SUPREME COURT OF QUEENSLAND

CITATION:	*Mentink v Registrar of the Australian Register of Ships (No 2)* [2013] QSC 151
PARTIES:	**WILFRED JAN REINIER MENTINK** (applicant) **v** **REGISTRAR OF THE AUSTRALIAN REGISTER OF SHIPS** (respondent)
FILE NO/S:	8371/12
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	20 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2012
JUDGE:	Peter Lyons J
ORDER:	**1. Declare that the respondent, not having received a notice under s66(1) of the Shipping Registration Act 1981 (Cth) from the registered owner, but from some other person, was not authorized by s66 of that Act to make an entry in the register resulting in closure of the registration of Larus II.** **2. Refuse the other actions for declaratory relief.** **3. Make no order as to costs.**
CATCHWORDS:	SHIPPING AND NAVIGATION – SHIPS – REGISTRATION – OF SHIPS – where the applicant was the registered owner of the ship Larus II until 11 August 2004 – where registration of the ship was permitted under s 14 of the Shipping Registration Act 1981 (Cth) on the basis the ship was Australian owned – where on 6 August 2004, a third party provided to the respondent a bill of sale allegedly signed by the applicant which purported to transfer the ownership of the Larus II to the third party – where the applicant gave no notice of the transfer of ownership to the respondent and denies that ownership was transferred – where the third party was not an Australian national – where, upon the notice of the third party that the Larus II was no longer Australian owned, the respondent, under s 66 of the Shipping Registration Act 1981 (Cth) closed the registration of the Larus II on the Register – where the applicant sought declarations regarding the respondent making an entry in the

Register – whether declaratory relief should be granted

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – where the respondent submitted that the Supreme Court did not have jurisdiction to make the declarations sought because of s 9 the Administrative Decisions (Judicial Review) Act 1977 (Cth) – whether the Administrative Decisions (Judicial Review) Act 1977 (Cth) applies to exclude the jurisdiction of the Supreme Court to make the declarations sought by the applicant

ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – MEANING OF DECISION – PARTICULAR CASES - where the respondent submitted that the respondent made a "decision" to make an entry on the Register – whether the respondent making an entry on the Register was a "decision" for the purposes of the Administrative Decision (Judicial Review) Act 1977 (Cth)

ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – REVIEWABLE CONDUCT – where the respondent submitted that the respondent engaged in "reviewable conduct" by making an entry on the Register – whether the respondent engaged in "reviewable conduct" by making an entry on the Register for the purposes of the Administrative Decision (Judicial Review) Act 1977 (Cth)

PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – DECLARATIONS – APPROPRIATE FORM OF RELIEF - DISCRETION OF COURT – FUTILITY OF DECLARATION – where the respondent submitted that a declaration in the terms sought was too broad and did not reflect the findings previously made – where the respondent submitted the declaration would serve no utility, having no foreseeable consequence – where the respondent submitted a declaration would not be made as a summary recording of conclusions reached in the course of reasons for judgment – whether the declarations sought by the applicant should be made

Acts Interpretation Act 1901 (Cth) s15C

Administrative Decisions (Judicial Review) Act 1977 (Cth), s 3, s 9

Judiciary Act 1903 (Cth) s 39(2)

Jurisdiction of Courts (Cross Vesting) Act 1987 (Cth) s 4

Shipping Registration Act 1981 (Cth) s 59, s 66

Abebe v Commonwealth (1999) 197 CLR 510

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

Australian Health Insurance Association Ltd v Esso Australia Pty Ltd (1993) 41 FCR 450

Commonwealth v Sex Discrimination Commissioner (1998) 170 ALR 52

Doan v Health Insurance commissioner (2002) 124 FCR 125

Duncan v Chief Executive Officer, Centrelink (2008) 244 ALR 129

Evans v Friemann (1981) 53 FLR 229

Fencott v Muller (1983) 152 CLR 570

Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421

Gardner v Dairy Industry Authority of New South Wales (1978) 52 ALJR 180

Griffith University v Tang (2005) 221 CLR 99

Guss v Commissioner of Taxation (2006) 152 FCR 88

Minister for Immigration and Multicultural Affairs v Ozmanian (1996) 71 FCR 1

Philip Morris Inc v Adam P Brown M ale Fashions Pty Ltd (1981) 148 CLR 457

Plaintiff M61/2010E v The Commonwealth (2011) 243 CLR 319

Rural Press Ltd v Australian Competition and Consumer Commission (2003) 216 CLR 53

Tomkins v Civil Aviation Safety Authority [2006] FCA 1253

Warramunda Village Inc v Pryde (2001) 105 FCR 437

Warramunda Village Inc v Pryde (2002) 116 FCR 58

COUNSEL: The applicant appeared in person
M Brennan for the respondent

SOLICITORS: The applicant appeared in person
Crown solicitor for the respondent

[1] **Peter Lyons J**: The applicant applied for an order under s 59 of the *Shipping Registration Act* 1981 (Cth) (*SRA*) for the rectification of the Australian Register of Ships, by deleting an entry recording the closure of the registration of the vessel "Larus II". He also sought certain declaratory relief.

[2] On 30 November 2012 I published reasons for judgment (*November 2012 reasons*). I indicated that I was not prepared to make an order for rectification of the register under s 59 of the *SRA*, and invited submissions from the parties as to the grant of the declaratory relief. These reasons deal with that question.

Background

[3] Prior to 11 August 2004, the applicant was the registered owner of the vessel. On 11 August 2004, an entry was made, recording the closure of its registration. There was evidence to indicate that subsequent to that date, other persons had had possession of the vessel, and some had claimed ownership.

[4] In my reasons, I dealt with the questions whether (as the respondent contended) the closure entry was authorised by s 66 of the *SRA*; and whether in any event I should make an order for rectification of the register under s 59 of the *SRA.* I came to the view that the closure entry was not authorised by s 66 of the *SRA*; but that I should not make an order under s 59 of the *SRA* because persons who might be significantly affected by the order had not been made parties to the proceedings.

Declarations sought

[5] The applicant's application was filed on 12 September 2012. It sought the following declarations:

> "1. A declaration that the Respondent was not authorized by the *Shipping Registration Act 1981* (Cth) or the *Shipping Registration Regulations 1981* (Cth) to invite and receive application from any person other than a registered owner of the registered Australian ship Larus II (ON 850894) to close the registration of the ship Larus II.
>
> 2. A declaration that the Respondent was not authorized by the *Shipping Registration Act 1981* (Cth) Section 66 to make an entry to the Register and to close or deem to be closed the registration of the registered Australian ship Larus II on notice from a foreign buyer.
>
> 3. A declaration that on the basis of the evidence before the Respondent on 11 August 2004 the Respondent could not reasonably decide that the administrative standards required by the *Shipping Registration Act 1981* (Cth) had been met in order to conclude that title to the Australian registered ship Larus II had transferred to Lee Anthony Thackray.
>
> 4. A declaration that the Respondent was bound by the *Shipping Registration Act 1981* (Cth) Section 58 to give notice to the Applicant who was at the relevant time the registered owner and registered agent of the Australian registered ship Larus II.
>
> 5. A declaration that the entry made to the Register by the Respondent at the relevant time namely that the Applicant had transferred the Australian registered ship Larus II to Lee Anthony Thackray was made without sufficient cause."

Jurisdiction

[6] Submissions provided by the respondent on 14 December 2012 raised for the first time potential questions about the jurisdiction of this Court to grant declaratory relief of the kind sought by the applicant. It was submitted that if the applicant's originating application were to be read as an application for declaratory relief "separately and apart from the claim to rectify the register", questions of jurisdiction would be likely to arise. They include the source of the jurisdiction to make declarations; and whether the jurisdiction has been taken away by s 9 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (*ADJRA*). They also referred to the possibility of a reinvesting of jurisdiction under s 4 of the *Jurisdiction of Courts (Cross Vesting) Act* 1987 (Cth) (*Cross Vesting Act*); and the provision for transfer of proceedings under s 6 of that Act. Submissions were also made about whether declaratory relief should be granted.

[7] Those submissions resulted in the posing of further questions for the consideration of the parties. In response, the respondent submitted that the jurisdiction to rectify the register, granted to this Court under s 59 of *SRA*, was not affected by s 9 of the *ADJRA*. However, it was also submitted that "an application for declaratory relief separately and apart from rectification of the register" might attract the operation of s 9 of the *ADJRA*, if this Court's jurisdiction derives from s 39 (2) of the *Judiciary Act* 1903 (Cth) (*JA*). The submissions proceeded on the basis that the registrar is an officer of the Commonwealth. The submissions did not explain why s 9 would not affect the Court's jurisdiction to deal with the application for declaratory relief, unless it were an application for such relief, separately and apart from rectification of the register. Nor did the submissions explain the meaning of the quoted expression.

[8] Not surprisingly, the applicant, who does not have legal representation, has not been able to provide substantial assistance in dealing with the Court's jurisdiction to grant the declaratory relief which he seeks.

[9] Section 9 of the *ADJRA* is as follows:

> "**9 Limitation of jurisdiction of State courts**
>
> (1) Notwithstanding anything contained in any Act other than this Act, a court of a State does not have jurisdiction to review:
>
> (a) a decision to which this section applies that is made after the commencement of this Act;
>
> (b) conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision to which this section applies;
>
> (c) a failure to make a decision to which this section applies; or
>
> (d) any other decision given, or any order made, by an officer of the Commonwealth or any other conduct that has been, is being, or is proposed to be, engaged in by an officer of the Commonwealth, including a decision, order or conduct given, made or engaged in, as the case may be, in the exercise of judicial power.
>
> Note: This subsection has effect subject to the *Jurisdiction of Courts (Cross-vesting) Act 1987* and to subsection 1337B(3) of the *Corporations Act 2001*.
>
> (2) In this section:
>
> ***decision to which this section applies*** means:
>
> (a) a decision that is a decision to which this Act applies; or
>
> (b) a decision of an administrative character that is included in any of the classes of decisions set out in Schedule 1.
>
> ***review*** means review by way of:

(a) the grant of an injunction;
(b) the grant of a prerogative or statutory writ (other than a writ of *habeas corpus*) or the making of any order of the same nature or having the same effect as, or of a similar nature or having a similar effect to, any such writ; or
(c) the making of a declaratory order.

(4) This section does not affect:
(b) the jurisdiction conferred on the Supreme Court of a State by section 32A of the *Federal Court of Australia Act 1976*; or
(c) the jurisdiction of a court of a State in respect of any matter that is pending before it at the commencement of this Act."

[10] To understand the effect of s 9(1), it is necessary to have regard to the following provisions from s 3 of the *ADJRA*:

"**3 Interpretation**

(1) In this Act, unless the contrary intention appears:

...

decision to which this Act applies means a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):
(a) under an enactment referred to in paragraph (a), (b), (c) or (d) of the definition of ***enactment***; or
(b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of ***enactment***;
other than:
(c) a decision by the Governor-General; or
(d) a decision included in any of the classes of decisions set out in Schedule 1.

Note: Regulations for the purposes of section 19 can declare that decisions that are covered by this definition are not subject to judicial review under this Act.

...

enactment means:
(a) an Act, other than:
(i) the *Commonwealth Places (Application of Laws) Act 1970*; or
(ii) the *Northern Territory (Self-Government) Act 1978*; or
(iii) an Act or part of an Act that is not an enactment because of section 3A (certain legislation relating to the ACT); or
(b) an Ordinance of a Territory other than the Australian Capital Territory or the Northern Territory; or
(c) an instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance, other than any such instrument that is not an enactment because of section 3A; or
(ca) an Act of a State, the Australian Capital Territory or the Northern Territory, or a part of such an Act, described in Schedule 3; or
(cb) an instrument (including rules, regulations or by-laws) made under an Act or part of an Act covered by paragraph (ca); or
(d) any other law, or a part of a law, of the Northern Territory declared by the regulations, in accordance with section 19A, to be an enactment for the purposes of this Act;
and, for the purposes of paragraph (a), (b), (c), (ca) or (cb), includes a part of an enactment.

Note: Regulations for the purposes of section 19B can amend Schedule 3 (see section 19B).

…

officer of the Commonwealth has the same meaning as in paragraph 75(v) of the Constitution.

…

(2) In this Act, a reference to the making of a decision includes a reference to:

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing;

and a reference to a failure to make a decision shall be construed accordingly."

[11] In my view, the *SRA* comes within the definition of "enactment". It follows that this Court does not have jurisdiction to review by way of making a declaration, a decision of an administrative character made under the SRA nor a decision of the Registrar (assuming the registrar is an officer of the Commonwealth). Although I have not had the benefit of submissions on the question, it seems to me that, making an entry in the register established by the *SRA* is not a decision of an administrative character, nor a decision for the purposes of s 9(1)(d) of the *ADJRA*. The making of an entry by the respondent under s 66 is simply the performance of the act for which that section provides.

[12] The expression "a decision of an administrative character made … (whether in the exercise of a discretion or not …) … under an enactment" used in the definition of the expression "decision to which this Act applies" in s 3 of the *ADJRA,* on its face is capable of wide application. That width may be thought to have been extended by s 3(2) of that Act. However, the joint judgment of Gummow, Callinan and Heydon JJ in *Griffith University v Tang*[1] pointed out that there are dangers in looking at the definition as other than a whole; that is to say, it is not appropriate to look individually at the question whether there is a "decision"; whether it is "of an administrative character"; and whether it is "made … under an enactment"; each question being considered in isolation.

[13] The decision reached in *Australian Broadcasting Tribunal v Bond*[2] has the effect that the scope of the term "decision" used in this expression is cut down by the context provided by the *ADJRA*. Brennan and Deane JJ agreed with the reasoning of Mason CJ dealing with the scope of this expression. The reasons of Mason CJ show that a "decision" for the purposes of this Act is generally one which is final or operative and determinative, at least in a practical sense, of the issue of fact falling

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1 (2005) 221 CLR 99 at [59]-[60].

2 (1990) 170 CLR 321.

for consideration.[3] However, his Honour also recognised that where the statute expressly provided for the making of a finding or ruling "as a step along the way in a course of reasoning leading to an ultimate decision", such a decision is reviewable.[4] It might be observed that such a decision would appear to be one that makes a determination, although it is of an intermediate nature; and it would seem to dispose of an intermediate question.

[14] Mason CJ also considered that an essential quality of a reviewable decision is "that it be a substantive determination".[5] On that basis, he considered that s 3(2)(g) of the *ADJRA* had limited operation, referring to the exercise, or refusal to exercise, a substantive power.[6]

[15] *Guss v Commissioner of Taxation*[7] was an appeal against a decision of a single Judge of the Federal Court holding that a decision to give a penalty notice under s 222APE of the *Income Tax Assessment Act* 1936 (Cth) was not a decision of an administrative character made under an enactment, and accordingly not reviewable under the *ADJRA*. The decision at first instance was based on the proposition that the decision to give the penalty notice was "not a substantive determination". There was no application, enquiry or dispute that was determined by, or as a result of, it.[8] The appeal was, by majority, dismissed. Edmonds J, one of the majority, decided the case on the basis that the giving of the notice did not affect legal rights or obligations, and accordingly was not a decision made under an enactment, as explained in *Griffith University v Tang*.[9] His Honour considered it was not helpful in determining the appeal to deal with the question whether the decision to issue the notice was operative and determinative of the issue of fact calling for consideration.[10]

[16] The other member of the majority in *Guss* was Greenwood J. His Honour examined in detail the judgment of Mason CJ in *Bond*. His Honour then identified what he described as "two central features" of a decision which might be reviewed, as follows:[11]

> "First, there must be a determination, a resolution, a position taken, a judgment made by a decision-maker. Second, that determination must be the emanation of a consideration by the decision-maker or structural organs of an organisation charged with making a determination, of a matter of substance that necessarily involves some feature of deliberation, assessment or analysis that, in the ordinary course, would comprehend those facets of decision-making *behaviour* (described earlier in His Honour's reasons)." (The emphasis appears in the original reasons.)

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3 *Bond* at p.337.
4 *Bond* at p.337.
5 *Bond* at p.337.
6 *Bond* at p.337.
7 (2006) 152 FCR 88.
8 *Guss* at [22].
9 (2005) 221 CLR 99; see *Guss* at [40]-[41].
10 *Guss* at [42]-[43].
11 *Guss* at [75].

[17] His Honour then referred to a series of cases which considered whether an overt act might be a decision, quoting the references in a number of them to the deliberative behaviour or mental process which preceded the act, and the reasoning involved.[12] His Honour then said:[13]

> "It seems to me that what follows from these observations is that the resolution of an issue (particularly an issue of substance) leading to an operative determination must necessarily engage a process of reasoning."

[18] Greenwood J discussed the effect of s 3(2) of the *ADJRA*, by reference to the observation of Fox ACJ in *Evans v Friemann,*[14] to the effect that its provisions place emphasis on the manifestation of the decision and could be regarded as "largely evidentiary in effect".[15] His Honour then said:

> "However, s 3(2) has the effect that a reference to the making of a decision *includes* a reference to the seven classes of subject matter. Section 3(2) does not bring each class of conduct within the scope of a 'decision' unless engaging in the nominated subject matter also involves an operative determination of a matter in issue derived from an engaged process of reasoning." (Again, the emphasis appears in the original reasons.)

[19] There are other decisions of the Federal Court which are consistent with the approach of Greenwood J.[16] In *Commonwealth v Sex Discrimination Commissioner,*[17] it was held that the referral by the Commissioner of a matter to the Human Rights and Equal Opportunity Commission was not a decision that could be reviewed under the *ADJRA*. Section 57(1) of the *Sex Discrimination Act* 1984 (Cth) required the Commissioner to refer a matter to the Commission where the Commissioner was of either of two opinions specified in the section, or where the Commissioner had unsuccessfully endeavoured to settle the matter by conciliation. Branson J said:[18]

> "Section 57 of the Act imposes a duty on the Commissioner to refer 'a matter' to the Commission in the circumstances specified in the section. The section does not, in my view, provide for the making of any substantive determination of an administrative character by the Commissioner. If one of the circumstances specified by the section arises, the Commissioner is obliged to take the action required by the section."

[20] To similar effect is the decision of Marshall J in *Doan v Health Insurance Commissioner*.[19] Section 89 of the *Health Insurance Act* 1973 (Cth) provided that when an investigative referral is made, the second respondent to the proceedings

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12 *Guss* at [76]-[81].
13 *Guss* ast [82].
14 (1981) 53 FLR 229 at 233.
15 See *Guss* at [96].
16 Including his Honour's decision in *Wilhelm v McKay* [2007] FCA 367.
17 (1998) 170 ALR 52.
18 At 63.
19 (2002) 124 FCR 125.

"must conduct an investigation …" into certain matters. In holding that a decision to carry out an investigation under s 89 (as the second respondent had described what he had done) was not reviewable, his Honour observed:[20]

> "The word 'decision' implies that the decision-maker has some discretion to decide a question or an issue in a particular manner. Section 89 imparts an obligation upon (the Second Respondent) to conduct an investigation. The second respondent had no choice in the matter. It is irrelevant that the second respondent described his actions as a decision."

[21] Section 9 of the *Freedom of Information Act* 1982 (Cth) required the principal officer of an agency to make copies of certain documents available for inspection by the public, and to cause a statement to be prepared specifying the documents so made available. In *Duncan v Chief Executive Officer, Centrelink*,[21] Finn J held that actions taken in response to this obligation constituted a decision that was amenable to review under the *ADJRA*. However, in doing so, his Honour applied the reasons of Greenwood J in *Guss*.[22] His Honour earlier observed that s 9(1) of the *Freedom of Information Act* identified the documents to which the section applied, and that s 9(2)(a) contained the obligation to make those documents available for public inspection. His Honour said:[23]

> "It is, in my view, improbable that parliament intended s 9(1) as identifying objective facts on which s 9(2)(a) would operate rather than as setting criteria which, though largely factual in character, does (*sic*) involve deliberative evaluation and could give rise to questions of judgment and degree…. When coupled with the need to negative the operation of s 9(4) before making the determination to make a document available, s 9(2)(a) clearly required that a mental process be engaged in requiring the application of consideration to a variety of matters posed by the s 9(1) criteria and by the s 9(4) exception before reaching a decision …"

[22] The language in the passage cited from *Doan*, and the decision in *Commonwealth v Sex Discrimination Commissioner*, might be thought not to take account of the expression, "whether in the exercise of a discretion or not" found in the definition of a "decision of an administrative character". In my view, those words are intended to include a decision which determines a matter of substance, for which legislation mandates a particular consequence. *Duncan* provides an example. The passage from *Doan* seems to me to be consistent with this view. Whether the decision in *Commonwealth v Sex Discrimination Commissioner* is also consistent with this view would depend on a careful analysis of the *Sex Discrimination Act*, a task which I do not consider it necessary to undertake.

[23] Section 66 of the *SRA* imposes an obligation on the registrar on the happening of an event. That event is the receipt by the registrar of notice in writing, under s 66(1) of the *SRA*, from the registered owner, that a registered ship has been lost, taken by an enemy, or burnt or broken up; or that it has ceased to be entitled to be registered.

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20 At [99].
21 (2008) 244 ALR 129.
22 *Duncan* at [27].
23 At [27].

The obligation is to make an entry in the register of the event, the subject of the notice. That is consistent with one of the express functions of the registrar, under s 49(1) of the *SRA*, namely, "to receive and record all information and documents required or permitted to be lodged with the Registrar under this Act". This language is not suggestive of the making of a decision. Section 66 of the *SRA* gives no operative role to any consideration or determination by the registrar. In particular, he is not required to determine whether any of the events which are to be the subject of a notice under s 66(1) of the *SRA* has come to pass. The obligation to make an entry arises on receipt of a notice under s 66(1) of the *SRA*; and unless that happens, the obligation does not arise. It therefore seems to me the legislation does not provide for any substantive determination by the registrar. Nor is this a case where the statute has provided for the making of an intermediate finding or ruling, as a step along the way in the course of reasoning leading to an ultimate decision, the exception noted by Mason CJ in *Bond*[24] to the requirement that a reviewable decision be "final or operative and determinative …".

[24] It follows that the making of an entry under s 66(2) of the *SRA* is not a decision of an administrative character made under an enactment, and accordingly does not satisfy the definition of the expression "decision to which this act applies" in s 3(1) of the *ADJRA*. Nor, it seems to me, is it a decision given, or an order made, by an officer of the Commonwealth, for the purposes of s 9(1)(d) of the *ADJRA*. That provision extends to conduct, suggesting the reasoning of Mason CJ in *Bond* is applicable. It follows that s 9 of the *ADJRA* does not exclude from the jurisdiction of this Court, the making of a declaration relating to the making of an entry by the registrar under s 66 of the *SRA*.

[25] It does not inevitably follow that, in exercising jurisdiction in these proceedings, I have jurisdiction to grant declaratory relief of the kind sought by the applicant. The primary jurisdiction which he invoked is that which arises by virtue of s 59 of the *SRA*. That section authorises this Court to make such order as it thinks fit, directing the rectification of the register and, in proceedings under s 59 of the *SRA*, to decide any question that it is necessary or expedient to decide in connection with the rectification of the register.

[26] The distinction between the conferral of jurisdiction on a court, and the grant to it of a power, was discussed in *Australian Health Insurance Association Ltd v Esso Australia Pty Ltd*.[25] Black CJ said:[26]

> "There is a distinction between the conferral of jurisdiction and the grant of a power. Jurisdiction in this context means the authority a court has to decide a matter and power goes to the exercise of that authority."

[27] In that case, Black CJ held that the conferral of a power, then under consideration, carried with it the conferral of jurisdiction.[27] Sheppard J agreed.[28]

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24 At 337.
25 (1993) 41 FCR 450.
26 At p 459-460; see also p 476 per Northrop J.
27 At p 460.
28 At p 494.

[28] In my view, s 59 of the *SRA* both grants a power (to direct rectification of the register) and confers jurisdiction (to decide any question that it is necessary or expedient to decide in connection with the rectification of the register). The conferral of jurisdiction, it seems to me, is broader than is necessary simply to determine whether the register should be rectified. It extends to deciding any question, necessary or expedient to decide, in connection with rectification. It seems to me that it is arguable that this court is thereby authorised to exercise such powers as it might have, necessary to decide such questions. A declaration would be the exercise of an appropriate power pursuant to that jurisdiction.

[29] Under s 77 of the *Commonwealth Constitution*, the Federal Parliament may make laws investing a court of a State with federal jurisdiction in respect of any of the matters mentioned in ss 75 and 76 of the *Constitution*. Matters mentioned in s 76 of the *Constitution* include matters arising under any laws made by the Federal Parliament. Consistent with s 77 of the *Constitution*, s 15C of the *Acts Interpretation Act* 1901 (Cth) provides that where a provision of an act authorises a proceeding to be instituted in a particular court in relation to a matter, the provision is deemed to vest that court with jurisdiction "in that matter". It seems to me the purpose (and effect) of s 15C of the *Acts Interpretation Act* is that where a provision of an Act authorises the commencement of proceedings in a particular court, and those proceedings are related to a "matter", then the jurisdiction conferred is jurisdiction "in that matter". That is not to deny that, when the Federal Parliament confers jurisdiction on a court in a matter, it may restrict that jurisdiction, for example, to part only of the matter.[29]

[30] In this context, the expression "matter" is not limited to a claim for a particular form of relief; nor to a particular cause of action. Nevertheless, it will not always encompass the whole of the dispute between parties. Where a cause of action is within federal jurisdiction, that jurisdiction might extend to causes of action described by Mason J in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*[30] as "non-severable". In *Fencott v Muller*,[31] the joint judgment of Mason, Murphy, Brennan and Deane JJ pointed out the difficulties in the precise determination of the scope of a matter, though they stated that the existence of common transactions and facts was a generally sound guide. Their Honours said with respect to such a matter:[32]

> "… it would be erroneous to exclude a substantial part of what is in truth a single justiciable controversy and thereby to preclude the exercise of judicial power to determine the whole of that controversy. What is and what is not part of the one controversy depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships. The scope of a controversy which constitutes a matter is not ascertained merely by reference to the proceedings which a party may institute, but may be illuminated by the conduct of those proceedings and especially by the pleadings in which the issues in controversy are defined and the claims for relief

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29 *Abebe v Commonwealth* (1999) 197 CLR 510, 533-534, 604.

30 (1981) 148 CLR 457 at 512.

31 (1983) 152 CLR 570, at 606, 607.

32 At p 608.

> are set out. But in the end, it is a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter."

[31] Reference should also be made to s 39(2) of the *Judiciary Act* 1903 (Cth). That section invests State courts with federal jurisdiction in all matters in which original jurisdiction can be conferred upon the High Court. As has been seen, under s 76(2) of the *Constitution*, jurisdiction may be conferred on the High Court, in any matter arising under a law made by the Federal Parliament. On its face, therefore s 39(2) of the *SRA* would also confer jurisdiction on this court in respect of a matter arising under the *SRA*.

[32] The respondent submitted that, in respect of an application for declaratory relief "separately and apart from rectification of the register", if jurisdiction were conferred by s 39(2) of the *Judiciary Act*, that jurisdiction would be taken away by s 9 of the *ADJRA*. The submission depends upon the proposition that the respondent made a reviewable decision, or engaged in reviewable conduct. I have rejected the first proposition. Reviewable conduct is conduct for the purpose of making a decision to which the *ADJRA* applies.[33] If the making of the entry is not a reviewable decision, then any conduct of the registrar which led to the making of an entry is not conduct which might reviewed under the *ADJRA*.

[33] I therefore do not accept the submission that if this court's source of jurisdiction to grant declaratory relief is to be found in s 39(2) of the *Judiciary Act*, that that jurisdiction would be removed by s 9 of the *ADJRA*.

[34] I again note that the submission did not explain why the jurisdiction is removed if the application were for declaratory relief "separately and apart from rectification of the register"; but s 9 of the *ADJRA* would not otherwise apply. It may perhaps be based on the proposition that s 9 of the *ADJRA* is not intended to affect "non-severable" causes of action, or what is sometimes referred to as "accrued (federal) jurisdiction". It is not obvious that this proposition is correct, particularly since s 9(4) of the *ADJRA* reveals some attention was paid to the exclusion of matters from the jurisdiction of State Courts. However, it is unnecessary for me to consider this question further.

[35] I should add that although a specific grant of jurisdiction may restrict the operation of s 39(2) of the *Judiciary Act*[34] (if that is the relevant source of jurisdiction), it seems to me there is no reason to think that s 59 of the *SRA* has that effect. Its intention is to confer a specific power, which would not otherwise be available to a State Supreme Court, namely, the power to give directions for the rectification of the register. It also gives a State Court a broad authority to decide any question necessary or expedient to decide, in connection which the rectification of the register. These circumstances do not suggest an intention to limit jurisdiction otherwise conferred on such Courts. In any event, s 15C of the *Acts Interpretation Act* seems intended to ensure that the jurisdiction conferred, extends to the determination of the matter.

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33 See s 6(1) of the *ADJRA*.

34 See *Adams v Cleeve* (1935) 53 CLR 185, 190–191.

[36] Declaration 2 is at the very heart of the controversy between the parties. In this case, it is directed to the core question which was raised by the applicant's claim for rectification of the register. It seems to me that, in this case, it clearly forms part of the matter in respect of which jurisdiction is conferred on this Court.

[37] The remaining declarations relate to the conduct of the registrar antecedent to the making of the entry in the register, and which, at least at a practical level, led to it. It seems to me that the issues raised by this part of the applicant's claim are sufficiently related to his claim for rectification of the register, as to form part of a single controversy, and part of the matter in respect of which jurisdiction is conferred on this Court. That conclusion may perhaps be most easily reached with respect to Declaration 5, which would extend to the question whether a notice of a the kind referred to in s 66(1) of the *SRA* had been received by the registrar. However, Declarations 1, 3 and 4 seem to me to be directed to the question whether the registrar was in a position to make an entry on the register under s 66 of the *SRA*. Were that not correct, then those three declarations sought by the applicant, relate to matters arising under the *SRA*, in respect of which jurisdiction is conferred by s 39(2) of the *Judiciary Act*.

[38] I accordingly conclude that I have jurisdiction to determine the application for declaratory relief.

Declarations 1, 3, 4 and 5

[39] The respondents submitted that these declarations do not conform to the facts as found by me. The applicant submitted that they reflected specific errors committed by the respondent.

[40] Section 58 of the *SRA* in terms confers on the registrar a discretionary power to require the provision of information or documents in certain circumstances. No reason was identified for the proposition that s 58 of the *SRA* imposes an obligation on the registrar. I do not propose to make Declaration 4.

[41] It is difficult to see any utility in making Declarations 1, 3 and 5. With a limited exception relevant to Declaration 5, it has not been suggested that, if the matters asserted in the proposed declarations were correct, the closure of the registration would have been beyond power. The exception is that covered by Declaration 2, namely, that the entry was made without sufficient cause because the registrar had not received a notice under s 66(1) of the *SRA*. Nor is any other consequence of any legal significance said to attach to these declarations. Moreover, the applicant's submissions acknowledge that some further fact finding would be required before these declarations could be made.

[42] Accordingly, I am not prepared make Declarations 1, 3, 4 and 5.

Declaration 2

[43] The respondent submitted that a declaration in the terms sought was too broad, and did not reflect the findings previously made. It was also submitted that the declaration would serve no utility, having no foreseeable consequence. Nor would a declaration be made as a summary recording of conclusions reached in the course of reasons for judgment. The submission appears to have been based in particular on a

passage from *Warramunda Village Inc v Pryde* (*Warramunda (No 1)*); [35] and on passages from *Ainsworth v Criminal Justice Commission (Ainsworth)*.[36] Reliance was also placed on *Gardner v Dairy Industry Authority of New South Wales*.[37] It was submitted, by reference to *Minister for Immigration and Multicultural Affairs v Ozmanian*[38] and *Tomkins v Civil Aviation Safety Authority*[39] that the recording of an error on the part of a decision maker is not sufficient to warrant the making of a declaration.

[44] The passage relied upon from *Warramunda (No 1)* is as follows:[40]

> "The remedy of a declaration of right is ordinarily granted as final relief in a proceeding. It is intended to state the rights of the parties with respect to a particular matter with precision, and in a binding way. The remedy of a declaration is not an appropriate way of recording in a summary form, conclusions reached by the Court in reasons for judgment. This is even more strongly the case when the conclusion is not one from which any right or liability necessarily flows."

[45] In *Warramunda Village Inc v Pryde (Warramunda (No 2))*[41] Finkelstein J challenged the correctness of the view stated in *Warramunda (No 1)*. In particular, he drew attention to the fact that the term "right" in this context is a broad term, not limited to an equitable or a legal right.[42] In my respectful opinion, his Honour's observations reflect the broad scope of the power to grant declaratory relief described by Gibbs J in *Forster v Jododex Australia Pty Ltd*,[43] endorsed by the High Court in *Ainsworth*.[44] In the latter case, the joint judgment of four members of the High Court observed that the power to grant discretionary relief was "confined by the considerations which mark out the boundaries of judicial power", and continued:[45]

> "Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions.[46] The person seeking relief must have 'a real interest'[47] and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen'[48] or if 'the Court's declaration would produce no foreseeable consequences for the parties'.[49]"

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35 (2001) 105 FCR 437 at [8].
36 (1992) 175 CLR 564, 581-582.
37 (1978) 52 ALJR 180, 188.
38 (1996) 71 FCR 1, 31-33.
39 [2006] FCA 1253 at [24], [25].
40 *Warramunda (No 1)* at [8].
41 (2002) 116 FCR 58, [73]-[78]
42 *Warramunda No 2* at [76].
43 (1972) 127 CLR 421, 437.
44 (1992) 175 CLR 581-582.
45 At 582.
46 See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.
47 *Forster* at 437; *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, 448.
48 *University of New South Wales v Moorhouse* (1975) 133 CLR 1, 10.
49 *Gardiner* at p 188, 189.

[46] In *Gardiner*, the applicants had sought declarations that certain changes in the arrangements controlling the access of dairy farmers to the market for milk were invalid. Those arrangements had been superseded. The applicants failed to establish the invalidity of those arrangements. However, Mason J indicated that he would not, in any event, have granted declaratory relief in respect of the superseded arrangement. His Honour said:[50]

> "It was not contended that the appellants, had their arguments been correctly founded, were entitled to damages or other consequential relief. All that was suggested was that the Executive might in some undefined way initiate administrative or legislative action which would improve the lot of the appellants and persons in the appellants' position. It is one thing to say that declaratory relief would be granted against the Executive or a statutory authority in relation to existing rights and transactions. It is quite another thing to say that it should be granted in respect of past transactions under legislation which has been repealed or amended when the Court's declaration will produce no foreseeable consequences for the parties."

[47] In *Rural Press Ltd v Australian Competition and Consumer Commission*[51] Gummow, Hayne and Heydon JJ considered it appropriate to grant declaratory relief, there being some utility in making declarations identifying the basis on which parties were found to be liable, and on which penalty orders were made. In *Plaintiff M61/2010E v The Commonwealth*,[52] a case where neither certiorari nor mandamus was granted, in determining whether a declaration should nevertheless be made, the Court said:

> "[102] The power to grant declaratory relief is a power which '[i]t is neither possible nor desirable to fetter … by laying down rules as to the manner of its exercise'[53]. As pointed out in *Ainsworth v Criminal Justice Commission*[54], it is a form of relief that is confined by considerations which mark out the boundaries of judicial power.
>
> [103] In the circumstances of this litigation it cannot be said that a declaratory order by the Court will produce no foreseeable consequences for the parties[55]. Declaratory relief is directed here to determining a legal controversy; it is not directed to answering some abstract or hypothetical question[56]. Each plaintiff has a 'real interest'[57] in raising the questions to which the declaration would go."

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50 At p 188.
51 (2003) 216 CLR 53, 92.
52 (2011) 243 CLR 319 at [102] - [103].
53 *Forster* at 437; *Ainsworth* at 581–582.
54 (1992) 175 CLR 564 at 582. See also *Pape* (2009) 238 CLR 1, 68 at [152].
55 *Gardiner* at 188, 189.
56 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355–356 [46] – [47].
57 *Russian Commercial and Industrial Bank* at 448, quoted with approval in *Forster* at 437 – 438.

[48] In the present case, a declaration in terms somewhat similar to Declaration 2 sought by the plaintiff would not be without utility. It deals with the legislative scheme which is still in force. The provisions of the *SRA* considered in the November 2012 reasons show the importance of registration. It seems to me that the identification of circumstances in which the respondent is required to make an entry in the register which closes a ship's registration is a matter of considerable public importance. There is plainly a real, legal controversy between the applicant and the respondent about the validity of the closure. That controversy is of relatively long standing. The question is not hypothetical or abstract. It is by no means clear that the applicant is without any remedy against the respondent arising from the closure of the registration. Not surprisingly, in his submissions he has indicated an intention to claim compensation. In that context, the question whether the registrar was required to make the entry resulting in closure is likely to be an important and relatively discrete issue. These considerations, in my view, take the case beyond those referred to by the respondent, where declaratory relief was considered inappropriate.

[49] The language of Declaration 2, however, does not seem to me to be sufficiently precise. It would be appropriate to make a declaration to the effect that the respondent, not having received a notice under s 66(1) of the *SRA* from the registered owner, but only from someone else, was not authorised by s 66 of the *SRA* to make an entry in the register resulting in the closure of the registration of Larus II.

Other matters

[50] The applicant's submissions sought to re-agitate the question whether relief should have been granted under s 59 of the *SRA*. That matter was determined in the November reasons. The applicant has not sought leave to reargue that question; and his submissions do not demonstrate any real basis for permitting him to do so. To a large extent his submissions deal with cases discussed in the November 2012 reasons. Other cases to which he has referred would be unlikely to affect my conclusion. Accordingly, I am not prepared to reconsider my refusal to grant relief under s 59 of the *SRA*.

Costs

[51] The respondent has sought its costs. Its submissions assume that no declaration would be made. It relied on its success in resisting the application made under s 59 of the *SRA*; and that in granting an application by the present respondent for an order for security for costs against the applicant in earlier proceedings, the Federal Court concluded that, in the absence of additional parties, the applicant's application had almost no prospects of success. The respondent submitted that in respect of its unsuccessful cross-application, there should be no order as to costs, it having been dismissed because the applicant's application was first dealt with on its merits.

[52] I have indicated that I am prepared to grant some declaratory relief. Moreover, on a substantial issue, the applicant has been successful. However, he has failed in his application for rectification of the register.

[53] It seems to me that where both parties have had some success, an appropriate course to take is to make no order as to costs in respect of both the applicant's application and the respondent's cross-application.

Conclusion

[54] I propose to make a declaration to the effect that the respondent, not having received a notice under s 66(1) of the *Shipping Registration Act* 1981 (Cth) from the registered owner, but from some other person, was not authorised by s 66 of the *Shipping Registration Act* 1981 (Cth) to make an entry in the register resulting in the closure of the registration of Larus II; and to make no order as to costs on the applicant's application and the respondent's cross-application.