

# When the Rules Collide: Racing Rules, COLREGS and the Common Law After *Moore v Keane*

A working paper for sailors, protest committee members, clubs and Australian Sailing

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## 1. Introduction

*Moore v Keane* [2026] NSWSC 475 (with the subsequent costs judgment, [2026] NSWSC 565) is, on its face, an ordinary personal injury case arising from a collision between two racing yachts at a mark rounding. Underneath that, it is one of the few reported Australian decisions to work through — in real detail — how three separate rule systems bear on a collision between racing yachts: the Racing Rules of Sailing (RRS), the International Regulations for Preventing Collisions at Sea (COLREGS), and the common law of negligence, as modified by the Civil Liability Act 2002 (NSW).

This paper is written for three audiences who each need something different from the case:

- **Sailors** — crew and helmsmen — who need to understand what legal exposure actually looks like when a race goes wrong, and where the comfortable assumption that “we were racing under RRS” stops protecting them.
- **Protest committee members**, who need to understand the relationship (and the gap) between a protest finding and a civil liability finding.
- **Authorities** — clubs and Australian Sailing — who need to understand where their risk-management documentation held up, where it didn't, and what regulatory framework sits behind the RRS's authority to govern a race in the first place.

Sections 2 to 7 set out the facts, the interaction between RRS, COLREGS and negligence law, and what each audience should take from the case, in plain and practical terms. A second part of the paper, for readers who want the full legal architecture — the detailed negligence and statutory-defence reasoning, a note on a related evidentiary judgment, and the NSW regulatory framework behind race-day right-of-way rules — follows the Conclusion.

## 2. The Case in Brief

**Facts.** On 12 December 2020, *Brand X* (owned and skippered by the second defendant, Greg Brand, with the plaintiff, David Moore, as crew) and *Knockabout* (owned and skippered by the first defendant, Jeffrey Keane) were both converging on a rounding mark in a Cronulla Sailing Club race on Port Hacking, each carrying a spinnaker. As the boats rounded and gybed, *Knockabout's* bowsprit struck *Brand X*, and Mr Moore was struck in the lower back.

**Cause.** The court found the collision was caused **solely** by Mr Keane's failure to keep a proper lookout. For a period of around 10 seconds during the critical manoeuvre, Mr Keane's attention was on a tangled mainsheet and his son, rather than on where

*Knockabout* was headed. He conceded in cross-examination that he could have looked up and avoided the collision at any point during that window. Mr Brand, by contrast, was found not to have been at fault — even accepting a possible technical breach of RRS 18.4 (sailing further from the mark than his proper course required before gybing), the court held this was not causative and “not negligent in the strict sense.”

**Statutory defences — both failed.** - *Section 5L (obvious risk of a dangerous recreational activity)*: failed. Collision is an obvious risk of competitive sailing, but the court held the materialised risk did not reach the threshold of a “significant risk of physical harm” required to make sailing a *dangerous* recreational activity on the evidence before it (including statistical evidence of a low incidence of serious injury from racing collisions). - *Sections 5M and 5N (risk warning defeating duty of care; contractual exclusion of liability)*: failed at the threshold. The defendants argued Mr Moore was bound, via a SailPass “temporary membership” completed on his behalf by Mr Brand using a QR code, by a contract incorporating a risk warning and liability waiver. The court held no contract was ever formed with Mr Moore at all — the QR-code process was too thin, and too disconnected from anything Mr Moore himself did or authorised in the necessary legal sense, to bind him.

**Result.** Judgment for Moore against Keane only. Judgment for Brand against Moore. Brand’s cross-claim for contribution against Keane succeeded; Keane’s cross-claim against Brand was dismissed. Costs (565) followed the result, including an adverse costs order against Moore for unreasonably rejecting an early offer of compromise from Brand.

**A friction point worth holding onto.** The Cronulla Sailing Club’s own protest committee, convened shortly after the incident, found **both boats at fault** and disqualified both. The Supreme Court, on a fuller evidentiary record built around 15 minutes of continuous stern-camera video, reached a different, single-fault conclusion. That divergence is a recurring theme in what follows.

### 3. The Three Rulebooks: How RRS, COLREGS and Negligence Actually Interact

#### 3.1 What the RRS Part 2 Preamble does — and doesn’t — replace

The Preamble to RRS Part 2 (When Boats Meet) provides, in substance, that the rules of Part 2 apply between boats racing (or about to race, or having raced), and that when a boat racing meets a vessel that is not, she must comply with COLREGS or applicable government right-of-way rules instead. Critically, the RRS’s own wording is careful: it replaces the **right-of-way rules** of COLREGS. It does not purport to touch COLREGS’ general seamanship obligations.

That distinction tracks COLREGS’ own internal structure. Part B of COLREGS splits into:

- **Section I (Rules 4–10)** — conduct required *in any condition of visibility*, of every vessel, *at all times*: keeping a proper lookout (Rule 5), proceeding at a safe speed (Rule 6), assessing risk of collision (Rule 7), and taking action to avoid collision (Rule 8).
- **Section II (Rules 11–18)** — the actual right-of-way allocation between vessels in sight of one another (opposite tacks, overtaking, crossing, and so on).

RRS Part 2 substitutes its own right-of-way scheme for Section II. Nothing in the preamble touches Section I. **A helmsman racing under RRS is not thereby relieved of the Rule 5 lookout obligation** — RRS 14 (Avoiding Contact) sits alongside that duty, not in place of it.

### 3.2 The NSW mechanism that actually makes any of this operative

This structural point in the RRS is not merely persuasive or analogical in NSW — it is backed by a specific, gazetted legal instrument, discussed in full in the Appendix at the end of this paper (and treated there as background rather than as part of the case analysis, since it played no part in the judgment). In short: NSW's exemption regime for sailing events exempts participants only from **COLREGS Rule 12** — the give-way rule for sailing vessels — and from nothing else. The lookout obligation was never within the scope of what either instrument — RRS or the NSW regulatory exemption — actually displaces.

### 3.3 What the judgment actually did with “proper lookout”

Here is the notable feature of *Moore v Keane* itself: **the judgment never once mentions COLREGS**. Keane's failure was pleaded and found purely as a common law negligence question — a failure to keep a “proper lookout,” assessed under ordinary principles of breach of duty and causation. Counsel argued the case on RRS 14 and 18.4 and on the general law of negligence; nobody raised COLREGS Rule 5 at all.

Yet the substance of what the court found — a sustained failure, over some 10 seconds, to look at what was happening around the boat during a critical manoeuvre — is precisely what Rule 5 requires, independently of racing status. This is worth naming clearly: **two independent legal sources, COLREGS Rule 5 and the ordinary common law duty of care, arrive at the same substantive lookout standard**. The court did not need COLREGS to reach its conclusion, because negligence law's own “reasonable care” standard for a helmsman already demands the same thing. That convergence is reassuring for the coherence of the law, but it also means sailors cannot treat “we were racing under RRS, not COLREGS” as any kind of answer to a negligence claim — the same lookout obligation reaches them by an entirely separate legal route regardless.

## 4. For Sailors (Crew and Helmsmen)

**A right-of-way boat under RRS still owes a common law duty of care.**

A right-of-way boat under RRS still owes a common law duty of care. RRS 14's “need not act to avoid contact until it is clear the other boat is not keeping clear” is a racing rule, not a shield from negligence. It did not feature as a defence for Keane, and would not have helped him — his failure was a failure to look, not a failure to give way correctly.

**Keeping a lookout is not something RRS ever excuses you from — under the RRS's own words, under the NSW regulatory exemption, and under ordinary negligence law.**

Keeping a lookout is not something RRS ever excuses you from — under the RRS's own words, under the NSW regulatory exemption, and under ordinary negligence law. Three separate sources point the same way. Treat “we're racing, COLREGS doesn't apply” as true only for the specific give-way rule — never for watching where you're going.

**“I was entitled to assume the other boat would keep clear” is not a defence to a lookout failure.**

“I was entitled to assume the other boat would keep clear” is not a defence to a lookout failure. Brand was entitled to expect Keane would follow him around the mark under RRS 18.4 — but that entitlement doesn’t excuse a helmsman who stops watching the boat he’s about to cross paths with.

**A protest committee outcome is a different question from a civil liability outcome, and won’t necessarily align.**

A protest committee outcome is a different question from a civil liability outcome, and won’t necessarily align. The CSC protest committee disqualified both boats; the Supreme Court found only one negligent. Don’t assume a protest result predicts, or is admissible proof of, your civil exposure.

**“Obvious risk” defences have a real ceiling.**

“Obvious risk” defences have a real ceiling. The general riskiness of racing (congestion, collision at marks) is real, but the court held the specific risk that materialised here didn’t reach the threshold of a “significant risk of physical harm” needed for the statutory obvious-risk defence to succeed. Don’t assume “sailing is dangerous, everyone knows that” defeats a claim if you hurt someone.

**Crew signed up “by someone else, on the day” may not be bound by waivers they never saw.**

Crew signed up “by someone else, on the day” may not be bound by waivers they never saw. Moore never personally completed any entry document; a skipper completed a SailPass using Moore’s phone via a QR code, without Moore’s direct involvement in, or apparent understanding of, its terms. That was found insufficient to bind him to a risk warning or liability waiver.

**Momentary distraction carries real legal weight.**

Momentary distraction carries real legal weight. A single ~10-second lapse — attending to a tangled sheet, checking on a crew member — was, on its own, enough to found sole liability. Where possible, delegate below-deck problems to crew so the helm’s eyes stay up during the highest-risk seconds of a rounding.

## **5. For Protest Committee Members**

**Your findings and a court’s findings are answering different questions, and may not align.**

The CSC protest committee found both boats at fault and disqualified both; the Supreme Court, with a fuller evidentiary record, found only one boat negligent. A protest decision is not authoritative on civil liability and shouldn’t be assumed to predict, or be relied on in, later litigation.

**RRS breach and negligence are not the same inquiry.**

The court treated Brand’s possible RRS 18.4 breach as, at most, context — not itself negligent, and not causative. Protest committees apply RRS’s own rule-breach framework; courts apply a reasonable-care/causation analysis. The two can diverge sharply on identical facts.

**A DSQ under RRS 14 or 18 says nothing, by itself, about civil fault.**

A disqualification for failing to avoid contact or keep clear doesn’t establish degree of fault, causation, or a substandard standard of care for negligence purposes. Language in protest write-ups should be careful not to suggest otherwise.

**Evidence quality matters, and a court may simply have more of it than you did on the day.**

The Supreme Court leaned heavily on 15 minutes of continuous video and detailed cross-examination unavailable to a protest hearing conducted quickly after a race. Contemporaneous, well-preserved evidence — video, incident reports, prompt witness statements — is exactly what later ends up mattering.

**Recognise the limits of your role.**

Protest committees adjudicate racing rules; they are not, and shouldn’t be treated by sailors or clubs as, a substitute forum for resolving personal injury liability.

**6. For Authorities (Clubs and Australian Sailing)**

**Risk-warning and waiver systems need to actually reach the participant they’re meant to bind.**

The SailPass QR-code process — completed on a crew member’s behalf by someone else, with minimal information captured — was held insufficient to form a contract with Mr Moore at all, let alone incorporate a risk warning or liability exclusion. A process that isn’t demonstrably completed *by or with the direct involvement of* the actual participant offers little or no protection.

**Design entry systems for evidentiary robustness, not just administrative convenience.**

The finding turned on the thinness of the process — no clear record of who completed it, on what device, with what actually shown to them. Systems should ideally capture an affirmative acknowledgment from the participant themselves, not just a next-of-kin field and a button click completed by someone else.

**“Obvious risk” defences under s5L have a real ceiling.**

Even a strongly worded club risk warning listing collision and equipment injury as risks did not, on its own, establish the “dangerous recreational activity” threshold here. Clubs should treat a risk warning as one factor supporting a defence, not a complete answer to it.

**The RRS/negligence gap has governance implications, not just litigation ones.**

Because protest outcomes are not determinative of negligence, clubs and Australian Sailing may wish to consider guidance to protest committees and members about the distinct purpose and legal weight of protest decisions, to avoid members treating a protest outcome as a proxy for their legal exposure.

**The crew/agent-entry problem is systemic, not specific to this case.**

Many crew are entered by skippers, not themselves. This case shows how easily that defeats a club's own risk-allocation documentation. A standardised, individually completed acknowledgment for all crew — not just boat owners — would materially strengthen the position clubs and Australian Sailing are trying to achieve.

**Insurance and costs exposure follow the civil liability finding, not the protest outcome.**

With costs following the substantive result (565), clubs and insurers should treat a protest finding of “both boats at fault” as no guide at all to where civil liability, damages and costs exposure will actually land.

**Regulatory Framework.**

See the Appendix for a discussion of the regulatory framework (Marine Safety Act, the TfNSW Exemption Order, and SENS) that clubs rely on to run races under RRS at all — this framework was not before the court in this case, but is directly relevant to how clubs should think about their compliance and record-keeping going forward.

## 7. Conclusion

Step back from the detail, and *Moore v Keane* tells a consistent story from three different angles — and it is not the story a sailor steeped in RRS and COLREGS might expect.

**The common law needed none of the machinery this paper has spent so much time on.**

Section 3 showed that COLREGS Rule 5's lookout obligation survives RRS Part 2's displacement of the right-of-way rules — but the court never had to say so, because ordinary negligence law's own “reasonable care” standard for a helmsman already demanded the same thing, and reached it unaided. The statutory defences — s5L, s5M, s5N — each failed not because the law left a gap for defendants in this position, but because the facts on the ground (a QR code completed by someone else, statistics that undercut the “significant risk” threshold) didn't clear a real, workable, well-established bar; the full doctrinal detail of why is set out in Part II for readers who want it. And the Appendix shows that an entire regulatory architecture — the Marine Safety Act, the gazetted Exemption Order, the specific mechanism by which RRS acquires legal authority to govern right-of-way on Port Hacking at all — was operating in the background of this exact event, evidenced by Mr Keane's own incident report, without anyone needing to invoke a word of it.

**The throughline is that the common law of negligence is self-sufficient here.**

It doesn't need COLREGS to define a lookout standard; it doesn't need the RRS to define a standard of care; and it doesn't need the statutory exemption chain to be pleaded for a

court to work out who was at fault and why. Three sophisticated, purpose-built rule systems — one international maritime convention, one international sporting code, and one detailed NSW statutory licensing scheme — all sat unused or only partially used, while a single, general-purpose legal principle (take reasonable care; keep a proper lookout) did all the real work. That is not a criticism of the specialised systems — RRS and the Exemption Order both exist for good reasons, mostly about *fair racing* and *administrative efficiency* respectively, not about *compensating injury* — but it is a genuinely important thing for every audience in this paper to internalise: **none of the rulebooks are a substitute for, or a defence against, the ordinary law of negligence.**

That has different practical shapes for each reader:

- **For sailors**, it means the comfortable shorthand — “we were racing under RRS,” “I was the right-of-way boat,” “the protest committee cleared me” — answers a racing question, not a legal one. The lookout obligation that actually decided this case exists independently of all of that, and would have applied whether COLREGS, RRS, or nothing at all governed the right-of-way rules that day.
- **For protest committees**, it means your findings — however carefully reasoned under RRS — are not, and were never intended to be, findings about civil fault. The CSC committee’s “both boats at fault” finding and the court’s “one boat, solely at fault” finding are not in tension; they are answers to two different questions, asked under two different frameworks, for two different purposes.
- **For clubs and Australian Sailing**, it means risk management has to operate on two tracks at once: administrative compliance with the regulatory framework that lets you race under RRS at all (documented, auditable, and — as the Appendix shows — directly evidenced by exactly the kind of incident report this case turned on), and a genuinely robust, individually-completed risk-warning and entry process that can actually withstand the same scrutiny a s5L or s5M defence received here. This case shows both halves matter, and that neither is any substitute for the other.

**A final observation, offered carefully.** Nothing in this paper should be read as suggesting the court, or counsel, got anything wrong by not addressing COLREGS or the Exemption Order — on the pleaded case, once the contractual and negligence pathways were chosen, that framework may simply have added nothing the court needed. But it is worth naming plainly, for the benefit of the next case: a public, gazetted, conditional regulatory instrument sits directly behind every RRS-governed club race in NSW, is triggered by exactly the kind of incident this case involved, and was not identified once in over 200 paragraphs of combined judgment. Clubs and Australian Sailing are best placed to make sure that gap doesn’t recur — not because it changed this outcome, but because the next case may turn on facts where it does.

## Appendix A: For the Legally Interested Reader

*The material below expands on sections 2 and 3 with the full doctrinal reasoning behind the court’s negligence and statutory-defence findings, a note on a related evidentiary judgment, and — as an appendix — the NSW regulatory framework that sits behind a club’s authority to race under RRS at all. None of this material is necessary to follow the practical guidance in sections 4 to 7 above; it is provided for readers, particularly lawyers advising clubs or sailors, who want the underlying legal architecture.*

### A. What the Court Actually Decided: A Closer Look at the Negligence and Statutory-Defence Analysis

*Unless otherwise indicated, all paragraph references in this section are to the principal judgment, Moore v Keane [2026] NSWSC 475.*

**In plain terms, before the detail:** Mr Moore only had to prove that his injury was caused by someone’s carelessness. The court found that it was — Mr Keane’s, and only Mr Keane’s. That should have been the end of the legal analysis, but the defendants ran three further arguments, each of which would have defeated the claim even if negligence was proven: that sailing is simply too dangerous an activity for the law to compensate this kind of injury (the “obvious risk” defence); and two versions of an argument that Mr Moore had, in effect, signed away his right to sue before the race even started (the risk-warning and contract-exclusion defences). All three failed. The reasoning in each case turned on a demanding, technical threshold that the defendants could not quite clear — not because the arguments were unreasonable, but because the facts (a QR code completed by someone else, on Mr Moore’s phone, without his direct involvement; and an actual, if low, statistical incidence of serious sailing injuries) fell short of what the law requires before it will excuse an otherwise negligent defendant. What follows sets out why, in more doctrinal detail, for readers who want the full legal architecture.

#### A.1 Duty, Breach and Causation

No party disputed that a duty of care was owed between competitors in a yacht race — the contest was over breach and causation (at [8]–[9]). The court’s finding was unambiguous: the collision was caused **solely** by Mr Keane’s failure to keep a proper lookout during a critical ~10-second window while his attention was on a tangled mainsheet and his son, including Mr Keane’s own evidence that he could have looked up and avoided the collision “at any point in that period” (at [32]). The court separately found that Mr Brand was not at fault (at [33]). Considerable reliance was placed by Mr Keane on RRS 14 and 18.4, set out at [34], and on an extended submission (recorded as a transcript exchange at [35]) that Mr Brand’s possible breach of RRS 18.4 formed part of the context in which “both defendants” failed to keep clear and failed to keep a proper lookout. The court rejected that submission as resting on an unsupported premise — that Mr Brand himself failed to keep a lookout — describing it as “beguiling” but “fundamentally flawed” (at [36]–[37]), and restated its conclusion that the collision was caused solely by Mr Keane’s failure to look at what was happening in the seconds before the collision (at [38]). The court was accordingly not required to, and did not, apportion fault between the two defendants under general maritime causative-potency principles (of the kind urged on the court by reference to *The “Nordlake” v The “Seaeagle”* [2015] EWHC 3605, at [31]); this was a single-cause case on the facts found.

## A.2 The Section 5L Defence: “Obvious Risk of a Dangerous Recreational Activity”

Section 5L of the Civil Liability Act 2002 (NSW) provides a complete defence where harm results from the materialisation of an obvious risk of a dangerous recreational activity. The High Court’s four-part test in *Tapp v Australian Bushmen’s Campdraft & Rodeo Association Ltd* [2022] HCA 11 at [104], set out by the court at [128], required the defendants to establish: (i) a recreational activity; (ii) that was dangerous, in the sense of carrying a significant risk of physical harm; (iii) an obvious risk; and (iv) that the harm resulted from the materialisation of that obvious risk.

The first and third elements were not seriously contested — competitive sailing is a recreational activity, and collision at close quarters is an obvious risk of it (at [133]–[134]). The case turned entirely on the second element: was the *specific* risk that materialised (collision causing crew injury during a mark rounding) a **significant** risk of physical harm, such that sailing — or at least this kind of sailing — is a *dangerous* recreational activity within the meaning of the Act?

Two further doctrinal points from *Tapp*, addressed by the court, shaped how that question had to be approached:

- **The level of generality at which the risk is characterised** must match the level at which the risk was characterised for the purposes of assessing breach of duty (*Tapp* at [110]–[115], extracted in full by the court at [129]) — neither more specific (requiring foreseeability of the precise mechanism of injury) nor more general (reducing the inquiry to “sailing is risky” as an abstraction).
- **The evidentiary record on prevalence mattered.** Mr Moore’s case relied on statistical evidence tendered by Mr Keane himself (Exhibit 22, an Australian Sailing Inquiry Report recording 70,000 occurrences of yacht racing over seven years against 10 serious injuries, discussed at [125]–[126] and at [141]) to show that, notwithstanding the *obviousness* of collision as a risk, the *incidence* of resulting serious injury was low — supporting the submission that an activity with an obvious risk of even catastrophic injury does not become “dangerous” within s5L merely because the injury, when it occurs, can be serious (see also *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17 at [31], applied at [140]). The court accepted this evidence was relevant to characterising the risk and ultimately could not conclude that Mr Moore had been engaged in “anything that involved a significant risk of physical harm,” notwithstanding that it involved an obvious risk of *some* harm (at [141]).

The consequence is a defence that failed not because collision wasn’t foreseeable or obvious, but because the defendants could not establish the *degree* of danger the statute requires (the defence was held “not made out” at [142]) — a genuinely high bar, and one worth sailors and clubs understanding precisely: **s5L does not protect against ordinary negligence in a recreational activity merely because that activity carries some inherent risk.** It protects only against harm from risks that are both obvious *and* significant.

### A.3 The Sections 5M and 5N Defences: Was Mr Moore Ever Bound by a Contract?

The second and third defences both depended on a common threshold question: had Mr Moore become a party to a contract — constituted by the Cronulla Sailing Club’s Notice of Race, Sailing Instructions and SailPass documentation — containing a risk warning (engaging s5M, which removes the duty of care in respect of warned risks) and/or a liability exclusion clause (engaging s5N, which permits contractual exclusion of liability for recreational activities)? The three ways the defendants put this — s5M, s5N, and as reinforcement of the s5L case — are set out together at [92].

**The factual starting point.** Mr Brand’s evidence was that he completed the SailPass QR-code process on Mr Moore’s behalf on the morning of the race, on a phone he could not later recall was his or Mr Moore’s, entering next-of-kin details and “click[ing] a button” (at [43]–[45]). Mr Moore’s evidence was that he did nothing himself by way of completing any application or entry form, and understood that Mr Brand had “completed all the paperwork” for his participation (at [46]).

**The contractual foundation relied upon.** The defendants invoked the line of authority beginning with *Clarke v Earl of Dunraven and Mount-Earl* [1897] AC 59 (each competitor in a regatta contracts with every other competitor, on the terms of the club’s rules), as applied in Australia in *Forbes v Australian Yachting Federation Inc* (1996) 131 FLR 241, and drew a close analogy with the reasoning in *Commissioner of Taxation v Racing Queensland Board* [2019] FCAFC 224 at [92], [100] and [104] (a regulatory licensing framework can itself generate the contractual intention necessary for a multiparty sporting contract, with participation itself constituting acceptance), together with *Mercato Sports (UK) Ltd v Everton Football Club Company Ltd* [2018] EWHC 1567, all discussed at [52]–[59]. On this analysis, Mr Moore’s participation as crew — a “competitor” within RRS rule 3 — was said to bind him to the contractual framework regardless of any formal step taken personally by him.

**Three independent bases were argued for Mr Moore’s inclusion in that framework**, each addressed and rejected in turn:

1. **Actual agency** (at [68]–[71]) — that Mr Moore authorised Mr Brand to do “whatever was necessary” for him to be “right to sail,” which as a matter of ordinary agency principles (*Garnac Grain Co Inc v Faure & Fairclough Ltd* [1968] AC 1130 at 1137, extracted at [70]) was said to extend to completing the SailPass entry on his behalf.
2. **Ratification** (at [72]–[75]) — that even absent express authority, Mr Moore’s acceptance of the benefit of having been entered (via the SailPass) amounted to ratification of Mr Brand’s act, applying *Bolton Partners v Lambert* (1889) 41 Ch D 295 and *Koenigsblatt v Sweet* [1923] 2 Ch 314 (at [75]).
3. **Participation in a pre-existing contractual structure** (at [76]–[80]) — that, independent of any agency analysis, RRS rule 3 and the *Racing Queensland* reasoning meant participation itself was the relevant act of assent.

The plaintiff’s answer to all three bases — that the agency case was unpleaded and “untenable,” and that the evidence in any event went no further than establishing a contract, if any, to exchange next-of-kin details — is recorded at [97]–[100].

**Why all three failed.** The court’s analysis did not turn on any of these doctrinal frameworks being wrong in principle — it turned on the thinness of the underlying facts. The evidence of what Mr Brand actually did was, in the court’s assessment, too disconnected from Mr Moore himself, and too laconic in what it actually established, to found either actual authority extending to acceptance of contractual risk-allocation terms, or ratification of an act whose content and terms Mr Moore was never shown to have understood or turned his mind to. The court accepted a “degree of novelty” in the defendants’ submissions — a concession made by counsel and noted by the court at [116] — and ultimately held, at [117]–[120], that the *Clarke v Earl of Dunraven* line of authority answers the question of *what terms are incorporated once a contract is shown to exist* — it does not, by itself, answer the anterior question of *whether a contract came into existence at all*. On the facts, it did not: “there seems to me to be an extensive amount of daylight between an understanding and acceptance by Mr Moore that he was ‘right to sail’ and the creation of contractual relations” (at [120]).

**Consequence.** Because no contract was formed, ss5M and 5N were never engaged (the ultimate conclusion that the claim “is not defeated by s5M or s5N” appears at [121]) — the risk warning and disclaimer of liability, however clearly worded, never bound Mr Moore, because he was never shown to be a party to anything that incorporated them. Separately, and in any event, the court held that Mr Moore was never given a warning of the relevant risk in fact, and that nothing done by Mr Brand was reasonably likely to draw such a warning to his attention (at [105]) — meaning that even if a contract had been found, the s5M defence would independently have faced difficulty on the “reasonably likely to result in people being warned” requirement in s5M(2), the text of which the court sets out at [106].

#### A.4 Reading the Three Defences Together

A pattern worth naming explicitly: **each defence failed for want of evidentiary substance, not doctrinal unavailability.** Section 5L failed because the defendants’ own statistical evidence (tendered by Mr Keane as Exhibit 22) undercut the “significant risk” threshold. Sections 5M and 5N failed because the entry process was too informally executed to establish the necessary contractual relationship. None of the three defences was rejected as a matter of law being closed to defendants in this position — each remains fully available in principle to a club or skipper who can make out the relevant facts. That has direct, practical implications for how clubs structure entry and risk-warning processes going forward (see section 6, Authorities).

#### Afterword: A Note on the Expert Evidence Judgment ([2026] NSWSC 228)

[2026] NSWSC 228 dealt with the admissibility of expert opinion evidence on sailing risk and boat-handling standards. That evidence did not ultimately drive the outcome in 475 — the case was resolved on the primary factual record (principally the video) and orthodox negligence and statutory analysis. It is included here, as an afterword to the doctrinal discussion above, because its relevance is legal rather than practical: it is not something a sailor, protest committee member, or club risk manager needs to act on, but it is a genuine part of the litigation history and worth recording for completeness.

The main point of interest is a general one, and it echoes the theme running through section 8: even where expert evidence about the inherent risks of a sport is admitted, a

court may resolve fault on direct evidence of what actually happened, with expert opinion serving mainly to confirm the generic riskiness of the activity rather than to decide breach or causation. Here, as elsewhere in this litigation, the ordinary tools of negligence law — direct evidence, cross-examination, and the video record — did the deciding work, and a more specialised body of material sat comparatively unused.

## Appendix B: The NSW Governance Chain — How RRS Comes to Govern Right of Way at All

*A note on placement: this material did not feature in the judgment, and nothing in this appendix should be read as a criticism of the parties, counsel, or the court — the statutory framework discussed here may simply have been immaterial to the pleaded case once the contract and negligence pathways were argued. It is included here, separately from the case analysis above, because clubs and Australian Sailing in particular will benefit from a clear account of it.*

### B.1 The default position

Marine Safety Act 1998 (NSW), s10, empowers regulations adopting a collision-avoidance regime for NSW navigable waters. Marine Safety Regulation 2016 (NSW), cl 5, is the adoption instrument that gives that power effect — it applies COLREGS (together with the NSW Special Rules of the Road) as the default law of NSW waters, including enclosed waters such as Port Hacking that would otherwise fall outside COLREGS' own stated scope. Absent any exemption, COLREGS — including its right-of-way rules — governs every vessel on Port Hacking, racing or not.

### B.2 The exemption power and its exercise

Marine Safety Act 1998 (NSW), s18, defines “aquatic activity” to include a race, empowers Transport for NSW to require a licence for such activities, and, at s18(4), allows a licence or approval to include an exemption from a requirement of the Act or regulations. Marine Safety Regulation 2016 (NSW), cl 140(1), empowers TfNSW, by delegate, to make a general Exemption Order rather than requiring case-by-case licensing.

Three successive Exemption Orders have occupied this field, and the lineage is now fully established. An Exemption Order was published on 28 July 2017, in NSW Government Gazette No 83 at pages 4233–4238 (not sighted for this paper). It was revoked and replaced by an Exemption Order published on 20 March 2020, in NSW Government Gazette No 51 at pages 964–970, signed by Alex Barrell, Acting Executive Director Maritime, and dated 16 March 2020, taking effect on publication. This 2020 Order is the instrument in force on 12 December 2020, the date of the collision in *Moore v Keane*. It was in turn revoked and replaced by the current Exemption Order, dated 6 February 2023 and signed by Mark Hutchings, Executive Director Maritime.

The 2020 Order, like its 2023 successor, exempts Organisers from needing an aquatic licence at all, and exempts participating vessel operators from COLREGS Rule 12 only — the sailing-vessel give-way rule — as between event participants, provided the event is not one requiring exclusive use of the waterway. That exemption is conditional, not automatic: among other things, it requires an Operational Plan and Risk Assessment, a Written Warning and Adequate Safety Briefing to participants, that the event be conducted under World Sailing Racing Rules or Australian Sailing Annexes to those rules (General Condition 7 — the specific mechanism by which RRS acquires its authority to govern right-of-way at all), advance notification to TfNSW and affected authorities and stakeholders, and incident reporting within 24 hours for any Injury or Significant Damage (General Condition 22). A breach of any condition renders the exemption inoperative, reverting the Organiser to the full licensing regime. The Rule 12

exemption itself does not apply where there is a risk of collision with a non-participating vessel, mirroring the equivalent limitation in the RRS Part 2 preamble. Port Hacking is not a listed area in Schedule 2 (Area Specific Conditions) of the 2020 Order — only Eden, Coffs Harbour, Newcastle, Port Kembla, Sydney Harbour/Botany Bay and Yamba are listed — so only the General Conditions applied to this race.

### **B.3 What operated in December 2020 — now confirmed**

The 20 March 2020 Order was the operative instrument on 12 December 2020. This is no longer an inference: the Order’s own terms record its commencement on publication and its revocation of the 2017 predecessor, and nothing in the record suggests it was itself revoked before December 2020 — the 2023 Order, which did revoke it, post-dates the collision by over two years.

Before the modern Sailing Event Notification System (SENS) was formalised, this framework was commonly, if imprecisely, referred to by sailors as an “Australian Sailing Aquatic Licence.” That label is misleading in two respects: the operative instrument was a TfNSW-made Exemption Order of general application, not a licence, and the legal relationship it creates runs between the event Organiser and TfNSW, with Australian Sailing’s racing rules referenced as a condition rather than Australian Sailing itself holding or administering a licence on clubs’ behalf. Cronulla Sailing Club, as an Australian Sailing-affiliated club running an ordinary Saturday club race with no exclusive-use requirement, almost certainly relied on this framework rather than an individual aquatic licence.

### **B.4 A note connecting this to the trial record**

Mr Keane’s evidence refers to a “vessel incident report” he prepared for Transport for NSW on the day of the collision. This is no longer merely consistent with General Condition 22 of the operative Exemption Order — it is a direct, dateable match to a specific, gazetted, legally operative obligation. The 2020 Order defines “Injury” broadly, as any injury requiring first aid, and requires the Organiser to report any such Injury to TfNSW within 24 hours, with a follow-up written report within 28 days. Mr Moore’s injury plainly falls within that definition. The parties were, on the available evidence, operating inside, and actively complying with, this regulatory framework at the time of the collision, even though neither the framework nor its documentation was identified or discussed in either judgment.

### **B.5 The point for clubs and Australian Sailing**

The exemption that allows RRS to govern right-of-way on club racing days is real, gazetted, conditional, and, importantly, narrow: it displaces only COLREGS Rule 12. It does not touch the lookout obligation, safe speed, or any other general seamanship duty. Clubs relying on this framework should understand that their entitlement to race under RRS at all is conditional on compliance with the Exemption Order’s General Conditions — Operational Plan, Risk Assessment, Written Warning, Safety Briefing, notification, and incident reporting — and that a breach renders the exemption inoperative. They should treat the Exemption Order’s incident-reporting requirement as a source of exactly the kind of contemporaneous record that mattered so much to the outcome in this case, given how heavily the stern-camera video, incident reports and witness statements all featured in the court’s reasoning. And they should recognise that “we

raced under RRS” rests on compliance with a specific, checkable regulatory instrument, not on custom or general understanding, and audit that compliance accordingly.

## **B.6 A note on other Australian jurisdictions**

While this paper analyses the legal framework in New South Wales, it is reasonable to expect that other Australian jurisdictions have adopted similar regulatory mechanisms. Marine safety legislation throughout Australia generally prohibits departures from the International Regulations for Preventing Collisions at Sea (COLREGS), yet organised yacht racing necessarily requires competitors to comply with the Racing Rules of Sailing, including rules that differ from the COLREGS. Consequently, organised racing in each jurisdiction must operate under some form of statutory authorisation or exemption that permits the displacement or modification of the ordinary navigation rules during the conduct of an approved event. The precise legislative mechanism varies between jurisdictions and is outside the scope of this paper.