



## **FINDING OF INQUEST**

*An Inquest taken on behalf of our Sovereign Lady the Queen at Adelaide in the State of South Australia, on the 25<sup>th</sup>, 25<sup>th</sup> and 27<sup>th</sup> days of February 2013, the 6<sup>th</sup> day of March 2013 and the 19<sup>th</sup> day of September 2013, by the Coroner's Court of the said State, constituted of Anthony Ernest Schapel, Deputy State Coroner, into the deaths of Adam Mark Nicolai and Justin Shane Hellyer.*

*The said Court finds that Adam Mark Nicolai aged 28 years, late of 597 Yorketown Road, Edithbury, South Australia died at sea in Gulf of St Vincent off Stansbury, South Australia on the 28<sup>th</sup> day of September 2008 as a result of salt water drowning.*

*The said Court finds that Justin Shane Hellyer aged 28 years, late of 596 Yorketown Road, Edithbury, South Australia died at sea in Gulf of St Vincent off Stansbury, South Australia on the 28<sup>th</sup> day of September 2008 as a result of exposure to the sea - probable drowning.*

*The said Court finds that the circumstances of their deaths were as follows:*

### **1. Introduction and cause of death**

- 1.1. These are the findings in respect of concurrent Inquests held into the deaths of Adam Mark Nicolai, aged 28 years and Justin Shane Hellyer, aged 28 years, who both died at sea on 28 September 2008.
- 1.2. Both men died after the vessel of which they were occupants sank in the Gulf of St Vincent off the coast of Yorke Peninsula.
- 1.3. Mr Nicolai's body was recovered from the sea on 29 September 2008. A post-mortem examination of his body was performed by Professor Roger Byard, a forensic

pathologist at Forensic Science South Australia. Professor Byard established that Mr Nicolai's cause of death was salt water drowning<sup>1</sup>. Toxicological analysis on a sample of post-mortem blood did not reveal the presence of alcohol or other illicit drugs or substances. I find that the cause of Mr Nicolai's death was salt water drowning.

- 1.4. Mr Hellyer's body was not located. The circumstances of his last sighting, the fact that his remains have not been found and the fact that he has not been heard from since render it clear that Mr Hellyer is deceased. I so find. I am further satisfied that Mr Hellyer met his death on 28 September 2008 in similar circumstances to those in which Mr Nicolai met his death. It is not possible to be completely certain about the anatomical cause of Mr Hellyer's death, having regard to the fact that his failure to be located precluded any form of examination, but I am satisfied that he perished at sea and that the most probable cause was drowning. I find that Mr Hellyer's cause of death was exposure to the sea – probable drowning.
- 1.5. A third man had been on the vessel before it sank. He was Mr Andrew Paul Pisani, aged 34 years at the time of the incident, a professional fisherman, a principal of B & A Fisheries Pty Ltd (B & A) and the operator if not effective owner of the vessel in question. Mr Pisani managed to survive the sinking of the vessel, and the consequent exposure to the sea, by swimming for several hours and ultimately reaching the shore. He was able to do this notwithstanding the fact that he was not wearing a personal flotation device (PFD). Mr Nicolai's deceased body, when located in the sea, was not wearing any such device. To my mind it is highly unlikely that Mr Hellyer was able to don a PFD at any stage before he died. In the course of these findings I will deal with the presence of PFDs on the vessel and an attempt to have Messrs Nicolai and Hellyer don them as the vessel was sinking.

## **2. The Industrial Court proceedings**

- 2.1. Following the incident B & A was charged with an offence contrary to the Occupational, Health, Safety and Welfare Act 1986. The charge against B & A alleged that B & A had failed to provide and maintain, so far as was reasonably practicable, a safe system of work in that it failed to ensure that Mr Pisani and the two deceased men, who were stated in the charge to have been 'employees' of B & A,

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<sup>1</sup> Exhibit C3a, post-mortem report

wore PFDs at all times while on the vessel in the waters in which it was operating at the relevant time. The particulars of the charge also alleged that B & A failed to provide and maintain, so far as was reasonably practicable, the vessel in a safe condition in that it was unstable to the extent that it was unsuitable for use in the waters in which it was operating at the relevant time. There were other particulars that do not need to be recited. I have taken those particulars from the judgment of Industrial Magistrate Lieschke in the matter of Farrell v B & A Fisheries Pty Ltd. It is evident from that judgment that a concurrent prosecution against Mr Pisani in his personal capacity was withdrawn. B & A entered a plea of guilty to the charge. The judgment reveals that the entirety of the allegations as formulated within the charge were admitted by and on behalf of the defendant, B & A. B & A were subjected to a regime of penalties and orders that included a conviction, fines, other levies and the payment of compensation to family members of the deceased. As well, a Publication of Notices of Offence was ordered to be compiled and this notice appeared in The Advertiser<sup>2</sup>. The notice stated that it had been published by B & A pursuant to an order of the Industrial Court of South Australia. Within the notice it is clearly admitted that the vessel in question was not stable enough to remain buoyant when a wave swamped the deck of the vessel and that the instability was partly caused by the addition of a large, heavy net reel which was not suitable for the vessel. The notice also admits that neither of the deceased had been required to wear a PFD whilst on the deck of the vessel despite there being the same on board. The notice makes the acknowledgement that had the men been wearing PFDs, this would have significantly increased the possibility of them surviving.

2.2. It is clear from Mr Pisani's evidence that at the time with which this Inquest is concerned he was the driving force behind and the operator of the business, B & A. He was also the operator and in effect the owner of the vessel in question when all corporate niceties are put to one side. He purchased the vessel, modified it and undertook responsibilities in relation to the registration of the vessel, responsibilities which in the event he failed to carry out. If any person other than Mr Pisani could be cloaked with responsibility for what transpired between February 2007 when the vessel was acquired and September of 2008 when it sank, Mr Pisani did not lay any such claim either in his evidence before the Industrial Court or this Court.

2.3. The Industrial Court proceedings were not finalised until 4 June 2012.

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<sup>2</sup> Exhibit C36o

### **3. Issues at Inquest**

- 3.1. In this Inquest the Court investigated the cause and circumstances of the deaths of Mr Nicolai and of Mr Hellyer. In particular, the Court examined whether their deaths could have been prevented and whether, if similar circumstances were to be replicated, future deaths could be avoided.
- 3.2. The only person who could provide any description of what had taken place in respect of the circumstances of the sinking of this vessel and of the fate of the two deceased men was Mr Pisani. Mr Pisani was called to give oral evidence at the Inquest. I heard evidence during this Inquest concerning the condition of the vessel in question and in particular its freeboard, its stability and its liability to sink if inundated with water. I will come to the circumstances of the sinking of this vessel in some detail in these findings, but it is sufficient to say at this point that I have accepted the evidence of Mr Pisani that the vessel was struck by two unusually large waves and that the vessel was catastrophically inundated as a result. Regardless of whether or not this vessel had intrinsic instability for whatever reason, be it because of a dangerously high centre of gravity caused by the addition of a large metal reel or by a lack of sufficient freeboard at the rear of the vessel, or both, the evidence that these matters were in and of themselves causative of the vessel sinking was somewhat unconvincing when regard is had to the circumstances in which the vessel was inundated and the fact that it cannot be said with complete certainty that a properly configured and weighted vessel would have withstood the inundation in any event.

### **4. The circumstances of the death of Messrs Nicolai and Hellyer**

- 4.1. Mr Pisani told the Court that he had intended to go fishing on the day in question and that Messrs Nicolai and Hellyer wanted to come for a ride. Aside from the possibility that Messrs Nicolai and Hellyer may have received some of Mr Pisani's catch had the fishing expedition been successful, there may have been no other reason for their presence on the vessel other than for the sake of companionship while Mr Pisani went about the task of fishing. On the other hand, there is some evidence of a hearsay nature that from time to time Mr Nicolai received money from Mr Pisani for helping him on the boat and that Mr Nicolai went out on the night in question because he needed the money<sup>3</sup>. Mr Pisani asserted in his oral evidence that he did not know that

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<sup>3</sup> Exhibit C14a, Statement of Brenton Shane Garner

Mr Hellyer was said to be a poor swimmer. Although there were PFDs on the vessel, numbering about 5 or 6 and located at various places on the vessel, it is clear that Mr Pisani did not specifically draw the attention of his two companions to the presence those devices or tell them where they were located. Certainly he did not advise either man to don a PFD at any time prior to the catastrophe. To my mind neither deceased man made a conscious choice as to whether they would don a PFD or not. It simply was not an issue that was given any consideration.

- 4.2. At an earlier time on the day in question, the three gentlemen had in fact been out on the water and had returned. They had been out in the early hours of that morning and had returned to shore without incident at approximately 9:30am. The three had then travelled to Mr Pisani's house at Stansbury where they slept. They later rose and went back out again at about 4:00pm. Mr Pisani stated in evidence that none of the three had been drinking alcohol at all during that day, either at Mr Pisani's home or on the vessel. There is no evidence to the contrary and I note, as already alluded to, Mr Nicolai's bloodstream did not have any alcohol or any other substances of abuse in it. Mr Pisani told the Court that they had something to eat before they set out.
- 4.3. The three arrived at the Stansbury boat ramp sometime between 4:30pm and 5pm. At that time there was a southerly wind of approximately 10 knots. Mr Pisani told the Court that as far as he was concerned the state of the sea was safe for their purposes. They headed out from the Stansbury ramp to an area that Mr Pisani regularly fishes. This location was approximately 6 kilometres offshore.
- 4.4. The fishing net was rolled up on a large metal reel that was affixed to the rear of the vessel. This was the reel that Mr Pisani had installed. At about 5:00pm the net was run out to a distance of about 1300 metres. Mr Pisani told the Court that it takes approximately 25 to 30 minutes to be run out. At approximately 7:00pm Mr Pisani commenced pulling in the net using the motorised reel. There was still some daylight left at that point. The net was pulled in over the port bow of the vessel. The vessel is not anchored for this purpose. The engine of the vessel is used to operate the reel.
- 4.5. On this particular occasion the catch was poor, consisting only of dog sharks and 'fiddlers'. As the net was brought in these had to be picked out of the net and then thrown back into the sea. During this process Mr Pisani was towards the bow of the vessel on the port side, where the net was coming back into the vessel. The reel's

controls were also at that location. According to Mr Pisani, Messrs Nicolai and Hellyer, were on the engine box in front of the reel. They were situated in the centre of the vessel but on the port side. Mr Pisani himself attended to the business of removing dog sharks and 'fiddlers' from the net and throwing them back into the sea.

- 4.6. Mr Pisani described for the Court what then transpired. He said that when there was approximately 250 metres of the net to be pulled in, the wind from the southwest was, to use his expression, 'just getting out of control'<sup>4</sup>. At about that point the first of two large waves struck the vessel on the starboard side. Mr Pisani's immediate reaction was to attempt to cut the remaining part of the net free of the vessel and to move to a shallower location. However, having cut the net a second wave struck the vessel which was at that point inundated to such an extent that Mr Pisani came to the immediate realisation that there was no hope of retrieval. He told Messrs Nicolai and Hellyer to remove their wet weather gear as it would hamper their buoyancy. Mr Pisani opened the front hatch of the vessel where there were some PFDs stored. He handed them to Messrs Nicolai and Hellyer. As seen earlier PFDs were on board. Mr Pisani's evidence was imprecise as to which or how many of the devices were passed to his companions. A number of the vessel's PFDs were found subsequent to these events. What is known is that Mr Nicolai was not wearing a PFD when his body was located. As well, two of the new and unused PFDs were found in their original plastic wrappers and were still within a container that was found in a large icebox that was located floating in the sea. Clearly it was neither of those jackets which were handed to Messrs Nicolai and Hellyer. Mr Pisani told the Court that at first Messrs Nicolai and Hellyer were clinging on to the front of the vessel. The stern was by that time submerged. At that stage the PFDs were in their hands. Mr Pisani told the Court:

'There's no way in the world with two big waves like that hitting us at that speed, there was going to be no time to put anything on, you know. They had them in their hands.'<sup>5</sup>

One can appreciate that there would have been no time to put PFDs on before the vessel was ultimately inundated. As well, it would have been extremely difficult for the devices to have been donned in the water. I accept the evidence of Mr Pisani that he attempted to place Messrs Nicolai and Hellyer in possession of PFDs.

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<sup>4</sup> Transcript, page 276

<sup>5</sup> Transcript, page 279

- 4.7. Mr Pisani had to remove his wet weather gear while in the water. He felt himself sinking. Mr Pisani attempted to swim to two life rings and other equipment that was now floating in the sea. One of those items was the icebox. Apart from containing the new PFDs, the icebox contained flares. Mr Pisani was unable to reach it due to the velocity of the wind. The bow of the vessel was still at that point above the waterline and Messrs Nicolai and Hellyer were still clinging to it. By then it was dark. Mr Pisani told the Court that he swam back to where his companions were clinging to the vessel. He told them to remove as much of their clothing as they could. He believed that they were still in possession of PFDs at that stage. There was discussion about Mr Pisani swimming for help. At about that point what had remained of the vessel above the waterline disappeared. That left all three men in the water, Messrs Nicolai and Hellyer still holding PFDs. Mr Pisani's expressed some uncertainty as to whether at that point there had been one or two devices in their possession<sup>6</sup>.
- 4.8. By then the weather was, in Mr Pisani's description, 'horrendous'<sup>7</sup>. All three men attempted to swim for a short period of time. Mr Nicolai urged Mr Pisani to 'swim for it' and it may well be that what motivated Mr Nicolai at that point was his knowledge that Mr Hellyer's ability to swim was limited. Mr Pisani set off and several hours later was able to make it to shore.
- 4.9. As I understood the evidence, there had been no opportunity to use the radio in any meaningful sense or for the EPIRB to be activated.
- 4.10. When Mr Pisani reached land it was approximately 2:00am on the morning of 29 September 2008. The statement of Timothy Fowler<sup>8</sup>, who on the night in question was occupying a caravan situated almost at the water's edge at the Stansbury caravan park, states that at about 2:00am he was awoken by the sound of moaning. He went out to explore and found Mr Pisani in the water about 15 metres off shore. Mr Pisani was continually coughing and spluttering and was obviously exhausted. He went to Mr Pisani's assistance. Mr Pisani was not wearing a PFD. Mr Pisani told Mr Fowler that his boat had gone over at about 7:00pm or 8:00pm and that his two companions were 'gone'. He said that he had tried to swim with them for a short time and had tried to keep them going but that they were going under.

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<sup>6</sup> Transcript, page 282

<sup>7</sup> Transcript, page 282

<sup>8</sup> Exhibit C6a

- 4.11. In the event a search was conducted of the gulf waters. There is no suggestion other than that the search was competently carried out and was adequate. There can be no suggestion that the deaths of either of the two men could have been prevented by any more competent or appropriate searching. It is highly likely that Messrs and Hellyer had died before Mr Pisani reached shore.
- 4.12. As alluded to earlier, I have accepted the evidence of Mr Pisani's description of what took place. There is no evidence to the contrary. Whatever evidence there was of the weather conditions that may have prevailed at the time of this incident could not in any way disprove Mr Pisani's account of the wind conditions and of the state of the sea at that location. Moreover, the evidence of weather forecasts also proved very little. For instance, there was no evidence that Mr Pisani went out on the water in the face of a forecast that predicted the conditions that he described.

## 5. **The vessel**

- 5.1. The vessel in question was a Gilcraft 6.66 metre fibre-glassed hull boat. It had originally been owned by a Mr David Gill of Port Victoria. Mr Gill was a boat builder. He built the vessel in question. It was specifically designed for use in shallow water (less than 15 metres deep) and for net fishing. The vessel was originally equipped with a Mercruiser inboard diesel motor. Mr Gill also equipped the vessel with a net reel that was situated towards the stern of the vessel as illustrated in a photograph attached to Mr Gill's witness statement<sup>9</sup>. This was not the reel that was on the vessel when it sank. Mr Pisani would ultimately place his own reel on the vessel when he acquired it in 2007.
- 5.2. It is common ground in the Inquest that having regard to the type of vessel, its purpose and where it would operate, it was required to be registered pursuant to part 9 of the Harbors and Navigation Act 1993. For these purposes the vessel was classed as a restricted vessel that was 7.5 metres or less in length, or 'FISH-RESTRICT < 7.5' as described on the registration certificate. Its survey class was designated as 3C. The vessel was surveyed by the then manifestation of the Department of Transport (the Department) on 9 October 1997 at Port Victoria. According to the memorandum of survey the vessel was built by Mr Gill in 1997<sup>10</sup>. Within the document, Mr Gill is described as the owner at that time. The Department file relating to the vessel in

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<sup>9</sup> Exhibit C16a

<sup>10</sup> Exhibit C48k

question contains only the one memorandum of survey that I have just described. To my mind it is clear that no further Department survey took place after 1997.

- 5.3. The memorandum of survey makes reference to the Mercruiser diesel engine. However, there is no reference within detailed descriptions of the vessel's equipment of the existence of a net reel at the time of survey. However, it is clear that at some point during the course of Mr Gill's ownership of the vessel there was a net reel affixed to it.
- 5.4. The vessel was duly registered and a Certificate of Survey/Registration was from time to time issued during Mr Gill's ownership of the vessel. Such certificates have currency for a period of 2 years, after which they are renewed upon payment of the necessary fee. The most recent Certificate of Survey/Registration was said within the document to have been issued on 1 March 2006. The document states that the certificate was valid until 31 October 2007. Thus the registration came to be renewed as of 31 October 2007 by which time the vessel was in the possession of Mr Pisani. As will be seen, the registration was not renewed at its expiration with consequence that at the time of its sinking the vessel was not registered. Mr Pisani had purchased the vessel from Mr Gill in February 2007. It was plainly Mr Pisani's duty to have maintained its registration if he was to continue using it, which he did.
- 5.5. The sale to Mr Pisani was recorded in a handwritten memorandum that is undated but which was completed at the time of sale. The handwritten document describes the vessel and some of its equipment. When the vessel was sold to Mr Pisani the original diesel motor had been removed, as had the original net reel. Although the handwritten memorandum of sale does not refer to the reel, the fact that it was sold without a motor is reflected in the following phrase, '*complete, ready to have motor installed*'. A change of ownership proforma document was completed and signed by Mr Gill and it is dated 9 February 2007. This document originally described Mr Pisani himself as the new owner, but this was crossed out and 'B & A Fisheries' was substituted. The postal address of the new owner was originally stated to be PO Box 122, Stansbury SA 5582. The number of the PO Box has been crossed out and the number 112 was placed in substitution. The evidence is that B & A's postal address was in fact PO Box 112 at Stansbury. The change of ownership document refers among other things to the owner's obligation to advise Commercial Marine Services, an arm of the Department, of any 'proposed alterations to the structure or equipment

of the vessel'. Clearly at the time of the change of ownership there already had been an alteration to the structure or equipment of the vessel insofar as the motor had been removed. As well, the net reel had been removed, although I am not entirely certain whether this piece of equipment had originally been on the vessel when surveyed. Nothing turns on that. In any event, there would be further alterations to the vessel after Mr Pisani bought and took delivery of it. Mr Pisani would install his own petrol engine in the vessel. In addition he placed his own net reel on the vessel. Both the new motor and the new reel were on the vessel at the time it sank in September 2008. The obligation to notify proposed alterations to the structure or equipment of the vessel as stated on the change of ownership document was said to be reflective of the obligation set out in section 59 of the Harbors and Navigation Act 1993 (the Act). I here set out that provision. The provision was the same both in February 2007 and in September 2008.

**'59—Certificate of survey**

- (1) A certificate of survey issued in respect of a vessel certifies—
  - (a) that the vessel is structurally sound and conforms with the requirements of the regulations; and
  - (b) that the vessel has the equipment required by the regulations and that the equipment is in working order.
- (2) A certificate of survey remains in force for a period stated in the certificate.
- (3) If—
  - (a) a structural alteration is made, without the consent of the CEO, to the hull of a vessel in respect of which a certificate of survey is in force; or
  - (b) a material alteration is made, without the consent of the CEO, to the equipment of a vessel in respect of which a certificate of survey is in force, the certificate of survey is void.
- (4) A certificate of survey that is void under subsection (3) must be returned to the CEO at his or her request.
- (5) If a certificate is not returned in accordance with subsection (4), the owner and the master of the vessel to which the certificate relates are each guilty of an offence.

Maximum penalty: \$750.'

Section 60 of the Act, which I do not need to set out, rendered it unlawful for a vessel that required a valid certificate of survey to be operated without that certificate.

- 5.6. There was a great deal of discussion during the Inquest concerning the obligation on the operator of a vessel such as this, at the time of these events, to notify the

Department of material alterations made to a vessel of this description. To my mind this obligation is by no means clear. The obligation was said by counsel to derive from section 59 of the Act, that is to say from the obligation to hold a certificate of survey and to make no material alteration to the equipment of a vessel that requires such a certificate without the consent of the CEO of the Department, with the added implication that there is a concomitant duty to notify material alterations. I am not satisfied that this assertion by counsel was correct. More of this in the next section.

- 5.7. I have already alluded to the suggestion that there were a number of shortcomings in respect of the vessel. A number of them could have no possible materiality as far as the sinking of this vessel was concerned. Other matters including the size and weight of the reel and net that Mr Pisani had installed and its effect on stability and freeboard at the stern of the vessel were of much greater materiality. There was also the question of the installation of a petrol motor of a significantly reduced weight when compared to the original motor. A stability assessment in respect of the vessel carried out after these events by a naval architect employed by the Department of Planning, Transport, Infrastructure Marine Services, Mr Howard Peachey, suggested that the vessel was very susceptible to stability degradation due to the free surface effects both transversely and longitudinally as might be caused by water in the vessel that could not be quickly cleared by the bilge pumps. It was said that the effect of gust and steady wind on the side of the vessel combined with any passenger movement would heel the vessel significantly. In a dynamic situation, with low freeboard due to the water in the vessel, a wave or waves could easily come over the coaming and overwhelm the vessel. Mr Peachey gave oral evidence in the Inquest. Mr Peachey told the Court that much of his assessment relied upon computerised reconstructions, more or less in a desktop exercise without putting the now damaged vessel physically to the test.
- 5.8. Mr Adam Brancher is a marine surveyor and is the Manager, Standards and Operations for the new domestic vessel division of the federal national regulator for marine safety. Prior to that he worked for the Department as a marine surveyor. He managed the survey and qualifications team and as such he was the principal marine surveyor. Mr Brancher gave evidence in the Inquest to the effect that the modifications to the vessel after Mr Pisani had acquired it triggered an obligation that the Department be notified of those alterations. Moreover, he suggested that the

notification of alterations would have triggered a re-inspection if the vessel was to be reintroduced into commercial operation. The thrust of Mr Brancher's evidence is that the vessel was so configured that it was unlikely to have passed such an inspection for various reasons, the most material of which concern alleged intrinsic instability caused for the most part by the addition of Mr Pisani's reel. As well, he suggested that if the vessel had been inspected the Department would have required larger capacity bilge pumps and for them to have been relocated to a less vulnerable and more effective position. In his oral evidence before the Court Mr Brancher said:

'But I think the key point here is this boat should not have been out, unsurveyed, in the condition that it was with, with the machinery the way it was set up and with the safety gear the way it was. It shouldn't have been out that night. So yes, I agree with everything you say but I think were missing a fundamental point; this boat should not have been at sea, it should have been inspected by one of our inspectors as the company who has been fishing a long time would know and all of these factors would have been taken out of the equation.'<sup>11</sup>

5.9. While Mr Brancher's evidence led the Court to the conclusion that this vessel did have characteristics of instability, and that there was only limited freeboard giving rise to limited reserve if the vessel was swamped, neither Mr Peachey's nor Mr Brancher's evidence persuaded the Court that a properly configured vessel of the type in question would necessarily have survived the catastrophic conditions that Mr Pisani's vessel encountered on the night in question.

5.10. Mr Brancher also told the Court about the Department's lack of enthusiasm for the installation of inboard petrol engines in vessels such as this having regard to the risk of fire. However, I am not certain that their attitude was so stringent at the time with which this Inquest is concerned such that the vessel would not have passed muster on that basis alone.

5.11. As to the question of inspection, Mr Brancher said this:

'Had the vessel been presented for inspection after the modifications, including the new engine and the addition of the shark reel and all the other bits and pieces that went onto the boat, essentially we would have issued an order for repairs and renewals, which is, I think, a form 507, and the owner would have been invited to fix the boat to the point where it would have been fit for purpose.

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<sup>11</sup> Transcript, page 183

If the boat had been presented with that shark reel on the back it would have absolutely have triggered a stability test. It's not inconceivable that with the other modifications we would have also looked for a stability test as well. It's a really simple thing to perform, it really is, and as I said yesterday, the cost to people in this fishing sector is minimal.'<sup>12</sup>

Mr Brancher told the Court that the law about this was 'clear'<sup>13</sup> and that everyone in the industry knows that if they alter a vessel, the Department needs to be informed so that the Department can carry out tests on its structural integrity, its machinery and its stability. In other words, it would have required a renewed survey.

## **6. The continuing registration of the vessel and its failure to be registered**

- 6.1. The sole information concerning the vessel, except for a matter that I shall discuss shortly, that was in the hands of the authorities as of the day of its sinking was that it had been sold to B & A in February 2007 as per the memorandum of sale that had been drawn up between Mr Gill and Mr Pisani and as described in the change of ownership form dated 9 February 2007. Although on 19 February 2007 the records of the Department for Transport, Energy and Infrastructure were updated to reflect the change ownership, there had not been the issuing of a new Certificate of Survey/Registration in the name of B & A. It will be remembered, however, that the memorandum of sale stated that the vessel was sold '*complete, ready to have motor installed*'. Thus it was within the knowledge of the Department that the vessel had been sold without the original, or any, motor. If this should have been regarded as a material alteration to a vessel that required a certificate of survey and which would have voided that certificate, no action was taken in respect of that material alteration.
- 6.2. In his evidence before the Court Mr Pisani asserted that after he had purchased the boat, he notified the Department about his own proposed modifications to it. This evidence appeared to me to be something of an afterthought. It was not elicited in his evidence-in-chief. He told the Court that he spoke on the telephone to a Department official by the name of Carmel. This person is Ms Carmel O'Malley who would also be called to give oral evidence at the Inquest. Mr Pisani claimed that at a time in February 2007, and after he had started the work on the vessel, he had telephoned Ms O'Malley who was an official to whom he had spoken on a number of occasions throughout his fishing career. He states that he informed Ms O'Malley of the

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<sup>12</sup> Transcript, page 189

<sup>13</sup> Transcript, page 191

proposed alterations with the expectation that the Department would organise a date and a time to inspect the vessel. He told the Court that Ms O'Malley suggested that in the interim they would organise what he called an 'exemption' and said that she would get back to him. When pressed in the witness box as to what an 'exemption' was, Mr Pisani was somewhat vague, but the thrust of what he was suggesting was that he might be exempted from whatever rigours were involved in his having made material alterations to the vessel. He asserted that Ms O'Malley never did get back to him, suggesting further that in the past she had lost his paperwork on several occasions resulting in what he termed 'a complete mess'. Mr Pisani admitted that at no stage had he tried to contact Ms O'Malley after this because she had said that she was going to get back to him. Nonetheless, he acknowledged that he was never given any kind of exemption<sup>14</sup>. He completed the alterations to his vessel and he fished with it until its ultimate sinking. Mr Pisani states that he told Ms O'Malley that the new motor was already in the vessel and that he was going to put a fishing net reel on the vessel as well. He even told her the type of new engine, being a petrol Chevy motor.

- 6.3. Ms Carmel O'Malley was called to give evidence at the Inquest. She has been with the Department for 27 years. For the past 15 years she has worked in the Commercial Marine section. Her duties are to process registrations of vessels including restricted fishing vessels under 7.5 metres. Ms O'Malley recalled Mr Pisani as a man who from time to time had dealings with the Department in respect of his boats. Ms O'Malley had an involvement in the receipt of the paperwork in respect of the change of ownership of the vessel in question. She updated the Department records in respect of the change of ownership but told the Court that no new Certificate of Survey/Registration was at that time issued in the name of the new owner. Ms O'Malley told the Court that she is not certain whether she would have noticed from the paperwork the reference to the absence of a motor. Nevertheless, Ms O'Malley told the Court that she would have noted the change of ownership and the fact that the renewal of the registration was not due until 31 October of that year.
- 6.4. Ms O'Malley told the Court that if she had noticed the endorsement about the motor that she may have telephoned the client to enquire whether he had installed the new motor or to advise him to let the Department know if and when it was installed.

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<sup>14</sup> Transcript, page 294

However, if she had not noticed the endorsement, the matter of the motor would have been updated when the renewal of registration came to be considered<sup>15</sup>. In any event she would have made a note of any conversation about the matter if one had taken place with Mr Pisani. She did not make any such note in the Department file<sup>16</sup>. Nevertheless, she acknowledged that she may have spoken to Mr Pisani on the phone in February or March 2007. She knew Mr Pisani, she had had dealings with him in person. In any case she told the Court that if she had promised that she would get back to Mr Pisani she would have done so in accordance with her usual practice. Although Ms O'Malley had no recollection of any conversation with Mr Pisani about the new motor in particular, she told the Court that she always asked clients to let the Department know about a change of motor because '*if it is a heavier motor that can also change the stability of the vessel*'<sup>17</sup>. Ms O'Malley also said that if she had any such conversation with Mr Pisani, and had been advised about alterations involving a new motor and the addition of a net reel, she would have spoken to the principal surveyor about those matters and also have involved the naval architect in the matter. She feels certain that in all of the circumstances she would have come back to Mr Pisani about the vessel.

- 6.5. Another matter on which Mr Pisani says he placed significant stock was the fact that he had notified the Department of Primary Industries and Resources of South Australia (PIRSA), the authority that oversees fishing licences, that B & A had acquired another vessel. Admittedly Mr Pisani's application to have the vessel registration endorsement made to his fishing licence did indicate that the engine within the vessel was a 350 Chevy of 330 horsepower, that is to say the new motor, but it said nothing about whether it was the original motor or otherwise or whether it was petrol or diesel. If Mr Pisani had an obligation to notify material alterations to the authority specifically charged with responsibility for marine safety, it could hardly have been discharged in such an oblique fashion.
- 6.6. As far as the expiry of the vessel's Certificate of Survey/Registration is concerned, Ms O'Malley was able to demonstrate that the vessel in question was one of a number

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<sup>15</sup> Transcript, page 408

<sup>16</sup> Exhibit C48k

<sup>17</sup> Transcript, page 431

of vessels in respect of which renewal notices were sent out on behalf of the Department before the registration expired at the end of October 2007. In the case of the vessel in question the records suggest that the renewal notice was posted to the correct address for B & A, namely PO Box 112, Stansbury SA 5582. However, Mr Pisani told the Court that he never received the renewal. I regarded this assertion as intrinsically unlikely.

- 6.7. I find that Mr Pisani did not telephone Ms O'Malley in February or March 2007 to tell her about the new motor and the new reel. There may have been some discussion between them about the current absence of a motor, but to my mind it is unlikely that Ms O'Malley would have received detailed information including that it was a petrol motor and information about the placement of a reel on the vessel without at least making a note of this. There is no note of it. If I am wrong about that, the fact that Ms O'Malley did not get back to Mr Pisani would hardly have relieved him of any obligation that he had, if he did have one, not to put the boat into the water for commercial purposes until the appropriate authority was fully informed about the new equipment on the vessel.
- 6.8. I also find that Mr Pisani received the registration renewal notice and failed to renew the registration of the vessel.
- 6.9. The evidence would very much suggest that if any inspection of the vessel had been undertaken, it probably would not have been regarded as seaworthy in terms of the conditions under which it would be used. I so find.
- 6.10. The issue regarding Mr Pisani's obligation to notify the Department of the material alterations to the vessel or its equipment is not free from difficulty. Whether there was such an obligation is a matter of law. If it existed it would have an underlying legislative basis, either in the Act itself or in the regulations made under the Act. Counsel did not identify any legal obligation other than the one I have already referred to, namely that contained in section 59 of the Act where it is stipulated that a material alteration made, without the consent of the CEO of the Department, to the equipment of a vessel in respect of which a certificate of survey was in force renders a certificate of survey as void. I pause here to observe that if this obligation was in any

way relevant to this vessel, either in the hands of Mr Gill or those of Mr Pisani, the removal of the original motor would have constituted a material alteration voiding the certificate of survey. The re-installation of a different motor as well as the installation of a new reel would also have constituted material alterations voiding the certificate of survey. In that event, it would be surprising that the Department, knowing at least that the original motor had been removed, would send out a renewal notice covering both survey and registration of the vessel.

- 6.11. The obligation to maintain a valid certificate of survey in respect of a vessel and the obligation to notify the Department of material alterations to the vessel's equipment, as that obligation supposedly existed at the time with which this Inquest is concerned, has to be examined against Regulation 111 of the Harbors and Navigation Regulations 1994 (since repealed). I set this out below:

**'111—Vessels requiring certificate of survey: section 56**

- (1) Subject to these regulations, a certificate of survey is required in respect of—

- (a) the following classes of commercial vessels:

Class 1A	Class 2A	Class 3A
Class 1B	Class 2B	Class 3B
Class 1C	Class 2C	Class 3C
Class 1D	Class 2D	Class 3D
Class 1E	Class 2E	Class 3E;

- (b) an observation vessel.

- (2) A certificate of survey is not required in respect of—

- (a) a ferry or punt that crosses a river or fairway by means of ropes or cables; or  
 (b) a fishing vessel that is 7.5 metres or less and operates only in inland waters; or  
 (c) a vessel that is required to be registered under these regulations.'

It will be noticed immediately that as things stood in 2006, 2007 and 2008 a certificate of survey was not required in respect of a vessel that was required to be registered under the regulations<sup>18</sup>. This is so regardless of the fact that the vessel is a commercial vessel of a class listed in regulation 111(1)(a), in this case Class 3C. Regulation 111(2)(c) provides an exception to the rule requiring survey. As a restricted vessel that was less than 7.5 metres in length, Mr Pisani's vessel was

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<sup>18</sup> Regulation 111(2)(c)

required to be registered under the regulations. This vessel was so registered. Therefore, a certificate of survey was not required. It would follow that the duties as contained in section 59 of the Act not to make material alterations to the vessel, or to seek the consent of the CEO to make them, had no application to this vessel.

- 6.12. I was not persuaded that the survey requirements as they existed in 2006, 2007 and 2008 applied to Mr Pisani's vessel. No other legal obligation regarding notification of material alterations to commercial vessels has been drawn to my attention. That said, there were in existence powers to prohibit the use of unsafe vessels and powers to order the survey of vessels that were suspected of being unsafe contained in Part 2 Division of the Regulations under the Act, but that is a different issue from the duty to notify of material alterations of a surveyed vessel. Of course, none of the above considerations would relieve Mr Pisani of the moral responsibility of taking men out on a boat that was safe.
- 6.13. The fact is that regardless of whether or not Mr Pisani received the registration renewal papers at or about the time of the registration expiry in October 2007, as the operator of the vessel he was obliged not to operate the vessel without a current certificate of registration<sup>19</sup>. There was no such certificate in existence because Mr Pisani had failed to renew the registration. Thus, in this sense the vessel should not have been out on the water in the first place.

## **7. Personal flotation devices**

- 7.1. I have accepted Mr Pisani's evidence that he attempted to provide Messrs Nicolai and Hellyer with PFDs. I have already referred to the devices that were on board the vessel. Neither man was wearing a PFD at any stage before the catastrophe unfolded. Nor were they instructed, advised or otherwise encouraged to don any of the PFDs that were available.
- 7.2. Mr Brancher told the Court that two of the older PFDs that were recovered, being of a Corvette model, were old and he doubted their buoyancy properties. The new and unused PFDs were still in their plastic wrappers and were contained within the icebox that was found floating in the sea. These PFDs were pre-tied with the result that even if they had been made available to Messrs Nicolai and Hellyer, they would have been very difficult to don, especially in the water.

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<sup>19</sup> Section 55 of the Act

- 7.3. Mr Pisani told the Court that there were two buoyancy rings attached by ties to either side of the net reel. There was some criticism levelled at Mr Pisani in respect of the location of these devices and the manner of their having been affixed to the vessel. I did not fully understand this criticism given that the devices did not go down with the vessel. Regardless of how they were tied and where they were tied, they nevertheless managed to float free of the vessel. They were found in the sea after the event.
- 7.4. I have accepted Mr Pisani's evidence that the effect of the two large waves was so swift and catastrophic that there was simply no time for any person on board to don PFDs or to secure the buoyancy rings. Nevertheless it is hard to disagree with the conclusion of the Industrial Court that there had been a foolhardy and reckless approach to the wearing of life jackets at night in offshore waters in a small vessel that was prone to sinking if swamped<sup>20</sup>. This comment was made in the context of a prosecution against B & A, but it applies equally to Mr Pisani in his personal capacity. I say that regardless of the fact of whether either of Messrs Nicolai and Hellyer or both could properly be characterised as employees of either B & A or Mr Pisani.
- 7.5. There was some argument during the Inquest as to whether or not if Messrs Nicolai and Hellyer had been wearing the newer PFDs prior to the catastrophe, their deaths might have been prevented. The argument advanced on behalf of Mr Pisani in essence was that PFDs of the type involved may still not have prevented the drowning of the two men, or at least it could not be shown that PFDs were so effective as to have prevented their drowning. However, as a matter of common sense the wearing of PFDs would significantly have increased the possibility of both men surviving. Without them, they had little chance of survival once a decision had been made not to try to make shore with Mr Pisani. Dr Christopher Acott is a medical practitioner practising within the Diving/Hyperbaric Medicine Unit of the Royal Adelaide Hospital. He originally provided a letter that is now covered by way of affidavit to SafeWork SA in respect of this matter<sup>21</sup>. Dr Acott's letter states that the wearing of a PFD definitely increases the chances of survival, but it is not a guarantee. Ideally, any such device should be in position at all times. Dr Acott points out that if the person in the water is not wearing a PFD then the person has to tread water to stay afloat which markedly decreases survival time up to approximately 50%. Dr Acott does suggest that spray hoods on PFDs are important. I accept all of that evidence.

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<sup>20</sup> Exhibit C36n, Paragraph 40

<sup>21</sup> Exhibit C32a

7.6. The Notice to Commercial Fishers and Operators that was ordered to be published by the Industrial Court and which was published in The Advertiser by B & A acknowledges that had Messrs Nicolai and Hellyer been wearing PFDs this would have significantly increased the possibility of them surviving. It is a conclusion that is difficult to escape.

**8. Recommendations**

8.1. Pursuant to Section 25(2) of the Coroners Act 2003 I am empowered to make recommendations that in the opinion of the Court might prevent, or reduce the likelihood of, a recurrence of an event similar to the event that was the subject of the Inquest.

8.2. I make the following recommendations:

- 1) That measures be introduced requiring owners and operators of vessels of the kind with which this Inquest is concerned to report to Department of Planning, Transport and Infrastructure material alterations to the equipment of those vessels;
- 2) That measures be introduced requiring owners and operators of vessels of the kind with which this Inquest is concerned to have such a vessel surveyed or otherwise inspected for seaworthiness;
- 3) That the Minister for Transport consider making it a legal requirement that each occupant of a vessel of this type, while being used for commercial purposes, at all times wear a personal flotation device that is designed to inflate automatically on immersion. The operator of the vessel should be under an obligation to ensure that all occupants of the vessel are wearing such devices.

*Key Words: Fishing; Drowning*

*In witness whereof the said Coroner has hereunto set and subscribed his hand and*

*Seal the 19<sup>th</sup> day of September, 2013.*

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*Deputy State Coroner*