FEDERAL COURT OF AUSTRALIA

Mentink v Registrar of the Australian Register of Ships
[2015] FCAFC 150

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| Citation: | Mentink v Registrar of the Australian Register of Ships [2015] FCAFC 150 |
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| Appeal from: | Mentink v Registrar of the Australian Register of Ships [2012] QSC 380Mentink v Registrar of the Australian Register of Ships (No 2) [2013] QSC 151 |
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| Parties: | **WILFRED JAN REINIER MENTINK v REGISTRAR OF THE AUSTRALIAN REGISTER OF SHIPS** |
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| File number: | QUD 599 of 2013 |
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| Judges: | **RARES, LOGAN AND MCKERRACHER JJ** |
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| Date of judgment: | 23 October 2015 |
|  |  |
| Catchwords: | **ADMIRALTY**– legal consequences of entries relating to registration of ship on Australian Register of Ships under *Shipping Registration Act 1981* (Cth) – closure of registration of ship on Register – whether Register serves as evidence of title or creates title – whether unlawful and erroneous entry on Register ought be rectified under s 59 – where primary judge made declaration that Registrar not entitled to close registration of vessel under s 66 and that entry doing so was unlawful – where primary judge declined to order rectification of Register under s 59(1) or to make any further declaration – where rectification could affect interests of third parties acquired after erroneous entry made **PROCEDURAL FAIRNESS** – where third parties who appeared to have an interest in ship after erroneous entry made on Register could be affected by orders sought not joined or given notice of proceedings before primary judge – third parties who may have acquired rights or interests in ship must have opportunity to be heard before any order made for rectification under s 59(1)**ADMIRALTY** – statutory interpretation – whether erroneous entry by Registrar causing deemed closure of registration of ship under s 66(3)(b) no decision at all or valid unless Court orders rectification of entry under specific power pursuant to s 59 – whether Registrar obliged to act under discretionary power conferred by s 58 before making entry affecting owner  |
|  |  |
| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth)*Federal Court of Australia Act 1976* (Cth)*Freedom of Information Act 1982* (Cth)*Judiciary Act 1903* (Cth)*Shipping Registration Act 1981* (Cth)Richard Coles & Edward Watt: *Ship Registration: Law and Practice* (2nd ed) informa, London 2009Z. Oya Özçayir: *Port State Control* (2nd ed) LLP, London 2004  |
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| Cases cited: | *Adsteam Harbour Pty Ltd v The Registrar of the Australian Register of Ships* [2005] FCA 1324 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564*Annetts v McCann* (1990) 170 CLR 596*Breskvar v Wall* (1971) 126 CLR 376*Cape Moreton* 143 FCR 43*CDJ v VAJ* (1998) 197 CLR 172*Commissioner of Police v Tanos* (1958) 98 CLR 383*Eastman v Director of Public Prosecutions (No 1)* (2014) 9 ACTLR 16*General Credits (Finance) Pty Ltd v Registrar of Ships* (1982) 44 ALR 571*Lauritzen v Larsen* 345 US 571*Mentink v Registrar of Ships* [2009] FCA 871*Mentink v Registrar of the Australian Register of Ships* (2012) 277 FLR 248*Mentink v Registrar of the Australian Register of Ships* (2014) 320 ALR 137*Mentink v Registrar of the Australian Register of Ships (No 2)* [2014] 1 Qd R 397*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24*Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476*Project Blue Sky Inc v Australian Broadcasting Authority*  (1998) 194 CLR 355*Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (Ex Freya)* (2005) 143 FCR 43*Wills v Australian Broadcasting Corporation* (2009) 173 FCR 284  |
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| Date of hearing: | 18 May 2015 |
|  |  |
| Place: |  |
|  |  |
| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 85 |
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| Counsel for the Appellant: | Appellant appeared in person |
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| Counsel for the Respondent: | Mr PJ Dunning QC with Mr CM Tam |
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| Solicitor for the Respondent: | Australian Maritime Safety Authority |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| in admiralty |  |
| GENERAL DIVISION | QUD 599 of 2013 |

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| ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND  |

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| BETWEEN: | WILFRED JAN REINIER MENTINKAppellant |
| AND: | REGISTRAR OF THE AUSTRALIAN REGISTER OF SHIPSRespondent |

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| JUDGES: | RARES, LOGAN AND MCKERRACHER JJ |
| DATE OF ORDER: | 23 OCTOBER 2015 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent’s costs, including any reserved costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND  |

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| BETWEEN: | WILFRED JAN REINIER MENTINKAppellant |
| AND: | REGISTRAR OF THE AUSTRALIAN REGISTER OF SHIPSRespondent |

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| JUDGES: | RARES, LOGAN AND MCKERRACHER JJ |
| DATE: | 23 OCTOBER 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

**THE COURT:**

1. Immediately before 11 August 2004, Wilfred **Mentink** was registered as owner of the yacht ***Larus II***, in the Australian **Register** of Ships maintained under the *Shipping Registration Act 1981* (Cth). However, at 4.14 pm on 11 August 2004, the **Registrar** of Ships made an entry on the Register that recorded that this registration had been closed, under ss 17(1) and 66(3)(b) of the Act. That closure occurred because Lee **Thackray**, a citizen of the United Kingdom, sent documents to the Registrar from Dili, in Timor Leste, that appeared to show that Mr Mentink had sold *Larus II* to him (Mr Thackray).
2. The Registrar was aware that Mr Thackray was a citizen of the United Kingdom. Accordingly, he could not be registered as owner of the yacht in the Register since he was not an Australian national or Australian resident, within the meaning of ss 8(1)(a) and 14(b) of the Act.
3. In 2012, Mr Mentink brought proceedings in the Supreme Court of Queensland under s 59 of the Act to rectify the Register. He also sought five declarations. The primary judge held, *first*, that the entry made in the Register on 11 August 2004 closing the registration of *Larus II*, which effectively cancelled Mr Mentink’s registration as her owner,was not authorised by the Act, but his Honour declined to make an order to rectify the Register: *Mentink v Registrar of the Australian Register of Ships* (2012) 277 FLR 248 at 258 [51], 259 [55]).
4. Subsequently, on 20 June 2013, the primary judge made a declaration that the Registrar had not been authorised under s 66 of the Act to make the entry in the Register that resulted in the closure of the registration of *Larus II*. That was because the Registrar had not received any notice from Mr Mentink, as registered owner of the yacht under s 66(1) of the Act. But his Honour then refused to grant any further relief and made no order as to costs of the proceedings: *Mentink v Registrar of the Australian Register of Ships (No 2)* [2014] 1 Qd R 397.
5. Mr Mentink appealed from his Honour’s orders under s 82(1) of the Act, by leave of a judge of this Court: *Mentink v Registrar of the Australian Register of Ships* (2014) 320 ALR 137. He needed leave because he had not filed a notice of appeal within the time prescribed in the *Federal Court Rules 2011* (Cth). In the appeal, he sought an order rectifying the Register to its state immediately before its closure on 11 August 2004.
6. The issue before us is whether the primary judge was correct to hold that, because of the apparent subsequent changes of ownership of *Larus II* and the potential effect of an order of rectification under s 59 on third parties, who had no notice of the proceedings below, he would not make such an order or grant other declaratory relief that Mr Mentink had sought.
7. In our opinion, for the reasons given below, the primary judge was correct in his refusal to grant Mr Mentink any further relief than the declaration he made.

## The legislative scheme

1. In its form at 11 August 2004, the Act provided that:
* except relevantly in ss 8, 58 at Pt VI of the Act, “**owner”** meant “a person registered as owner in accordance with the regulations”;
* “small craft” meant a ship that was less than 12 metres l.o.a. (like *Larus II*) (s 3(1));
* a reference to an Australian owned ship had to be read as a reference to a ship that was owned by an Australian national (s 8(1)(a));
* every Australian owned ship had to be registered under the Act (s 12(1)) subject to the exceptions in s 13;
* the Registrar could not register a ship under the Act if it were registered under the law of a foreign country (s 17(1));
* the Registrar registered a ship by entering into the Register prescribed particulars (s 18) and, upon registration, the Registrar had to grant a registration certificate in the prescribed form (s 19), being Form 2 under the *Shipping Registration Regulations 1981* (Cth);
* importantly, s 20(1) provided:

**20 Custody of registration certificate**

1. The registration certificate of a ship **shall not be used except for the purpose of the lawful navigation of the ship**, and **shall not be subject to detention by reason of a claim by an owner**, mortgagee, charterer, operator or any other person **to any title to**, lien or charge on, or interest in, **the ship**. (emphasis added)
* a ship should be transferred by a bill of sale made in accordance with the Regulations (s 36(1)) that had to be lodged, together with a declaration of transfer made by the transferee within 14 days after execution of the bill of sale (s 36(2)) and, pursuant to s 36(3)(b):

(3) A declaration of transfer for the purposes of subsection (2) shall be made in accordance with the regulations and, where the transferee is not the Commonwealth or a State or Territory, shall include:

…

(b) in the case of the transfer of a ship, or a share in a ship, being a small craft:

(i) a statement specifying the nationality of the transferee or, where the transferee is a body corporate, the country in which it was incorporated;

(ii) a statement specifying the normal place of residence of the transferee or, where the transferee is a body corporate, the principal place of business of the body corporate; and

(iii) a statement that, to the best of the knowledge and belief of the person making the declaration, the ship concerned will not cease to be an Australian-owned ship or a ship referred to in paragraph 14(b) or (c) by reason only of the transfer.

* the Australian Register of Ships would contain entries of all matters required or permitted by the Act to be entered on it (s 56(1)).
1. Regulation 23 specified the matters that a bill of sale and a declaration had to contain pursuant to s 36(1) and (3), but the Regulations did not prescribe any forms for those documents. A bill of sale had to specify, relevantly, the name and official number of the ship, the number of shares in her to which the bill related, the names and addressees of each transferor and transferee and be signed by each transferor (reg 23(1)).
2. The Act also provided:

**45 Powers of disposal by owner**

The owner of a ship or of a share in a ship has power, subject to this Act and to any rights and powers appearing in the Register to be vested in any other person, absolutely to dispose of the ship or share and to give effectual receipts in respect of the disposal.

…

**47 Equities not excluded**

Subject to sections 41, 45 and 46, beneficial interests may be enforced by or against the owner or mortgagee of a ship or of a share in a ship in respect of his or her interest in the ship or share in the same manner as in respect of any other personal property.

…

**49 Functions and powers of Registrar**

(1) In addition to the functions conferred by other provisions of this Act, **the functions of the Registrar are to maintain the Register and, for that purpose**:

(a) **to receive and record all information and documents required or permitted to be lodged with the Registrar under this Act**;

(b) **to grant, issue, vary or revoke such certificates and other documents as are required or permitted to be granted or issued under this Act**; and

(c) to issue copies of, and extracts from, any such certificates and other documents and entries in the Register.

(2) **The Registrar has power to do all things necessary or convenient to be done for or in connection with, or as incidental to, the performance of his or her functions** including, but without limiting the generality of the foregoing, such powers for and in relation to requiring the furnishing of information and documents (including the delivery of certificates and other documents granted or issued under this Act) as are provided by the regulations.

…

**59 Rectification of Register**

(1) If:

(a) an entry is omitted from the Register;

(b) an entry is made in the Register without sufficient cause;

(c) an entry wrongly exists in the Register; or

(d) there is an error or defect in an entry in the Register;

whether or not by reason of a decision of an officer (including a decision that the officer was empowered by this Act to make) a person aggrieved **or the Registrar** may apply to the Supreme Court of a State or Territory for rectification of the Register, and the Court may make such order as it thinks fit directing the rectification of the Register.

(2) Without limiting the generality of paragraph (1)(a), the reference in that paragraph to an entry omitted from the Register shall be read as including a reference to a matter that is required or permitted by this Act to be entered, or to remain, in the Register, but is not entered in, or is removed from, the Register.

(3) A Court may, in proceedings under this section, decide any question that it is necessary or expedient to decide in connection with the rectification of the Register.

(4) Notice of an application under this section by a person aggrieved shall be served on the Registrar, who may appear and be heard, and shall appear if so directed by the Court.

…

**60 Correction of clerical errors in Register**

The Registrar may correct, or cause to be corrected, any clerical error or obvious mistake in the Register. (emphasis added)

1. If no entry or amendment of an entry had been made in the Register for 30 days (being the time prescribed in reg 29 of the Regulations) and the Registrar had reason to suspect that any particulars entered in the Register in relation to a ship, other than a mortgage, were incorrect, the Registrar had power to serve a notice in writing under s 58(1) on, relevantly, “any owner” (being a person in the natural and ordinary meaning of “owner” and not as defined in ss 3(1) or 62) requiring him or her or it to furnish the information or documents specified in the notice within 30 or more days after service. The Registrar had to inform the Australian Maritime Safety Authority (**AMSA**) if the person served failed to furnish the information sought or if the Registrar considered that the information provided, justified, relevantly, the closure of the registration relating to the ship (s 58(2)). In such a case, AMSA had power to direct the Registrar, among other matters, to close the registration as if s 66 applied (s 58(2A) and (3)(b)).
2. Next, Pt VI of the Act dealt with miscellaneous matters and commenced with its own definition of “owner” in s 62, namely:

**62 Interpretation**

In this Part:

***owner***, except in sections 64 and 74, means:

(a) in relation to an Australian owned ship – **the registered owner of the ship**;

(b) in relation to a ship, other than an Australian -owned ship, registered by virtue of paragraph 14(b) – the registered owner of the ship; or

…

 (emphasis added)

1. Relevantly, s 66 provided:

**66 Ships lost etc. or ceasing to be entitled to be registered**

1. if:

(a) a registered ship … ceases to be entitled to be registered; and

(b) the owner of the ship knows of the event mentioned in paragraph (a);

the owner of the ship must give notice in writing to the Registrar.

(1A) Subsection (1) does not apply if written notice has already been given to the Registrar.

(2) Where the Registrar receives a notice under subsection (1) relating to a ship, he or she shall make an entry in the Register of the event to which the notice relates.

(3) Where an entry has been made in the Register under subsection (2) in respect of a ship:

 …

(b) if the entry is in respect of a ship that has ceased to be entitled to be registered – the registration of the ship shall, subject to this section, be deemed to be closed.

…

(10) Where the registration of a ship is closed or deemed to be closed under this section, the person having possession of the registration certificate or provisional registration certificate relating to the ship shall deliver the certificate to the Registrar or a proper officer in accordance with the regulations.

1. A copy of, or extract from, any entry in the Register certified by the Registrar or a Deputy Registrar and sealed with the seal of the Registration Office was admissible in evidence, in any proceedings, on its mere production, and by force of s 77(1) was “*prima facie* evidence of any matter stated in the document in pursuance of this Act or in pursuance of any duty under this Act”.
2. In addition, s 79 of the Act stated that the Act was not intended to exclude the operation of any law of a State or Territory providing for the recording or registration of ships:

… for a purpose other than the establishment of title, the transfer of title, … or the grant of nationality in relation to a ship.

1. A registration certificate in Form 2 prescribed by reg 12 contained a box for the entry of particulars of ownership, including the date, the address and nationality of each owner, number of shares held and the signature of the Registrar, Deputy Registrar or delegate.

## Background

1. As noted earlier, Mr Mentink had been registered as owner of *Larus II* prior to 11 August 2004. The evidence before the primary judge revealed that shortly before then, Mr Thackray, who held a United Kingdom passport, had visited the Australian Embassy in Dili, Timor Leste, and informed the Australian Consul that he had purchased *Larus II*. He showed the Consul what purported to be a bill of sale that appeared to have Mr Mentink’s signature and to be dated 30 August 2003. The document was headed as a receipt for the sale of *Larus II* for the price of $5,800 and it appeared to bear Mr Mentink’s and Mr Thackray’s signatures and dates of birth, with Mr Mentink being described in it as the “previous owner”. The receipt stated that the *Larus II* was to be handed over to Mr Thackray on 30 June 2004 in Bali, Indonesia at Mr Thackray’s request.
2. On 6 August 2004, Mr Thackray sent a letter by facsimile to the Registrar asserting that he had purchased the *Larus II* on 30 August 2003 from Mr Mentink. The letter stated that Mr Mentink had been deported from Timor Leste to Australia. It stated Mr Mentink appeared to have failed to inform the Registrar or his officers of the change of ownership with the result that the East Timorese authorities would not permit Mr Thackray to depart East Timorese waters while he did not have registration papers for the yacht. Mr Thackray stated that he had completed the British registration for the yacht and was currently in the process of transferring it to the British Register. He made a number of other assertions in communications with Australian officials.
3. On 9 August 2004, the Registrar emailed Mr Thackray referring to his letter of 6 August 2004 and stated that the vessel was currently registered in Mr Mentink’s name and was unencumbered. The email noted that, because Mr Thackray was not an Australian national, the vessel ceased to be entitled to be registered on the Australian Register, and provided an internet link in which the requirements for closing a ship’s registration on the Register could be found.
4. On 11 August 2004, Mr Thackray sent a facsimile to the Registrar agreeing to surrender the Australian certificate of registration for the ship to the Consul at the Australian Embassy in Dili when he had received confirmation of the termination of *Larus II*’s registration on the Australian Register. He stated that, at the Registrar’s request, he had had the sale receipt countersigned by a Ms Sarah Davy, another British citizen. This facsimile included a copy of the second page of a printed form that had provisions for inserting particulars of registered agent for *Larus II* and that named Mr Mentink as her registered agent, owner and master. Mr Thackray’s name and address had been added to each of the three descriptions by hand with a date of 30 August 2003 and what appeared to be Mr Thackray’s signature in the place where the endorsement of the Registrar ought to have appeared. The printed notes on the form included the statement: “2. A Registration Certificate is not a title document.”
5. On 11 August 2004, Mr Thackray emailed the Registrar making further enquiries about what he needed to do to change the registration of the yacht’s owner. The Registrar responded on the same day stating that he needed the return of the original certificate of registration, and the lodgment of the original or a certified true copy of the transfer documents together with a notice that Mr Thackray wished to close the Australian registration as he was not an Australian national. The Registrar said that on receipt of those documents a certificate confirming what had occurred could be provided, on payment of the prescribed fee.
6. On 11 August 2004 at 4:14 pm, the Registrar closed the registration of *Larus II* on the Register under s 66 on the basis that on 30 August 2003, the ship had been sold to a non‑Australian national, Mr Thackray, and so she had ceased to be entitled to registration under the Act.
7. On 27 August 2004, the border service officer in the Port of Dili issued Mr Thackray with a clearance certificate for *Larus II.* Subsequently, Mr Mentink claimed that he had learned in early September 2004 that *Larus II* had left Dili Harbour. On 18 September 2004, Mr Mentink wrote to the Director of Australian Consular Operations in Dili requesting, among other things, that the authorities in East Timor be notified that *Larus II* was missing, presumed stolen.
8. On 19 September 2004, Mr Mentink sent an email to the Registrar in which he asserted that he was the sole owner of *Larus II* and that the yacht had disappeared. He stated that he was reporting the yacht as stolen and sought advice as to what steps he could take.
9. On 23 September 2004, the Embassy replied to Mr Mentink’s letter of 18 September 2004 saying that he should contact AMSA to ascertain if the vessel was still registered in his name before the Embassy would take action. The primary judge found that the letter stated that the records indicated that a citizen of the United Kingdom had approached the Embassy in Dili, produced a bill of sale for the ship dated 30 August 2003 and requested information as to the transfer of ownership of an Australian registered vessel.
10. Also, on 23 September 2004, Indonesian officials issued a clearance approval for *Larus II* to sail in Indonesian waters between 16 September 2004 and 16 December 2004. The certificate identified Mr Thackray as owner and the nationality of the yacht as Australian.
11. On 1 October 2004, Mr Mentink sent a further facsimile to the Registrar asserting that the ship had been stolen and enquiring as to its registration status. On 5 October 2004, the Registrar informed Mr Mentink that the registration of *Larus II* had been closed on the Register following its sale to Mr Thackray and, on 7 October 2004, provided Mr Mentink with a copy of the sale receipt. Mr Mentink gave evidence to the primary judge that at that point, he realised the vessel had been stolen.
12. On 12 October 2004, Mr Mentink sent a letter to the then Minister for Justice, who was responsible for administering the Act, setting out the position as Mr Mentink saw it. Mr Mentink tried to find out more information about what had happened to the registration of his ship and its whereabouts by, among others, filing requests under the *Freedom of Information Act 1982* (Cth).
13. In May 2007, Mr Mentink travelled to Kupang in Indonesia, having heard that *Larus II* was there. He said he saw her at anchor in a small concealed cove and on 1 June 2007, wrote to the Registrar saying that he had located the vessel and sought to claim it. He asked to be restored to the Register as her owner in order that he could then use that registration as evidence to persuade the Indonesian authorities to restore the boat to him. The Registrar did not do so. Mr Mentink then continued to make enquiries.
14. By late August 2007, Mr Mentink had been informed that *Larus II* had been sold to a Mr Robert **Arrand**. He made some contact with Mr Arrand but was unable to obtain satisfaction as to what happened to the ship.
15. In 2009, Mr Mentink commenced proceedings in this Court against the Registrar, the Director of Consular Operations, the Minister for Foreign Affairs and the Commissioner of the Australian Federal Police as respondents. He sought, amongst others, an order that the Register be rectified by restoring his registration as owner of *Larus II*. The respondents in that case applied for security for costs. On 23 July 2009, Rares J made an order that Mr Mentink, who was then not residing in Australia, provide security: *Mentink v Registrar of Ships* [2009] FCA 871. Mr Mentink did not provide the security and the proceedings were then stayed.
16. In his reasons, Rares J observed that, as the matter then stood, there were almost no prospects that Mr Mentink would be able to succeed to have the Register amended. That was because Mr Arrand was not a party to the Federal Court proceedings, he might be denied or deprived of whatever rights he had, without having had the opportunity to have his own entitlements tested or even to have had notice that they were in fact being challenged with the object of removing them from him.
17. By the time he commenced the proceedings before the Supreme Court, Mr Mentink had returned to being an Australian resident and, accordingly, no security for costs was required. However, despite what Rares J had said, Mr Mentink did not join Mr Arrand or Mr Thackray or anyone else, apart from the Registrar, as respondents to his application in the Supreme Court, as the primary judge noted. Mr Mentink asserted, in his affidavit of 15 October 2012, that after he had received an email address for Mr Arrand on 19 September 2012, he had sent an email to that address “advising him of this application should he wish to become a respondent”. Mr Mentink said that the email appeared not to have failed but he had received no reply to the email. He said that he had sent the email because of Rares J’s observation that as matters had stood on 23 July 2009, Mr Arrand was a necessary party to Mr Mentink’s claim that *Larus II* be restored to the Register as his ship: *Mentink* [2009] FCA 871 at [23]. The primary judge found that there was no more recent evidence as to the whereabouts of *Larus II.*
18. In addition to seeking an order for rectification of the Register under s 59(1) of the Act, Mr Mentink sought the following declarations in his application filed in the Supreme Court, namely:

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.

 [sic]

## Fresh evidence in the Federal Court

1. Mr Mentink annexed to his affidavit of 7 March 2014 in support of his application for leave to appeal, documents that he had received from the United States Department of Homeland Security, National Vessel Documentation Centre for the United States **Coast Guard** with its letter to him dated 3 January 2013. Those documents were:
* a notarised letter dated 30 July 2008 written by Mr Arrand seeking registration of *Larus II* in the United States. The letter enclosed a certificate of deletion issued by the Registrar on 30 August 2007 that recorded that “registration of the ship … was closed … on 11 August 2004 in accordance with [s 66(3)(b) of the Act] (ship being sold to foreigners namely Mr Lee Thackray of England)”;
* two certificates of documentation issued by the Coast Guard respectively on 10 November 2008, expiring on 30 November 2009 and on 26 October 2009, expiring on 30 November 2010. Each certificate named the vessel as *Merpati Damai* and Mr Arrand as her owner;
* an email dated 13 November 2009 from Mr Arrand to the Coast Guard in which he said that he was the owner of *Merpati Damai* and wanted to have the words “formerly *Larus II*” added to the remarks section of the certificate of documentation, because an Indonesian harbour master had requested this clarification “for legal reasons here in Indonesia where I original [sic] purchased and rebuilt the boat”;
* a renewal notice that Mr Arrand sent to the Coast Guard on 26 November 2010 which he had completed by hand on 21 November 2010 stating “Boat was sold to Indonesian [NAME REDACTED]. No longer belongs to Robert Arrand. Registered in Indonesia”.
1. Mr Arrand said in his 30 July 2008 letter to the Coast Guard, that he had bought the “abandoned and inoperable” Australian built steel sailing yacht, *Larus II*, to rebuild her. He said that he and his family had lived in Indonesia, were Christian missionaries and United States’ citizens and wished to register her in their home country. The letter stated that the yacht had been registered in Australia until 2003 when it had been sold by an Australian national to an English national in Dili, and he referred to the enclosed certificate of deletion issued by the Registrar. Mr Arrand said that shortly after that purchase the Englishman had sailed the ship to Kupang in Indonesia but he had faced trouble there and fled from the Indonesian authorities never to return to Indonesia.
2. Mr Arrand claimed that the Englishman had placed the yacht under the care of a named Indonesian national and that she had remained safely anchored in a small harbour at Semau Island. The letter explained that after four years, the bailee had not heard from the English owner and that the bailee had “legally claimed the boat as his personal property and sold it off in order to collect unpaid monies due to him for caring for the abandoned boat”. Mr Arrand said that he purchased the boat from that person in August 2007. Mr Arrand enclosed three documents with his letter that were not in evidence, in support of what he had asserted.
3. The Registrar did not object to the Full Court acting on the basis of the fresh evidence in the Coast Guard documentation. We admitted this evidence under s 27 of the *Federal Court of Australia Act 1976* (Cth). This further evidence was admissible to demonstrate, as Mr Mentink wished to argue, that his Honour’s dismissal of his other claims to relief were erroneous. It was admissible as well to buttress his Honour’s findings that supported that dismissal. Moreover, both parties agreed to the additional evidence being considered in this appeal: *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [109]-[114] per McHugh, Gummow and Callinan JJ; *Wills v Australian Broadcasting Corporation* (2009) 173 FCR 284 at 294-295 [52]-[55] per Rares J with whom North J and Emmett J respectively agreed at 287 [8], [15].

## The decisions of the primary judge

1. In his initial judgment, the primary judge *first*, found that the material before the Registrar in August 2004 did not entitle him to close the registration of *Larus II* under s 66 of the Act. His Honour reasoned that the registered owner was the only person who could give notice of the occurrence of a relevant circumstance prescribed in s 66(1) and that, indeed, the registered owner was also obliged to do so. That was because, his Honour held, s 74(1A) created an offence in respect of each day that an owner failed to give a notice under s 66(1) that was punishable by a daily fine not exceeding $500 for a natural person (s 74(4B). Accordingly, his Honour concluded, the Registrar’s entry closing the registration made on 11 August 2004 had not been authorised because Mr Mentink, as registered owner, had not given a notice under s 66(1): *Mentink* 277 FLR at 256 [39]-[41], 257-258 [48]-[51].
2. *Secondly*, however, his Honour held that Mr Mentink was not entitled to an order for rectification of the Register under s 59, because of its potential to affect the rights of third parties who may have, or may have thought they had, acquired interests in the yacht based on a title derived through Mr Thackray: *Mentink* 277 FLR at 259 [53]-[55]. *Thirdly*, the primary judge found that the Registrar had failed to prove that Mr Mentink was not the true owner of *Larus II*. He held that Mr Mentink was entitled to declaratory relief but his Honour considered that he should hear the parties on the form of that relief in light of his reasons: *Mentink* 277 FLR at 259-260 [58].
3. In his second judgment, his Honour held that the making of an entry in the Register was not an administrative decision or a decision of an administrative character. Accordingly, he held that s 9(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**the ADJR Act**) did not preclude a court of a State, such as the Supreme Court of Queensland, from granting a declaration where an entry in the Register had been made without any lawful basis: *Mentink* [2014] 1 Qd R at 404 [11], 407-408 [23]-[24]. His Honour considered that s 59(1) and (3) expressly authorised a Supreme Court to make such order as it thought fit directing the rectification of the Register and to decide any necessary or expedient question in connection with such rectification: [2014] 1 Qd R at 408 [28], 410 [35]. He held that he had jurisdiction to grant, and should grant, the second of the five declarations that Mr Mentink sought, namely a declaration that the Registrar had not been authorised to close the registration of the yacht under s 66 of the Act: [2014] 1 Qd R at 410 [36], 412-414 [48]-[49], [50].
4. We should note that the Registrar did not file any notice of cross appeal or contention, or otherwise seek to re-agitate in the appeal his argument, that the primary judge rejected, that s 9(1) of the ADJR Act precluded the grant of declaratory relief by his Honour. Accordingly, this was not an issue on the appeal and we have not considered it.
5. The primary judge refused to make the fourth declaration sought by Mr Mentink, namely that the Registrar was bound to give him notice under s 58 of the Act. He held that s 58 created a discretionary power, not an obligation for the Registrar to give a notice: [2014] 1 Qd R at 410 [39]-[40]. His Honour held that there was no utility in making the first, third and fifth declarations sought by Mr Mentink and that, in any event, Mr Mentink had acknowledged that “some further fact finding would be required before these declarations could be made”: [2014] 1 Qd R at 410-411 [41]-[42].
6. In the event, his Honour made only a declaration that the Registrar, not having received a notice under s 66(1) of the Act from the registered owner, but from some other person, had not been authorised by s 66 to make the entry in the Register that resulted in the closure of the registration of *Larus II*. The primary judge made no order as to costs or any other orders on Mr Mentink’s application or on the Registrar’s cross-application.

## The grounds of appeal

1. As in the court below, Mr Mentink appeared for himself and presented his case clearly. In essence, he sought orders for rectification of the Register and for the declaratory relief that the primary judge had refused. He raised the following grounds in support of that relief, namely that the primary judge had erred because:
2. having found that the entry closing the registration of the yacht was not authorised by s 66 of the Act, his Honour had no discretion to refuse, or erred in failing, to order rectification so as to remove the erroneous entry;
3. his Honour should have found that the Registrar ought to have acted under s 58 and given Mr Mentink notice of any reason the Registrar may have had to suspect that there was any error in the Register;
4. the Supreme Court had jurisdiction pursuant to s 59 of the Act to grant the four refused declarations and ought to have done so;
5. the decision to close the registration had been affected by jurisdictional error and was no decision at all in that, *first*, there was no bill of sale that complied with s 36 and reg 23 on which the Registrar could act and, *secondly*, Mr Mentink, as registered owner and the only person recognised in s 66 who could do so, had not given the Registrar any notice under s 66(1) to enliven the power to make the entry.

## Mr Mentink’s submissions

1. Mr Mentink argued that the Registrar did not have power to close the registration of *Larus II* based on the bill of sale dated 30 August 2003. He contended that the only power that the Registrar had to act on that bill of sale was that given by s 58 of the Act. He relied on the requirement in s 36(2) that a transferee had to lodge a bill of sale and declaration of transfer within 14 days after its execution “or within such longer period as the Registrar, in special circumstances, allows”. Mr Mentink also noted that he had not given any notice to the Registrar under s 66(1). He submitted that, accordingly, the only power on which the Registrar could have acted to close the registration on 11 August 2004 was that in s 58, and that the preconditions for the exercise of that power had not been satisfied. He argued that this was because the 30 day period prescribed in reg 29 for the purposes of s 58(1)(a) had expired by the time Mr Thackray sought closure of the entry in August 2004 and, if the bill of sale were taken at face value, then the Registrar would have had reason to suspect that the particulars of ownership of *Larus II* entered in the Register were incorrect. If that were so, Mr Mentink contended that the Registrar should have served a notice on him under s 58(1) and that, if he had failed to respond to such a notice, only then could the Registrar have taken the step of informing AMSA of Mr Mentink’s failure to respond. He argued that the only power that the Registrar could have had to close the registration was if AMSA directed him to do so under s 58(2A) and (3) but this had never occurred.
2. Mr Mentink argued that the primary judge had erred by failing to give him relief beyond the declaration that his Honour made. He argued that he was entitled to both a declaration in terms of declaration 5 that he had sought, and an order rectifying the Register. He argued that an entry in the Register is not a mere record, or evidence, of title to a ship but instead was, itself, the source of title by registration just as in the Torrens system of registered title to land. In essence, Mr Mentink argued that registration under the Act created absolute indefeasibility of title of the person registered in the absence of fraud or error by the Registrar.
3. Mr Mentink contended that the primary judge was wrong to have refused to rectify the Register on the basis that persons who may have been affected by such an action had not been joined as parties.
4. Mr Mentink contended that after he had alerted the Registrar on 19 September 2004 of his allegation that *Larus II*  had been stolen, the Registrar should have applied to the Court under s 59 to seek rectification of the Register. He also submitted that the Coast Guard’s registration of Mr Arrand as owner of *Larus II* was unlikely to have conferred American nationality on her and so would not stand in the way of the rectification of the Register, given the absence of evidence of any subsequent registration of the yacht in another jurisdiction.
5. Mr Mentink argued that the Registrar’s decision to close, or act of closing, the registration of *Larus II* had not been authorised by the Act and so was no decision or act at all. He submitted that in those circumstances the Register had to be rectified to remove the erroneous entries.

## Consideration

1. A nation’s register of ships affects a ship and those with interests in her in both public and private international law respects. *First*, the registration of a ship by a sovereign State ordinarily entails the consequence that the ship has the status of being governed by the law of that State and must fly its flag or ensign. As Jackson J put it, giving the opinion of the Court in *Lauritzen v Larsen* 345 US 571 at 584 (1953):

Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag.

1. *Secondly*, however, different countries can attach different consequences to registration of a ship, in respect of property or legal rights and interests in her, as matters of domestic, or private international, law, as Ryan and Allsop JJ explained in *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (Ex Freya)* (2005) 143 FCR 43 at 75 [127]. There, they said that, in the Australian context, under the Act:

… the title of the registered owner is protected by giving to the registered mortgagee or owner power (subject to interests on the register) absolutely to dispose of the ship or a share therein and to give effectual receipts in respect thereof: ss 41 and 45 of the S[hipping] R[egistration] Act. The preservation of priorities is dealt with by giving priority to the date of registration: s 39 of the SR Act. Other national registration systems may deal with such issues differently….This role of title by, or by reference to, registration is to be contrasted with other systems, such as those of the United Kingdom and **Australia in which the register substantially operates as a record of title**, subject to the effect of provisions such as ss 39, 41 and 45 dealing with the order of registration, priorities and power of disposition. (emphasis added)

1. Their Honours discussed, in illuminating detail, some of the legal consequences of a person’s registration as owner of a ship in both public and private international law (143 FCR at 74-84 [123]-[163]). They concluded (143 FCR at 81 [152]), and we agree, that it was clear that the Act:

does not provide title by registration. The register is evidence of title only: s 77. Ownership precedes, and, indeed, is a requirement for, registration.

1. In our opinion, it follows that Mr Mentink’s characterisation of the effect of registration of ownership under the Act was incorrect. Registration under the Act is not equivalent to what Barwick CJ described as the role of the land title register in the Torrens system which operates not as “a system of registration of title, but as a system of title by registration”: *Breskvar v Wall* (1971) 126 CLR 376 at 385.
2. The analysis of Ryan and Allsop JJ of the function of Register in *Cape Moreton* 143 FCR 43 is compelling. In addition, we would add, s 20(1) identified that the registration certificate of a ship had only one use, namely for the purpose of lawful navigation of the ship and not as evidence of title to, or an interest in, the ship. Rather, s 36 provided a means for a registered owner to transfer the legal title to a ship, under the Act, pursuant to that person’s power to do so under s 45. However, s 47 recognised that beneficial interests could be enforced against the owner of a ship in the same manner as in respect of any personal chattel, as Ryan and Allsop JJ held in *Cape Moreton* 143 FCR at 81-83 [152]-[161].
3. While Mr Mentink alleged that Mr Thackray had acted fraudulently to obtain closure of the registration of *Larus II*, the primary judge correctly confined his finding to the failure of the Registrar to follow the statutory requirement in s 66(1) of acting only on a notice in writing given by the registered owner. The declaration that the primary judge made reflected the fact that Mr Mentink had not given such a notice and that the Registrar had erred in acting on the sole basis of Mr Thackray’s communications with the Registrar and Australian officials in Timor Leste.
4. For the same reason, McPherson J correctly held in *General Credits (Finance) Pty Ltd v Registrar of Ships* (1982) 44 ALR 571 at 574 that the Registrar’s power in s 60 to correct a clerical or obvious mistake did not confer authority to expunge an erroneous registration that had been made after his Honour had granted an *ex parte* injunction restraining the Registrar from registering an application for a transfer of ownership, but before the Registrar had been given notice of that order. The newly registered owner and its mortgagee were not made parties to those proceedings and McPherson J refused to make an order expunging their registration without affording those persons the right to be heard in opposition, whether or not as parties. He said, correctly in our opinion (44 ALR at 575-576):

Section 59(4) requires that notice of an application for registration shall be served on the Registrar, who may appear and be heard. His presence may often be necessary if the register is to be altered. **It is certainly not sufficient, except perhaps in rare cases, that he alone should be represented in response to an application for rectification.**

What I have said should not be taken as deciding that the plaintiff's title is inferior to those of [the newly registered owner or its mortgagee], or that registration now precludes the plaintiff from vindicating that title. As I have said, **registration does not carry indefeasibility** and the register is by s 59 open to rectification. **But in a case such as this, it should not be rectified in the absence of the party or parties who will be most directly affected by it.** The application for rectification is therefore refused. (emphasis added)

1. Rares J made a similar point in his decision to order Mr Mentink to pay security for costs, when he was not residing in Australia, in his earlier proceedings seeking rectification: *Mentink* [2009] FCA 871 at [22]-[23]. He said there that unless Mr Arrand, who then appeared to be the owner and in possession of *Larus II*, were joined to those proceedings, Mr Mentink would have almost no prospects of succeeding in his claim for revising the entry closing the registration of the ship.
2. The evidence before the primary judge demonstrated that Mr Thackray had acted on the basis of the closure of the registration of *Larus II* and that, apparently, Mr Arrand had acquired her subsequently. The further evidence of Mr Arrand’s registration of the yacht by the United States Coast Guard and his later sale of her to another person in Indonesia confirmed that rights of third parties in respect of the ship or dealings in her have arisen in the years since the closure of the registration in August 2004. The Coast Guard’s registration appears to have had the effect of conferring the nationality of the United States of America on *Larus II*,until Mr Arrand sold her to an Indonesian national. There is no evidence as to the yacht’s current registration, if any.
3. It is one thing to make a declaration, as the primary judge did, that the Registrar had not been authorised by s 66 to make the entry closing the registration, and another to rectify the Register. Rectification would affect the rights of third parties who have dealt with the ship in the years following the closure of her registration here. Mr Mentink chose not to join and serve all persons who appeared to have acquired interests in the yacht, including Mr Thackray and Mr Arrand, whose interests may have been affected were the Register rectified to cancel the closure of her registration on 11 August 2004.
4. Ordinarily, it would be necessary for all third parties who may have acquired rights or interests in a ship after an erroneous entry, including a closure, has been made on the Register, to have an opportunity to be heard before a court would make any order under s 59(1) rectifying the error. Such an order may prejudice the rights or interests of any such third party. This is a fundamental application of the principles of procedural fairness, that is also called natural justice, which, in the absence of express words of plain intendment, necessarily apply to proceedings of a court exercising judicial power: *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; *Eastman v Director of Public Prosecutions (No 1)* (2014) 9 ACTLR 163 at 174 [40] per Rares, Wigney JJ and Cowdroy AJ. Indeed, in *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395 Dixon CJ and Webb J said:

… it is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard.

1. Nor did the Act impose an obligation on the Registrar to apply to a court under s 59(1) to rectify the Register merely because Mr Mentink asserted in September 2004 that his yacht had been stolen. The Registrar could not have known or proved that serious allegation. Moreover, Mr Mentink himself took no such proceedings at that time.
2. As we have noted, the Register serves both public and private law functions. Once a ship’s registration on a national register of ships, such as the Register, has been entered or closed, the ship’s nationality, or status, ordinarily, will change with that event. Countries into whose waters she sails will look to her registration certificate in respect of the lawfulness of her right to navigate as, for example, s 20 of the Act contemplated. In addition, persons who might wish to acquire rights or interests in the ship will be concerned to observe the existing and, where apposite, future flag State’s laws for the transfer or creation of those rights and interests: cf Richard Coles & Edward Watt: *Ship Registration: Law and Practice* (2nd ed) informa, London 2009 at [1.22]-[1.25], [2.1]-[2.4]; Z. Oya Özçayir: *Port State Control* (2nd ed) LLP, London 2004 at [1.6]-[1.7], [1.31]-[1.32].
3. The primary judge correctly refused to order rectification in the absence of the persons who had, or may have, acquired rights or interests in the yacht based on a title derived through Mr Thackray.
4. We reject Mr Mentink’s argument that, in the circumstances, the Registrar had an obligation to serve a notice on him pursuant to s 58(1) of the Act. The argument did not give any effect to the terms of the section that depended on the Registrar forming a state of mind that he had “reason to suspect” that, among others, certain particulars entered in the Register were incorrect and that if he did form that state of mind he “**may**, by notice in writing served on the registered agent or any owner of the ship, require him or her to furnish” information or documents specified in the notice. The word “may” in s 58(1) created a discretion, not an obligation, that the Register could decide to exercise. The section did not prescribe any content or requirements for a notice that the Registrar might have decided to serve. The Registrar could choose what to include in any notice that he might have decided to serve.
5. Importantly, s 58(1) did not require the Registrar to serve the registered owner, because the definition of “owner” in s 3(1) did not apply to s 58. The Registrar could choose the person on whom the notice would be served from between the registered agent or “any owner”. And that person’s response or failure to respond could be used as the basis of setting in train the steps under s 58(2), (2A) and (3) that could result in closure of the relevant ship’s registration.
6. The only substantive action that could occur under s 58 was the deemed closure of the relevant ship’s registration. If the registered agent or any owner responded to a notice with information or documents that revealed an error that could not result in such a closure, that error could only be corrected by a court order under s 59, or by the Registrar under s 60 if it were a clerical error or obvious mistake.
7. However, s 58(1) did not create any obligation on the Registrar to act by serving a notice. It did not provide for a person to make any form of application to the Registrar to act. That is hardly surprising, since any person aggrieved by any of the matters specified in s 59(1) had the right to apply to the Federal Court or a Supreme Court for an order for rectification of the Register.
8. The existence of the specific right to apply to a Court, that the Registrar may also exercise, under s 59(1) and the absence of any corresponding right or duty in s 58(1) suggests that the power conferred on the Registrar by s 58(1) was discretionary and that the Registrar was not obliged to exercise it. Indeed, the Registrar’s right to apply to the Court under s 59(1) covered matters that could also have been the subject of the power under s 58(1), yet neither section excluded or confined the operation of the other or the circumstances in which the Registrar could exercise his power to proceed under one or other of those sections.
9. In our opinion, these factors suggest that s 58(1) conferred a discretion on the Registrar to choose whether to serve a notice at all, on whom to serve it and what information or documents he would seek in the event he had reason to suspect any of the three matters referred to in s 58(1)(b). Such a discretion was unconfined, except if the Registrar chose to exercise it, by the subject matter, scope and purpose of s 58 itself: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 per Mason J, with whom Gibbs CJ and Dawson J agreed.
10. It follows that the primary judge was correct to hold that s 58 created a discretionary power, and not a duty, in the Registrar to serve a notice in writing on the registered agent or any owner (registered or not) requiring that person to provide specified information or documents relating to a ship. Accordingly, Mr Mentink has not made good his claim to a declaration in terms of paragraph 4 of his application in the Court below.
11. None of the declarations that Mr Mentink sought in paragraphs 1, 3 or 5 of his application before the primary judge was necessary or expedient to be made in connection with his application to rectify the Register. *First*, the declaration that his Honour made gave Mr Mentink all the relief that was necessary and appropriate to resolve the controversy: *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 359 [103] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; see too s 59(3).
12. *Secondly*, as his Honour found, Mr Mentink acknowledged that further facts had to be found before the three further declarations he sought could be made: *Mentink* [2014] 1 Qd R at 411 [41]. *Thirdly*, Mr Mentink did not identify any foreseeable consequences for the parties if declarations in the form of paragraphs 1, 3 and 5 were made and so, it was not appropriate for his Honour, in the exercise of his discretion, to make them: *M61* 243 CLR at 359[103]; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ.
13. Mr Mentink has not established that he was entitled to any further relief than that granted by the primary judge. Moreover, we are satisfied that his Honour correctly found that there was no utility in granting declarations in terms of paragraphs 1, 3 or 5 of Mr Mentink’s application, given the terms of the declaration that his Honour did make.
14. We reject Mr Mentink’s argument that the Registrar’s unauthorised action in closing the registration of *Larus II* was no decision at all, in the sense of a decision affected by jurisdictional error as explained by Gaudron, McHugh, Gummow, Kirby and Hayne JJ in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 506 [76]. If that were so, detailed provisions such as ss 58 and 59, that empower the Registrar and the Court to rectify or make an entry in the Register in circumstances including where the affected entry was wrongly made, would not need to be in the form that the Parliament enacted. McHugh, Gummow, Kirby and Hayne JJ held in *Project Blue Sky Inc v Australian Broadcasting Authority*  (1998) 194 CLR 355 at 392 [97] that:

Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act [*Montreal Street Railway Co v Normandin* [1917] AC 170 at 175; *Clayton v Heffron* (1960) 105 CLR 214 at 247; *TVW Enterprises Ltd v Duffy [No 3]* (1985) 8 FCR 93 at 104-105].

1. Their Honours made those observations in the context of an act done by a Commonwealth authority in contravention of a statutory provision that required it to act in a manner consistent with any agreement between Australia and a foreign country. They held that properly construed, the legislation in that case entailed that an act of the Authority done in contravention of the section was not invalid, but was “a breach of the Act and therefore unlawful”, and that a person with a sufficient interest was entitled to sue for, and obtain, a declaration to that effect, and, because it was appropriate on the facts of that case, an injunction restraining the authority from taking any further action based on its unlawful action (see 194 CLR at 393 [100]). They had said that “the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have” (194 CLR at 384 [78]). And , as Gaudron, McHugh, Gummow, Kirby and Hayne JJ said in *Plaintiff S157* 211 CLR at 510 [90]:

Seldom will a construction that gives a provision no useful work to do achieve that end.

1. It is not necessary to decide whether the bill of sale was invalid and not capable of affecting entries in the Register, as Mr Mentink argued, because even if it were, that would not affect the operation of the closure of the registration of *Larus II*.
2. Here, s 58 of the Act allowed the Registrar to initiate a process with a view to changing certain obsolete or incorrect entries, other than particulars relating to a mortgage (see s 58(1)(b)(i)). And s 60 allowed the Registrar to correct “any clerical error or obvious mistake in the Register”.
3. More importantly, s 59(1)(c) gave a person aggrieved or, significantly, the Registrar, the right to apply for rectification of the Register to the Supreme Court of a State or Territory if “an entry wrongly exists in the Register” and for that Court to “make such order as it thinks fit directing the rectification of the Register”. Of course, the person aggrieved or the Registrar can also apply to the Federal Court for that relief by force of the jurisdiction conferred by s 39B(1A)(c) of the *Judiciary Act 1903* (Cth), as Allsop J held in *Adsteam Harbour Pty Ltd v The Registrar of the Australian Register of Ships* [2005] FCA 1324 at [5]-[7].
4. If an erroneous or wrong entry in the Register were no decision, or of no effect, at all, the Registrar could have ignored it. Yet, s 59(1)(c) created a specific right for a person in Mr Mentink’s position, as well as the Registrar, to apply to a court for an order for rectification and the section created a discretion for, and not an obligation of, the Court to make an order for rectification.
5. In our opinion, the words of s 59(1) evinced an intention of the Parliament that a court could make an order for rectification where, among other circumstances, an entry wrongly existed in the Register, only if the Court considered that such an order were appropriate in the exercise of its judicial discretion.
6. The Act entailed that until the Court made an order for rectification under s 59(1), the entry would be valid and operate according to its terms, including to confer or withdraw Australian nationality on a ship. The public inconvenience of any other result is self evident. The fact of registration or its closure on the Register has the public international law consequence of determining whether Australia is the ship’s flag State. The Parliament intended that until the Court made an order rectifying the Register under s 59(1), any entry would mean what it said and operate as effectual.
7. Nonetheless, private international law rights and interests, such as beneficial interests, could still co-exist and be enforceable by or against a registered owner or mortgagee of a ship or a share in a ship, as s 47 of the Act expressly recognised. But, those equitable interests were personal rights that, if established, could be used to support the making of an entry to reflect them on the Register, including, where appropriate, pursuant to a court order for rectification under s 59(1).
8. For these reasons, the closure of the registration of *Larus II* made on 11 August 2004 was not invalid even though it was unlawful: *Project Blue Sky* 194 CLR at 392 [97], 393 [100]. It was and will remain operative, unless and until an order is made to rectify the Register under s 59(1).

## Conclusion

1. For these reasons the appeal must be dismissed with costs.

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| I certify that the preceding eighty-five (85) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Rares, Logan and McKerracher. |

Associate:

Dated: 23 October 2015