OCC/3/1. The Dunedin Chamber supported this idea and wrote to other New Zealand chambers.

enforcement of provisions based on Australasian legislation.[45] Fourth, there was the issue of permitting clauses that were legitimately included by shipowners to protect against dishonest or opportunistic claims for compensation.[46]

Notwithstanding such technical difficulties, the colonists had little choice but to attempt their own reform (despite Dunedin's continued suggestions that an imperial solution was the only option).[47] Efforts to address the bill of lading issue with the shipowners was 'like fighting against a stone wall',[48] with the shipowners acting 'in combination' to protect their own interests.[49] As the chair of the Dunedin Chamber of Commerce put it, 'the interests of the shipping companies at Home are so strong, that they have things all their own way, and we are at their mercy'.[50]

A Legislative Solution

Although it was not yet widely known in Australasia, the United States was already taking a much more cargo-friendly approach to the issue of carriers' liability. The divide between the US and English thinking on the subject was already growing clear by the time of the *Missouri Steamship Company* case in 1888. This involved the loss of cattle on a voyage from Boston to England, with the terms of the British shipowner's contract excluding liability for a wide range of negligent acts. Justice Chitty observed that such a term was apparently void under the law of Massachusetts, being against public policy in that jurisdiction, but held that the contract was governed by English law and enforceable.[51]

45 On European competitors in Australia, see Broeze, *Island Nation*, 92; Blainey, *The Tyranny of Distance*, 273.

46 See Storey, 'Bills of Lading, General Average, and Average Deposits', xcii.

47 Dunedin Chamber of Commerce to West Devonport Chamber of Commerce, 22 November 1900, Dunedin Chamber of Commerce Letter Book 29 January 1900 to 20 March 1905, HL, UN-022, OCC/10/2, 117.

48 *Annual Report of the Dunedin Chamber of Commerce July 1897*, HL, Pamphlets 96, 14 (remarks of the president of the chamber).

49 Driffield, 'Bills of Lading', ciii.

50 *Report of Proceedings of a Conference of Chambers of Commerce Held in Dunedin (NZ) on the 28th of January 1890*, 57 (remarks of Dunedin Chamber of Commerce chairman George Denniston).

51 *In Re Missouri Steamship Company* (1888) 42 Ch Div 321 (Ch); compare *Liverpool & Great Western Steam Co v Phenix Insurance Co* 129 US 397 (1889); *Compania de Navigacion La*

Not long after, that American public policy was reflected in federal legislation, with the passage of the *Harter Act 1893*.[52] Championed by Michael Harter, a congressman from inland Ohio farming interests, this short Act set minimum standards for shipowners in terms of providing a seaworthy ship and taking care of cargo. It prohibited any clause excluding such liability and even made it a crime to not comply with the Act for all bills of lading signed in the US.

The Australasian chambers of commerce were keeping abreast of American commercial law developments,[53] including by sending representatives to conferences in the US,[54] spurred on by new direct shipping services between Australasia and the US.[55] The passage of the Harter Act was reported in the *Sydney Morning Herald* a few months after its entry into force.[56] Awareness of the legislation continued to spread throughout Australasian commercial circles over the course of the next decade. In December 1901, the Wellington-based *New Zealand Trade Review* wrote, with reference to the Harter Act:[57]

> We thus see that in America the Government recognises it as a duty to protect its traders from the abuse of power by a potential combination of shipowners. … With substantially lower freights and such a measure of immunity from loss, is it any wonder that the American trader makes headway against his British rival?

Flecha v Brauer 168 US 104 (1897).

52 I. L. Evans, 'The Harter Act and its Limitations', *Michigan Law Review* 8 (1910): 637-54; Sturley, 'The History of COGSA and the Hague Rules', 12-14; Joseph C. Sweeney, 'Happy Birthday Harter: A Reappraisal of the Harter Act on its 100th Anniversary', *Journal of Maritime Law and Commerce* 24 (1993): 1-42.

53 See, for example, Cowderoy, 'Bills of Lading and Average Deposits', appendix, 23 (referring to a United States bill addressing liability for shipowners' servants).

54 Report to Dunedin Chamber of Commerce, 29 January 1900, Dunedin Chamber of Commerce Letter Book 17 November 1893 to 29 January 1900, HL, UN-022, OCC/10/1, 500 (New Zealand delegate attending a congress in Philadelphia along with New Zealand's London-based Agent-General, William Pember Reeves).

55 Broeze, *Island Nation*, 93.

56 'United States New Shipping Act', *Sydney Morning Herald*, 7 September 1893, 4.

57 'Topics of the Day', *New Zealand Times* (Wellington), 30 December 1901, 4.

The following month, the *Otago Daily Times* printed a copy of the Harter Act's key provisions, and the chamber of commerce distributed copies of the legislation among the importers of Dunedin.[58]

New Zealand Legislates

Widespread knowledge of the American exporters' accomplishment spurred renewed efforts in Australasia (particularly Melbourne and Sydney) to promote legislation on the bill of lading question.[59] Although the Australians were far more active proponents of reform, it was New Zealand that first took up the Harter Act's ideas in legislation, as part of the *Shipping and Seamen Act 1903*. The relevant provisions were introduced to the Bill at the suggestion of the conference of New Zealand chambers of commerce in January 1901,[60] and the reform was framed as part of a wider effort to improve trading conditions for colonists across the empire:

> [The Shipping and Seamen Bill] will not affect bills of lading made in the United Kingdom, but it may prove to be a step in that direction if other colonies can be induced to legislate to the same effect and then united in urging similar steps upon the Imperial Government.[61]

In enacting the 1903 Act, the New Zealand Parliament saw its role as regulating shipping within the wider context of empire, referring to the need to consolidate existing legislation to incorporate imperial development. Like the UK's Merchant Shipping Acts on which it was based, the Act contained only limited commercial law provisions and primarily dealt with a range of often amended regulatory settings, such as seafarers' conditions of employment and vessel safety, along with maritime-specific regimes, such as wreck and salvage.[62]

58 'Dunedin Chamber of Commerce', *Otago Daily Times*, 9 January 1902, 7.

59 Cowderoy, *Melbourne's Commercial Jubilee*, 105.

60 Bills of lading were on the agenda: 'Chambers of Commerce', *Press* (Christchurch), 10 January 1901, 2.

61 'Chamber of Commerce', *New Zealand Times*, 17 April 1903, 3; 'Proposed Legislation', *Evening Post* (Wellington), 28 August 1903, 5.

62 *New Zealand Parliamentary Debates (*hereafter *NZPD*) 124 (20 August 1903), 701. 'The Bill consolidates not only the Shipping and Seamen's Act of 1887, and the Acts of 1889, 1890, 1895, 1896, and 1899, but also a considerable part of the Imperial Merchant

Nonetheless, a growing sense of New Zealand's identity as a trading nation emerges from the parliamentary record, with the Minister of Marine presenting the following confident — indeed, far-sighted — remarks:

> When we consider the progress that has been made during the last few years — for it is only a few years since New Zealand first became a colony — and realise the position it is likely to assume from its increasing exports, we can form but a slight idea of what our colony is likely to become in the comparatively near future. Our position with regard to foreign countries, to the Australian Commonwealth, and to the Pacific Islands, the opening-up of countries like China and Japan, the prospects of trade with India, must lead to greatly improve our position and to the further development of the resources of our own country. And as development takes place in those countries New Zealand must keep on extending its trade …[63]

Drawing on the nascent notion of a more independent trade policy, it was the Member for Wairarapa, Walter Clarke Buchanan, who spoke to 'one of the most important clauses in the Bill'.[64] Buchanan represented inland farming interests (similar to Harter's involvement with flour milling in Ohio) and was an advocate for the frozen meat trade. He 'worked to bring down freight rates for farmers, and was instrumental in forming, in 1912, a farmers' shipping company'.[65] Buchanan said:

> A few days ago I asked [the Minister of Marine] whether he would introduce legislation along the lines of the American [Harter] Act, or otherwise, to prevent shipping companies from using bills of lading the terms of which effectively deprive consignees of cargo of any chance of recovering damages from the ship, no matter how flagrant the neglect may have been. I pointed out a case where a large quantity of frozen meat from the colonies was landed in London in a damaged state, and it was found absolutely impossible to

Shipping Act of 1894': *NZPD* 126 (13 October 1903), 369.

63 *NZPD* 124 (20 August 1903), 700.

64 *NZPD* 124 (20 August 1903), 710.

65 David Hamer, 'Buchanan, Walter Clarke', in Dictionary of New Zealand Biography, first published in 1993, updated June 2017, 'Te Ara Encyclopedia of New Zealand', https://teara.govt.nz (last accessed 31 July 2019).

> recover any damages, although it was conclusively proved in Court that the damage occurred because of the nature of the cargo which the steamer carried on the previous trip.[66]

The case to which Buchanan referred must have been *Borthwick v Elderslie Steamship Company*, in which the vessel's holds were disinfected with carbolic acid after it carried a cargo of horses. This tainted the cargo of frozen meat that was thereafter loaded at Melbourne. The trial judge had held that the carrier could rely on a broadly worded exclusion clause, despite having found that the ship was not in a fit condition to carry the cargo. Buchanan could not have known that this finding would be reversed on appeal a few months later, but the case nonetheless illustrates the difficulties faced by cargo interests confronting an obvious case of negligent carriage.[67]

Buchanan's comments were not the only ones on the liability regime. Some members attempted to have cargo- or carrier-friendly amendments to the liability regime passed,[68] with the lack of a nautical fault defence in the Bill as drafted highlighted as a particular shortcoming (this defence appears in the Harter Act).[69] However, no strong opposition to the Harter Act-inspired provisions emerged from the debate.

As enacted, Part XI of the 1903 Act largely replicated the provisions of Part VIII of the *Merchant Shipping Act 1894* (UK), both of which were headed 'Liability of Shipowners'. This included a limitation of liability regime for loss or damage to cargo or personal injury caused without an owner's 'actual fault or privity'.[70] There were also some minor innovations in the New Zealand legislation; notably, a rule relating to claims against a ship's agents for short-delivery or pillage of cargo,[71] which was described by a

66 *NZPD* 124 (20 August 1903), 710; see also 720.

67 *Borthwick v Elderslie Steamship Co* [1904] 1 KB 319 (CA); *Borthwick v Elderslie Steamship Co* [1905] AC 93 (HL) (affirming the Court of Appeal).

68 *NZPD* 125 (22 September 1903), 683-84; *NZPD* 126 (13 October 1903), 374.

69 'Liability of Shipowners', *New Zealand Herald* (Auckland), 23 September 1903, 5.

70 Compare *Shipping and Seamen Act 1903* (NZ), ss. 294-304; *Merchant Shipping Act 1894*, ss. 503-8.

71 *Shipping and Seamen Act 1903* (NZ), ss. 301-2. Section 303 did not have a direct counterpart in the 1894 Act but was similar to section 3 of the *Bills of Lading Act 1855* (UK).

British commentator as 'a novel method of founding jurisdiction in the colony' that 'imposes severe obligations on [a ship's] agents'.[72]

The real innovation, at least for the British Empire, lay in sections 293 and 300 of the Act. These were, in substance, copies of sections 1 and 2 of the US Harter Act.[73] Section 293 applied to any ship transporting cargo to or from any port in New Zealand. It provided that if the ship's owner had exercised due diligence to make the ship seaworthy and properly manned, equipped and supplied, then that shipowner (as well as any charterers or agents) would not be liable for any loss or damage resulting from fault or errors in the navigation or management of the vessel (so-called nautical fault).

The provision went on to exclude the shipowner, charterer, agent and master of the vessel from liability for loss or damage resulting from:

- dangers of the sea or other navigable waters;
- acts of God;
- public enemies;
- inherent defect, quality or vice of the things carried, or insufficiency of packaging;
- seizure under legal process;
- any act or omission of the shipper or owner of the goods, his agent or representative; or
- saving or attempting to save life or property at sea, or from any deviation in rendering such service.

Section 300 then prevented a shipowner from further excluding liability under a bill of lading or other shipping document. It rendered 'null and void' any clause excluding liability for loss or damage arising from careless dealings with the vessel's cargo or purporting to exclude the obligation to exercise due diligence in making the vessel seaworthy.

72 'Report by Hill, Dickinson, and Co on "The Shipping and Seamen Bill, 1903", of New Zealand' [1905], *Appendix to the Journals of the House of Representatives* (hereafter *AJHR*) A1, 26.

73 The New Zealand provisions added a reference barring exclusion of liability for the 'harmful or improper condition of the ship's hold' and any attempt to reduce the obligation to 'make the hold of the ship fit and safe for the reception of cargo' to the United States formula: compare *Shipping and Seamen Act 1903* (NZ), s. 300 and *Harter Act 1893* (US), ss. 1-2. This was an innovation of Walter Buchanan MP, who was concerned about frozen meat shipments: *NZPD* 125 (22 September 1903), 684; 'Liability of Shipowners', *New Zealand Herald*, 23 September 1903, 5.

One political correspondent in Wellington noted, with reference to the shipowners' liability provisions, that the New Zealand Bill was 'being carefully watched by the States of the Australian Commonwealth'.[74]

Australia Legislates

When it came time to introduce Australia's equivalent Bill to the House of Representatives, Prime Minister Reid did not mince his words:

> The shipping companies … have exercised their ingenuity to minimize their responsibility for the carriage of freight to the smallest point, and so fully have they absolved themselves that, if, whilst a cargo was being carried across the seas, the grossest negligence, the grossest thieving, or the grossest abuse should occur, they would not be liable.[75]

Unlike in New Zealand, where meat and dairy exporters had been the key proponents of reform, Australia's fruit exporters in South Australia, Tasmania and Western Australia were at the forefront of the politicians' minds. Senator Clemens of South Australia gave the example of fruit growers in his state having five shipping companies to choose from — but just one bill of lading. The growers had lost thousands of pounds through spoiled cargoes when ships' holds were not maintained at a constant temperature throughout a voyage.[76]

Australia's provisions on bills of lading were originally included in an early departmental draft of what eventually became the *Navigation Act 1912*, but they were removed and given priority by way of a separate Sea-Carriage of Goods Bill.[77] This was introduced to the Senate in November 1904 and enacted the following month.

Although the timing of the respective Acts did not represent a case of Australia emulating New Zealand (rather, both colonies adopting the US

74 'Shipping and Seamen Bill', *Star* (Christchurch), 23 September 1903, 2.

75 *Commonwealth Parliamentary Debates, House of Representatives* (hereafter *CPDHR*) 49 (8 December 1904), 8156.

76 *Commonwealth Parliamentary Debates, Senate* (hereafter *CPDS*) 47 (23 November 1904), 7292; see also 7299 (Senator Dobson).

77 Australian Department of Trade and Customs memorandum to Prime Minister's Office, 'Sea Carriage of Goods Act – Statute Bill of Lading', 29 September 1920, NAA, A595, BT1924/375, 4.

position at slightly different times), government and commercial interests across the Tasman were encouraged by the New Zealand legislation.[78] During parliamentary debates, the Australian Bill's proponents remarked that not only had recent case law showed that US law was more shipper-friendly than the English position, but also that New Zealand's legislation had worked well, without leading to rising freights, as had been feared.[79]

The Australian Bill also had its detractors. Senator Gray of NSW even claimed it was 'the most drastic measure which has been passed by this Parliament'.[80] This group was mainly concerned with questions of detail and the desirability of giving shipowners more time to comment on the Bill.[81]

Australia's legislation borrowed more faithfully from the Harter Act than had the New Zealand Act, but it also featured some unique touches to make the legislation yet more cargo-friendly.[82] For example, it is the only one of the three to expressly refer to liability for failures in refrigeration equipment.[83] Unlike New Zealand's Act, it took the US approach of making it an offence, punishable by a £100 fine, to insert clauses in a bill of lading that were incompatible with the Act.[84] It also applied the legislation less widely than did New Zealand — only to vessels going from Australia (or between Australian ports) and not 'to or from any port in New Zealand'.[85] Its core provisions remain the same: a series of implied clauses in affected bills of lading that provided protection for the shipowner, combined with a prohibition on clauses that removed liability for the shipowner's failings in relation to cargo handling and the ship's seaworthiness (including that of its holds).[86]

78 'Chamber of Commerce', *Press*, 28 January 1901, 6 (correspondence between Freemantle Chamber of Commerce and Canterbury Chamber of Commerce); 'Wellington Notes', *Auckland Star*, 12 March 1903, 2 (Marine Departments in Australia requesting copies of the New Zealand legislation and select committee report).

79 *CPDS* 47 (23 November 1904), 7286-9. The threat of rising freights was also raised during the New Zealand parliamentary debates on the subject.

80 *CPDS* 47 (24 November 1904), 7404.

81 *CPDHR* 50a (13 December 1904), 8316.

82 Sturley, 'The History of COGSA and the Hague Rules', 15.

83 *Sea-Carriage of Goods Act*, s. 5(b).

84 *Sea-Carriage of Goods Act*, s. 7.

85 *Sea-Carriage of Goods Act*, s. 4(1); compare *Shipping and Seamen Act*, s. 293.

86 *Sea-Carriage of Goods Act*, ss. 5, 8.

The Reaction

Reaction to the New Zealand and Australian legislation on the home front was relatively muted. Some Australian politicians' concerns were spelled out in more detail in 1905, by way of a paper written by Tasmanian Member of Parliament Donald Cameron. This claimed that Tasmanian fruit exports to the 'East' via Colombo had dropped from 6,000 to 600 cases, as British shipowners were refusing to carry the cargoes, and they were being shipped in non-refrigerated holds. Cameron blamed this on the legislation having been too hastily enacted.[87] However, several Members spoke in response, to the effect that life was fine under the new legislation, with one asserting that his fruit shipping interests had expanded under the *Sea-Carriage of Goods Act 1904*.

It was the reaction in London that demonstrates the true significance of what might otherwise appear to be a technical change in shipping law. Neither Act's future was assured until 1905, and then only after a significant volume of official correspondence, industry lobbying and legal analysis.

New Zealand's more extensive consolidating Act was understandably subject to a higher degree of legal scrutiny.[88] A memorandum from the Solicitor to the Board of Trade went into some detail on the extent to which the UK's *Merchant Shipping Act 1894* permitted colonies to develop maritime legislation that diverged from the imperial template to meet local priorities.[89] A colonial legislature could 'repeal, wholly or in part' aspects of the imperial Act for vessels registered in that colony, as well as regulating the coasting trade of that colony (but only in a manner that treated all British ships equally). Both such approaches were subject to royal approval.[90]

However, even while pointing out aspects of the New Zealand legislation that may have gone too far in exerting local authority over visiting ships

87 *CPDHR* 33 (16 August 1905), 992.

88 Lyttelton to Plunket, 8 March 1905, despatch 21/1905; [1905] *AJHR* A1, 1-2.

89 *Merchant Shipping Act 1894*, ss. 735-6; *Colonial Laws Validity Act* 28 & 29 Vict. c. 63 (1865) (UK). See John E. Martin, 'Refusal of Assent – A Hidden Element of Constitutional History in New Zealand', *Victoria University of Wellington Law Review* 41 (2010): 79-81.

90 *Merchant Shipping Act* 57 & 58 Vict. c. 60 (1894) (UK), ss. 735-6.

from other parts of the empire, the memorandum adopted a tone of resignation when it came to the legal means of addressing this:

> I am afraid that, so far as New Zealand is concerned, the principles which govern colonial legislation … have been in the past somewhat relaxed … and it may be difficult to go back upon past legislation, but the time has probably come to prevent further extensions in this direction, and it may be that, notwithstanding that the colony's Acts technically go further than they should, they may in practice have not worked any great detriment to British shipping.[91]

In terms of the New Zealand provisions on shipowners' liability, the Solicitor pointed out that the provisions of the *Merchant Shipping Act 1894* on this subject applied across the whole empire. However, while it would seem unnecessary for any colonial legislature to deal with this subject, such provisions were not prohibited by that Act.[92]

The specialist maritime law firm Hill Dickinson's lengthy opinion on behalf of British shipowning interests (via the Shipowners' Parliamentary Committee) devoted far more time to sections on shipowners' liability, describing them as 'probably the most important provisions in the Bill from the point of view of the British shipowner, introducing as they do provisions very similar to those contained in the Harter Act of the United States of America'.[93] Their advice suggested that the New Zealand provisions were somewhat less stringent than the American equivalent, as they rendered a contract in breach of them void, rather than illegal, and gave courts a broad discretion to amend a contract or declare it valid. However, this flexibility would also lead to uncertainty and litigation and give courts 'law-making' instead of 'law-interpreting' powers, which 'has always been repugnant to British ideas of judicial functions'. The firm further noted that conflict of laws issues would arrive, with courts needing to determine which country's law would apply to a contract.[94] The Harter Act, while more stringent, was therefore also more certain, as it was illegal

91 'Memorandum by Solicitor to the Board of Trade' (14 October 1904), [1905] *AJHR* A1, 7.

92 'Memorandum by Solicitor to the Board of Trade', 5, 16.

93 'Report by Hill, Dickinson, and Co on "The Shipping and Seamen Bill, 1903", of New Zealand', 24.

94 'Report by Hill, Dickinson, and Co on "The Shipping and Seamen Bill, 1903", of New Zealand', 25.

not to have all bills of lading signed in the US comply with it on pain of a criminal penalty. The firm noted that the New Zealand legislation was interfering with freedom of contract but accepted this was not something on which the *Colonial Laws Validity Act 1865* (UK) had any bearing.[95]

Australia's legislation was equally unwelcome to shipping interests. While the Secretary of State for the Colonies, Alfred Lyttelton, informed Australia's government that the King would not be disallowing the Act, he passed on protests from eleven shipowners' organisations, including London's Chamber of Shipping, the Shipowners Association of Liverpool and similar bodies.[96] These protests attempted to convince Lyttelton to have royal assent for the Bill withheld, on the basis that its Harter-inspired terms were a 'startling innovation', 'at once unjust to shipowners, injurious to all the interests concerned in the Australian over-sea trade and inexpedient on grounds of public policy'.[97] It would interfere with freedom of contract, hinder insurance arrangements, interfere with uniformity across the empire's laws and increase freights. It was *ultra vires* Australia's Constitution Act, as its impacts were felt far beyond Australia's borders and might give foreign flagged shipping an advantage over British ships if it were held not to apply to the former. The General Shipowners Society was even complaining that the Bill placed responsibility on the shipowner for providing a seaworthy ship.[98]

The managers of the White Star Line believed the Australian legislation was a response to problems with refrigerated cargo, despite cargo interests having 'always accepted' that they took on the risk of machinery breakdown. The Bill was described as 'panic legislation … passed very much at the instigation of certain shippers of fruit whose cargo during one particular Season had suffered severely'.[99] The writers had evidently missed — or deliberately overlooked — the long series of attempts by Australasian merchants to reverse that position.

As a sign of the power the British shipowners believed they held, the Chamber of Shipping not only scolded the Australian Governor-General

95 *Harter Act*, ss. 1, 5; 'Report by Hill, Dickinson, and Co on "The Shipping and Seamen Bill, 1903", of New Zealand', 26.

96 Lyttelton to Northcote, 18 August 1905, NAA, A6661, 1075.

97 Liverpool Steam Ship Owners' Association to Lyttelton, 3 April 1905, NAA, A6661, 1075.

98 General Shipowners Society to Lyttelton, 12 April 1905, NAA, A6661, 1075.

99 Ismay, Imrie & Co to Lyttelton, 29 March 1905, NAA, A6661, 1075.

for assenting to the Bill, but also resolved that the Secretary of State for the Colonies should warn the chamber as soon as any Bills affecting shipping were introduced to colonial parliaments, and that no such legislation should receive the royal assent until the shipowners' views had been considered.[100]

Prime Minister Deakin assured the Secretary of State that these protests 'would receive careful attention' and agreed to refer the suggestion of a conference on merchant shipping to the Royal Commission on the Commonwealth's navigation laws. Ultimately, that commission, the tone of which Bach described as 'stridently nationalist',[101] decided the cargo interests' concerns regarding bills of lading had been justified and recommended no changes to the legislation.[102]

The suggestion of further empire-wide discussions also featured in the response to New Zealand's Act, with the Secretary of State for the Colonies suggesting the time had come to explore a uniform approach to the question of British merchant shipping. With both Australia's *Navigation Act 1901* and New Zealand's *Shipping and Seamen Act 1903* in force, there was a sense that the system of imperial legislation, supplemented by colonies in respect of their domestic shipping industries, needed to be re-examined. The fear expressed then was the same as exists today: that a ship would leave one port in compliance with widely accepted laws, only to arrive in another port in breach of an entirely different set of standards. Similar concerns had been expressed by officials in London about the application of Australian law to British ships, and the potential for clashes with English shipping laws, during the final drafting stages of Australia's Constitution.[103]

The Secretary of State suggested a meeting between British, Australian and New Zealand shipping representatives, with a view to developing 'a

100 Chamber of Shipping of the United Kingdom to Lyttelton, 29 March 1905, NAA, A6661, 1075.

101 Bach, *A Maritime History of Australia*, 174.

102 Deakin to Northcote, 30 September 1905, NAA, A6661, 1076; Australian Department of Trade and Customs memorandum to Prime Minister's Office, 'Sea Carriage of Goods Act – Statute Bill of Lading', 29 September 1920, NAA, A595, BT1924/375, 4-5.

103 J. A. La Nauze, *The Making of the Australian Constitution* (Melbourne: Melbourne University Press, 1972), 251-8. Such problems continued to arise in Australia into the twentieth century: Alex C. Castles, *An Australian Legal History* (Sydney: Law Book Company, 1982), 412-14, 419-21; Bach, *A Maritime History of Australia*, 295-300.

code as nearly uniform throughout the Empire as the diversity of circumstances will allow'.[104] This correspondence started a chain of events that led to the Colonial Merchant Shipping Conference of 1907, which dealt with several issues, primarily connected to wages and manning. Bills of lading were the fifth item on the twelve-item agenda.

In his opening remarks, the President of the Board of Trade, David Lloyd George, suggested that New Zealand's 1903 Act had been given the royal assent on the understanding that it would be discussed at the conference. New Zealand Premier Sir Joseph Ward replied that there was no question of New Zealand revisiting legislation that its parliament believed was in the best interests of the colony. There was no such thing as 'conditional assent', he said; rather, it was more likely the UK and the empire would look to New Zealand's maritime legislation for guidance and to achieve uniformity. The Australians were not to be divided on this matter: speaking of the two colonies' shipping legislation, Australian politician Sir William Lyne said, 'we are sisters — we are close together — what one does the other generally does'.[105]

However, the two colonies' comments on the bill of lading question suggest that the legislation had not had the desired impact. Ward described the bill of lading still being used by British shipowners as 'worse than useless' to all but the shipowner,[106] while Australian politician Dugald Thomson argued the situation was leading to a 'national loss' for Australia: a loss to exporters that was holding the national economy back.[107] The Australasians then attempted to pass a resolution on an agreed form of bill of lading, arguing that British shipowners were still contracting out of all liability.[108]

Debate on the proposal broke along the usual lines, and it failed after being rejected by the Board of Trade and shipowners (the Colonial Office abstained). The shipowners would never agree to greater liability when there was cargo insurance available, and cheaper freight for the cargo

104 Lyttelton to Plunket, 8 March 1905, despatch 21/1905; [1905] *AJHR* A1, 1-2.

105 *Navigation Conference: Report of a Conference between Representatives of the United Kingdom, the Commonwealth of Australia, and New Zealand, on the subject of Merchant Shipping Legislation* (1907), NAA, CP103/12, Bundle 24/18, 100-101.

106 *Navigation Conference* (1907), 2-4.

107 *Navigation Conference* (1907), 102.

108 *Navigation Conference* (1907), 100-101.

interests when liability was excluded.[109] The Australasians replied that there was no freedom of contract when the shipowners combined to exert power on the colonists, and insurance was not always available to colonial exporters, or at least not on acceptable terms. Moreover, the British shipowners had only themselves to blame. Their bad behaviour had lost them the faith of merchants, especially when US vessels were offering cheaper freight rates on voyages to which the Harter Act applied.[110]

Towards a Fairer Deal

The 1907 conference was the high-water mark of Australasian attempts to push an independent agenda on contracts of carriage, but other colonies followed suit in subsequent years.[111] By 1921, the Imperial Shipping Committee decided that imperial legislation along similar lines was necessary.[112] Not long afterwards, the 1924 Hague Rules on international contracts of carriage were agreed to on a multilateral basis. The Rules eventually entered into force across the UK, Australia and New Zealand and were closer to the position represented by the 1903 and 1904 legislation than the total freedom of contract sought by shipowners of the time. Many defences remained available to shipowners for damage, but they at least needed to provide a seaworthy ship at the start of the voyage and take reasonable care of the cargo.

Although these developments highlight a degree of longer-term success for the Australasian merchants, there are suggestions that their domestic legislation was of limited utility in practice. Fifteen years after the passage of the Australian legislation, government officials were reporting that shipowners trading out of Australia were resorting to all manner of creative drafting practices to circumvent the 1904 Act. This included clauses purporting to apply English law and clauses unlawfully excluding liability in an attempt to bluff cargo interests into forfeiting their rights

109 *Navigation Conference* (1907), 3; Australian Department of Trade and Customs memorandum to Prime Minister's Office, 'Sea Carriage of Goods Act – Statute Bill of Lading', 29 September 1920, NAA, A595, BT1924/375, 7-8.

110 Debates about shipowners' conduct in the context of liner conferences were raging around the same time: Bach, *A Maritime History of Australia*, 175.

111 Canada, for example, passed legislation along similar lines in 1910: *Water Carriage of Goods Act 1910* (Can).

112 Paul Myburgh, 'Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?', *Victoria University of Wellington Law Review* 31 (2000): 359.

(these would take the form of wide exclusions of liability, followed by fine print suggesting those exclusions would be 'read subject to the 1904 Act').[113]

Conclusion

Australia and New Zealand's shipping law reforms at the turn of the twentieth century remind us that commercial law — despite its technicalities and jargon — can provide valuable insights into key issues facing a colonial society. With growing economies and increasing political independence, a sufficient number of Australasian merchants and politicians joined forces against powerful British interests and, adopting an American precedent, forged an independent commercial policy. The reaction they received in London clearly illustrates the significance of their actions.

From a maritime and commercial law perspective, the reforms give a glimpse of what might have been — and what may yet be achieved. As is the case today, it was not unusual during this period to find articles promoting the harmonisation of New Zealand and Australia's shipping and other commercial laws.[114] During the passage of New Zealand's 1903 Act, the legislature borrowed from NSW legislation on seamen's employment and discussed the need to harmonise certain survey requirements with that state.[115] Discussions regarding New Zealand's 1903 Act also coincided with the passage of Australia's *Coastwise Trade Act 1903* (regulating coastal shipping), and some were even advocating for an 'Australasian merchant marine' to service the two countries' coastal trades.[116] Although the two Acts examined here were not identical to each other (or to the US legislation from which they derived), they clearly represented the desire to harmonise and cooperate on points of commercial and maritime law reform.

113 Australian Department of Trade and Customs memorandum to Prime Minister's Office, 'Sea Carriage of Goods Act – Statute Bill of Lading', 29 September 1920, NAA, A595, BT1924/375.

114 'Chambers of Commerce', *Press*, 10 January 1901, 2; 'Wellington Notes', *Auckland Star*, 12 March 1903, 2.

115 *NZPD* 124 (20 August 1903), 705-6; *Seamen's Act 1898* (NSW).

116 'A Mercantile Marine for Australasia', *Evening Post*, 3 December 1900, 4; 'Parliamentary News', *New Zealand Herald*, 20 August 1902, 5; See also Hawke, *The Making of New Zealand*, 118 (cooperation on mail services).

It is useful for us to look back on what New Zealand and Australia have achieved in the past in this regard, to provide illustrations of how the countries may cooperate in the future. Of course, it is far more common now to talk in terms of global uniformity of commercial and maritime law, led by institutions like the United Nations Conference on Trade and Development. Nonetheless, the ability of exporting (as opposed to shipowning) countries with common interests to establish their own cooperative solutions, and to stand up to those who insist there is no alternative to the shipowners' position, should not be underestimated. Australia and New Zealand were certainly no global superpowers when they enacted their reforms, yet their gamble paid off: those laws ultimately contributed to a better deal for cargo interests around the world.[117]

Another commercial law aspect of the 1903 and 1904 Acts that strikes a chord in the age of digital commerce is the role of technology in driving law reform. The background to this legislation highlighted the problems of shipowners working 'in combination' (including via anticompetitive liner conferences), the failure of freedom of contract to provide fair outcomes and the importance of good trade law to growing export economies.[118] However, technological developments in refrigerated shipping were clearly a major factor.[119] As with any new technology — especially during the early period when its reliability is questionable — associated commercial risks needed to be allocated. The ability to send refrigerated cargoes to Europe and elsewhere not only expanded the wealth and influence of Australasian exporters, but also led to a greater expectation of care for their perishable goods. Although the legal developments represented by the Harter-inspired Acts may have occurred in time regardless, refrigeration undoubtedly accelerated the process of reform, adding another point in favour of the already celebrated influence of this technology for Australia and (more especially) New Zealand's development.[120]

These Australasian shipping reforms also provide more general lessons regarding New Zealand and Australia's legal development during their late colonial stages. First among these is the central role played by a

117 Sturley, 'The History of COGSA and the Hague Rules', 18-19.

118 Bach, *A Maritime History of Australia*, 151-53.

119 *CPDS* 47 (24 November 1904), 7575; *CPDHR* 50a (13 December 1904), 8322.

120 Michael King, *The Penguin History of New Zealand* (Auckland: Penguin, 2003), 236-38.

confident merchant class in both countries in organising concerted resistance to the British shipowners' stance of refusing to accept liability for cargo handling aboard their vessels. Even if their risks could, in theory, be insured in London and passed on to local consumers, this was a group well placed to turn to legal avenues of reform and to pressure their elected representatives for change. As with Anderson's account of New Zealand bankruptcy law reform half a century earlier, chambers of commerce were the key entities through which reform was organised.[121] The parliamentarians were willing to take their lead in commercial law from these commercial people as they corresponded and conferenced their way to achieving their goals, with almost no involvement from the legal profession.

In terms of the substance of these reforms, the influence of US law in giving form to the key policy ideas underlying them pushes against common preconceptions that the colonies pursued a 'strong, generally almost slavish, reliance on British statutes as the preferred means of controlling a wide range of commercial activities'.[122] Certainly, both legal systems inherited and continued to apply a largely English approach, but there are a few occasions on which outside influences prevailed (to say nothing of purely domestic innovations). Finn observes that Canadian and US ideas had considerable impact on Australian and New Zealand legislation during the late nineteenth century. Examples include reforms on workers' liens and the treatment of family homes during insolvency, both of which involve policy-driven interventions in commercial law of a kind similar to the Acts examined here.[123] From a New Zealand perspective, the 1903 Act falls within the period that Finn labels the 'first wave of reform' (1880–1914), during which New Zealand was more comfortable experimenting with new ideas and economic interventions than would prove to be the case for most of the early twentieth century.[124]

These Australasian shipping law reforms thus point to the emergence of a more dynamic empire during this period. There could be no suggestion

121 Stuart Anderson, 'Going for the Broke: Making Bankruptcy Law in New Zealand c. 1860-1867', *New Zealand Universities Law Review* 26 (2015): 510, 533.

122 Castles, *An Australian Legal History*, 453; see similarly Jeremy Finn, 'Development of the Law in New Zealand', in *A New Zealand Legal History*, ed. Peter Spiller, Jeremy Finn and Richard Boast (Wellington: Brookers, second edition, 2001), 78.

123 Finn, 'Development of the Law in New Zealand', 89-90.

124 Finn, 'Development of the Law in New Zealand', 112.

that ideas and laws were proceeding solely from the centre outwards: here was a direct challenge to British capital by colonial merchants. Frustrated by their lack of success in negotiations over a long period, and seized of an American method of protecting their interests, they were capable of convincing their local legislatures to enact the necessary laws. The shipowners and their representatives objected to those laws on both policy and legal grounds but, instead of attempting to override the development via imperial legislative powers, felt compelled to enter into negotiations that led towards a compromise all parties could accept. Although they may have been confident in their ability to erode the impact of the Australasian reforms via contractual clauses applying English law, the colonial legislatures could not be ignored altogether. They were undoubtedly making inroads in the field of shipping law — a field in which the UK had long held itself out as a world leader.

The speech of the chairman to the conference of chambers of commerce in Christchurch in January 1901, addressing the issues of closer commercial and defence union within the empire, captures a sense of what the colonists believed was possible. Touching on the codification of laws such as the Marine Insurance Act, he suggested that it would be up to the colonies to achieve these goals: 'The Old Country is conservative … We are progressive'.[125]

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[125] 'Chambers of Commerce', *Press*, 10 January 1901, 2.