

# **ALRC 33**

## **Civil Admiralty Jurisdiction**

### **Terms of Reference**

I, NEIL ANTHONY BROWN, the Minister of State for Communications, acting for and on behalf of the Attorney-General of the Commonwealth of Australia, HAVING REGARD TO THE FOLLOWING:

- (a) that the Admiralty jurisdiction in Australia is at present still exercised pursuant to the United Kingdom Colonial Courts of Admiralty Act, 1890;
- (b) that the Constitution enables the Commonwealth Parliament to make laws conferring jurisdiction on the High Court and other federal courts in matters of Admiralty and maritime jurisdiction, and to make laws investing any court of a State or Territory with such jurisdiction; and
- (c) the other countries, including Canada and New Zealand, to which the Colonial Courts of Admiralty Act, 1890 previously applied, have enacted their own Admiralty legislation in a revised and updated form;

HEREBY REFER to the Law Reform Commission, for INQUIRY, REVIEW and REPORT thereon to the Attorney-General, all aspects of the Admiralty jurisdiction in Australia, and REQUEST the Law Reform Commission, in considering this reference, (a) to have regard to the Report of the Joint Committee of the Law Council of Australia and the Maritime Law Association of Australia and New Zealand dated 22 April 1982 on Admiralty Jurisdiction in Australia, and (b) to take note of the draft Admiralty Jurisdiction Bill set out as Appendix "A" to that Report, and, in particular, to

- (i) make recommendations on the provisions to be included in an Australian Admiralty Act;
- (ii) consider whether any, and if so what, consequential amendments should be made to other Commonwealth legislation, including the Navigation Act 1912;
- (iii) formulate draft Rules of Court for possible application by courts upon which Admiralty jurisdiction may be conferred by the Admiralty Act as recommended by the Commission;
- (iv) consider whether Australia should enact its own law of Prize and, if so, formulate recommendations for such a law; and
- (v) to formulate a draft Explanatory Memorandum that could be used as an aid in the interpretation of any Bill for an Act to give effect to recommendations by the Commission pursuant to these Terms of Reference.

23 November 1982

# **Participants**

## **The Commission**

For the purpose of the Reference, the President in accordance with s 27(1) of the Law Reform Commission Act 1973 created a Division comprising the following members of the Commission.

### ***President***

The Hon Justice MD Kirby, BA, LLM, BEc (Syd) (resigned 1984)  
The Hon Justice MR Wilcox, LLB (Syd) (Acting Chairman, 1984)  
The Hon Xavier Connor QC, LLB (Melb) 1985

### ***Commissioner in Charge***

Professor JR Crawford, BA, LLB; (Adel), DPhil (Oxon)

### ***Commissioners***

Sir Maurice Byers, CBE, QC (resigned, December 1985)  
The Hon Justice FM Neasey, LLB (Tas) (retired, October 1984)  
Professor MC Pryles, LLB (Melb), LLM, SJD (SMU), LLD (Melb)  
The Hon Justice DM Ryan, QC, BA, LLB (Hons) (Melb)  
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## **Officers of the Commission**

### ***Secretary and Director of research***

Mr IG Cunliffe, BA, LLB (ANU)  
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The legislation set out in Appendix A was settled in collaboration with Mr JQ Ewens, QC, CMG, CBE, LLB (Adel), formerly First Parliamentary Counsel.

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Hon Justice KJ Carruthers, Supreme Court of NSW  
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Mr PG Foss, Lawyer, Stone James Stephen Jaques, WA  
Mr MA Hill, General Manager, Associated Marine Insurers Aust Pty Ltd  
Mr P Holmes, Department of Transport, Canberra  
Professor DHN Johnson, Professor of Law, University of Sydney  
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Mr GJ Lindell, Senior Lecturer in Law, Australian National University (resigned December 1984)  
Mr B Makins, Nominee of the Australian Chamber of Shipping  
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Mr AT Scotford, Solicitor, Ebsworth and Ebsworth, Sydney  
Mr P Shannon, Department of Foreign Affairs, Canberra  
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***Persons Nominated by State/Territory Governments \****

Mr BM Selway, Crown Solicitor, South Australia  
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\* The recommendations in the report and statements of opinion and conclusion are necessarily those of the Members of the Law Reform Commission alone. They may not be shared by the consultants or nominees nor by the departments or organisations with which they are associated.

# **Summary**

## **The Development of Admiralty**

Admiralty jurisdiction has a long history, dating back to 14th century England. In its modern form it is a distinctive jurisdiction with respect to a wide range of shipping and maritime disputes. The key feature of admiralty is the action *in rem*, which allows civil jurisdiction to be asserted over disputes, wherever arising, involving a ship. This jurisdiction is predicated mainly upon service of process on the ship, and can be backed up by arrest of the ship by the court, with the subsequent sale of the ship providing a fund from which claims can be met. As a result of developments in England from the 17th to the 19th century, two classes of *in rem* action came to be recognised: those based on a limited number of maritime liens (eg salvage, wages, collision damage) and those based on a much wider category of claims in contract or tort involving the operation of ships (eg goods supplied to a ship, cargo claims). The expansion of admiralty jurisdiction over the latter class of claims was brought about by legislation in the 19th and 20th century, and this process has been expanded through international developments (especially the 1952 Brussels Convention on the Arrest of Sea-Going Ships, a Convention that is itself now undergoing revision) and through further legislative expansion and development in countries such as the United Kingdom (1956, 1981), Canada (1970), New Zealand (1973) and South Africa (1983).

## **The Need for Reform**

Further development of admiralty jurisdiction along these lines in Australia was prevented by the Colonial Courts of Admiralty Act 1890 (UK), a paramount force statute applying to Australia and limiting admiralty jurisdiction to matters within the admiralty jurisdiction in England in 1890. As a result there are many obscurities and uncertainties about the scope of the jurisdiction in Australia, even about its distribution among the various courts, and there are many unjustified limitations as to the subject matter of the jurisdiction. All are agreed on the need for reform. The Commonwealth Parliament has sufficient power, under s 76(iii) of the Constitution (which deals with matters ‘of Admiralty and maritime jurisdiction’) and otherwise, to carry out such reform: it can confer ‘Admiralty and maritime jurisdiction’ on appropriate Australian courts and regulate the exercise of that jurisdiction in appropriate ways. It can also repeal Imperial Acts dealing with admiralty jurisdiction so far as they apply in Australia.

## **Basic Principles**

There are good reasons for retaining admiralty as a distinct jurisdiction. The long history of admiralty as a distinct jurisdiction has created international business expectations, arrangements and practices that rely on the fact that jurisdiction will be asserted over ships and shipowners in special ways. For these reasons it is desirable to accept the broad contours of what is traditionally and internationally accepted as falling within admiralty jurisdiction. The prime need is for clarification within the broad framework of admiralty jurisdiction, rather than a root and branch reform involving the abolition of admiralty jurisdiction and a restructuring of the general remedial powers of courts. Furthermore, Australia has distinct interests in admiralty and maritime jurisdiction, in view of its position as a country of shippers rather than shipowners, and as a country dependent on foreign shipping for much of its import and export trade. Thus Australia’s interests support a policy of maintaining and broadening admiralty jurisdiction *in rem* (a universal jurisdiction based on local service on the *res*) as an exception to a general principle of territorial jurisdiction. But any expansion must take account of international trends in admiralty jurisdiction. Australian admiralty jurisdiction needs to remain within generally acceptable limits, to ensure recognition of judgments and judicial sales in admiralty and to maintain the position of admiralty as an exceptional and special jurisdiction. A balance thus has to be struck between the interests of ship operators and those dealing with ships. But this balance can be struck in various ways and at various levels. On balance, a broad admiralty jurisdiction is desirable, with the interests of ship owners and financiers catered for through procedural means (including guarantees against vexatious arrest, and machinery for providing alternative forms of security). And it is in the interests of all that admiralty jurisdiction be stated in clear, precise and accessible form.

## **Summary of Recommendations on Australian Legislation**

1. **A New Act.** There should be a new Admiralty Act, providing for a uniform admiralty jurisdiction for Australia. The Colonial Courts of Admiralty Act 1890 (UK) should be repealed (para 83).

### **The Subject of the Action *in rem***

2. **Definition of ‘Ship’.** The basic elements of the definition of ‘ship’ in the Navigation Act 1912 (Cth) s 6(1) should be adopted, but with certain clarifications and exceptions. A ship should include any kind of vessel used or constructed for use in navigation by water, and include a vessel which is sunk, stranded or wrecked (para 98-9). The following should be specifically excluded from the definition of ‘ship’:

- aircraft and seaplanes (para 100);
- inland waterways vessels, defined as vessels used exclusively on Australian inland waters (para 106);
- vessels under construction but not yet launched (para 108).

The following should be specifically included:

- hovercraft (para 101);
- off-shore industry mobile units (ie mobile rigs), as defined in the Navigation Act 1912 (Cth) s 6(1) (para 102-4).

There should be no specific exclusion for small craft or pleasure craft (para 105). There is no need to define what equipment on board a ship constitutes part of the ship for admiralty purposes (para 107).

3. **Cargo, Freight and other Types of res.** Actions *in rem* can also be brought against cargo, freight and proceeds of sale in the hands of the court. The circumstances in which cargo and freight can be the subject of an action *in rem* are a matter of substantive law: overseas legislation such as that in the UK refers only to ‘a ship or other property’ and this formula is sufficient for the Australian legislation. However specific provision should be made for commencing actions *in rem* against proceeds in court of the sale of a ship or other property (para 109-10).

4. **Geographical Scope of Admiralty.** It is not necessary to define when an arrest (eg of a moving ship) is effective, since this is largely a matter of fact (para 112). But s 380(1) of the Navigation Act 1912 (Cth), providing for the jurisdiction of courts over any ship ‘lying or passing off the coast’ is vaguely worded. A specific provision should be inserted in the legislation making it clear that the admiralty jurisdiction of Australian courts extends to service and arrest of ships in the territorial sea, subject to the limits on arrest of ships in innocent passage under art 20(2) of the Convention on the Territorial Sea and Contiguous Zone of 1958 (to which Australia is a party). There should be no power to serve process on or arrest a ship outside the territorial sea in respect of civil claims relating to the continental shelf or exclusive economic zone. This may need to be reconsidered later, when the question of the propriety of such extraterritorial service and arrest is better settled internationally (para 113-14). So far as claims arising on inland waters are concerned, the proposed legislation should not apply where the cause of action arose in respect of the use or intended use of a ship exclusively on Australian inland waters unless the ship concerned is a foreign ship (para 115).

5. **Treatment of Maritime Liens in the Legislation.** The legislation should maintain the existing distinction between maritime liens and statutory rights of action *in rem*. The primary need for expansion of admiralty jurisdiction is with respect to the latter. Pending agreement at the international level on the proper scope of maritime liens, new maritime liens should not be created (para 120-1). The legislation should state that an action *in rem* may be brought in any case in which there is a maritime lien or other charge on a ship or other property, adding an indicative definition of the four important categories of lien (salvage, damage, wages and master’s disbursements) (para 122). The question of enforcement of foreign maritime liens should be left open (para 123).

**6. Statutory Rights of Action in rem: Nexus with Personal Liability.** In respect of each statutory right of action *in rem* it is necessary to identify a ‘wrongdoing’ ship, that is, a ship with respect to which the claim arose (para 124-5). Statutory rights of action *in rem* on proprietary maritime claims can be brought against the ship in question; the claim in question will determine the nexus with the ship (para 126). A statutory right of action *in rem* with respect to a general maritime claim should only be able to be brought where, when the cause of action arose, the relevant person was connected to the ship in some way (as owner, operator, charterer or person in possession or control) and, when the proceeding is commenced, that person is the owner or demise charterer of the ship (para 126-36). If that recommendation is not accepted, an alternative is to require that the relevant person be an operator of the ship when the action is commenced (including a time charterer who is effectively the operator of the ship) (para 137).

**7. Ships Owned by Related Corporations.** There should be no provision specifying when the corporate veil is to be lifted to determine ownership of a ship or property (para 138-41).

**8. Relationship between Actions in rem and in personam.** *In personam* admiralty jurisdiction needs to be retained (para 142). It should be made clear that someone who is not a relevant person but who appears in a proceeding *in rem* (for example a shipowner seeking to defend on behalf of the ship) does not thereby become liable *in personam* for the payment of money (other than costs) in respect of the claim (para 143). Claims commenced *in personam* in admiralty should be commenced separately from claims commenced as actions *in rem* (para 144).

**9. Scope of Statutory Rights of Action in rem.** There is no need for geographical or other restrictions on particular heads of admiralty jurisdiction: a ship should be able to be arrested on each head of jurisdiction (para 146-8). Admiralty jurisdiction *in rem* should be conferred with respect to:

- disputes relating to the ownership, possession or title to a ship or a share in a ship (para 149);
- disputes as to co-ownership (para 150);
- mortgages, including foreign mortgages or hypothecations, whether or not registered (para 151), with the Federal Court given concurrent power to rectify the register under the Shipping Registration Act 1981 (Cth) (para 152);
- claims for towage (para 153) and pilotage (para 154);
- all claims relating to salvage (para 155-6), but not including under this head claims for negligent salvage or liability salvage (para 156-7);
- general average claims (para 158);
- claims for wages of masters and crew members (para 159); ‘crew members’ should be defined as in the Navigation Act 1912 (Cth) s 6 but apprentices should be crew members for this purpose (para 160); allottees of wages should not be included (para 161); ‘wages’ should be broadly defined (para 162);
- claims for disbursements made by masters, shippers, charterers or agents on behalf of a ship (para 164);
- claims for damage done by a ship (para 165);
- personal injury claims occurring in the operation of a ship for which the ship owner, operator or charterer is liable (para 166);
- claims for loss of or damage to goods carried by ship (para 167);
- claims for the carriage of goods by ship (para 168);

- claims arising from agreements for the use or hire of a ship (para 169);
- claims for the construction, repair, alteration or equipping of a ship (including claims for construction before the ship was launched) (para 108, 170);
- claims for goods, materials or services supplied to a ship (para 171);
- claims for unpaid insurance premiums or protection and indemnity club calls (para 173);
- dock, harbour, light and similar dues and charges (para 174);
- claims for pollution damage under the Protection of the Sea (Civil Liability) Act 1981 (Cth); the jurisdictional limits in art IX of the International Convention on which that Act is based should also be given effect to (para 175);
- claims for damages arising in the operation of a ship for which the ship owner, operator or charterer is liable; this head of jurisdiction will include the innominate torts at present within the inherent jurisdiction; it should be merged with the provision for personal injuries recommended in para 166 (para 179-184);
- claims for the enforcement of arbitral awards in respect of maritime claims (para 186);
- claims for the enforcement of local and foreign admiralty judgments *in rem*; such claims should be treated as proprietary in character (para 190-2).

*In personam* admiralty jurisdiction should be conferred over:

- claims for damage done to a ship (para 172);
- claims to limit liability under any of the International Conventions applicable in Australian law allowing for limitation of liability in relation to ships (para 176);
- ancillary matters of admiralty and maritime jurisdiction associated with matters in respect of which the court's jurisdiction is invoked (para 195).

On the other hand, there should be no head of jurisdiction covering:

- forfeiture or condemnation of ships (para 177);
- wreck and droits of admiralty; questions of wreck should be dealt with by the Navigation Act 1912 (Cth) (para 178);
- 'residual' matters, that is matters historically within the jurisdiction of the English admiralty court before 1890 (para 193).

**10. Security Pending Arbitration or Other Proceedings.** The court should have power to retain security in an action *in rem* pending arbitration or other legal proceedings, and with power to enforce any award or judgment enforceable under Australian law against the security so retained. The court should also have power to order alternative security to be provided in such cases, before releasing the *res* (para 187-9).

**11. Restrictions on Admiralty Jurisdiction Against Particular Defendants.** There should be no special limitation on admiralty jurisdiction in cases involving local ships and defendants (para 197), nor in *in personam* collision actions involving foreign defendants (para 198). The Crown in right of the Commonwealth, a State or a Territory (as distinct from separate trading corporations) should not be liable to an action *in rem*, but the substance of Navigation Act 1912 (Cth) s 405A(2) (allowing actions mistakenly commenced against the Crown *in rem* to proceed *in personam*) should be carried over into the legislation (para 199). No additional provision is necessary for ships belonging to foreign states (para 200).

12. ***Actions in rem Against Surrogate Ships.*** ‘Sister ship’ or surrogate ship actions should be introduced in Australia (para 203-4). A surrogate ship should be able to be served and arrested in an action *in rem* if the relevant person was an owner or charterer of or in possession or control of the wrongdoing ship when the cause of action arose and is the owner of the surrogate ship when the action is commenced (para 204-5). All co-owners of the surrogate ship must be relevant persons in respect of the claim (para 206). Where the relevant person is merely a charterer of the surrogate ship no action should lie (para 207). Surrogate ship arrest should not apply to proprietary maritime claims, but should apply to all general maritime claims (para 208). Actions *in rem* against surrogate freight and cargo should not be possible (para 209).

13. ***Multiple Arrest and Rearrest.*** In principle, only one ship should be able to be validly served and arrested in respect of any one claim (para 210). This rule and the limited exceptions to it should be spelt out in the legislation: the exceptions should be

- where the service or arrest is struck out or set aside;
- (so far as service only is concerned) where the action is discontinued against the ship in question;
- where a maritime lien subsists despite the arrest of a surrogate ship;
- where the original ship arrested has broken arrest and custody has not been regained (para 210-12, 216).

Rearrest of the same ship should be possible with the consent of the court, for example, where there has been default in the security given to procure release (para 211). Arrest should be permitted before or after judgment (para 213). Proceedings should be able to be commenced naming more than one ship, and appropriate provision for amendments substituting ships or persons named as defendants should be made (para 214-15).

14. ***Allocating Admiralty Jurisdiction in personam.*** The Federal Court, and State and Territory courts with relevant civil jurisdiction, should have *in personam* jurisdiction over maritime claims under the legislation. The only exception relates to limitation actions (brought otherwise than by way of defence): these should be heard only in the Federal Court or a Supreme Court (para 233-4).

15. ***Allocating Admiralty Jurisdiction in rem.*** The Federal Court and the Supreme Courts of each State and Territory should have concurrent jurisdiction over *in rem* proceedings under the legislation. There should be express provision for transfer of proceedings between courts, and for co-operation in arrest and custody of ships and other property (para 238-9). Service of process should be within the jurisdiction of the court concerned, but service *ex juris* within Australia of Supreme Court process should be available if the *res* was within the State or Territory in question when the action *in rem* was commenced, or during the currency of the writ (para 239). Proclaimed lower courts should be able to exercise *in rem* jurisdiction in specified cases where there are special circumstances (eg geographical remoteness) justifying this. Proceedings *in rem* should be able to be remitted to lower courts for trial on the merits, with custody over the *res* retained by the remitting court (para 240-1).

16. ***Admiralty Appeals.*** Appeals in admiralty should proceed through the relevant Full Court or Court of Appeal, with the High Court as final court of appeal, under the ordinary rules for appeals (para 242-3).

17. ***Arrest and in personam Remedies, including Mareva Injunctions.*** The issue of Mareva injunctions against ships in actions *in rem* should not be prohibited or regulated but left to judicial development (para 245-7). Similarly the availability of other *in personam* remedies in admiralty should be left to the courts (para 248).

18. ***Time Limits.*** Time limits in admiralty actions should be assimilated with those under the general law (para 249-52), with a residual time limit of 3 years to cover any remaining cases (para 253). In exercising any discretion to extend time limits, the absence of the *res* from the jurisdiction should not be relevant (para 254); s 396(3) of the Navigation Act 1912 (Cth) should be amended accordingly (para 254). The doctrine of laches should no longer apply (para 252).

19. **Priorities.** There should be no codification of admiralty priorities (para 257), and no express provision is necessary to regulate the relationship between bankruptcy or insolvency and admiralty proceedings (para 258). But it should be made clear that a general maritime claim is not subordinated in priority by being brought against a surrogate ship (para 259-261).

20. **Arrest and Statutory Rights of Detention.** Admiralty arrest should prevail over statutory rights to detain a ship in respect of a civil claim which could be brought in admiralty. Where a ship is already under detention in respect of such a claim the court's power of arrest should prevail, but the claim in question should be given an appropriately high priority in distributing the proceeds of sale (para 264-5).

21. **Pre-Judgment Interest.** No specific provision on the court's powers to award interest in admiralty is required, but there should be a separate head of jurisdiction to cover interest due in respect of both proprietary and general maritime claims (para 268-70).

22. **Repeal of Imperial and Other Legislation.** The Colonial Courts of Admiralty Act 1890 (UK) and other Imperial legislation dealing with admiralty jurisdiction should be repealed (para 271). So too should Navigation Act 1912 (Cth) s 383, 385 (para 275-6). The defence of common employment in respect of ships should be abrogated entirely by extending s 59A of that Act to cover all ships (para 276). The Navigation Act 1912 (Cth) should be validated retrospectively against possible invalidity of specific provisions on grounds of repugnancy with, or failure to comply before 1939 with any manner and form requirements in, Imperial legislation (para 276).

23. **Admiralty Procedure and Rules.** There should be uniform admiralty rules, made by the Governor-General, regulating key aspects of admiralty procedure, in particular the procedural aspects of actions *in rem* (para 281-3). The Attorney-General should be empowered to constitute a Rules Committee to advise on the Rules and possible amendments to them (para 282). Consequential amendments should be made by the appropriate authorities to the existing rules (para 284). Proposed rules are set out in Appendix A to this Report. Particular features include the following:

- retention of an admiralty Registrar and Marshal to be appointed by each court with *in rem* jurisdiction, and with power to appoint deputies (para 285-6);
- a range of ancillary powers (eg assessment of damages) to be exercised by the Registrar, subject to review by the court (para 287);
- no provision for nautical assessors (para 288-91);
- maintenance of a single register of caveats against arrest in the Federal Court, and of a register of admiralty proceedings, and of caveats against release, in each superior court (para 292-3);
- admiralty actions *in rem*, limitation proceedings and associated proceedings to be tried without a jury (para 294);
- retention of a system of preliminary acts for collision cases, with power in the court to order preliminary acts in a wider range of damage cases (para 295-7);
- no provision for notice of arrest to consuls (para 298);
- clear procedures specified for limitation actions, broadly along the lines of those in the United Kingdom and New Zealand (para 299);
- retention of caveats against arrest, which should prevent arrest without leave of the court (para 300).

24. **Vexatious Arrests.** An action for damages should lie where a party to proceedings unreasonably and without good cause arrests property, demands excessive security, or refuses to consent to the release of arrested property (para 301-4). The court should also have express power to moderate bail (para 304).

# PART I: INTRODUCTION

## 1. Introduction

1. **The Terms of Reference.** On 23 November 1982 the then Acting Attorney-General referred to this Commission the question of Admiralty jurisdiction in Australia. The Terms of Reference require the Commission to report generally on ‘all aspects of the Admiralty jurisdiction in Australia’, though certain specific matters are listed. In preparing this Report the Commission has had regard to the Report of the Joint Committee of the Law Council of Australia and the Maritime Law Association of Australia and New Zealand on *Admiralty Jurisdiction in Australia*. That Report was produced in 1982 by a Joint Committee under the Chairmanship of the Hon Justice HE Zelling CBE of the Supreme Court of South Australia.<sup>1</sup> The Report was a continuation of efforts by Justice Zelling over many years to bring about the reform of the Australian law of admiralty: the Commission has benefited greatly from his work and writings in this area,<sup>2</sup> and from discussions with him.

2. **Consultation on the Reference.** Questions of admiralty jurisdiction were discussed at the Eighth Australian Law Reform Agencies Conference in Brisbane in July 1983,<sup>3</sup> where papers were delivered by Justice Zelling,<sup>4</sup> by Professor Kevin Ryan QC and by the Commissioner in Charge of the this Reference.<sup>5</sup> Professor Ryan (now a judge of the Supreme Court of Queensland) was also involved as a member of the Queensland Law Reform Commission in its consideration of this topic, after a request to the Commission for advice on the Zelling Report from the Queensland Attorney-General.<sup>6</sup> In accordance with its usual practice this Commission has consulted widely on the issues raised by the Reference, both in Australia and overseas. It has communicated with leading British lawyers in the field: in particular with Lord Brandon of Oakbrook (formerly the Admiralty judge), Justice Barry Sheen (the present Admiralty judge), the Admiralty Marshal, Mr B Rix, and Professor David Jackson of the University, Southampton; with Mr PM Troop, Assistant Deputy Attorney-General (Admiralty and Maritime Law) in the Canadian Department of Justice and with Mr DJ Shaw QC of the South African Law Commission. It consulted Commonwealth Government Departments (in particular the Attorney-General’s Department and the Departments of Transport, Trade and Foreign Affairs), State Departments of Law, and the Chief Justices or Chief Judges of Supreme Courts, the Federal Court and the High Court. The Attorney-General appointed a number of honorary consultants on the Reference, mostly from Australia but including Mr PA Cornford of the New Zealand Crown Law Office, who was involved in preparing the New Zealand Act. of 1973. Each State was asked to nominate a contact person within the relevant Attorney-General’s Department or Department of Law, and to send that person to consultants meetings. Assistance with questions of Admiralty procedure and rules was given by a number of people, and in particular by Mr Bruce Brown, Secretary of the Rules Committee of the NSW Supreme Court.

3. **The Commission’s Consultative Papers.** To further this process of consultation the Commission issued three research Papers on civil admiralty jurisdiction. These papers were made available to consultants and others interested in commenting in detail on the issues involved.<sup>7</sup> In particular research Paper 3, which included the texts of proposed legislation and draft uniform rules, with annotations and commentary, was widely distributed, as was the Commission’s summary Discussion Paper 21, *Admiralty Jurisdiction* (November 1984).

4. **Public Meetings and Other Discussions of the Commission’s Proposals.** In addition to two consultants meetings (and meetings of a sub-committee of consultants to consider the proposed Admiralty Rules), the Commission held a number of meetings and other discussions on the Reference. In February 1985 public meetings were held, in conjunction with the Maritime Law Association of Australia and New Zealand (MLAANZ) in the five mainland capital cities. In May 1985 a similar meeting was held in Launceston, Tasmania in conjunction with the Australian Maritime College. A morning session of the MLAANZ Annual Conference in Melbourne in October 1985 was devoted to the Reference, and to discussion of the draft proposals. Items relating to the Reference appeared in the press and in specialist journals. Over 80 written submissions were made to the Commission: a list of these is set out in Appendix B.

5. **Overseas Developments.** At the same time as these questions have been discussed in Australia, there has been considerable activity in comparable jurisdictions elsewhere. New Zealand<sup>8</sup> and Canada<sup>9</sup> enacted legislation in the 1970s providing a new basis for the exercise of admiralty jurisdiction. The scope of admiralty jurisdiction in England was broadened by the Supreme Court Act 1981 (UK), so as to bring it more

into line with the Brussels Convention on the Arrest of Sea-Going Ships of 1952,<sup>10</sup> but the extension was not without controversy.<sup>11</sup> Subsequently, at the request of the United Kingdom Government, a Sub-Committee of the British Maritime Law Association under the Chairmanship of Justice B Sheen has undertaken a study of the whole question of security for maritime property or claims. Work on maritime liens, mortgages and arrest is also being undertaken by the *Comite Maritime International* (CMI), and by the International Maritime Organisation. A meeting of the CMI in Lisbon in May 1985 to discuss revisions to the 1952 Convention was attended by Justice KJ Carruthers, one of the Commission's consultants on the Reference, who kept the Commission fully informed of developments there.<sup>12</sup> Of particular significance from an Australian point of view are recent developments in South Africa, which like Australia for long depended for its admiralty jurisdiction on the Colonial Courts of Admiralty Act 1890 (UK). Following a Report of the South African Law Commission in 1983, the Admiralty Jurisdiction Regulation Act 1983 (SAf) was passed.<sup>13</sup> Although this Act differs in some respects from the Bill recommended by the South African Law Commission, it does extend admiralty jurisdiction significantly beyond the position taken in England under the Supreme Court Act 1981 (UK). The member of the South African Law Commission in charge of the Admiralty Law project, Mr DJ Shaw QC, most helpfully provided this Commission with information about the implementation and progress of the 1983 Act.

**6. *The Need for Reform.*** The time is overdue, therefore, for a thorough consideration of civil admiralty jurisdiction in Australia. This Report deals with civil admiralty jurisdiction. Part II describes the present Australian law and the scope of Commonwealth constitutional power to reform admiralty jurisdiction. Part III deals with the reform of civil admiralty jurisdiction, including such matters as:

- the basic principles underlying reform (ch 6);
- which ships or other forms of *res* should be subject to arrest (ch 7);
- the treatment of maritime liens and statutory rights of action *in rem* in the proposed legislation, including questions of the relationship between *in rem* and *in personam* liability (ch 8);
- what heads of jurisdiction, giving rise to statutory rights of action *in rem*, should exist, and what limitations, if any, there should be on this jurisdiction by reference to particular classes of defendants (for example, the Crown, local residents) (ch 9);
- the arrest of sister ships or surrogate ships, and questions of rearrest and multiple arrest (ch 10);
- which courts should exercise the jurisdiction (ch 11);
- questions of remedies, time limits and priorities (ch 12); and
- the relationship of the proposed legislation to other laws (ch 13).

Part IV (chapter 14) deals with questions of admiralty procedure and rules. The Commission's recommended legislation, in the form of an Admiralty Bill and proposed uniform Admiralty Rules, is set out in Appendix A. Appendix A also contains an Admiralty (Miscellaneous Provisions) Bill and the annotations to the proposed legislation.

**7. *Criminal Admiralty Jurisdiction and Prize.*** In addition to these questions of civil admiralty jurisdiction, the Terms of Reference require the Commission to consider the separate issues of criminal admiralty jurisdiction and prize law. These are less urgent matters, which are separate and distinct from the topic of civil admiralty jurisdiction. A separate report will be issued on these topics.<sup>14</sup>

## PART II: CIVIL ADMIRALTY JURISDICTION: THE PRESENT LAW

### 2. The Development of Admiralty Jurisdiction

8. ***The Relevance of History.*** Before discussing the present law of admiralty jurisdiction it is necessary to describe briefly its historical development in England and its reception in Australia. A survey of the development of admiralty jurisdiction makes it clear how much the present state of that jurisdiction is the result of historical accident and of conflicts between courts over business, and how little it is the product of any coherent assessment of need. It also helps in gaining an understanding of the confused theoretical underpinnings of the maritime lien and the action *in rem*, and in particular of the important differences between a maritime lien and a statutory right of action *in rem*.

#### The Development of English Admiralty

9. ***The Early English History.*** Courts exercising admiralty jurisdiction in Australia today are the successors to what used to be the High Court of Admiralty in England, whose origins are traceable to the 14th century.<sup>1</sup> A court dealing with piracy and other offences committed at sea was an outward sign of the sovereignty of the seas claimed by English kings of the period. The Admirals and their deputies did not long confine themselves to the hearing of criminal cases, but soon asserted a right to a larger jurisdiction by hearing civil suits as well. This aroused opposition and led to two statutes enacted during the reign of Richard II.<sup>2</sup> The first, enacted in 1389, provided that:

the Admirals and their Deputies shall not meddle henceforth with anything done within the Realm, but only such things done upon the sea according as was used in the time of the noble King Edward, Grandfather of our Lord the King that now is.<sup>3</sup>

The second, enacted in 1391, provided:

that of all Manner of Contracts, Pleas and Quarrels, and of all other things done or arising within the Bodies of the Counties, as well by Land as by Water and also of Wreck of the Sea, the Admiral's Court shall have no Manner of Cognizance, Power, nor Jurisdiction.<sup>4</sup>

Further petitions having been received about the encroachments of the Admiral's Court, yet another enactment, passed in 1400, provided that anyone wrongfully pursued in Admiralty 'shall recover his Double Damages against such Pursuant; and such Pursuant shall incur the Pain of Ten Pounds to the King for the Pursuit so made, if he be attained'.<sup>5</sup>

10. ***Bitter Jurisdictional Conflicts.*** The Tudor period saw a revival of interest in the jurisdiction of the Admiral's Court. The patents of the Admirals of the period provide for wide-ranging grants of jurisdiction.<sup>6</sup> In several instances they omit the proviso to be found in earlier patents, which confined the jurisdiction to the limits marked out by the statutes of Richard II, and they state that the jurisdiction they confer is to be exercised 'any statutes, acts, ordinances, or restrictions to the contrary passed, promulgated, ordained or provided notwithstanding'.<sup>7</sup> The common law courts retaliated. Basing their attack upon the statutory foundation provided by the Acts of Richard II, they had recourse to prohibitions at common law, which issued constantly.<sup>8</sup> Following a conference with the common law judges, articles of agreement were drawn up in 1575 in an endeavour to settle the jurisdictional questions.<sup>9</sup> These did not, however, settle the conflict, which reached an acute stage when Coke became Chief Justice.<sup>10</sup> Coke denied that the Admiralty Court was a court of record.<sup>11</sup> He denied it had any jurisdiction over contracts made on land, whether abroad or not, and whether or not they were maritime or were to be performed upon the sea.<sup>12</sup> When the civil lawyers, who practised in the Admiralty Court, petitioned James I, relying on the agreement reached in 1575, Coke denied that that agreement had ever been ratified.<sup>13</sup> In 1632 another compromise was attempted but the agreement arrived at — if it was acted upon at all — was short-lived.<sup>14</sup> Under the Commonwealth an ordinance was passed in 1648 defining and considerably extending the scope of the Admiral's jurisdiction, but at the restoration that ordinance was set aside as of no validity.<sup>15</sup> A determined civilian effort was subsequently made to persuade the Parliament to have the provisions of the ordinance re-enacted in statutory form, but it met with no success.<sup>16</sup> The Court fell into a decline thereafter, confining itself largely to its work in prize.<sup>17</sup>

11. **The Admiralty Court Acts, 1840 and 1861.** This decline was not reversed until there began, in 1813,<sup>18</sup> a statutory process that was to restore much of the Court's former jurisdiction and add to it much new jurisdiction. The principal reforms were passed in 1840 and 1861. By the Admiralty Court Act 1840 (UK) the Court was given jurisdiction, subject to the terms of the Act, over claims involving ships' mortgages<sup>19</sup> and over claims in salvage, towage, damage, wages and necessaries, bottomry and possession (even though those may have arisen within the body of a county).<sup>20</sup> The Act for the first time authorised rules of court to be made.<sup>21</sup> By the Admiralty Court Act 1861 (UK) the Court was at last declared to be a court of record with all the powers of a superior court of common law.<sup>22</sup> The jurisdiction given included questions involving the ownership of ships and claims for damage to cargo and for the building, equipping and repairing of ships.<sup>23</sup> All the jurisdiction conferred could be exercised either *in rem* or *in personam*.<sup>24</sup>

12. **Subsequent restatements and Additions.** The admiralty jurisdiction thus established was restated and to some extent enlarged in 1920<sup>25</sup> It was again substantially enlarged by the Administration of Justice Act 1956 (UK). That Act was passed in part to give effect to Conventions signed at Brussels on 10 May 1952 concerning Civil Jurisdiction in Matters of Collision and the Arrest of Sea-Going Ships.<sup>26</sup> The High Court now exercises admiralty jurisdiction under the Supreme Court Act 1981 (UK).<sup>27</sup>

13. **Courts Exercising Admiralty Jurisdiction in England.** Although admiralty had developed as a specialist jurisdiction vested in a specialist court, the Judicature Commission in 1869 recommended the amalgamation of Admiralty and common law courts to eliminate non-suits and to take advantage of the more attractive remedies of admiralty.<sup>28</sup> Its recommendations were implemented by the Supreme Court of Judicature Act 1873 (UK). The High Court was divided into five Divisions, to one of which — the Probate, Divorce and Admiralty Division — was assigned all the admiralty business. In 1970 the Division was abolished, being replaced by an Admiralty Court sitting as part of the Queen's Bench Division.<sup>29</sup> Although admiralty continues to be recognised as an area for specialists, the basic principles of the Judicature Act system apply, subject to the special situations sometimes created by the action *in rem*, which remains the distinctive feature of admiralty.

14. **Nature of the Action *in rem*.** Before examining Australian developments it is necessary to sketch briefly developments during the last century and a half concerning the action *in rem*. According to Wiswall:

The action *in rem* seems to have been employed in Admiralty before the Elizabethan era, but only by the nineteenth century had it become the dominant Admiralty procedure; and it was in the mid-nineteenth century — as a result of the dominance of the action *in rem* — that the modern theory of maritime liens began to evolve. The beginning of consideration of the action *in rem* itself must lie in the emergence of the theory of maritime liens, for the two have since become inextricably intertwined.<sup>30</sup>

The theory of maritime liens (which are inchoate property rights in the ship concerned, based on the right to sue the ship in admiralty) was first clearly articulated in England in 1851 by the Privy Council in *The Bold Buccleugh*.<sup>31</sup> The Privy Council identified the following characteristics of a maritime lien: it does not include or require possession; the lien adheres to the *res* notwithstanding the fact that the *res* has been sold to a bona fide purchaser without knowledge of it; it is inchoate from the moment the claim attaches and when carried into effect by legal process it relates back to the time when it first attached; the legal process in question is an action *in rem* and hence a maritime lien can only be enforced in admiralty; conversely, wherever a proceeding *in rem* is the proper course, there a maritime lien exists; and finally the maritime lien/action *in rem* is not merely a procedural device to secure the appearance of the defendant. The last two propositions require elaboration.

15. **Statutory Rights of Action *in rem*.** Even if it was ever true that, wherever an action *in rem* could be properly brought, the cause of action also gave rise to a maritime lien,<sup>32</sup> this was no longer the case by the end of the 19th century. The additions to admiralty jurisdiction made by statute, particularly the Admiralty Court Acts of 1840 and 1861, posed something of a dilemma. Was a new category of maritime lien created by each addition to admiralty jurisdiction? After some hesitation<sup>33</sup> the courts concluded that, where the new jurisdiction arose merely because some restrictions (usually geographical) had been removed from a class of claims which had previously given rise to maritime liens,<sup>34</sup> the maritime lien was extended to match the new jurisdiction.<sup>35</sup> By contrast, where an entirely new class of claims was brought within admiralty jurisdiction, no maritime lien was created.<sup>36</sup> Instead, the effect of the statutory extensions of jurisdiction was to create a wholly novel<sup>37</sup> form of action sometimes referred to as a statutory lien but more accurately described as a

statutory right of action *in rem*.<sup>38</sup> While not all the characteristics of a statutory right of action *in rem* have yet been worked out, the main outlines are clear. Unless already carried into effect by the commencement of proceedings *in rem*, the right does not survive a bona fide change of ownership. In any competition between claims it ranks after both the maritime lien and the mortgage in priority. It does not relate back to the time when the cause of action arose but gives a security interest only when proceedings are commenced.<sup>39</sup> It is, initially, merely a right to commence proceedings to arrest the property in an action *in rem*.<sup>40</sup> One 19th century writer contrasted maritime liens with statutory rights of action *in rem* by noting that while on some occasions recourse is had to the jurisdiction *in rem* for the purpose of giving effect to a maritime lien already existing and attaching to the res, on other occasions any rights which a suitor may have over the *res* have their origin in the exercise of that jurisdiction, and not in the circumstances which called for it.<sup>41</sup>

**16. Relevance of the Distinction between Maritime Liens and Statutory Rights of Action *in rem*.** The decisions which involve these rights all turn on the interpretation of the statute which expanded the subject matter of admiralty jurisdiction. These decisions remain important for a number of reasons. They delineate the scope of the maritime liens which exist today and establish the two-tier framework, lien and statutory right, which is a feature of present admiralty law in England and Australia, and which has various consequences for the rights of the parties. They may also be relevant in determining the meaning of the phrase ‘Admiralty jurisdiction’ in s 76(iii) of the Constitution. The premise underlying the 19th century decisions is that statutes which expanded the range of matters which could be brought in admiralty were essentially procedural statutes dealing with admiralty *jurisdiction*, even though those statutes had various substantive effects on the rights of parties.<sup>42</sup> The English decisions were not dealing with a head of constitutional power; and the weight to be accorded to them in Australia will be considered in chapter 5. Here it is enough to say that they seem to suggest that a statutory right of action *in rem* is a procedural right, while a maritime lien is a substantive right.<sup>43</sup> To use the language of Lord Watson in *The Henrich Bjorn*, the former relates to remedies, the latter to the rights of suitors.<sup>44</sup>

**17. The Personification and Procedural Theories.** A second strand which runs from *The Bold Buccleugh*<sup>45</sup> to the present day is one of competition between two theories each of which purports to explain the action *in rem*. The personification theory, as its name suggests, treats the ship as a ‘person’, a legal entity. The procedural theory treats the arrest of a ship as essentially a device to compel the appearance of the owner of the ship. *The Bold Buccleugh* is generally regarded as the high-water mark of the personification theory.<sup>46</sup> The decision in 1892 of Sir Francis Jeune in *The Dictator*<sup>47</sup> is regarded as marking the beginning of a switch to the procedural theory, though a number of decisions (both earlier and later) are inconsistent with the personification theory.<sup>48</sup> The statutory adoption of the facility of ‘sister ship’ arrest in 1956<sup>49</sup> marks a further step towards acceptance of the procedural theory. There are indications that English admiralty judges are willing to take additional steps in the same direction.<sup>50</sup> But still ‘there is much modern law which it is impossible to relate to the tenets of the procedural theory’.<sup>51</sup> It will become necessary to refer to these aspects in various contexts later. The point is that there is no single theory which is capable of explaining all the features of the action *in rem*. In this admiralty resembles the common law which is in many areas equally a theoretical. But it does make the reform of Admiralty jurisdiction more difficult. Many of these issues have existed for many years, yet there are still basic questions upon which there is no guiding precedent. The absence of any single unifying theory means that the gaps thus left cannot be filled by reference to a basic theory. How one chooses to fill any particular gap often has implications for how other gaps should be filled. Thus even if the proposed legislation does not resolve all the questions, the way in which any one point is dealt with may have wider implications.

## Developments in Australia

**18. Vice Admiralty Courts.** Admiralty jurisdiction in Australia derived initially from Royal letters patent of 12 April 1787 which authorised the Lords Commissioners of the Admiralty:

to constitute and appoint a Vice Admiral and also a Judge and other Officers requisite for a Court of Vice Admiralty within the ... Territory called New South Wales in like manner as Vice Admirals Judges and other proper officers of such Courts have been constituted ... in places where they have been usually heretofore appointed.<sup>52</sup>

Pursuant to this patent, on 30 April 1787, letters patent under the seal of the High Court of Admiralty appointed Governor Phillip to be Vice Admiral and Robert Ross as Judge in Vice Admiralty. Following the usual form, with great particularity, Ross was given ‘full power to take cognizance of and proceed in all

causes civil and maritime ... according to the civil and maritime laws and customs of our said High Court of Admiralty'.<sup>53</sup> His authority extended as well to 'offences or suspected offences [and to] crimes'. Further letters patent were issued in May 1787 to appoint Commissioners under the Piracy Act 1698 (UK) 'to call and assemble a Court of Admiralty on shipboard or upon the land when and as often as occasion shall require' to deal with cases of piracy, robbery and felony on the high seas.<sup>54</sup> It was under the patent relating to piracy, rather than under the general patent of April 1787, that the first Court of Vice Admiralty was assembled in Australia.<sup>55</sup> The Court thus established remained always an Imperial court external to the ordinary court system. It was unaffected by the creation of three civil courts in New South Wales in 1814; nor was any of its jurisdiction withdrawn when in 1823, and again in 1828, the Supreme Court was invested with a criminal jurisdiction over maritime offences.<sup>56</sup> Its judge held office by virtue of an appointment from the British Admiralty and not through appointment as judge of the colony. From an early stage its proceedings were regulated by an Imperial Act, the Vice Admiralty Courts Act 1832 (UK), and by Rules and Tables of Fees promulgated under that Act.

19. **Vice Admiralty Courts Act 1863 (UK).** By 1863, Vice Admiralty Courts had been established in all the Australian colonies. Although their jurisdiction was the same as that of the High Court of Admiralty, they did not succeed to the statutory additions made to that Court's jurisdiction by the Admiralty Court Acts of 1840 and 1861. To bring their jurisdiction more into accord with that of the English Court and to provide for their better administration, the Vice Admiralty Courts Act 1863 (UK) was passed,<sup>57</sup> restating their jurisdiction over suits for seamen's wages, pilotage, bottomry, damage by collision, breaches of navy regulations, salvage and droits of Admiralty,<sup>58</sup> and giving them new jurisdiction over claims involving ships mortgages, claims arising between owners touching the ownership, possession, employment or earnings of any registered ship, and claims for master's wages, towage, for the building, equipping and repairing of ships, for life salvage and for necessaries.<sup>59</sup> The Act also provided for a right of appeal to the Judicial Committee, provided for Rules of Court (eventually promulgated in 1883), and empowered the judge in Vice Admiralty to appoint a Registrar or Marshal.<sup>60</sup>

20. **The Colonial Courts of Admiralty Act 1890 (UK).** To have an entirely separate Imperial court, existing side by side with the ordinary colonial courts yet utilising their facilities and personnel, was widely regarded as unsatisfactory. Change was brought about by the Colonial Courts of Admiralty Act 1890 (UK), the main purpose of which was to replace the system of Vice Admiralty Courts with a new system of non-imperial courts to be called Colonial Courts of Admiralty.<sup>61</sup> The Act provided that, upon its commencement in a British possession, every Vice Admiralty Court in that possession was to be abolished and every court of law in that possession declared under the Act to be a court of Admiralty or (if no such declaration was made) having original unlimited civil jurisdiction was to become a Colonial Court of Admiralty with the jurisdiction specified in the Act.<sup>62</sup>

21. **Application of the 1890 Act in Australia.** The Colonial Courts of Admiralty Act 1890 (UK) commenced operation in the Australian colonies, except New South Wales and Victoria, on 1 July 1891. Those two colonies were listed in the First Schedule to the Act as British possessions in which, under s 16(1), its operation was delayed, due to local fears, it seems, that Imperial control was to be exercised over the colonial courts.<sup>63</sup> The fears subsided and the Act came into force in Victoria and New South Wales on 1 July 1911, pursuant to an Order in Council of 4 May 1911 made under s 14. The Colonial Courts of Admiralty Act 1890 (UK) is still in force and remains the principal source of civil jurisdiction in admiralty in Australia today. Another source may be the Judiciary Act 1903 (Cth), s 39, to the extent that it invests 'admiralty and maritime' jurisdiction under s 76(iii) of the Constitution in State courts.<sup>64</sup> Other sources include the Merchant Shipping Act 1894 (UK) and the Navigation Act 1912 (Cth). Colonial Courts of Admiralty sitting under the 1890 Act possess jurisdiction over 'like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise' and may exercise that jurisdiction to the same extent.<sup>65</sup> However their jurisdiction does not extend to the English Court's jurisdiction as existing from time to time, but only at the time when the Act was passed.<sup>66</sup> Jurisdiction under the Act therefore extends only to the jurisdiction which that court possessed in 1891. The Act allows for a right of appeal to the Judicial Committee either where there is as of right no local appeal or after a decision given on local appeal, and enables local Rules of Court to be made.<sup>67</sup> It also authorises local laws to confer limited admiralty jurisdiction upon inferior or subordinate courts.<sup>68</sup>

## Other Commonwealth Countries

22. ***Replacement of 1890 Act by Local Statutes.*** The Colonial Courts of Admiralty Act 1890 (UK) came into force in Canada, New Zealand and, except as otherwise provided, every other British possession on 1 July 1891. Following the passage of the Statute of Westminster 1931 (UK), the Admiralty Act 1891 (Can) was replaced by the Admiralty Act 1934 (Can).<sup>69</sup> That Act repealed the Colonial Courts of Admiralty Act 1890 (UK) in so far as it formed part of the law of Canada. In 1970 the Admiralty Act 1934 (Can) was in its turn repealed and replaced by the Federal Court Act 1970 (Can). The admiralty provisions of the Administration of Justice Act 1956 (UK) have served as the model for laws which have been passed, replacing the Colonial Courts of Admiralty Act 1890 (UK), in Singapore, Bermuda, Malaysia, and New Zealand.<sup>70</sup> South Africa in 1972 provided for the repeal of the 1890 Act, but the old jurisdiction would have been continued by the 1972 Act itself.<sup>71</sup> The 1972 Act, however, never commenced operation so that the 1890 Act continued in force in the Republic until its repeal by the Admiralty Jurisdiction Regulation Act 1983 (SAf), which now regulates admiralty jurisdiction in South Africa.<sup>72</sup>

### 3. Australian Courts Exercising Admiralty Jurisdiction

#### Original Civil Jurisdiction

23. ***Colonial Courts of Admiralty.*** The principal source of civil admiralty jurisdiction in Australia remains an Imperial Act, the Colonial Courts of Admiralty Act 1890 (UK). This defines the scope of admiralty jurisdiction and determines which courts shall exercise that jurisdiction. There has been a tendency to speak of Colonial Courts of Admiralty as a distinct set of Imperial courts,<sup>1</sup> which they are not, and were never intended to be.<sup>2</sup> As the Act makes clear, they are courts possessing other jurisdictions, which only go by that name when exercising the jurisdiction conferred by the Act or upon them as such by other Acts. A court is a Colonial Court of Admiralty if it qualifies under s 2(1) of the Colonial Courts of Admiralty Act 1890 (UK), which provides:

Every court of law in a British possession, which is for the time being declared in pursuance of this Act to be a court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a court of Admiralty, with the jurisdiction in this Act mentioned ... and such court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty.

This provision raises three questions: the meaning of ‘British possession’, the meaning of, original unlimited civil jurisdiction’, and the consequences of a declaration under s 2(1).

24. ***The Meaning of ‘British Possession’.*** The Interpretation Act 1889 (UK) s 18(2) defines ‘British possession’ as:

any part of Her Majesty’s dominions exclusive of the United Kingdom, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession.

In the first case to consider the question, *John Sharp & Sons Ltd v The Ship Katherine Mackall*,<sup>3</sup> the High Court had little hesitation in applying this definition to hold that, in Australia, the ‘British possession’ referred to in s 2(1) of the Colonial Courts of Admiralty Act 1890 (UK) was the Commonwealth and not each of its constituent States. Thus Chief Justice Knox CJ and Justice Gavan Duffy stated:

If the first part of the definition stood alone, there could, we think, be no doubt that each Australian State and the Commonwealth as a whole would be a ‘part of Her Majesty’s dominions’, and therefore a British possession. As the definition stands, we think the Commonwealth is a British possession within the second part of the definition. It is clear that parts of Australia, namely, the States, are under both a central and a local legislature.<sup>4</sup>

The High Court thus decided that the ‘British possession’ was the Commonwealth, despite the fact that the combined effect of s 16 and the First Schedule of the 1890 Act was to name New South Wales and Victoria as British possessions, where the operation of the Act was to be delayed.<sup>5</sup> It is not clear why it was not argued that these provisions were sufficient evidence of intent to the contrary within the meaning of the Interpretation Act 1889 (UK).<sup>6</sup> The point is now of no significance since the decision in the *The Katherine Mackall*<sup>7</sup> has been followed in later cases.<sup>8</sup> Merely because the Commonwealth is the ‘British possession’ does not mean that State courts do not qualify as Colonial Courts of Admiralty under the Act.<sup>9</sup> They are courts ‘in’ the British possession, the Commonwealth, which is all that s 2(1) requires. Since *McArthur v Williams*,<sup>10</sup> there can be no doubt that State courts of original unlimited civil jurisdiction qualify as Colonial Courts of Admiralty.

25. ***Original Unlimited Civil Jurisdiction’.*** The Colonial Courts of Admiralty Act 1890 (UK), s 15 defines the expression ‘unlimited civil jurisdiction’ to mean ‘civil jurisdiction unlimited as to the value of the subject matter at issue, or as to the amount that may be claimed or recovered’. The Act is not confined to courts of original ‘unlimited’ civil jurisdiction existing at the time when it came into force but includes later creations — what Chief Justice Latham called ‘future possible’ courts of original unlimited civil jurisdiction.<sup>11</sup> The question is, then, which Australian courts now qualify as courts of original unlimited civil jurisdiction under the Act.

- ***The High Court and State and Territory Supreme Courts.*** The first courts to qualify as Colonial Courts of Admiralty in Australia were the Supreme Courts of Queensland, Tasmania, South Australia and

Western Australia. Before federation, each of these Colonies was a ‘British possession’ under the Act.<sup>12</sup> After federation, their Supreme Courts continued to be Colonial Courts of Admiralty because they were courts of original unlimited jurisdiction in the ‘British possession’, the Commonwealth. The High Court became a Colonial Court of Admiralty when it came into existence pursuant to the Judiciary Act 1903 (Cth). If effect is given to s 16 of the Colonial Courts of Admiralty Act 1890 (UK) and to the Imperial Order in Council made under s 14, the Supreme Courts of New South Wales and Victoria did not become Colonial Courts of Admiralty until 1 July 1911.<sup>13</sup> The Supreme Courts of each of the Territories, including both the Australian Capital Territory and the Northern Territory and the various ‘external’ Territories (Norfolk Island, Cocos (Keeling) Islands and Christmas Island), became Colonial Courts of Admiralty at the time each was established.<sup>14</sup> All these Courts continue to qualify as Colonial Courts of Admiralty under the 1890 Act.<sup>15</sup>

- *The Federal Court of Australia.* It is possible that other Australian courts are courts of ‘original unlimited civil jurisdiction’ for this purpose. For example, the Federal Court may well be a Colonial Court of Admiralty depending on the meaning to be given to s 19(1) of the Federal Court of Australia Act 1976 (Cth).<sup>16</sup> The Federal Court, by s 5(1) of that Act, is a superior court of law and equity and is ‘a court of law in a British possession’ within the meaning of s 2(1) of the 1890 Act. Section 19(1) of the Federal Court of Australia Act 1976 (Cth) states that the Federal Court ‘has such original jurisdiction as is vested in it by laws made by the Parliament’. Thus, by virtue of s 86 of the Trade Practices Act 1974 (Cth) the Federal Court has jurisdiction under s 82(1) of that Act to hear actions for damages for loss suffered by conduct in contravention of Pt IV or V of the Act. This jurisdiction is, within the terms of the definition in s 15 of the 1890 Act, ‘unlimited ... as to the amount that may be claimed or recovered’. It is certainly ‘civil’ jurisdiction. From this it may well follow that the Federal Court is a Colonial Court of Admiralty under the 1890 Act.<sup>17</sup> On the other hand it is possible to construe s 19(1) as limiting the Court’s original jurisdiction to matters that arise under Commonwealth law,<sup>18</sup> in which case s 2(1) of the Colonial Courts of Admiralty Act 1890 (UK) would be excluded. The difficulty with this view is that the (apparently similar) provisions of s 75 and 76 of the Constitution, providing for the original jurisdiction of the High Court, have not been read that way. It would seem that the Federal Court may be a Colonial Court of Admiralty even though its ‘unlimited civil jurisdiction’ is confined to particular matters only. The Colonial Courts of Admiralty Act 1890 (UK) draws no distinction between courts which have general unlimited civil jurisdiction and courts which have unlimited civil jurisdiction in particular matters only.
- *Other courts.* On this basis, it could also be argued that other courts — even inferior or subordinate courts — with unlimited civil jurisdiction as defined in particular matters qualify as Colonial Courts of Admiralty. For example, some superior or even intermediate courts in Australia have unlimited civil jurisdiction in limited classes of case (eg personal injuries).<sup>19</sup> Another example is the Land and Environment Court of New South Wales which under the Land and Environment Court Act 1979 (NSW) has unlimited civil jurisdiction to hear specified valuation, planning and environment cases.<sup>20</sup> A similar argument could perhaps be maintained with respect to the unlimited civil jurisdiction of the Family Court of Australia under the Family Law Act 1975 (Cth). It has not yet been decided whether such statutory courts qualify as Colonial Courts of Admiralty under the 1890 Act. The position is accordingly unclear, though in practice it would no doubt be manifestly inconvenient for admiralty cases to be brought before courts such as the Land and Environment Court. What is clear is that the formula by which the 1890 Act selects the courts to exercise admiralty jurisdiction is imprecise, inconvenient, and in need of reform.

**26. *The Effect of a Declaration under Section 3.*** Section 3(a) of the Colonial Courts of Admiralty Act 1890 (UK) provides that:

The legislature of a British possession may by any Colonial Law (a)declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such court of its jurisdiction under this Act, and limit territorially, or otherwise, the extent of such jurisdiction ...

Cases such as *McArthur v Williams*<sup>21</sup> and *Union Steamship Company of New Zealand Ltd v The Ship ‘Caradale’*<sup>22</sup> make it clear that a declaration enacted under this section specifying one court has the effect of confining the jurisdiction conferred by the Act to that court. Section 2(1) speaks in the alternative of courts of ‘original unlimited civil jurisdiction’ and courts declared under the Act to be Colonial Courts of

Admiralty. Courts of the former type do not qualify under the Act if there are in existence courts of the latter type. By s3 of the Judiciary Act 1914 (Cth), in purported exercise of the power in s 3(a), the Commonwealth amended the Judiciary Act 1903 (Cth) by inserting s 30A. This declared the High Court ‘to be a Colonial Court of Admiralty within the meaning of the Imperial Act known as the Colonial Courts of Admiralty Act, 1890’. For the duration of that law, if it was valid,<sup>23</sup> no other court in Australia possessed the jurisdiction of a Colonial Court of Admiralty. However a further amendment to the Judiciary Act in 1939<sup>24</sup> revoked the declaration, putting an end to the doubts which it had created.<sup>25</sup> The only other attempt in Australia to rely on the power contained in s 3(a) of the 1890 Act was s 17(1) of the Supreme Court Act 1935 (WA) which declared the Supreme Court ‘to be a Colonial Court of Admiralty within the meaning and for the purposes of the Colonial Courts of Admiralty Act, 1890’. This provision was repealed in 1971, but it is extremely doubtful whether it was ever valid. As Justice Wanstell pointed out in *R v Commissioner for Transport, ex parte Cobb & Co Ltd*:

It may be that for the purposes of s 3(a), the context requires that the power of declaration be restricted to the Commonwealth Parliament, so as to avoid the difficulties which would arise from s 2(1) if a single State Parliament were to declare the Supreme Court of its State a Colonial Court of Admiralty.<sup>26</sup>

**27. *The Statute of Westminster 1931 (UK)*.** The Statute of Westminster 1931 (UK) s 6, adopted by the Commonwealth with effect from September 1939,<sup>27</sup> provides:

Without prejudice to the generality of the foregoing provisions of the Act, s4 of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty’s pleasure or to contain a suspending clause), and so much of s7 of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

It has been assumed without much argument that s 6 allowed the States as well as the Commonwealth to make rules of court for admiralty matters without following the procedures set out in the 1890 Act.<sup>28</sup> The extent (if any) to which s 6 allowed the States to proceed under s 4 of the 1890 Act to affect ‘the jurisdiction of or practice or procedure in any’ Colonial Court of Admiralty has not been explored.<sup>29</sup> These questions have been rendered irrelevant for future State legislation by the enactment of the Australia Act 1986 (Cth) and its counterpart United Kingdom legislation, the Australia Act 1986 (UK).

**28. *Inferior Courts Exercising Admiralty Jurisdiction*.** The Colonial Courts of Admiralty Act 1890 (UK) s 3(b) provides that:

The legislature of a British possession may by any Colonial law ...

(b) confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit;

Provided that any such Colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty.

The only case in which this power was exercised is the Broome Local Court Admiralty Jurisdiction Act 1917 (WA). This confers upon the Local Court at Broome in Western Australia ‘such and the like admiralty jurisdiction as is possessed by the Supreme Court’ of that State over any claim by a seaman or master for wages and by a master for disbursements providing, however, that the amount of the claim does not exceed one hundred pounds and that the ship (whether British or foreign) in respect of which the claim is made does not exceed 150 tons burden and is, at the time when the action is commenced, within the State or its territorial waters thereof and north of the Tropic of Capricorn.<sup>30</sup> The jurisdiction it confers does not take any precedence over the jurisdiction possessed by the Local Court by virtue of s 91(1) of the Navigation Act 1912 (Cth). The Broome Local Court Admiralty Jurisdiction Act 1917 (WA) is valid only if the Parliament of Western Australia was in 1917 the ‘legislature of a British possession’ under s 3(b) of the Colonial Courts of Admiralty Act 1890 (UK). But for the presence of s 107 of the Constitution, there would be little difficulty in applying the definition of ‘British possession’ in s 18(2) of the Interpretation Act 1889 (UK) with the result that, in Australia, the legislature of the British possession to which s 3(b) refers, has, since 1900, been the Parliament of the Commonwealth. On this view, the Broome Local Court Admiralty Jurisdiction Act 1917 (WA) would be invalid. However, s 107 of the Constitution may operate so as to preserve in the Western Australian Parliament the power it undoubtedly had prior to 1901.<sup>31</sup> The matter is of very limited

significance, since the Commission has been informed that the Broome Local Court has not exercised the jurisdiction under the 1917 Act in recent times. If the Broome Local Court Admiralty Jurisdiction Act 1917 (WA) is valid then the Local Court at Broome, as a court having jurisdiction in admiralty, would seem also to possess jurisdiction under s 449 of the Merchant Shipping Act 1894 (UK) and under s 252, 328 and 385 of the Navigation Act 1912 (Cth).<sup>32</sup>

## Appellate Jurisdiction

29. **Local Appeals.** The Colonial Courts of Admiralty Act 1890 (UK) deals both with local appeals (s 5) and appeals to the Judicial Committee of the Privy Council (s 6). So far as ‘local appeals’ are concerned, s 5 provides that:

Subject to the rules of court under this Act, judgments of a court in a British possession given or made in the exercise of the jurisdiction conferred on it by this Act shall be subject to the like local appeal, if any, as judgments of the court in the exercise of its ordinary civil jurisdiction and the court having cognizance of such appeal shall for the purpose thereof possess all the jurisdiction by this Act conferred upon a Colonial Court of Admiralty.

Section 15 defines the expression ‘local appeal’ to mean ‘an appeal to any court inferior to Her Majesty in Council’ and the expression ‘appeal’ to mean, ‘appeal, rehearing, or review’. When read with s 15, s 5 was obviously ‘intended to carry out the main idea of the assimilation of the Admiralty jurisdiction to the ordinary civil jurisdiction of Colonial Courts by giving the same right of appeal or rehearing in an Admiralty cause as exists in an ordinary civil cause’.<sup>33</sup> The right of local appeal is not limited to a single appeal, notwithstanding that s 6 refers only to ‘a decision’ on local appeal. The High Court in *McIlwraith McEacharn Ltd v Shell Company of Australia Ltd*<sup>34</sup> held that each of successive appeals can be a local appeal.

30. **Appeals to the Privy Council.** Section 6(1) provides that:

The appeal from the judgment of any court in a British possession in the exercise of the jurisdiction conferred by this Act, either where there is as of right no local appeal or after a decision on local appeal, lies to Her Majesty the Queen in Council.

This provision was an important part of the scheme of the 1890 Act, which conferred a wide admiralty jurisdiction on local colonial courts but sought to retain a degree of, central control in the form of the jurisdiction of the Privy Council on appeal. However within ten years of the passage of this Act a considerably more extensive power of local Australian control over Privy Council appeals was conferred by sections 73 and 74 of the Commonwealth Constitution. An appeal to the High Court from a court sitting as a Colonial Court of Admiralty would be a ‘local appeal’ within the meaning of s 5 of the Colonial Courts of Admiralty Act 1890 (UK).<sup>35</sup> From the judgment given by the High Court on appeal, s 6 arguably gave a right of appeal to the Judicial Committee. However, under s 73 of the Constitution, the judgments of the High Court given in the exercise of its appellate jurisdiction are ‘final and conclusive’. As Justice Dixon pointed out in *McIlwraith McEacharn Ltd v Shell Company of Australia Ltd*,<sup>36</sup> the Constitution is a later Imperial statute. If the ordinary rule of construction that a subsequent statute prevails over an earlier one is applied,<sup>37</sup> s 73 must be regarded as prevailing over s 6. The result is that s 6 did not confer appellate jurisdiction on the Judicial Committee from decisions of the High Court.<sup>38</sup> The argument is now of historical interest only, with the abolition of all appeals to the Privy Council from the High Court in 1975. The position with appeals to the Privy Council from the courts of the States was even more complex.<sup>39</sup> Whether, before the Australia Act 1986 (Cth) and the Australia Act 1986 (UK) came into force, there was a right of appeal under the Colonial Courts of Admiralty Act 1890 (UK) s 6 to the Privy Council from State Supreme Courts depended on whether the admiralty jurisdiction of State Courts is federal jurisdiction under s 39 of the Judiciary Act 1903 (Cth).<sup>40</sup> Again this question has been rendered irrelevant by the abolition of all remaining Privy Council appeals from Australia by the Australia Acts 1986.

## The Effect of the Judiciary Act 1903 (Cth) s 39

31. **A Coexisting Federal Jurisdiction?** The difficulties with the Colonial Courts of Admiralty Act 1890 (UK) are compounded by the unresolved question whether the Judiciary Act 1903 (Cth) s 39 confers admiralty and maritime jurisdiction upon State courts. This interpretation may be arrived at by reading s 39

with s 38.<sup>41</sup> In respect of certain matters, s 38 gives the High Court jurisdiction exclusive of that of the courts of the States. None of the matters involves admiralty or maritime jurisdiction as such. So far as the High Court's jurisdiction is not exclusive under s 38, s 39(2) provides that, subject to certain conditions, State courts:

shall within the limits of their several jurisdictions, whether such limits are as to locality, subject matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it.

Since, by s 76(iii) of the Constitution, 'Admiralty and maritime jurisdiction' is a matter in respect of which the Commonwealth can make laws conferring original jurisdiction upon the High Court, it would seem to follow that s 39(2) vests in State courts the jurisdiction mentioned in s 76(iii).

**32. Consequences of Concurrent Federal Jurisdiction.** To the extent that the jurisdiction in s 76(iii) is coextensive with the jurisdiction conferred by the 1890 Act, a serious question of inconsistency or repugnancy between the two arises. In *McIlwraith McEacharn Ltd v Shell Company of Australia Ltd*,<sup>42</sup> Justice Dixon expressed the view that s 39 should not be construed as conferring federal jurisdiction in admiralty matters, at least to the extent that jurisdiction in those matters is conferred by the Colonial Courts of Admiralty Act 1890 (UK). In a passage which is in many ways difficult to interpret he said:

When s 39 was passed, the Statute of Westminster 1931 (Imp) had not been enacted and, having regard, not only to the many inconveniences that would result, but also to the conflicts with the provisions of the Colonial Courts of Admiralty Act which would ensue from an attempt to make the jurisdiction thereunder of this Court exclusive of that of the Supreme Courts and then to invest them with Federal jurisdiction of the same character as would otherwise belong to them as Colonial Courts of Admiralty, I do not think that the general words of s 39 should be interpreted as applying to the special case of the jurisdiction of Colonial Courts of Admiralty.<sup>43</sup>

This passage was considered by the High Court in *China Ocean Shipping Co v State of South Australia*.<sup>44</sup> That case involved a number of questions concerning the applicability of the limitation of liability provisions in the Merchant Shipping Act 1894 (UK). Justices Gibbs, Stephen and Aickin held that the provisions of the Merchant Shipping Act 1894 (UK) applied geographically to South Australia but that the Crown in right of that State was not bound by them in terms or by necessary implication.<sup>45</sup> On the further question whether those provisions were applicable by virtue of s 64 of the Judiciary Act 1903 (Cth), Justices Stephen and Aickin held that s 64 applied only in proceedings in which a court was exercising federal jurisdiction.<sup>46</sup> In separate judgments, they held that in the present case the court had been exercising jurisdiction conferred by the Merchant Shipping Act 1894 (UK) rather than any of the jurisdiction conferred by s 39 of the Judiciary Act 1903 (Cth).<sup>47</sup> Although he recognised that the jurisdiction mentioned in s 76(iii) had been invested in State courts by s 39, Justice Stephen considered that no simultaneous divesting of their previous jurisdiction on the subject matter of 'Admiralty and maritime jurisdiction' had taken place: 'There was thus in 1903 an investing of State courts with new federal jurisdiction unaccompanied by any divesting of their old jurisdiction'.<sup>48</sup> As to the problem before him, Justice Dixon's view in *McIlwraith McEacharn Ltd v Shell Company of Australia Ltd* was precisely applicable:

[F]or the reasons which his Honour ... stated, s 39 is just as inapplicable to a State court's Merchant Shipping Act jurisdiction, as it is to its Colonial Court of Admiralty jurisdiction. Neither is affected by s 39 of the Judiciary Act. The general words of s 39(1) did not render either of those jurisdictions, possessed as they were by the High Court in consequence of Imperial grant, exclusive of the State court's like jurisdiction (even were s 39(1) understood as extending to jurisdiction of the High Court conferred not by the Constitution and the Judiciary Act but by Imperial Act); nor did the general words of s 39(2) invest State courts with those jurisdictions under the guise of federal jurisdiction. Likewise, even if the content of the truly federal jurisdiction in 'Admiralty and maritime jurisdiction' ... includes jurisdiction in respect of that creature of exclusive Imperial statutory origin, the limitation suit, 39(2) did not invest that jurisdiction in State courts.<sup>49</sup>

Justice Aickin in substance agreed: 's 39(2) should not be construed as conferring federal jurisdiction on the State courts in respect of proceedings under those sections'.<sup>50</sup> Although Justice Gibbs arrived at the same result as Justices Stephen and Aickin on this question, his view was that the proceedings at hand did not involve a suit to which a State was a party within the meaning of s 64. That being so, neither the construction of s 39 nor the possible 'repugnancy between that section and the Colonial Courts of Admiralty Act if the words of the section were given their ordinary and natural meaning' arose.<sup>51</sup> He added, however, that he regarded those questions as 'completely open'.<sup>52</sup> Despite the views of Justices Stephen and Aickin (agreeing with that of Justice Dixon), the matter cannot be regarded as settled. Chief Justice Barwick said nothing on

the point. Justice Gibbs regarded the questions as ‘completely open’. On the other hand Justice Murphy stated that the Colonial Courts of Admiralty Act 1890 (UK) ceased to operate in Australia when the Constitution became effective and that decisions on the Colonial Courts of Admiralty Act 1890 (UK) to the contrary were ‘errors’,<sup>53</sup> undoubtedly he would regard 39 of the Judiciary Act as covering the field.

33. **Unresolved Issues.** If the words of s 39 are given their ordinary and natural meaning, then the jurisdiction in s 76(iii) does appear to have been invested in the courts of the States. To the extent that s 76(iii) is coextensive with the jurisdiction conferred by the 1890 Act, it is hard to see how it can be said that s 39 does not purport to invest federal jurisdiction over those subjects in State courts. If federal jurisdiction over those matters has been purportedly invested in State courts, then it seems clear that that jurisdiction should be treated as inconsistent with any other jurisdiction with respect to the same matters.<sup>54</sup> But this view presents difficulties, because s 39(2) was passed before the Statute of Westminster Adoption Act 1942 (Cth). It would seem to follow that (so far as ‘admiralty’ jurisdiction covered by the 1890 Act is concerned) s 39(2) is invalid under the Colonial Laws Validity Act 1865 (UK). As pointed out by Justice Aickin, the repugnancy seems to take the acute form of the co-existence of two purportedly exclusive jurisdictions.<sup>55</sup> The argument for invalidity gains support from *Union Steamship Co of New Zealand Ltd v Commonwealth*,<sup>56</sup> where provisions of the Navigation Act 1912 (Cth) were held invalid for repugnancy to the Merchant Shipping Act 1894 (UK). On the basis of the decisions in *Commonwealth v Limerick Steamship Company Ltd*<sup>57</sup> and *Commonwealth v Kreglinger & Fernau Ltd*<sup>58</sup> it may be argued that since s 39(2) was passed under the Constitution, the jurisdiction it confers prevails over that conferred by the Colonial Courts of Admiralty Act 1890 (UK) because the Constitution is itself an Imperial enactment passed later than the Colonial Courts of Admiralty Act 1890 (UK). Justice Murphy regarded those cases as having adopted the ‘correct’ approach.<sup>59</sup> In both the validity of s 39(2)(a) of the Judiciary Act 1903 (Cth) was upheld notwithstanding the existence of previous inconsistent Imperial legislation. Justice Dixon’s approach in *McIlwraith McEacharn Ltd v Shell Company of Australia Ltd*,<sup>60</sup> on the other hand, avoids having to make any finding of inconsistency or repugnancy between s 39 of the Judiciary Act 1903 (Cth) and the Colonial Courts of Admiralty Act 1890 (UK) by reading s 39 as not extending to the jurisdiction of Colonial Courts of Admiralty. If s 39 does validly confer on State courts ‘Admiralty and maritime jurisdiction’, displacing the equivalent jurisdiction under the Colonial Courts of Admiralty Act 1890 (UK) then the consequences are unclear. No doubt the substantive law to be applied in the exercise of that jurisdiction would be unchanged, but since (as will be seen) the scope of ‘Admiralty and maritime jurisdiction’ in s 76(iii) of the Constitution is probably considerably wider than the scope of jurisdiction under the 1890 Act,<sup>61</sup> it may be that State courts could be called on to exercise federal admiralty jurisdiction in novel situations.<sup>62</sup> As in other contexts, the distinction between admiralty jurisdiction and substantive admiralty law is a difficult one to draw. What is clear is that these problems are tortuous and unnecessary. Obviously the enactment of appropriate legislation is called for.

## Summary

34. **The Present Position.** To summarise, the High Court, the Supreme Court of each State, and the Supreme Court of each Territory presently qualify as Colonial Courts of Admiralty under the 1890 Act. In addition it is possible that other superior courts established by statute with original unlimited civil jurisdiction in particular matters also qualify as Colonial Courts of Admiralty. This would include in particular the Federal Court. On the other hand, although there is power under s 3(b) of the 1890 Act to confer limited admiralty jurisdiction on lower courts, it is not clear whether this power can be exercised by the States or only by the Commonwealth. The validity of the Broome Local Court Admiralty Jurisdiction Act 1917 (WA) is therefore doubtful. The 1890 Act provides for appeals as of right to the Privy Council from the court which hears the final ‘local appeal’. This provision has been superseded by s 74 of the Constitution and Federal legislation under it, so that there is now no appeal in admiralty matters to the Privy Council from the High Court, the Supreme Court of a Territory, or (if it has jurisdiction under the 1890 Act) the Federal Court. Whatever the position before 1986, there is now no appeal to the Privy Council in admiralty cases from State Supreme Courts. But the scope of the admiralty jurisdiction of State Supreme Courts may be affected by whether their admiralty jurisdiction is formally ‘federal jurisdiction’ under s 39 of the Judiciary Act 1903 (Cth) or not. Whether this is so is completely unclear.

## 4. The Present Scope of Admiralty Jurisdiction in Australia

35. **Introduction.** The history of admiralty jurisdiction in Australia was briefly outlined in chapter 2. That jurisdiction continues to depend on the Colonial Courts of Admiralty Act 1890 (UK). However the 1890 Act does not itself specify which matters are within jurisdiction: it merely incorporates, by s 2(2), the then existing admiralty jurisdiction of the English High Court. This chapter describes the content of Australian admiralty jurisdiction (original and appellate) under the 1890 Act and under related Imperial, Commonwealth and State legislation.

36. **The Effect of Section 2(2) of the 1890 Act.** Section 2(2) of the 1890 Act vests in Colonial Courts of Admiralty the admiralty jurisdiction of the High Court in England ‘whether existing by virtue of any statute or otherwise’. This jurisdiction is to be exercised over ‘the like places, persons, matters, and things’ and ‘in like manner and to as full an extent’ as the jurisdiction of the High Court in England. The effect of s 2(2) was considered by the Privy Council in *The Yuri Maru*, *The Woron*, where it held that the jurisdiction of Colonial Courts of Admiralty is fixed as at 1890 rather than being ambulatory, and that statutory enlargement of the jurisdiction of the High Court in England in 1925 did not therefore enlarge the jurisdiction of courts of admiralty abroad.<sup>1</sup> The Supreme Court of Judicature (Consolidation) Act 1925 (UK) had not been requested by the Dominion of Canada to apply to Canada and contained no words indicating that it was intended to apply there. Speaking generally of the jurisdiction conferred by the 1890 Act, Lord Merrivale said that:

[o]n the whole, the true intent of the Act appears to have been to define as a maximum of jurisdictional authority for the Courts to be set up thereunder, the Admiralty jurisdiction of the High Court in England as it existed at the time when the Act was passed.<sup>2</sup>

There can be no doubt that the decision represents the law in Australia. As Justice Pape said in *Lewmarine Ply Ltd v The Ship ‘Kaptayanni’*:

the jurisdiction which this Court derives from the Imperial Act as a Colonial Court of Admiralty is the Admiralty jurisdiction of the English High Court as it existed when the Imperial Act was passed, that is, in 1890.<sup>3</sup>

The reason why ‘existing’ in s 2(2) has been interpreted to mean existing as at 1890 is, as the Privy Council itself pointed out, that treating it as meaning ‘existing from time to time’ would leave open the possibility of s 2(2) giving unrequested laws an unintended effect in the Dominions.<sup>4</sup>

### The Scope of Admiralty Jurisdiction

37. **The Territorial Scope of Admiralty Jurisdiction.** Section 2(2) preserves in Australia provisions of the Admiralty Court Act 1840 (UK) and the Admiralty Court Act 1861 (UK) which conferred jurisdiction upon the High Court in England in 1890. To overcome the restrictions placed upon the jurisdiction by the statutes of Richard II (which confined the jurisdiction to matters arising upon the high seas and excluded from the jurisdiction any matter arising within the body of a county<sup>5</sup>), a number of those provisions are expressed to confer jurisdiction over matters ‘whether or not arising within the body of a county or upon the high seas’. The expression ‘high seas’ does not have its international law meaning of the open sea beyond territorial waters, but referred to all waters seaward of the low-water mark as it followed the indentations of the coast.<sup>6</sup> An exception was those indentations in the form of a bay, a gulf or an estuary inter fauces terrae where the Admiral’s Court had no jurisdiction ‘because parts of the sea so circumscribed were held to be within the body of the adjacent county or counties’.<sup>7</sup> Under s 2(4) of the Colonial Courts of Admiralty Act 1890 (UK), where a matter does arise upon the high seas, it seems that no jurisdiction concurrent with the jurisdiction conferred by that Act can be exercised, at least by courts of the States.<sup>8</sup>

38. **Existing Heads of Admiralty Jurisdiction.** In addition to the jurisdiction conferred by s 2(2) of the 1890 Act, jurisdiction is also conferred on Colonial Courts of Admiralty by a number of later Acts. A third category of jurisdiction, under s 2(3) of the 1890 Act, is that previously conferred on Courts of Vice Admiralty by other United Kingdom Acts. These include Acts dealing with criminal matters such as the Piracy Act 1850 (UK), ss 2 and 5; the Foreign Enlistment Act 1870 (UK), ss 449, 472; the Slave Trade Act 1873 (UK) and the Pacific Islanders Protection Act 1875 (UK).<sup>9</sup> So far as civil admiralty jurisdiction is concerned, the effect of the 1890 Act and subsequent legislation is to confer jurisdiction over a range of matters, outlined in the following paragraphs. These fall into three basic classes:

- jurisdiction conferred or extended by the 1840 and 1861 Acts;
- the ‘inherent’ jurisdiction of the Admiralty Court unaffected by statute;
- jurisdiction conferred by subsequent statutes.

These will be dealt with in turn.

## Statutory Jurisdiction as at 1890

39. ***Ship Mortgages.*** This extends to claims by a mortgagee<sup>10</sup> in respect of

- any mortgage of a ship or vessel, provided that the ship or vessel is or its proceeds are already under arrest,<sup>11</sup>
- ‘any Mortgage duly registered whether the Ship or the proceeds thereof be under Arrest ...’ or not.<sup>12</sup>

Thus claims brought by mortgagees in respect of unregistered or equitable mortgages (whether of local or foreign ships) are only within jurisdiction in actions already commenced *in rem*.<sup>13</sup> Before 1981, a ship could only be arrested by a mortgagee if it was a British ship, because under Part I of the Merchant Shipping Act 1894 (UK) only mortgages of British ships could be registered.<sup>14</sup> The Shipping Registration Act 1981 (Cth) s 4 repealed Part I of the 1894 Act for Australia and introduced for the first time an Australian form of ship registration, including the registration of mortgages. The replacement of Part I of the 1894 Imperial Act by the 1981 Australian Act may have created unintended difficulties in relying on s 11 of the Admiralty Court Act 1861 (UK) in respect of registered mortgages. It is not clear that the reference in s 11 to mortgages registered under the Merchant Shipping Act 1854 (UK) includes mortgages registered under the 1981 Act:<sup>15</sup> if not, then the jurisdiction of Australian Colonial Courts of Admiralty over registered mortgages had inadvertently been removed. This result was retrospectively avoided by the Shipping Registration Amendment Act 1984 (Cth), s 29 of which inserted new s 94A in the 1981 Act:

Section 11 of the Imperial Act known as the Admiralty Court Act 1861 shall have effect and shall be deemed since 26 January 1982 to have had effect as if references in that section to a mortgage duly registered according to the provisions of the Merchant Shipping Act 1854, included references to a mortgage registered or deemed to have been registered under this Act.

It seems therefore that jurisdiction over mortgages where the ship is not already under arrest extends only to Australian-registered ships. Under the 1981 Act only mortgages of such ships can be registered.<sup>16</sup>

40. ***Claims for the Building, Equipping or Repairing of a Ship.*** This extends to claims for the building, equipping or repairing of any ship, provided that the ship or its proceeds are under arrest at the time when the cause is instituted.<sup>17</sup> Although jurisdiction over any such claim overlaps with jurisdiction over claims for the supply of necessaries, this head of jurisdiction is wider, in that a claim for the building, equipping or repairing of a ship may be brought whether or not the ship at the time was elsewhere than in the port to which it belonged.<sup>18</sup> While the cleaning of a ship is not its ‘repairing’, it may be its ‘equipping’, because it is made fit for the performance of its primary function of carrying cargo.<sup>19</sup>

41. ***Necessaries.*** This extends to claims for ‘necessaries’ supplied to:

- foreign ships or sea-going vessels, whether supplied within the body of a county or upon the high seas;<sup>20</sup>
- ships at the time elsewhere than in the port to which they belong unless at the time when the cause is instituted an owner or part-owner of the ship is domiciled in Australia.<sup>21</sup>

The expression ‘necessaries’ was explained by Chief Justice Abbott in *Webster v Seekamp*:

The general rule is, that the master may bind his owners for necessary repairs done, or supplies provided for the ship ... [W]hatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a

prudent man, would have ordered if present at the time, comes within the meaning of the term ‘necessary’, as applied to those repairs done or things provided for the ship by order of the master for which the owners are liable.<sup>22</sup>

Things as diverse as anchors,<sup>23</sup> clothing,<sup>24</sup> provisions for the crew<sup>25</sup> and money spent on them<sup>26</sup> have been held to be necessaries. On the other hand, a broker’s commission on a charter party for a future voyage effected whilst the ship is at sea under another charter,<sup>27</sup> and the insurance of a ship,<sup>28</sup> have been held not to be necessaries.

**42. Damage to Cargo.** Section 6 of the Admiralty Court Act 1861 (UK) extends to claims by the owner, consignee or assignee of a bill of lading of goods carried into a port in Australia in any ship, for damage done to the goods by the negligence or misconduct of or for breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless at the time when the case is instituted an owner or part-owner of the ship is domiciled in Australia. It has been held that this provision should be construed broadly, unaffected by any considerations as to whether there is any corresponding right of action at common law,<sup>29</sup> to afford the utmost relief which the fair meaning of its language allows.<sup>30</sup> Thus the word ‘carried’ is not interpreted to mean ‘imported’<sup>31</sup> and goods may be said to have been ‘carried’ into a port even if brought into it only incidentally.<sup>32</sup> Section 6 applies to foreign as well as to British ships,<sup>33</sup> but does not extend to a claim for damages under a charter-party<sup>34</sup> or to contracts of hire generally. In so far as jurisdiction is given over cases of breach of contract, s 6 has effect only in relation to breach of the contract contained in the bill of lading.<sup>35</sup>

**43. Damage Done to or by a Ship.** This extends to claims for damage:

- received by a ship or sea-going vessel whether at the time within the body of a county or upon the high seas;<sup>36</sup> or
- done by any ship.<sup>37</sup>

‘Damage’ can be ‘received’ without actual contact.<sup>38</sup> However, jurisdiction over claims for damage ‘done’ by a ship requires a distinction to be drawn between damage simply sustained on or in connection with a ship and damage inflicted by the ship as a thing ‘capable of causing harm’.<sup>39</sup> It is only when the ship is the ‘active agent’ or ‘noxious instrument’ of the damage that the damage is ‘done’ by the ship.<sup>40</sup> Thus, for example:

when injury arises from some defect in the condition of the ship considered as premises or as a structure upon which the person injured is standing, walking or moving the ship is treated as no more than a potential danger of a passive kind, a danger to the user, whose use is the active cause of the injury.<sup>41</sup>

It is, however a different matter

where the injury is the result of the management or navigation of the ship as a moving object or of the working of the gear or some other operation.<sup>42</sup>

Damage may, of course, be ‘done’ to another ship,<sup>43</sup> to objects such as submarine cables,<sup>44</sup> or to a person<sup>45</sup> (provided, however, apart from cases governed by s 262 of the Navigation Act 1912 (Cth), that the person does not die as a result.<sup>46</sup>) It does not matter that the damage is done in foreign inland waters or by a foreign ship to a foreign ship.<sup>47</sup> Although pollution of the seas as such is not a claim within this head of jurisdiction, ‘damage’ nonetheless may be found to exist as a result, for example, of the jettisoning of oil overboard.<sup>48</sup>

**44. Master’s and Seamen’s Wages and Master’s Disbursements.** This extends to claims by

- a seaman of any ship for wages earned on board the ship whether due under a special contract or otherwise; and
- the master of any ship for wages earned on board the ship and for disbursements made on account of the ship.<sup>49</sup>

A seaman to whom wages are due has a right of action at common law against the owner or the master. Alternatively the seaman may sue in admiralty either *in personam* against the employer or *in rem* against the ship relying on the maritime lien for wages. The two remedies are alternatives:<sup>50</sup> if one avenue of recovery

fails the other remains open.<sup>51</sup> Jurisdiction extends to foreign seamen on board foreign ships, but when a foreign ship is sued, certain formalities are required as a preliminary to the action.<sup>52</sup> The requirement that wages, to be recoverable in admiralty, should have been earned on board the ship was never interpreted strictly.<sup>53</sup> Certain other sums are recoverable as wages: for example, compensation for supplying bad provisions.<sup>54</sup> The term ‘disbursements’ has been held to include ‘all proper expenditure made by the master on the ship’,<sup>55</sup> and, generally, includes those sums which would be recoverable as having been spent on necessities.<sup>56</sup> In addition to disbursements strictly so called, however, some claims of a wider nature have been allowed. Thus in *The James Seddon*,<sup>57</sup> a master recovered as ‘disbursements’ the costs incurred by him in defending himself against a false charge of murder arising out of the performance of his duty as master. It is well established that ‘disbursements’ covers not only payments made but also a liability to make the relevant kind of payment in the future, notwithstanding that the Admiralty Court Act 1861 (UK) s 10 refers to ‘disbursements made’.<sup>58</sup>

45. **Salvage.** The expression ‘salvage’ was defined by Sir Christopher Robinson in *HMS Thetis* to mean

the service which those who recover property from loss or danger at sea render to the owners with the responsibility of making restitution, and with a lien for their reward.<sup>59</sup>

The distribution of salvage jurisdiction in Australia is both complex and obscure. The Court of Admiralty certainly had jurisdiction with respect to salvage claims arising on the ‘high seas’ and relating to property capable of being made the subject of a salvage claim. However, this ‘inherent’ jurisdiction was subject to important limitations: it excluded ‘life salvage’ (salvage reward for the saving of life at sea) and did not apply to salvage on the sea-shore or in waters *inter fauces terrae*.<sup>60</sup> The latter defect was remedied (so far as ‘any ship or sea-going vessel’ was concerned) by the Admiralty Court Act 1840 (UK) s 6. The Wreck and Salvage Act 1846 (UK) s 40 (in conjunction with s 19) extended this jurisdiction to all other property which could be made the subject of a salvage claim. Section 19 of that Act also appeared to create a jurisdiction with respect to life salvage, although this is not clear.<sup>61</sup> The uncertainty was remedied by the Merchant Shipping Act 1854 (UK) which re-enacted the salvage provisions of the 1846 Act with some variation.<sup>62</sup> The High Court of Admiralty was given jurisdiction with respect to most salvage claims, including life salvage: this applied ‘whenever any Ship or Boat is stranded or otherwise in Distress on the Shore of any Sea or Tidal Water situate within the limits of the United Kingdom’.<sup>63</sup> The 1854 Act also re-enacted in similar language the earlier provisions extending the Admiralty Court’s salvage jurisdiction to matters arising within the body of a county.<sup>64</sup> The jurisdiction over life salvage with respect to British ships was made worldwide by the Admiralty Court Act 1861 (UK) s 9: with respect to foreign ships, however, it was still necessary that life salvage services be rendered ‘within British waters’. This was the situation when the Colonial Courts of Admiralty Act 1890 (UK) was passed: its effect was to confer the life and property salvage jurisdiction under these Acts upon Colonial Courts of Admiralty. But subsequently the Merchant Shipping Act 1894 (UK) repealed the 1854 Act and s 9 of the 1861 Act, re-enacting their salvage provisions with some variations.<sup>65</sup> That Act applied to Australia of its own force, but did not in so many words confer admiralty jurisdiction.<sup>66</sup> To add to the confusion, the Navigation Act 1912 (Cth) itself enacted (with still further variations<sup>67</sup>) the salvage provisions of the 1894 Act.<sup>68</sup> Like the 1894 Act, the 1912 Act made no specific reference to admiralty jurisdiction,<sup>69</sup> but this was in a context where Australian admiralty jurisdiction was not vested in Supreme Courts as such. Of the English situation at this time, Thomas comments

The practice set by the Act of 1846 of making concurrent and distinct salvage jurisdictional provision alongside that contained in the Admiralty Court statutes was continued in the succeeding merchant shipping legislation and not until the Supreme Court of Judicature (Consolidation) Act 1925 were the two divergent sources of salvage jurisdiction converged into one: and this practice has been followed in the Administration of Justice Act 1956.<sup>70</sup>

No such convergence of ‘the two divergent sources of salvage jurisdiction’ has occurred in Australia, though it is not clear what the consequences of this are. Such Australian dicta as exist in salvage cases tend to support the view that the Supreme Courts have both the inherent Admiralty jurisdiction (as expanded by s 9 of the 1861 Act or s 565 of the 1894 Act) and the statutory salvage jurisdiction conferred by the 1894 Imperial Act and the Navigation Act 1912 (Cth).<sup>71</sup> But the exact relationship between the various provisions remains obscure. It remains to note that under the Navigation Act 1912 (Cth) salvage claims lie against Government ships, that is, ships belonging to the Commonwealth, a State or a Territory.<sup>72</sup>

46. **Towage and Pilotage.** It is clear that before 1840 the Admiralty Court had inherent jurisdiction with respect to towage or pilotage on the high seas, a jurisdiction exercisable *in rem* but apparently not giving rise to a maritime lien.<sup>73</sup> The Admiralty Court Act 1840 (UK) s 6 expressly extended the Court's jurisdiction for claims in the nature of towage arising within the body of a county. No reference was made to pilotage.<sup>74</sup> A claim in the nature of towage means a claim in the nature of 'ordinary' towage, that is, towage which is required only for expediting the progress of a ship or sea-going vessel not in distress.<sup>75</sup> Any other form of towage should be regarded as salvage services.<sup>76</sup>

47. **Title, Ownership, and Disputes between Co-owners.** This extends to claims or questions arising

- as to the title to or ownership of a ship or vessel or its proceeds in any cause of possession, salvage, damage, wages or bottomry;<sup>77</sup> or
- between all or any of the co-owners of a ship registered at a port in Australia concerning the ownership, possession, employment or earnings of the ship or of a share thereof.<sup>78</sup>

As between co-owners, these claims include suits for possession, actions of restraint and actions of co-ownership. The minority interest in a ship may claim that, without consent, the majority is about to send the ship on a voyage. By bringing an action of restraint, the minority may take out a warrant of arrest and have the ship detained until security is given for its safe return.<sup>79</sup> The security required is a 'stipulation' by the majority, and sufficient sureties to a bond, to pay the value of the minority interest in case the ship does not return. As soon as security is given the ship may sail, and it does so wholly at the risk, and for the profit, of the majority. A suit for possession may be in reverse form to an action of restraint. The majority interest in a ship may wish to send the ship upon a voyage but may be unable to do so because the minority refuses to release possession. In such cases the majority may arrest the ship.<sup>80</sup> Upon providing security for the ship's safe return in an amount sufficient to cover the value of the minority interest, the majority will be given possession and the ship may sail. A suit for possession may take other forms: for example, there is jurisdiction in respect of possession of a ship (including a foreign ship) wrongfully taken on the high seas.<sup>81</sup> It may be incidental to determining such a claim to order rectification of the register.<sup>82</sup> Under the Shipping Registration Act 1981 (Cth) s 59, however, power to order rectification of the register is vested in the Supreme Courts of the States and Territories otherwise than as Colonial Courts of Admiralty.

## Inherent Jurisdiction

48. **Certain Maritime Contracts.** This is one of a number of matters over which admiralty claimed inherent jurisdiction. It covers contracts, neither sealed nor ratified by deed, made and executed on the 'high seas' for a maritime consideration.<sup>83</sup> However, in the absence of modern case law it is doubtful if the claim to this inherent jurisdiction would be sustained.<sup>84</sup>

49. **Certain Torts at Sea.** Certain claims for torts committed on the high seas were also asserted by admiralty to fall within its inherent jurisdiction.<sup>85</sup> But, apart from the well recognised jurisdiction in collision cases, these claims have to be treated with caution.<sup>86</sup> Though some jurisdiction beyond collision cases survives,<sup>87</sup> the difficulty of determining its precise limits underlines the unsatisfactory way in which Australian admiralty jurisdiction is presently defined.

50. **Bottomry and respondentia Bonds.** Claims brought by a bond holder for the enforcement of a bottomry or respondentia bond were always recognised as distinctively admiralty matters.<sup>88</sup> Such bonds were in the nature of contracts of loan given on the security of property, and they gave rise to a maritime lien. A bottomry bond pledged the keel or bottom of the ship (on the basis that 'a part signifies the whole') as well as the freight it would earn.<sup>89</sup> A respondentia bond pledged only the cargo on board.<sup>90</sup> Both bonds were founded on the necessity of financing the voyage through the bond. To establish the validity of the bond, the holder had to prove that repayment would be made upon the safe arrival of the ship.<sup>91</sup> Necessity was proven where it was shown that the voyage could not be carried on without a bond.<sup>92</sup> That could only be shown where the borrowing took place at a foreign port<sup>93</sup> and if it was proved that it was impossible to raise the money in some other way.<sup>94</sup> It might involve, for example, the master's lack of personal credit.<sup>95</sup> The lender was required to be assured the necessity for the advance, but that would generally be presumed where the advance was made with the consent of the owners of the ship or cargo.<sup>96</sup> Both kinds of bond gave rise to a

maritime lien, and, since there was no *in personam* liability of the owner or master, could only be enforced by action *in rem*.<sup>97</sup> There is no doubt that jurisdiction over bottomry and respondentia bonds continues to exist in theory. In practice, however, these bonds have long been replaced by other methods of financing voyages,<sup>98</sup> although occasional cases of bottomry still occur.<sup>99</sup>

**51. Wreck at Sea.** The inherent jurisdiction extends to claims for the return of property or for salvage for recovering property found as wreck at sea.<sup>100</sup> Wreck at sea, together with pirate goods and spoils and certain kinds of Royal fish, were droits or perquisites of the Crown and generally assigned to the Admiral.<sup>101</sup> Wreck, in this sense, includes jetsam (shipwreck and cargo and deck gear jettisoned to lighten a vessel in extremis), whether found as flotsam (floating on the surface) or as lagan (sunken but buoyed for retrieval) and derelicts (abandoned vessels).<sup>102</sup> Only property found as wreck ‘at sea’ is within the inherent jurisdiction. Property found washed up on shore above high-water mark is wreck ‘of the sea’. Depending upon the circumstances of the find, property may be wreck at sea if it is found between high and low water marks.<sup>103</sup> The Colonial Courts of Admiralty Act 1890 (UK) s 8 provides that, ‘save as is otherwise provided by any other Act’, droits and forfeitures in admiralty shall ‘be notified, accounted for, and dealt with in such a manner as the Treasury from time to time direct’. This inherent jurisdiction ‘is virtually vestigial’<sup>104</sup> in Australia today because the whole question of wreck is dealt with by the Navigation Act 1912 (Cth) s 294-314.<sup>105</sup> This provides for the creation of an office of receiver of wreck. The receiver is given wide powers to deal with wreck and with claims for ownership of a wreck in the receiver’s possession.<sup>106</sup> Disputes as to title may be resolved either ‘in the same manner as if it were a dispute as to salvage’ or, if any party wishes, ‘in any Court of competent jurisdiction’.<sup>107</sup> Jurisdiction to determine claims for salvage in respect of wreck is conferred in the same way as jurisdiction over other salvage matters.<sup>108</sup> Various provisions dealing with the removal of wreck and derelicts can also be found in State shipping legislation, though without specific provision for jurisdiction.<sup>109</sup> No provision is made in Australian legislation for jurisdiction over claims with respect to Royal fish as such.<sup>110</sup> But the substantive law has, in most if not all respects, been overtaken by legislation which operates without reference to admiralty jurisdiction.<sup>111</sup>

**52. Master’s Claims for Unpaid Freight.** This extends to claims brought by a master for the enforcement of the possessory lien for unpaid freight attaching to the cargo in the master’s possession.<sup>112</sup>

## Jurisdiction under Later Legislation

**53. Miscellaneous Jurisdiction under Other Acts.** Although almost all the jurisdiction of Colonial Courts of Admiralty is that conferred by the Colonial Courts of Admiralty Act 1890 (UK), it remained possible for later Acts (either Imperial or Australian) to confer further jurisdiction on those courts. This has (or may have) been done in only a few cases, which must be briefly mentioned.<sup>113</sup>

**54. Merchant Shipping Act 1894 (UK).** The Merchant Shipping Act 1894 (UK) s 449 and 472<sup>114</sup> may be said to confer jurisdiction in admiralty not just because the courts upon which they confer jurisdiction are admiralty courts but also because the matters they deal with used to fall within the jurisdiction of the High Court of Admiralty. Indeed, until the Merchant Shipping Act 1854 (UK) was repealed, they fell within the jurisdiction of Colonial Courts of Admiralty under s 2(2) of the Colonial Courts of Admiralty Act 1890 (UK).

- **Section 449.** Section 449 applies to the extent to which it is not superseded by s 252 of the Navigation Act 1912 (Cth). The application of s 252 is considered later.<sup>115</sup> Section 449 confers upon Colonial Courts of Admiralty in Australia jurisdiction to declare as forfeited, to be disposed of as directed, certain dangerous goods carried on board British or foreign vessels.<sup>116</sup>
- **Section 472.** Section 472 confers upon Colonial Courts of Admiralty jurisdiction to remove the master of a ship and to appoint a new master.<sup>117</sup>

**55. Navigation Act 1912 (Cth).** The Navigation Act 1912 (Cth) purports to confer jurisdiction over a number of matters falling within the recognised scope of admiralty jurisdiction but in terms which make the relationship between the two unclear or uncertain. For example, s 318 and 328 enable certain claims in the nature of salvage, whether for recovering property found as ‘wreck’ or not, to be determined by State Supreme Courts, as well as ‘every Court in a State having Admiralty jurisdiction’.<sup>118</sup> Similarly, s 91(1)

enables a claim by a seaman for wages or by a master for wages or disbursements to be brought before a Supreme Court or any other ‘Court having civil jurisdiction in respect of the amount of the claim’.<sup>119</sup> Again the Act includes a reference to ‘any Court having Admiralty jurisdiction’.

56. ***The Ambit of the Navigation Act 1912 (Cth).*** It was pointed out in para 54 that s 449 of the Merchant Shipping Act 1894 (UK) applies only to the extent that s 252 of the Navigation Act 1912 (Cth) does not apply. The position is similar with s 472 of the Merchant Shipping Act 1894 (UK), which corresponds to s 385 of the Navigation Act 1912 (Cth).<sup>120</sup> Generally speaking, the Navigation Act 1912 does not apply to

- ships belonging to an Australian or foreign defense force;
- trading ships on voyages other than overseas voyages or inter-State voyages;
- Australian fishing vessels proceeding on voyages other than overseas voyages;
- inland waterways vessels;
- pleasure craft.<sup>121</sup>

Specific issues of interpretation apart, there are continuing uncertainties about the validity of provisions of the Navigation Act 1912 enacted before the Statute of Westminster Adoption Act 1942 (Cth), and which cover the same field as paramount provisions of the Merchant Shipping Act 1894 (UK) applying to Australia. That the 1894 Act was capable of overriding such provisions of the 1912 Act was made clear in *Union Steamship Co of New Zealand Ltd v Commonwealth*.<sup>122</sup> Since 1942 many provisions of the Navigation Act 1912 (Cth) have been replaced or re-enacted, and no problem of ‘repugnancy’ can arise for them. Other provisions remain the same, or have merely been amended. In 1932 Kenneth Bailey commented that, notwithstanding the Statute of Westminster Act 1931 (UK):

so far as the Navigation Act is concerned, the High Court’s decision in the Union Steamship Co’s case will still be good law unless and until the Commonwealth Parliament re-enacts the Navigation Act; or enacts that it is to be construed in relation to the Merchant Shipping Acts as though it had come into operation subsequently to the Statute of Westminster; or repeals any conflicting provisions of the Merchant Shipping Acts, or — as is in this case more probable — supersedes both Acts by a new shipping code.<sup>123</sup>

No such re-enactment of the 1912 Act<sup>124</sup> — still less its ‘more probable’ replacement by a new shipping code — has happened. It therefore remains the case that, as to the pre-1939 provisions of the Act:

the relation of the British Merchant Shipping Act to the Commonwealth Navigation Act ... is not susceptible of a summary, obvious answer, universally applicable.<sup>125</sup>

This provides yet another reason for the revision of Navigation Act provisions, so far as this can be done within the present Terms of Reference.<sup>126</sup>

## **The Exercise of Admiralty Jurisdiction under the 1890 Act**

57. ***Special Features of the Existing Jurisdiction.*** The special features of admiralty jurisdiction in the United Kingdom and comparable countries are discussed in some detail in chapter 6. But it is desirable to set out here certain special features of the jurisdiction exercisable under the 1890 Act.

58. ***Relation to Other Jurisdictions.*** The jurisdiction of Colonial Courts of Admiralty over the matters described above can give a misleading appearance of exclusivity. Colonial Courts of Admiralty do not have exclusive jurisdiction over such matters in all circumstances. Thus, a claim by a seaman for wages or by a master for wages or for disbursements can be enforced, outside admiralty jurisdiction, under s 91(1) of the Navigation Act 1912 (Cth) or, to the extent that that section does not cover the field,<sup>127</sup> under s 164 of the Merchant Shipping Act 1894 (UK) and other provisions in various State enactments.<sup>128</sup> Similarly, a claim in the nature of salvage, depending on the size of the claim, on the value of the property salved or on the consent of the parties, may be enforced summarily in certain State courts under s 318 of the Navigation Act 1912 (Cth). The same applies to claims for the return of property found as wreck at sea.<sup>129</sup> Indeed, apart from

such specific statutory provisions, most claims in admiralty could be brought before a court of appropriate general jurisdiction. Exceptions relate to claims based on the ‘general maritime law’, such as certain maritime liens or statutory liens (where the owner of the ship in question is not personally liable) or (perhaps) some salvage claims.<sup>130</sup>

59. **The Relevance of ‘International Comity’.** In the exercise of the jurisdiction conferred by the Colonial Courts of Admiralty Act 1890 (UK), courts are directed to have the same regard as the High Court in England to ‘international law and the comity of nations’.<sup>131</sup> Thus, although the claim would otherwise be within its jurisdiction a Colonial Court of Admiralty cannot entertain a proceeding *in rem* against a ship of a foreign state unless the ship in question was being used at the relevant time for ordinary trading purposes or the immunity is waived.<sup>132</sup> In addition, it is the usual practice for Colonial Courts of Admiralty to decline to exercise their jurisdiction *in rem* in certain cases where foreign vessels are involved until the consular representative of the foreign state concerned has been duly notified.<sup>133</sup> The former rule is no more than an application of ordinary principles applicable by the High Court in its general jurisdiction,<sup>134</sup> but Courts of Admiralty have traditionally been aware of the international or transnational context of the jurisdiction they exercise, and have had regard to arguments drawn from the maritime jurisprudence of other countries and of attempts at international unification of the law made during this century. This tendency owes something to the civil law origins of English admiralty law and procedure, but is also a reflection of current needs for the international recognition of the arrest and judicial sale of ships and of the exercise of jurisdiction based upon such arrest. Although the courts no longer regard themselves as applying (without statutory authorisation) the ‘general law of the sea’,<sup>135</sup> notions of international comity and of a general maritime law remain influential.<sup>136</sup>

## Other Sources of Federal Maritime Jurisdiction in Australia

60. **Changes in Australian Maritime Legislation.** While Australian admiralty jurisdiction has remained virtually unchanged since federation, the same has not been true in other areas of ‘maritime law’ — although even here there had been, until fairly recently, no thorough, comprehensive program of revision and reform, but rather a series of Acts on subjects of particular concern at the time. The Commonwealth Commission of Inquiry into the Maritime Industry in 1976 commented that the Navigation Act 1912 (Cth), the principal federal legislation in this field, ‘in many respects ... still reflects British attitudes at the end of the nineteenth century’, and called for comprehensive Australian legislation replacing both the Merchant Shipping Act 1894 (UK) and the Navigation Act 1912 (Cth), and enacting ‘appropriate provisions specifically designed to meet the needs of the Australian maritime industry’.<sup>137</sup> Since then there has been a great deal of legislative activity in respect of off-shore and maritime matters generally, including major amendments to the Navigation Act 1912 (Cth).<sup>138</sup> However that Act has not been subject to any systematic revision. As the then Minister for Transport commented, in introducing the Bill which became the Navigation Amendment Act 1979 (Cth),

... this Bill does not purport to effect a general revision of the Navigation Act. The need for such a revision has been recognised for some time and it is the Government’s intention to undertake such a task following the completion of discussions currently under way with the States and industry.<sup>139</sup>

This Report is not directly concerned with the body of substantive maritime law applying in Australia. But a number of Acts impinge on issues of admiralty jurisdiction, as the Terms of Reference, by their reference to the need for ‘consequential amendments ... to any other Commonwealth legislation including the Navigation Act 1912’, recognise. Some brief reference to relevant Commonwealth Acts is therefore necessary.

61. **Seamen’s Compensation Act 1911 (Cth).** This Act provides for compensation to be payable to seamen (including masters and pilots) in respect of injury or death arising out of or in the course of employment on an Australian ship engaged in overseas, interstate or Territorial trade, and in certain other circumstances.<sup>140</sup> The Act does not refer to admiralty but does authorise the detention of a ship subject to certain conditions.<sup>141</sup> This power of detention is considered in chapter 12.<sup>142</sup>

62. **Navigation Act 1912 (Cth).** In addition to provisions already referred to, this Act has provisions dealing with limitation of liability suits.<sup>143</sup> Other provisions include s 383, which gives (in terms similar to s 13 of the Seamen’s Compensation Act 1911 (Cth)) power to Supreme Courts to detain foreign ships with respect to claims for injury negligently caused to property ‘belonging to the Queen, the Commonwealth, a State, a

Territory, a Commonwealth country other than Australia, a British subject or a citizen of a Commonwealth country’,<sup>144</sup> and s 399, which empowers a Court to order the sale of a ship or its equipment to meet unpaid liabilities of the master or owner.

63. ***Historic Shipwrecks Act 1976 (Cth)***. This Act protects certain notified ‘historic shipwrecks’ in proclaimed Australian waters. The general law of salvage is excluded with respect to such shipwrecks.

64. ***Protection of the Sea (Civil Liability) Act 1981 (Cth)***. This Act was one of a number of Acts passed in 1981 to implement various international conventions on marine pollution and to provide for the protection of the Australian marine environment against such pollution.<sup>145</sup> In particular the Protection of the Sea (Civil Liability) Act 1981 (Cth) confers jurisdiction on State and Territory Supreme Courts to hear claims under provisions of the 1969 Convention on Civil Liability for Oil Pollution Damage, and its Protocol of 1976

- with respect to incidents causing pollution damage in Australia (s 9); and
- seeking to limit a shipowner’s or insurer’s liability with respect to such claims (s 10).<sup>146</sup>

Under Article XI(1) and (3) of the Convention (given the force of law by s 8(1) of the Act) actions for compensation for pollution damage, or to recover the cost of preventive measures, may only be brought in the courts of the contracting State in whose territory or territorial sea the damage occurred, or in respect of impending damage to the territory or territorial sea of which the preventive measures were taken.<sup>147</sup>

65. ***Shipping Registration Act 1981 (Cth)***. This Act, which established for the first time an Australian Register of Ships (and of interests in ships including mortgages), has already been referred to.<sup>148</sup> Jurisdiction is conferred on State and Territory Supreme Courts with respect to disputes concerning

- caveats on the Register (s 47B, 47C);
- rectification of the Register (s 59);
- enforcement of mortgages where a ship is to be deregistered (s 66);
- proceedings for forfeiture (s 70).

Appeals from decisions on such matters lie to the Federal Court, and thence to the High Court (s 82).

## 5. The Federal Constitution and Admiralty Jurisdiction

66. **Substantive and Jurisdictional Powers.** In reviewing the range of federal powers with respect to admiralty and maritime jurisdiction, it is necessary to take into account both the specific power to invest ‘Admiralty and maritime jurisdiction’ in federal and State courts, contained in s 76(iii) of the Constitution, and various substantive legislative powers in s 51.

### Federal Power to Confer ‘Admiralty and Maritime Jurisdiction’

67. **The Scope of Section 76(iii).** Section 76(iii) of the Constitution is the only section of the Constitution which refers specifically to jurisdiction in admiralty. It reads as follows:

The Parliament may make laws conferring original jurisdiction on the High Court in any matter —

(iii) Of Admiralty and maritime jurisdiction.

Section 77(iii) allows the Parliament to make laws investing any court of a State with federal jurisdiction over any matter arising, *inter alia*, under s 76(iii). Section 76(iii) has received very little attention, judicial or otherwise, and what attention it has received has been inconclusive.<sup>1</sup> In *John Sharp & Sons Ltd v The Ship ‘Katherine Mackall*, Justice Isaacs observed that

If it became necessary to determine this case upon s 76(iii) of the Constitution and s 30(b) of the Judiciary Act [which purported to confer original jurisdiction on the High Court ‘in matters of admiralty or maritime jurisdiction’] there are some very difficult questions to answer ... Were the decision of this case dependant on the provision of s 76(iii) of the Constitution with the statutory exercise of the power, there would be a field of inquiry by no means clear.<sup>2</sup>

There are other more recent dicta to similar effect.<sup>3</sup> These statements notwithstanding, guidance as to the meaning of s 76(iii) is available from several sources, including the interpretation of the United States provision from which it was drawn and the application of general principles of constitutional interpretation now well established in Australia.

68. **‘Admiralty and Maritime Jurisdiction’ in the United States Constitution.** The words of s 76(iii) were copied directly from Art III, s 2(1) of the Constitution of the United States, which provides that

The Judicial Power [of the United States] shall extend ... to all cases of admiralty and maritime jurisdiction,

The reasons for conferring federal jurisdiction in admiralty and maritime cases in the United States have been said to be clear:

Admiralty was a separate corpus of law which before the American War of Independence had been administered by British Vice-Admiralty Courts rather than by the ordinary colonial courts, so that general Admiralty jurisdiction covered an area in which the State courts and their predecessors had little experience. Moreover, ‘since one of the objectives of the Philadelphia Convention was the promotion of commerce and the removal of obstacles occasioned by the diverse local rules of the States, it was only logical that it should contribute to the development of a uniform body of maritime law by establishing a system of federal courts and granting to these tribunals jurisdiction over Admiralty and maritime cases’. The principal commerce of the period was maritime, and it was in this jurisdiction that disputes with foreigners were more likely to arise.<sup>4</sup>

As a source of jurisdiction Art III s 2(1) was thus intended to have a broad operation. In American colonial practice ‘admiralty’ jurisdiction had already been regarded as broader than the truncated jurisdiction of the English Court of Admiralty at that time: in particular the statutes of Richard II<sup>5</sup> were regarded as inapplicable, so that local admiralty jurisdiction was not restricted to the ‘high seas’.<sup>6</sup> It has been said that the term ‘maritime’ was added during the Convention Debates to make it clear that it was not to be restricted to the limited English jurisdiction.<sup>7</sup> What is certain is that this expansive effect was, after initial divisions of opinion, well established in United States case law by the mid-nineteenth century. In the words of Justice Story in the landmark case of *De Lovio v Boil*, the jurisdiction

comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea ...<sup>8</sup>

That case held that a dispute as to marine insurance was within the jurisdiction, a result only recently achieved by statute in some Commonwealth countries.<sup>9</sup> In addition it came to be settled that the waters covered by the jurisdiction extended

to all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce, whether or not the particular body of water is wholly within a State, and whether or not the occurrence or transaction that is the subject matter of the suit is confined to one State.<sup>10</sup>

**69. Relevance of the United States Position.** In several respects the effect of the United States provision was different from its Australian counterpart. For one thing, federal jurisdiction in the United States was to be vested exclusively in federal courts (below the level of the Supreme Court). There was no equivalent power to s 77(iii) of the Commonwealth Constitution to vest federal jurisdiction in State courts. Article III s 2(1) was thus taken as an assertion of an overriding ‘federal interest in the orderly and uniform judicial governance of the concerns of the maritime industry’,<sup>11</sup> and this had certain implications for State law affecting maritime matters. In Australia no such exclusive jurisdiction was intended: it was sufficient that federal law (including federal jurisdiction) when validly enacted or conferred prevailed over State law and jurisdiction. At least since the Statute of Westminster Adoption Act 1942 (Cth), federal law has also prevailed over law and jurisdiction with an Imperial origin. A second difference was that it was settled by 1874 that the power over admiralty and maritime jurisdiction under the United States Constitution carried with it Congressional power over the substantive law to be applied in that jurisdiction, that is, over the substantive maritime law.<sup>12</sup> No such inference has been drawn in Australia: the High Court has so far acted on the basis that powers to confer jurisdiction under ss 75 and 76 of the Constitution do not confer any distinct, substantive legislative power over the subject matter of that jurisdiction,<sup>13</sup> although there is express power to legislate on matters incidental to the investment of jurisdiction.<sup>14</sup> But both of these differences are a result of special rules of United States constitutional law, rules which are of general application and which do not relate to the interpretation of the words ‘of admiralty and maritime jurisdiction’ themselves. Neither of these differences is a reason for rejecting guidance to be obtained from United States jurisprudence on the meaning of the jurisdictional grant itself, In the words of Justice HE Zelling:

There is no doubt that the expression ‘of Admiralty and maritime jurisdiction’ was expressly taken by our Founding Fathers from the corresponding expression in the Constitution of the United States. It is therefore reasonable to think that the words should be given a wide connotation similar to that in America in their use in s 76(iii) of our Constitution. ... The High Court should interpret the needs of Australia as a great maritime and trading nation with twelve thousand miles of sea coast and an interlocking and growing web of international connections, treaties and conventions.<sup>15</sup>

**70. Settled Principles of Australian Constitutional Interpretation.** This conclusion is strongly reinforced by the application of well-established principles of constitutional interpretation in Australia. Terms used in the Constitution are not to be construed narrowly or pedantically, but liberally, in the light of changing circumstances and in view of their role as constitutional, not merely statutory, terms. This is particularly true of empowering provisions, which are not to be interpreted on the assumption that certain matters (such as intrastate trade) are ‘reserved’ to the States or are outside the scope of Commonwealth power.<sup>16</sup> These now well-established principles support the view that s 76(iii) should not be interpreted narrowly but should be regarded as a broad power to confer jurisdiction of an admiralty or maritime character. The Commission concludes that

- The term ‘Admiralty’ in s 76(iii) is not restricted to the scope of ‘Admiralty’ jurisdiction under the Colonial Courts of Admiralty Act 1890 (UK), but would be interpreted to include many if not all of the twentieth century extensions to that jurisdiction in comparable countries, so far at least as these relate to disputes involving ocean-going ships.
- The term ‘maritime’ is not to be treated as a mere reaffirmation of the meaning of ‘Admiralty’ jurisdiction (otherwise it would be meaningless<sup>17</sup>); nor, in view of its history, can it be treated as somehow restricting the meaning of ‘Admiralty’. It is a term of extension, and includes all matters properly described as ‘maritime’, whether or not within English or Australian admiralty jurisdiction in 1900.

- In particular, a matter may be one of ‘Admiralty and maritime jurisdiction’ notwithstanding that it involves ships engaged only in intrastate trade, or that it arose in waters inter fauces terrae (and therefore within a State).

These conclusions gain indirect support from the existence in s 51 and 98 of the Constitution of significant powers to legislate on maritime matters.<sup>18</sup> In the light of those powers as interpreted by the High Court, it is hard to see what justification there could be for a limited construction of s 76(iii), leaving particular ‘maritime’ matters to State jurisdiction. This broad view is supported by such authority as there is. For example, Quick and Garran in 1901 were

clear that the limitations imposed by [the 1890] Act on the jurisdiction of ‘Colonial Courts of Admiralty’ within the meaning of that Act ... cannot be read into the plenary powers conferred by that section.<sup>19</sup>

Justice Isaacs, despite the perceived obscurity of s 76(iii), commented that

the Constitution (by section 51(i) and (xxix) and section 98) undoubtedly gives great scope for relevant legislation. It is not, therefore, to be supposed that the constitutional power to confer jurisdiction on this Court in matters of admiralty and maritime law is a power in respect of merely a stereotyped common law admiralty jurisdiction, which at the date of the Constitution had already been extended for more than forty years in England.<sup>20</sup>

In *McIlwraith McEacharn Ltd v Shell Co of Australia Ltd*, Justice Dixon cited this passage, commenting that

The jurisdiction of the Court under the Colonial Courts of Admiralty Act may not be coextensive with the jurisdiction that s 76(iii) of the Constitution empowers the Commonwealth Parliament to confer upon this Court ... The observations made by Isaacs J ... indicate on the one hand the objections that exist to following American doctrine and treating the words as covering a wide field of maritime causes, and on the other hand the grounds that may be urged for not confining them to the narrow jurisdiction conceded by the common law courts to admiralty.<sup>21</sup>

Justice Gibbs in *China Ocean Shipping Co v South Australia* expressed himself much more strongly on this point:

there seems to me no possible justification for construing the admiralty jurisdiction mentioned in s. 76(iii) to that which existed in England in 1900 ...<sup>22</sup>

Despite the absence of decisions on the scope of s 76(iii) it is probable, if not certain, that the High Court will take a broad view of the power. This does not necessarily mean that all matters which now fall within admiralty jurisdiction in other comparable countries would be held to fall within s 76(iii) in Australia — though that result is quite likely.<sup>23</sup> Particular proposals for jurisdiction (for example over matters such as marine insurance) will be considered later in this Report.

**71. Power to Confer Original and Appellate Jurisdiction.** Where the Commonwealth Parliament has power to confer jurisdiction, it has substantial authority with respect to the courts which should exercise that jurisdiction and to the avenues of appeal. In particular, it may vest jurisdiction in existing State courts,<sup>24</sup> in existing or specially created federal courts<sup>25</sup> or in Territory courts.<sup>26</sup> Certain limitations apply depending on which choice is made. The Commonwealth cannot alter the ‘structure’ or ‘constitution’ of a State court invested with federal jurisdiction,<sup>27</sup> although it has extensive power over the scope of jurisdiction (which need not be limited, either in terms of subject matter or geographical extent, to the jurisdiction otherwise exercisable by the court). In the case of federal courts the Commonwealth is, subject to Chapter III of the Constitution,<sup>28</sup> fully competent to regulate the structure of the court. In the case of Territory courts the restrictions imposed by Chapter III do not apply,<sup>29</sup> but (as a corollary) it appears that a Territory court can only be given jurisdiction by a law under s 122 of the Constitution: it cannot be given federal jurisdiction.<sup>30</sup> (On the other hand a federal court can be given jurisdiction by a law under s 122.<sup>31</sup>) Thus the Commonwealth could invest exclusive jurisdiction under s 76(iii) in State Courts, or in the Federal Court (or an Australian Admiralty Court specially created), or could invest jurisdiction in federal, State and Territory Courts concurrently (with provision for transfer or remittal of cases between them). It could provide for appeals from all such courts in admiralty matters to go to the Federal Court exclusively, or to the State Full Courts or Courts of Appeal (in the case of appeals from State Courts at first instance).<sup>32</sup> It could provide for an appeal to the High Court as of right or by special leave only, and in some or all cases.<sup>33</sup>

72. ***Specific Constitutional Limitations.*** The Commonwealth's power to allocate admiralty jurisdiction between the various courts is accordingly a broad one. However three potential difficulties need to be referred to:

- ***Questions of Accrued and Associated Jurisdiction.*** Potentially the most important constitutional difficulty involves the problem of 'accrued', 'pendent' or 'ancillary' jurisdiction in cases with non-federal elements. It is possible for the same case to raise issues of 'admiralty and maritime jurisdiction' and other issues of a non-federal kind,<sup>34</sup> and in the case of jurisdiction vested in federal courts this may mean that no single court has jurisdiction to hear the whole case. But a federal court has jurisdiction to determine the entire case where it constitutes a single 'matter', and the High Court has adopted a very broad definition of when this is so.<sup>35</sup> The extent to which difficulties of 'accrued' jurisdiction are likely to occur under new admiralty legislation in Australia will depend to a considerable degree on the precise scope of that jurisdiction: this issue, and its impact on the choice of courts to exercise admiralty jurisdiction in Australia, are examined in chapter 11.
- ***Ancillary Judicial Power of Masters and Registrars.*** It is common for English and Australian courts to delegate ancillary powers to court officials (for example taxing costs and quantifying damages) and this has especially been the case in admiralty. The High Court had earlier held that such officials, not constituting part of the State court itself, could not exercise federal jurisdiction,<sup>36</sup> but these earlier decisions have now been overruled.<sup>37</sup> Whether officials of federal courts can validly exercise similar powers is not as clearly settled, but it is probable that they can do so. These questions are discussed in chapter 14 in the context of the appropriate powers of Admiralty Registrars and Marshals.<sup>38</sup>
- ***Exercise of Australia-wide Jurisdiction.*** Although the Commonwealth could constitutionally give Australia-wide jurisdiction to federal and State courts, Territory courts can, it appears, be given jurisdiction only with respect to matters having some connection with the Territory. This is a corollary of the rule that Territory courts may not exercise federal jurisdiction: an Australia-wide admiralty jurisdiction vested in a Territory court with respect to matters arising outside the Territory would be a federal, not a Territory, jurisdiction. The implications of this restrictions for the allocation of admiralty jurisdiction are discussed in chapter 11.

73. ***Incidental Matters (including Procedure).*** In addition, the Commonwealth Parliament has extensive power to make laws incidental to the vesting of jurisdiction in State or federal courts. This derives from s 51(39) which gives power to legislate on 'matters incidental to the execution of any power vested ... in the Parliament ... or in the Federal Judicature'. Pursuant to this power (or the implied incidental power) 'Parliament may in the exercise of any of [its] substantive powers ... make all laws which are directed to the end of those powers and which are reasonably incidental to their complete fulfilment'.<sup>39</sup> In the context of uniform legislation on admiralty jurisdiction, this would include provisions such as for admiralty rules, for remittal and transfer of cases, for particular procedures, for special powers for the arrest, detention and sale of ships and for other remedies.<sup>40</sup> Exactly where the line is to be drawn between incidental matters and matters beyond Commonwealth power can be a difficult question (especially in the case of admiralty jurisdiction where matters of jurisdiction, procedure and substance have always been closely intertwined). It will be discussed in more detail after the Commonwealth's substantive legislative powers in this area have been outlined.<sup>41</sup>

## **Substantive Federal Legislative Power over Admiralty and Maritime Matters**

74. ***A Range of Powers.*** In addition to the specific power in s 76(iii) to invest 'admiralty and maritime jurisdiction' in Australian courts, the Commonwealth Parliament has a range of substantive legislative powers over admiralty and maritime matters.<sup>42</sup>

75. ***Interstate and Overseas Trade and Commerce.*** Section 51(1) of the Constitution confers on the Commonwealth Parliament power to legislate with respect to 'trade and commerce with other countries, and among the States'. Section 98 provides that:

The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping ...

Although it was early held that s 98 was merely declaratory of the effect of s 51 (1), and did not give additional power to legislate with respect to intrastate shipping and navigation,<sup>43</sup> the power over interstate and overseas trade, navigation and shipping is an extensive one. It extends, for example, to acts preparatory to or part of an interstate or overseas transaction and to the regulation of documentation for or disputes arising out of such transactions.<sup>44</sup> In the words of the High Court in 1920

All the commercial arrangements of which transportation is the direct and necessary result form part of ‘trade and commerce’. The mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of ‘trade and commerce’...<sup>45</sup>

In addition the Commonwealth can regulate the safety and efficiency of interstate or international navigation, even if this also requires concomitant regulation of intrastate navigation. It could probably, therefore, lay down a general code of navigation rules in navigable waters around Australia applicable to all ships.<sup>46</sup> Thus ‘the combination of s 51(i) with s 98 gives the widest power to deal with the whole subject matter of navigation and shipping in relation to trade and commerce with other countries and among the States’.<sup>47</sup> As was said in *Australian Steamships Ltd v Malcolm*, s 98

authorizes Parliament to make laws with respect to shipping and the conduct and management of ships as instrumentalities of trade and commerce, and to regulate the relations and reciprocal rights and obligations of those conducting the navigation of ships in the course of such commerce both among themselves and in relation to their employers on whose behalf the navigation is conducted.<sup>48</sup>

The Navigation Act 1912 (Cth) is largely founded on the combination of s 51(1) with s 98.

76. ***Application to Admiralty Jurisdiction.*** All or virtually all matters of ‘admiralty and maritime jurisdiction’ within the meaning of s 76(iii) relate to navigation and shipping, and most occur in the course of trade and commerce or incidentally thereto. Section 51(1) is not, however, restricted to subjects of ‘admiralty’ jurisdiction in any narrower sense: under s 76(ii) of the Constitution, the Parliament can confer federal jurisdiction in any matter of navigation and shipping arising in the course of interstate or overseas trade and commerce, whether or not arising at sea.

77. ***External Affairs.*** The external affairs power (s 51(29)), as interpreted by the High Court in a series of cases in the last twenty years, is now a major potential source of legislative power over matters of admiralty and maritime jurisdiction. It is possible to distinguish three different ways in which the external affairs power may be relevant.

- ***Treaties as External Affairs.*** The effect of the two main High Court decisions on the external affairs power — *Koowarta v Bjelke-Petersen*<sup>49</sup> and *Commonwealth v Tasmania*<sup>50</sup> — is that the Commonwealth Parliament has legislative power to implement in Australia the provisions of any international treaty to which Australia is a party and which is in force, provided only that the treaty was not entered into solely as a device to acquire legislative power, and that the legislation in question is reasonably adapted to implementing the treaty in question, and is not inconsistent with it. It is unnecessary for present purposes to discuss these requirements in more detail. The Commonwealth could, by acceding to a treaty such as the 1952 Brussels Arrest Convention, legislate to implement that Convention as a matter of Australian law. Whether this is desirable is, of course, another question, depending on how closely it is desirable to adhere to the terms of that Convention in framing new Australian legislation.<sup>51</sup>
- ***Matters of International Concern Independently of Treaties.*** In addition, s 51(29) authorises federal legislation on matters intrinsically of international concern or significance, independently of any treaty.<sup>52</sup> The question of jurisdiction over foreign ships or in respect of maritime disputes involving those ships may well be such a matter, although in view of the plenary character of s 51(1) and 51(20) it may not be necessary to rely on this aspect of s 51(29).
- ***Matters Geographically External to Australia.*** In *New South Wales v Commonwealth*<sup>53</sup> (the Seas and Submerged Lands Act Case) the High Court held that the territory of the States did not include the ‘high seas’, in the sense of that term explained earlier,<sup>54</sup> but stopped at low-water mark, or at the line closing a bay or gulf the waters of which are inter fauces terrae at common law. The Coastal Waters (State Title) Act 1980 vested in the States ‘the same right and title to the property in the sea-bed

beneath the coastal waters of the State ... as would belong to the State if that sea-bed were the sea-bed beneath waters of the sea within the limits of the State'.<sup>55</sup> However the Act did not purport to extend the limits of any State (s 8(a)). Similarly the Coastal Waters (State Powers) Act 1980 empowers States to legislate for their coastal waters as if those waters were 'within the limits of the State'. (s 5(a)). But this is stated not to extend the limits of any State (s 7(a)), or to

give any force or effect to a provision of a law of a State to the extent of any inconsistency with a law of the Commonwealth or with the Constitution of the Commonwealth of Australia or the Commonwealth of Australia Constitution Act (s 7(c)).

Thus the Acts do not purport to affect Commonwealth legislative power over 'coastal' or other waters external to Australia. In *New South Wales v Commonwealth*, a majority of the Court held that the Commonwealth had, under s 51(29), plenary legislative power over matters geographically external to Australia. In Justice Jacobs' words,

the Commonwealth has the power to make laws in respect of any person or place outside and any matter or thing done or to be done or prohibited to be done outside the boundaries of the Commonwealth.<sup>56</sup>

On this view the Commonwealth could, if necessary incorporating by reference the law applicable to events or transactions on the 'high seas',<sup>57</sup> or in other countries, confer jurisdiction under s 76(ii) with respect to all such matters or events, whether or not they also constitute matters of 'admiralty and maritime jurisdiction' in some narrower sense.

**78. *Trading, Financial and Foreign Corporations.*** Section 51(20) of the Constitution enables the Commonwealth to make laws with respect to

Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

Although the outer limits of the corporations power are not yet fixed, a number of things are clear. Section 51(20) is not limited, as is s 51(1), to interstate or overseas trade.<sup>58</sup> It extends to regulating at least the trading and financial activities of trading and financial corporations, and activities incidental thereto.<sup>59</sup> The view adopted by at least three judges of the High Court in *Commonwealth v Tasmania*<sup>60</sup> is that the power extends to allow regulation of the external affairs of the relevant corporations generally.<sup>61</sup> Except in the case of small pleasure boats and yachts not operated for hire, most sea-going vessels which would be the subject of admiralty proceedings in Australian courts are owned or operated by foreign, trading or financial corporations within the meaning of s 51(20).<sup>62</sup> Companies which own or operate ships and which are incorporated in Australia would normally, if not invariably, be trading or financial corporations within the meaning of s 51(20) either because of their current activities or because they were formed for trading or financial purposes.

**79. *Other Relevant Powers.*** Other relevant federal powers might include:

- *Defence.* Section 51(6), which refers to 'the naval and military defence of the Commonwealth would authorise the enactment of federal legislation on prize, and the conferral of jurisdiction over prize under that legislation'.<sup>63</sup>
- *Insurance, other than local State insurance.* To the extent that there is doubt as to whether disputes as to marine insurance are matters of 'admiralty and maritime jurisdiction',<sup>64</sup> the power to legislate for 'insurance, other than State insurance, also State insurance extending beyond the limits of the State concerned' provides a potential source of power (s 51(14)). The Marine Insurance Act 1909 (Cth) relies on this power. Section 4 provides that:

The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall apply to contracts of marine insurance.

Jurisdiction over contracts of marine insurance could, therefore, be included in admiralty jurisdiction pursuant to s 76(ii), and independently of s 76(iii). This would exclude State marine insurance not extending beyond the limits of the State,<sup>65</sup> but there must be few such contracts of marine insurance not so extending.

- *Bankruptcy and insolvency.* Proceedings for the arrest and sale of a ship in admiralty are a form of maritime bankruptcy. Where claims against a ship cannot be met, the regulation of priorities among competing claims would be a matter with respect to insolvency (s 51(17)).<sup>66</sup> It would therefore be within federal power to enact a provision, such as s 11 of the Admiralty Jurisdiction Regulation Act 1983 (SAf), providing a comprehensive ranking of claims in admiralty jurisdiction.<sup>67</sup>
- *Federal Territories.* Section 122 gives the Commonwealth plenary power to make laws with respect to the various territories of the Commonwealth, including laws conferring jurisdiction on Territory or federal courts with respect to matters arising in the Territory or under laws made with respect to the Territory.

## The Relation between Legislative Power and Jurisdiction

80. ***The Basic Principle.*** Section 76(ii) of the Constitution, in conjunction with s 77(i) and (iii), gives power to the Commonwealth Parliament to confer on federal or State courts jurisdiction in any matter ‘arising under any laws made by the Parliament’. Where, as with the Shipping Registration Act 1981 (Cth), the Marine Insurance Act 1909 (Cth) or the other federal maritime legislation referred to in para 60-5, a ‘law made by the Parliament’ is in existence, there is no difficulty in conferring jurisdiction over matters arising under that law on any court with admiralty jurisdiction, and providing that the s 76(ii) jurisdiction is to be exercised in the same way as jurisdiction under s 76(iii). In this way any limitations there may be on the meaning of ‘admiralty and maritime jurisdiction’ in s 76(iii) could be circumvented. The problem is greater, however, where no substantive federal law has been enacted (notwithstanding the power to do so). Is a ‘bare’ grant of jurisdiction sufficient under s 76(ii) to create a ‘matter arising under’ a law made by the Parliament? In the United States this question is answered in the affirmative, on the basis that the conferral of federal jurisdiction is without more a method of regulating the subject matter and is accordingly within Congressional power.<sup>68</sup> This theory of ‘protective jurisdiction’ has never been relied on by Australian courts, and its validity under the Commonwealth Constitution is doubtful.<sup>69</sup> But the High Court has been very ready to imply from apparently jurisdictional provisions some substantive rule (which might only be a choice of law rule) to which the conferral of jurisdiction could be attached and which would give rise to a matter under s 76(ii).<sup>70</sup> Cowen and Zines comment that

It may be that in substance there will be little difference in the two approaches [viz ‘protective jurisdiction’ or the implication of a substantive rule] depending on how far the High Court is prepared to go in implying rules of substantive law. There would be no practical difference if the rule that is implied is an ambulatory provision incorporating State statutory or common law ... It would, however, obviously be wise for the draftsmen to provide expressly for the application of the common law or statutory law of a particular State. If that is done, it would appear that an object similar to that of ‘protective jurisdiction’ can be achieved. It is for this purpose, of course, necessary that the matter in respect of which jurisdiction is granted is one that can be controlled under Commonwealth law.<sup>71</sup>

This technique could be used to ensure that any possible gaps in s 76(iii) were filled. As was concluded in para 70, s 76(iii) is, so far as subject matter is concerned, probably broad enough for the support of s 51 powers not to be needed. Two areas where such powers may be needed, however, are maritime liens and statutory rights of action *in rem* which have the effect of binding shipowners with respect to liabilities of other persons operating or dealing with the ship (for example various kinds of charterers). It can be argued that maritime liens are substantive rights, so that any legislative provision which goes beyond providing a jurisdiction to enforce maritime liens (or related procedural matters such as time limits) goes beyond the scope of a jurisdictional power such as s 76(iii), and needs the support of a substantive legislative power. It could also be argued that the creation of a statutory right of action *in rem* with respect to a ship in respect of the liability of someone other than the shipowner has a ‘substantive’ aspect. If the relevant person liable *in personam* on the claim does not satisfy the liability, the ship may be sold, and to this extent the owner, though not personally liable, is directly affected. So far as maritime liens are concerned, the argument has some force, although the classification of maritime liens as ‘substantive’ or ‘procedural’ is not settled,<sup>72</sup> and many of the aspects of maritime liens which need clarification are undoubtedly procedural in character.<sup>73</sup> Moreover, maritime liens were central in 1900 to the idea of admiralty jurisdiction and remain an important part of it: a power to define and regulate admiralty jurisdiction could easily be held to extend to all aspects of maritime liens.<sup>74</sup> Whatever the position with respect to maritime liens, the position with respect to statutory rights of action *in rem* seems clear. There was no fixed rule in 1900 that ships could only be arrested on a statutory right in respect of owners’ liabilities.<sup>75</sup> In many situations the service or arrest of a ship on a

statutory right has important effects on other persons interested in the ship; this is especially so where the ship is sold. Yet it is clear that these situations, which have always been a feature of statutory rights of action *in rem*, fall within the scope of s 76(iii). The extent to which it is necessary to rely on substantive legislative powers with respect to maritime liens or statutory rights of action *in rem* will of course depend on the precise proposals. These questions will accordingly be dealt with in chapter 8, where proposals for reform in this area are made. As a general matter it can be concluded that there is power under s 76(iii) to create statutory rights of action *in rem* on a basis other than the *in personam* liability of the owner of the ship in question, and that at least some aspects of maritime liens (including jurisdictional, procedural and incidental aspects) can be dealt with, although whether new maritime liens may be created is an open question.

**81. Federal Power to Repeal Imperial Admiralty Legislation Applying to Australia.** Section 2(2) of the Statute of Westminster 1931 (UK) provides that

No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

As a result of the Statute of Westminster Adoption Act 1942 (Cth), the Parliament of the Commonwealth has power to repeal United Kingdom Acts so far as they are part of Australian law. It is now clear that this is an independent power of repeal which is not limited to repeal of laws which the Commonwealth Parliament has power itself to enact under s 51 of the Constitution.<sup>76</sup> In *Kirmani v Captain Cook Cruises Pty Ltd*,<sup>77</sup> the High Court held that the limitation of liability provisions of the Merchant Shipping Act 1894 (UK) had been wholly repealed by the Navigation Amendment Act 1979 (Cth) s 104, although the 1979 Act did not deal with limitation of liability involving ships which were not ‘seagoing’ ships. While different members of the majority reached this conclusion for slightly different reasons, it follows from the decision that the Commonwealth’s power of repeal extends to the repeal of Imperial legislation such as the Colonial Courts of Admiralty Act 1890 (UK). It is possible that the decision of one member of the majority (Justice Brennan) would have been different if the States had had the power themselves to repeal the legislation in question, and that the decision may therefore not be applicable now that the Australia Act 1986 (Cth), and its United Kingdom counterpart, have been enacted and have come into force.<sup>78</sup> However, even on the narrower view of Commonwealth power (taken by the minority in Kirmani’s case), the Commonwealth has ample power to repeal the Colonial Courts of Admiralty Act 1890 (UK), through the combination of its power to confer admiralty and maritime jurisdiction on Australian courts and its substantial legislative authority over admiralty and maritime matters generally. A valid conferral of federal jurisdiction on an Australian court will be regarded as excluding by implication any non-federal (that is, State or Imperial) jurisdiction with respect to the same matter.<sup>79</sup> Section 2(2) of the Statute of Westminster 1931 (UK) makes it clear that this form of implied repeal by the enactment of inconsistent legislation is not the only method of excluding unwanted Imperial legislation. The method of direct repeal is also available.

## Conclusion

**82. Comprehensive Federal Power.** The Commonwealth Parliament has sufficient power

- to confer ‘admiralty and maritime jurisdiction’ on appropriate Australian courts and to regulate the exercise of that jurisdiction in appropriate ways. The phrase ‘admiralty and maritime jurisdiction’ in s 76(iii) of the Constitution should be broadly construed, though its outer limits remain unclear;
- to confer jurisdiction with respect to a wide variety of ‘maritime’ causes which may or may not fall within s 76(iii), by an exercise of substantive Commonwealth legislative power under various paragraphs of s 51, especially s 51(1) and (29) of the Constitution. A general choice of law provision would be sufficient to support such an exercise of power under s 76(ii);
- to repeal Imperial Acts dealing with admiralty jurisdiction so far as they apply to Australia.

In the light of this conclusion, arguments for some form of co-operative legislation between the States and the Commonwealth are unnecessary.<sup>80</sup> The Commonwealth itself has the power to enact admiralty legislation

for Australia.<sup>81</sup> However it cannot be determined in the abstract whether s 76(iii) standing alone would be sufficient to support such legislation, since the boundary line between ‘jurisdiction’ and ‘substance’ in admiralty is an elusive one. As was pointed out in para 80, this question arises principally in the context of the relationship between *in rem* and *in personam* liability in admiralty, and will be discussed in chapter 8.

# PART III: CIVIL ADMIRALTY JURISDICTION: REFORM

## 6. Reform of Admiralty Jurisdiction

### The Need for Reform

83. **A Broad Consensus.** Everyone who has considered the present state of admiralty jurisdiction in Australia recognises the need for reform.<sup>1</sup> The Zelling Committee were ‘not aware of any opinion opposed to Australia now having its own admiralty legislation’.<sup>2</sup> Nor has this Commission received any suggestions that the current position should be maintained. This is not surprising, given the unsatisfactory state of Australian admiralty jurisdiction outlined in Part 11. At the level of detail there is room for disagreement as to exactly what is required. But it is clear that reform should go beyond merely clarifying the existing (that is, 1890) position. What is required is an admiralty jurisdiction that is both certain and accessible, and relevant to Australian interests in the 1980s, not the 1890s. The proposed reforms should take the form of a new Act. The alternative would be to add a fresh part or division to the Navigation Act 1912 (Cth). But it is generally accepted that that Act is itself long overdue for reform.<sup>3</sup> It has already suffered from too much patchwork amendment and clarity is unlikely to be achieved by making further substantial alterations to it. The question whether and to what extent jurisdictional provisions already in that Act should be transferred to the proposed legislation will be considered later in this Report, and especially in chapter 13. Here it is sufficient to recognise that a new Admiralty Act is necessary.

### Reform or Abolition of Admiralty?

84. **An Unnecessary Jurisdiction?** In formulating proposals for the reform of admiralty jurisdiction in Australia it is important to be aware of several constraints. If one were to design a legal system starting with a clean slate it might not be necessary to create any distinct category of admiralty jurisdiction. As exercised in comparable overseas countries, modern admiralty jurisdiction appears both overinclusive and underinclusive. For example, a local resident drives a truck down to a local fishing port, goes fishing for the day in a trawler, returns, loads the catch in the truck and drives to market. If the trawler collides with someone or something the very plaintiff-oriented remedy of proceedings *in rem* will be available. If it is the truck which is involved in a collision, the only remedy will be to proceed *in personam*. It is difficult to defend this on rational grounds. Why should locally-owned ships and their owners not be subject to the same jurisdictional principles as other locally-owned forms of transport? Equally, admiralty can be underinclusive because it only provides remedies in respect of maritime claims. The local resident who deals with foreign-owned aircraft, or, indeed with any foreign party who is only temporarily within the jurisdiction, is denied the ability to proceed *in rem* or by way of pre-judgment attachment (subject to the possible availability of a Mareva injunction<sup>4</sup>). If arrest of ships is such a beneficial remedy against foreign defendants, why should arrest not be available against other forms of wrongdoing transport?<sup>5</sup> Were there a clean slate to begin with it would be arguable that the relevant focus should not be ships or maritime claims. It might be more appropriate to select as a focus foreign defendants, or, perhaps more precisely, foreign defendants whose assets are potentially elusive and who are beyond the easy reach of local courts taking into account reciprocal arrangements for service of process and enforcement of judgments. Within such a general approach remedies could be devised within the general jurisdiction of courts which were adequate to cater for any special legal problems thrown up by ships and by maritime commerce.

85. **Abolition of Admiralty?** The question is then whether admiralty should simply be abolished as a separate jurisdiction. One advantage has already been indicated: abolition of admiralty would enable reform to focus on what appears to be the main area of concern, elusive foreign defendants, unfettered by the need to remain within a framework which, mainly for historical reasons, focuses on ships, whether local or foreign. It can be argued that it is impossible to achieve any lasting effective reform based on an incorrect foundation. As long as admiralty remains a small and rather esoteric jurisdiction, problems will continue to occur along the boundary with the general jurisdiction of courts. Chapter 12 details a range of problems which exist at present concerning Mareva injunctions, limitation of actions, insolvency, common law liens and statutory rights of detention, and pre-judgment interest.<sup>6</sup> It can be argued that satisfactory solutions to these problems are not possible while admiralty remains a separate jurisdiction, and that even if satisfactory solutions could be found to the present problems, those solutions would not last. Those responsible for the development of

the general law both in England and Australia have often acted without regard to admiralty, or at least without a proper understanding of its particular rules and idiosyncracies. This is likely to continue to happen. Arguably reform should remove rather than preserve a jurisdiction whose existence is largely the result of historical accident. A distinct jurisdiction to deal with ships is not an essential part of a modern legal system; many civil law jurisdictions in Western Europe have no counterpart to admiralty and its unique remedy of the action *in rem*.<sup>7</sup> It is not clear how much longer English admiralty will retain its distinct characteristics as the United Kingdom becomes more closely tied to Europe.<sup>8</sup> Despite these and other arguments, however, no support at all has been forthcoming for such an approach. One reason is that this would probably involve adopting some other basis for the assertion of jurisdiction over foreign defendants, eg by way of *saisie conservatoire* or attachment *ad fundam jurisdictionem* (both forms of seizure of property in order to procure the appearance of an absent defendant). This could involve major, and potentially controversial, changes to the existing structure of civil jurisdiction in Australia. Except in maritime cases, Australian interests do not support the expansion of jurisdictional claims based only on the presence of assets within the jurisdiction (where the cause of action arose elsewhere). Such jurisdictional claims are (again with the exception of maritime claims) also controversial internationally. On the other hand, in the specific area of maritime claims, admiralty jurisdiction does provide a convenient and acceptable basis for cases to be brought before Australian courts. It avoids problems of service on foreign defendants, and any requirements of a nexus between Australia and the cause of action, and it provides a way of obtaining tangible security, or a guarantee in lieu of security, for the claim. In any event the Commission is not in a position to start all over again. This is reflected in its Terms of Reference<sup>9</sup> which both limit the inquiry to admiralty matters and presuppose the continued existence of a distinct jurisdiction. The Constitution itself in s 76(iii) makes a similar assumption. The long history of admiralty as a distinct jurisdiction has created international business expectations, arrangements and practices that rely on the fact that jurisdiction will be asserted over ships and shipowners in special ways. For these reasons it is desirable to accept the broad contours of what is traditionally and internationally accepted as falling within admiralty jurisdiction. Within the broad framework of what is meant by admiralty jurisdiction the prime need appears to be for clarification, rather than a root and branch reform involving the abolition of admiralty jurisdiction and a restructuring of the general remedial powers of courts.

86. **Principles of Reform.** If the approach outlined in para 85 is pragmatic, it is not devoid of principle. Admiralty courts have some remedies and procedures not possessed by other courts. A subject matter should only fall within that jurisdiction if it requires the advantages of these remedies and procedures. Thus the unique features of admiralty jurisdiction must be identified. In measuring the extent to which these features are necessary for any particular subject matter regard must be had to international constraints. Many of the special features of admiralty have the effect of improving the position of the local supplier of goods and services, salvor, repairer, crewman and so forth vis-a-vis the foreign shipowner. Shipowners and those countries whose policies are influenced by shipowners resist the expansion of admiralty remedies over fresh subject matter. Those countries relying on foreign vessels for their maritime commerce and having few local shipowners tend to seek an expansion of admiralty remedies. The result of this tension has been a somewhat ragged compromise. Solutions going to the extremes of favouring either shipowners or those dealing with ships are not likely to be internationally acceptable. But there is considerable room between the extremes. This Report sets out an appropriate statement of the Australian national interest and, in the light of that interest, seeks to determine an appropriate position between the extremes. Particular points can be resolved by measuring their consistency with this position.

## Unique Characteristics of Admiralty

87. **Three Distinctive Features.** Before dealing with specific questions of reform it is necessary then to identify the special characteristics of admiralty, and to articulate an Australian national interest with respect to admiralty, within internationally acceptable limits, which will help in the assessment of proposals developing or restating these special characteristics. Apart from any more general characteristics it may have as a specialised jurisdiction for the ‘maritime industry’, there are three specific and distinctive features which apply in admiralty jurisdiction. These features should primarily determine the ambit of Australian admiralty jurisdiction, not, as in the United States, a focus on the maritime industry.

88. **An Accepted Jurisdictional Foundation.** The key distinguishing feature of admiralty jurisdiction is the ability it provides to proceed *in rem*. This has two aspects. The first is jurisdictional. The mere fact that the

*res* is present within the territory confers jurisdiction on the local admiralty court, irrespective of where the cause of action arose.<sup>10</sup> This is internationally accepted as not amounting to an exorbitant assertion of jurisdiction.<sup>11</sup> Admittedly there has been some international pressure to replace the mere presence of the *res* with a requirement that one of a number of more specific jurisdictional links be present. But this has occurred as part of a compromise agreement by treaty in particular areas and does not threaten the basic point.<sup>12</sup> The acceptance by the Anglo-Australian common law of something akin to the United States doctrine of *forum non conveniens*,<sup>13</sup> while in effect adding a requirement to that of mere presence of the *res*, nonetheless leaves the basic point intact. Staying an action on the ground that a foreign forum would be more appropriate is an exercise of jurisdiction, not a denial that jurisdiction exists.<sup>14</sup>

89. **Security for Maritime Claims.** The second aspect of a proceeding *in rem* is that from the moment of arrest, the plaintiff acquires a security for the claim in the form of the *res*. The value of the *res* may be insufficient to meet the full claim, or others with a greater priority may leave no residue for the plaintiff, so that the security is far from perfect. But the plaintiff is protected from the various risks of loss that can arise between serving a writ and obtaining judgment, such as the defendant absconding leaving no assets, becoming bankrupt or dissipating those assets. In practice, the arrest of the *res* almost invariably induces the defendant immediately to put up bail or provide other security acceptable to the plaintiff. It often induces a settlement of the claim itself. The recent development of the Mareva injunction as a general remedy has not removed the uniqueness of the security aspect of arrest *in rem*.<sup>15</sup> Hence the security aspect remains a key distinguishing characteristic of admiralty jurisdiction.

90. **Priorities in Admiralty.** A further feature of admiralty jurisdiction is that a set of general equitable guidelines prevails in admiralty to determine priorities where the value of the arrested *res* is insufficient to satisfy all claims. A claim arising out of a particular subject matter may well fare differently under admiralty than under the general law of insolvency.<sup>16</sup> Hence, if a particular type of claim would be given a higher priority if brought in admiralty, it is relevant in deciding whether that type of claim should be within admiralty jurisdiction to consider the effect on priorities.

## Australia's National Interest

91. **The Need for Balance.** There are two broad factors which have to be taken into consideration in calculating Australia's interest in the reform of admiralty jurisdiction: the particular interests of those engaged in international shipping in Australia, and the international acceptability of whatever position is proposed.

92. **Foreign Defendants the Primary Concern.** On the first point, the international focus of admiralty jurisdiction should be paramount. It may well be desirable that claims involving local pleasure craft, local fishing boats, ferries and the like should be able to be brought within the scope of a reformed admiralty jurisdiction. But the rationale for a distinct admiralty jurisdiction has historically always been, and should continue to be, to deal with overseas ships and claims that arise in connection with them. The unique characteristics of admiralty are largely directed to the situation where the shipowner or the defendant is outside the territory and has no assets within the jurisdiction apart from the ship itself. As Australia is made up of a number of jurisdictions, local claimants may be able to avail themselves of admiralty jurisdiction to deal with defendants in another State or Territory. But this is very much an incidental benefit and should not significantly influence the proposed legislation. Were inter-State concerns paramount, the appropriate direction for reform would be the Service and Execution of Process Act 1901 (Cth), the Act designed to overcome problems associated with pursuing defendants across State or Territory borders. A further aspect of admiralty which should not be allowed to dictate the direction of reform is in personam jurisdiction in admiralty. This is useful and should not be disparaged. But the uniqueness of admiralty lies in the action *in rem*. Hence most of the discussion which makes up the remainder of this Report is focused on *in rem* proceedings.

93. **Domestic Interests.** Australia's 'basic maritime transport policy orientation' is dictated by its 'status as a shipper rather than as a maritime nation ... as a user rather than supplier of shipping services'.<sup>17</sup> Only a very small proportion of the total cargo movements into and out of Australia is carried in Australian flag vessels.<sup>18</sup> It seems highly unlikely that this situation will change significantly despite some Government interest in increasing the size of the Australian merchant fleet,<sup>19</sup> and despite the entry into force of the UNCTAD Liner

Code Convention.<sup>20</sup> No one suggests that Australian flag vessels are about to engage in tramp shipping operations between foreign ports.<sup>21</sup> At present a significant proportion of Australia's overseas trade is carried in ships registered in 'open registry' or 'flag of convenience' states.<sup>22</sup> While not all open registry ships are deserving of the criticism commonly heaped upon them,<sup>23</sup> it is nonetheless the case that such vessels are far more likely to be involved in legal disputes than the general run of merchant ships.<sup>24</sup> Despite considerable international pressure it is most unlikely that open registry ships will disappear from the international shipping scene.<sup>25</sup> Australia therefore has a powerful interest in using the unique features of admiralty law so as to enable those in Australia who have dealings with foreign vessels to have a reasonable prospect of bringing the dispute before an Australian court and of recovering on any judgment obtained against the ship owner or charterer. On the information available it seems that the need to be able to proceed *in rem* is greatest with respect to claims for the supply of goods and services in Australian ports to foreign vessels, and claims for damage to cargo carried aboard those vessels. The person liable, whether ship owner or charterer, is often difficult to locate and when found often proves to be a \$2 company with elusive principals and no assets other than the vessel itself. It can often be unrealistic to litigate against such a defendant *in personam* and hope actually to recover on any judgment which may be obtained.

94. **International Constraints.** If the interest of potential plaintiffs is in having the widest possible jurisdiction *in rem*, there are international constraints on how far this can be done. Arrest *in rem* in admiralty carries with it in the common law world an assertion of jurisdiction to determine the merits. This is accepted internationally as an exception to the general principle that arrest *ad fundandam jurisdictionem* is regarded as an exorbitant assertion of jurisdiction.<sup>26</sup> But a wholesale expansion of the ability to arrest *in rem* in admiralty may run the risk of being seen abroad as exorbitant. The sale of a vessel in admiralty proceedings is generally treated internationally as valid and as giving a clear title to the ship. But this would not necessarily apply if the international perception was that, in the guise of admiralty proceedings, Australia was in effect allowing a remedy of arrest *ad fundandam jurisdictionem*.<sup>27</sup> The need for international uniformity also imposes a restraint. It is to the benefit, not only of shipowners but also of all parties engaged in international maritime trade, if ships entering Australian ports are not subject to a legal regime which differs widely and unjustifiably from the international norm. Unfortunately, although English judges have sometimes used expressions implying that there is a 'maritime law of the world',<sup>28</sup> there is a conspicuous lack of uniformity on maritime law even between western countries.<sup>29</sup> As a consequence there is considerable scope for choice in considering what should be Australia's position. To assess just how much scope there is, it is useful to note first the position with respect to liens, because whatever additional characteristics it may have, every maritime lien gives rise to a right of arrest.<sup>30</sup> One cannot do better than to quote Lords Salmon and Scarman on the difficulty of a policy of uniformity.

Unfortunately the maritime nations, though they have tried, have failed to secure uniformity in their rules regarding maritime liens: see the fate of the two Conventions of 1926 and 1967 ... each entitled (optimistically) an International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages. Though it signed each of them, the United Kingdom has not ratified either of them ... In such confusion policy is an uncertain guide to the law. Principle offers a better prospect for the future.<sup>31</sup>

The common law world itself shows a great diversity, with only a handful of maritime liens recognised in England and Australia, but a large number in the United States.<sup>32</sup> By no means all rights of arrest *in rem* in Anglo-Australian law depend upon the existence of a maritime lien.<sup>33</sup> But those countries which recognise a large number of maritime liens can hardly complain if Australian law gives a statutory right of arrest having only some of the characteristics of a maritime lien over claims which elsewhere give rise to full maritime liens. Apart from the Maritime Lien Conventions the main text of interest is the 1952 Arrest Convention. Lord Diplock recently referred to 'international comity as evidenced by the wide acceptance' of this Convention.<sup>34</sup> But it should be noted that acceptance is not particularly wide.<sup>35</sup> As at 1 January 1986 there were 57 states party to the Convention<sup>36</sup> including many states of little significance in world shipping but also including Belgium, Federal Republic of Germany, France, Greece, Italy, the Netherlands, the United Kingdom and Yugoslavia. None of the major open registry states is a party. Nor is the United States or the Soviet Union. In Australia's region, Japan, China (including Taiwan), India, the ASEAN states, New Zealand and the Republic of Korea are not parties. Overall, only 6 of the 20 largest ship-owning nations are parties.<sup>37</sup> Australia is not a party and does not seem to have seriously considered becoming a party.<sup>38</sup> But apart from the number of states supporting the Convention there are other problems with it. These will be discussed in more detail below in particular contexts. In general the Convention represents a compromise between civil and common law regimes of maritime law. In particular

The provisions of art 3 represented a compromise between the wide powers of arrest available in some of the civil law countries (including for this purpose Scotland) in which jurisdiction to entertain claims against a defendant could be based on the presence within the territorial jurisdiction of any property belonging to him, and the limited powers of arrest available in England and other common law jurisdictions, where the power to arrest was exercisable only in respect of claims failing within the Admiralty jurisdiction of the court and based on a supposed maritime lien over the particular ship in respect of which the claim arose.<sup>39</sup>

In achieving this compromise the drafting is not always as clear as it might be,<sup>40</sup> and there are important divergences between the equally authentic French and English texts. Some merely reflect inapt translation<sup>41</sup> but others reflect the difficulty of conveying some of the concepts used in the Convention into language familiar to the English admiralty lawyer.<sup>42</sup> There is a further difficulty in that not all the claims which give rise to a maritime lien under the 1926 Liens Convention are listed in what purports under article 2 to be the exclusive list of claims (art 1(1)) in the 1952 Arrest Convention for which a ship may be arrested.<sup>43</sup> Even where they are listed, the language used is not identical in both Conventions, thereby giving rise to doubts as to which text is authoritative.<sup>44</sup> There are also claims which give rise to maritime liens in the municipal law of some states which are not included in the Arrest Convention's list of maritime claims.<sup>45</sup> In addition, some of the provisions of the 1952 Arrest Convention are difficult to reconcile with other, more recent, maritime conventions.<sup>46</sup> In other words, even if it enjoyed wider support, there are difficulties with relying on the 1952 Arrest Convention as a satisfactory guide to what is internationally acceptable. Finally, the Convention is undergoing revision, a process which is itself lengthy, and which is likely to lead to further delays in ratification of the text either in its original form or as revised.<sup>47</sup> Despite these criticisms close attention has been paid to the Convention, and to the proposed revisions, in deciding how far Australia should go in extending the ability to arrest *in rem*.

95. **Overseas Legal Sources.** A different sort of constraint is imposed by the fact that, measured in terms of admiralty litigation, Australia is a small country. Even when the outmoded aspects and the obscurities of the present law have been removed this is likely to remain true. There would be some advantage to be gained if Australia did as Malaysia, Singapore and New Zealand have done and copied closely the relevant English admiralty legislation. Australian courts and practitioners would be able to obtain guidance not only from the large body of judicial decisions in England and these other countries but also from English textbooks and other writings. Yet there are difficulties in adhering closely to the English model. The balance which it strikes between shipper and shipowner interests is not, as already noted, one which is necessarily in Australia's interests. The admiralty provisions of the Supreme Court Act 1981 (UK) do not form a complete statement of the English law on admiralty jurisdiction.<sup>48</sup> The legislation leaves many questions to be answered, a few by reference to other legislation, but most by looking to reported cases, many of which date back to the 19th century. If the proposed legislation were to attempt a complete statement of the laws relevant to admiralty jurisdiction it would avoid recourse to this case law, not all of which is either readily accessible to the Australian practitioner or easily interpreted once found. There is a risk that such a restatement would isolate Australian admiralty jurisdiction from the guidance to be obtained from overseas courts and writers working with reference to that case law. On the other hand, where the present judicially-created law on admiralty jurisdiction is obscure, what is required is clarification by reference to principle and policy rather than attempting a faithful adherence to the 19th century authority. The issue is much wider than simply one of adhering to an overseas model. It raises the whole question of codification versus the common law (including in this context admiralty decisions). The general approach that has been taken in this Report is that there is a need to strike a balance between following the English legislation and seeking to clarify and simplify the law. In some respects admiralty concepts, and even the meaning of specific words, are well settled, and there is much to be gained from simply incorporating or adopting them. In others, however, the law is uncertain, obscure or unsatisfactory. Where this is so, it is desirable to spell out the solution in legislation, so as to avoid litigation and to enable advice to be given confidently and without what are essentially jurisdictional distractions. This approach does not involve either the direct copying of overseas texts or a complete codification of admiralty jurisdiction. Exactly where the line is to be drawn between these alternatives cannot be determined in the abstract, but depends on the particular issue or context. Reference will therefore be made to this underlying question as it arises in this Report.

96. **Conclusion.** To summarise, Australia has distinct interests in admiralty and maritime jurisdiction, in view of its position as a country of shippers rather than shipowners, and as a country dependent on foreign shipping for much of its import and export trade. But these interests operate at different levels and to some extent in different directions. At the most general level, Australia's position supports maintaining admiralty

jurisdiction *in rem* (a universal jurisdiction based on local service on the *res*) as an exception to a general principle of territorial jurisdiction.<sup>49</sup> More specifically, there is a strong interest in providing effective local remedies for persons dealing with ships, whether as importers, ship suppliers, crew members or otherwise. But other factors counteract this, to some degree at least. Excessive regard to the interests of plaintiffs may carry the risk that Australia will be unattractive to foreign shipping, and that freight rates will be adversely affected. Australian admiralty jurisdiction needs to remain within generally acceptable limits, to ensure recognition of judgments and judicial sales in admiralty and to maintain the position of admiralty as an exceptional and special jurisdiction. Obviously these arguments are of a somewhat general kind, leading to no very precise recipe for Australian legislation.<sup>50</sup> An appropriate balance can be struck in various ways and at various levels. For example, a broad admiralty jurisdiction is desirable, but the interests of ship owners and financiers may be sufficiently met through procedural means (including guarantees against vexatious arrest, and machinery for providing alternative forms of security). Finally, it is in the interests of all that admiralty jurisdiction be stated in clear, precise and readily accessible form.

## 7. The Subject of the Action *In rem*

97. **Introduction.** The key feature of admiralty jurisdiction is the action *in rem*. This chapter discusses the subject of an action *in rem*, the *res*. The *res* is typically a ‘ship’ and the chapter begins by discussing the definition of ship as a subject of an action *in rem* (para 98-108). In some situations the *res* may consist of cargo, freight, or wreck. Some discussion is necessary therefore of proceedings *in rem* against property other than ships (para 109-10). A third issue is whether these general definitions of *res* need to be qualified by reference to the geographical location of the *res*, or of the cause of action (para 111-5).

### The Definition of ‘Ship’

98. **The Need for Definition.** The term ‘ship’ is used for two purposes in defining admiralty jurisdiction. First, it provides a convenient means of describing the subject matter of admiralty jurisdiction. Heads of admiralty jurisdiction operate by reference to ships, for example, ‘goods supplied to a ship’ or ‘damage done by a ship’. The reference to ship effectively restricts the jurisdiction to maritime matters. The second use of ‘ship’ is to identify the most important of the types of *res* against which *in rem* proceedings can operate. Both uses are considered in this chapter, as the definition of ‘ship’ is common to both, and there appears to be no reason to define it differently in its different contexts.

99. **Vessels Used in Navigation.** At present ‘ship’ is defined for purposes of Australian admiralty jurisdiction by the Admiralty Court Act 1861 (UK) s 2 as including ‘any description of vessel used in navigation not propelled by oars’. This simple definition may be compared with that in the Navigation Act 1912 (Cth) s 6(1):

“ship” means any kind of vessel used in navigation by water, however propelled or moved, and includes -

- (a) a barge, lighter or other floating vessel;
- (b) an air-cushion vehicle, or other similar craft, used wholly or primarily in navigation by water; and
- (c) an off-shore industry mobile unit,

but (except in section 192B, in Division 3, 4, 5, 6, 10, 11 or 13 of Part IV, in Part VII or IX, in Division 1, 3, or 4 of Part X or in Part XI) does not include an off-shore industry mobile unit that is not self-propelled ...

The added complexity of the Navigation Act definition was introduced largely to deal with hovercraft and rigs (off-shore industry mobile units): these are dealt with below. For other aspects of what is included in ‘ship’ the existing law provides a better guide, perhaps because dumb barges, pontoons, floating cranes, buoys and the like have been about much longer than off-shore oil rigs. Moreover the courts have taken a broad view of what constitutes a ‘ship’ for the purposes both of admiralty jurisdiction and the Merchant Shipping Act 1894 (UK) and its Australian counterpart, the Navigation Act 1912 (Cth).<sup>1</sup> The Navigation Act definition of a vessel is adequate given this background of case law, and should be adopted. Whatever problems are created by such novelties as lighter-aboard-ship vessels can be resolved by the courts within the framework provided by this definition. An alternative would be to give a large number of instances of what is a ship so as to reduce any residual uncertainty, but this seems both cumbersome and unnecessary. However two specific clarifications are desirable. Whatever the position with vessels under construction but not yet launched,<sup>2</sup> a vessel should be subject to admiralty jurisdiction from the moment of its launch, whether or not it has yet been ‘used in navigation’. The phrase ‘used or constructed for use in navigation’ should be adopted to make this clear.<sup>3</sup> Approaching the other end of the vessel’s life, when it is sunk, stranded or wrecked, the admiralty rule has always been that a ship remains a ship in such cases while it is identifiable as such,<sup>4</sup> and this too could usefully be made clear. Even with these clarifications, a number of specific extensions or exclusions from the definition, to deal with aircraft, seaplanes, hovercraft, rigs, pleasure craft and inland waterways vessels, need to be discussed.

100. **Aircraft and Seaplanes.** The effect of the proposed definition would be to exclude aircraft from admiralty jurisdiction. It has been noted that as a matter of broad principle

... it may be that facilities *in rem* for the enforcement of any claim against owners of, or those in possession of aircraft, should be provided. Aircraft, like ships, do not usually remain for long in any jurisdiction. They generally move out of one into another.<sup>5</sup>

But nowhere has the law developed so as to place aircraft within admiralty for all purposes.<sup>6</sup> On the international level, for example, civil aviation is subject to its own regime of treaties and supervising organisations. The chief reasons for providing admiralty jurisdiction over aircraft are, first, that aircraft may crash over the sea and the maritime salvage regime might be considered appropriate, and secondly, that seaplanes while on water are more like ships than aircraft. At present in Australia there is no legislation dealing with aircraft salvage,<sup>7</sup> though there is an obligation on ships at sea to assist persons in or from an aircraft in distress.<sup>8</sup> In the absence of legislation it seems that admiralty has no jurisdiction to deal with claims for aircraft salvage even where the salvage occurs at sea.<sup>9</sup> Nor is there any common law right to salvage in respect of aircraft. In the United Kingdom this position has been altered as a matter of substantive law by applying maritime salvage law to salvage services rendered to an aircraft, its passengers, crew, apparel or cargo on or over the sea, tidal water or the shores of the sea or tidal water.<sup>10</sup> Jurisdiction over salvage claims arising out of such services is conferred by separate legislation on the Admiralty Court.<sup>11</sup> It appears that the issue of salvage of aircraft at sea rarely arises.<sup>12</sup> In the absence of any demonstrated need the present law appears satisfactory.<sup>13</sup> However, one situation in which aircraft might be brought within admiralty jurisdiction is when, as seaplanes, they behave more like ships than aircraft, that is, when afloat. Legislation in the United Kingdom, New Zealand and Canada gives admiralty jurisdiction in such cases in claims for towage and pilotage.<sup>14</sup> This is done by specific reference to aircraft in respect of such heads of claim, not by extending the definition of a 'ship' to cover aircraft while water-borne. Therefore jurisdiction is not given under other heads of claim (such as collision) which operate solely by reference to 'ship'. If the scope of admiralty jurisdiction is to be primarily determined by reference to the utility of *in rem* proceedings in dealing with foreign based parties, it seems unnecessary to allow flying boats to be brought within this jurisdiction. In England it is said that 'actions *in rem* against aircraft are practically unknown'.<sup>15</sup> The use of pilots in the nautical sense in connection with seaplanes must be a great rarity. Towage of a seaplane whose owner is not resident within Australia would be equally rare now that flying boats are no longer used on international routes. While it is appropriate to treat waterborne aircraft as vessels for some purposes, such as collision regulations,<sup>16</sup> it is unnecessary to bring claims in respect of such aircraft within admiralty jurisdiction.<sup>17</sup> In this context the 1952 Arrest Convention provides an appropriate guide. It leaves all aspects of jurisdiction over aircraft to be regulated by conventions on aircraft. The proposed legislation should adopt the same approach.

101. **Hovercraft.** The position with hovercraft is somewhat different, since they are primarily designed to operate on or adjacent to water, and since they navigate in essentially the same way as ships. Hovercraft are accordingly treated as ships for the purpose of admiralty jurisdiction in a number of overseas countries.<sup>18</sup> There are, it seems, none in regular use in Australia at the moment, but this may change. There is no harm from the international point of view in including hovercraft within the definition of 'ship' for the purposes of admiralty jurisdiction, and it is recommended that this be done. The definition should not extend to hovercraft used only over land, swamp or marshy terrain. The definition of 'vessel' in the Navigation Act 1912 (Cth) s 6 includes '... an air-cushion vehicle, or other similar craft, used wholly or primarily in navigation by water'.<sup>19</sup> This definition, combined with the limitation on claims arising on inland waters,<sup>20</sup> would eliminate the possibility of admiralty jurisdiction covering matters unconnected with the sea.

102. **Oil Drilling Rigs.** Off-shore drilling units present more difficult problems. These spend most of their existence either resting on or moored to the sea-bed, but occasionally move from place to place in ship-like fashion either under tow, or less commonly, under their own power. The 1952 Arrest Convention, the 1926 and the 1967 Liens Conventions, and the 1952 Collision Civil Jurisdiction Convention all fail to define 'ship'. They therefore leave unclear the extent to which they cover off-shore drilling units. The *Comite Maritime International* in 1977 proposed a Draft International Convention on Off-Shore Mobile Craft, which defined 'craft' so as to include off-shore drilling rigs.<sup>21</sup> It would have assimilated such craft to ships or vessels for the purposes of existing Conventions on collisions, salvage, arrest, limitation of liability, liens and mortgages, registration of rights in vessels under construction, and oil pollution where in each case the State party is also a party to the relevant existing Convention. This draft Convention has not yet been submitted to a diplomatic conference of States, let alone opened for signature. If 'ship' is not defined in the proposed legislation the position will be uncertain. Those rigs which work without being anchored to the sea-bed would probably be held to be ships.<sup>22</sup> However submersibles, semi-submersibles and jack-up rigs would

possibly not be regarded as ships.<sup>23</sup> Alternatively, the line might be drawn so as to exclude submersible and jack-up rigs on the basis that these two types of rig can only perform their main function while resting on the sea-bed.<sup>24</sup> But much might turn on the extent to which a court was prepared to be guided by the definition of ‘ship’ in the Navigation Act 1912 (Cth) s 6(1). This defines a ‘ship’ (for the purposes of some parts of the Act) to include ‘an off-shore industry mobile unit’.<sup>25</sup> This expression is in turn defined in s 8(3) as including ‘a structure (not being a vessel) that is able to float or be floated [and] is able to move or be moved as an entity ...’ and which contains drilling equipment as part of its structure. For other parts of the Act an off-shore industry mobile unit is given a more restricted definition, which excludes units that are not self-propelled.<sup>26</sup> But the broader definition applies to those parts of the Act where the overlap with traditional admiralty jurisdiction is greatest, that is, collision, salvage and wreck. The broader definition also applies to other provisions of concern to this Reference, such as powers to detain foreign ships which have caused damage and to order the sale of ships to meet unpaid liabilities of the master or owner under the Act.<sup>27</sup>

103. **The Options.** Given this background one option would be to simply use ‘ship’ without providing any definition directed at oil rigs.<sup>28</sup> While this would probably allow the most mobile types of rig to be the subject of an action *in rem*<sup>29</sup> it would be unlikely to allow the arrest of a jack-up rig. Yet even the latter can raise its legs and sail out of the jurisdiction leaving those with claims against it to pursue its (almost invariably foreign) owner *in personam*. A second option would be to define all types of mobile off-shore rig as ‘ships’ for the purposes of admiralty jurisdiction. This would allow, for example, claims for necessaries to be pursued *in rem*. But it would also allow an action *in rem* for claims for damage done by a ship, including, for example, a blowout during drilling causing oil pollution.<sup>30</sup> While this might seem appropriate, only self-propelled off-shore industry mobile units are treated at present as ships for the purposes of limitation of liability actions.<sup>31</sup> Thus the jack-up rig owner would have the burden of his rig being subject to an action *in rem* without the normally corresponding benefit of being able to limit liability. Even if the limitation regime is extended to rigs which are platforms rather than ship-like hulls, the measurement of tonnage for limitation purposes is not free from difficulty.<sup>32</sup> There may also be difficulties in trying to treat as a ship a rig which is engaged in drilling (as opposed to being moved from one place to another). For example, what would arrest mean: that the rig could not be moved or could not be worked? Those working on the drilling operation would presumably be regarded as its ‘crew’ in the sense in which that term has been traditionally used of people who sign ship’s articles for a voyage.<sup>33</sup> Another option would be to treat rigs of the jack-up, submersible and semi-submersible types as ships only while not on their drilling station. But this would create undesirable boundary problems: ‘such a drilling unit would be an indeterminate animal, subject to laws of limitation, salvage and the like at some times and not at others’.<sup>34</sup> It would also mean that claims which arose while it was drilling could not be pursued *in rem*. Another variation might be to allow claims to accrue against the rig while drilling but allow arrest only when the rig is mobile. But this does not eliminate the difficulties in determining how admiralty concepts like ‘damage done by a ship’ and the like apply to drilling operations so as to give rise to admiralty claims. Yet another approach would be to define ‘ship’ differently for the purposes of different heads of admiralty jurisdiction. There is a precedent for this in the varying definitions used in the Navigation Act 1912 (Cth). Supply of goods and materials to an oil rig could be brought within admiralty while leaving out, say, damage done by a ship. But this would introduce further complications and does not appear desirable. It is not clear upon what basis the types of claims which could be brought in admiralty would be distinguished from those which could not.

104. **Conclusion on Rigs.** The arguments for and against including mobile rigs in admiralty are fairly finely balanced. What can be said is that it is desirable to make the matter clear rather than leave it to be resolved on a case-by-case application of the definition of ‘ship’. Clearly there are many purposes (for example wages, goods supplied) for which rigs should be assimilated to ships. That rigs may not be able to limit their liability under the various limitation conventions is a matter to be dealt with under those conventions, and is not as such a reason for excluding them from admiralty.<sup>35</sup> Many mobile rigs would be classed as ‘ships’ for admiralty purposes, and for the sake of clarity and certainty it is better to extend the class to cover all such rigs. This view was generally supported in submissions and in other views expressed to the Commission.<sup>36</sup> Accordingly the definition of ‘ship’ should specifically include off-shore industry mobile units as defined in the Navigation Act 1912 (Cth) s 8(3).

105. **Pleasure Craft.** In the United States considerable litigation has been devoted to establishing if tort actions arising out of the use of pleasure boats can properly be brought in admiralty.<sup>37</sup> In 1982 the Supreme Court held by a 5:4 majority that they can.<sup>38</sup> The issue has not arisen in other countries such as the United

Kingdom or New Zealand perhaps because, unlike the United States,<sup>39</sup> the rules applied in those countries are much the same whether the action is brought in admiralty or in the general courts.<sup>40</sup> Attempting to distinguish pleasure craft from other types of craft for the purposes of admiralty would be both difficult<sup>41</sup> and undesirable. Especially these days, ‘pleasure craft’ can be large and expensive, fully capable of international navigation. Nothing in the proposed definition should exclude such craft.

106. **Inland Waterways Vessels.** To attempt to extend admiralty jurisdiction to inland waterways vessels seems unnecessary, and may raise constitutional difficulties.<sup>42</sup> A convenient way of achieving this result is to exclude such vessels from the definition of ‘ship’. The Navigation Act 1912 (Cth) s 6 defines an ‘inland waterways vessel’ as a ship used ‘wholly in waters other than the waters of the sea’. The same section defines ‘sea’ as including ‘any waters within the ebb and flow of the tide’. This language would exclude from admiralty jurisdiction all claims against or in respect of such vessels. It would also exclude this type of vessel from the category of *res* which may be arrested. It is recognised that there will be some marginal uncertainty about the definition of ‘inland waterways vessel’. For example, claims might arise in respect of a boat sold (or hired) on a trailer and delivered to the customer on land. Establishing the waters upon which it was used (or intended to be used) might be difficult. But such difficulties are marginal and can be left to the courts.<sup>43</sup>

107. **Equipment, Furniture, Stores, Bunkers.** The definition of ‘ship’ for the purposes of arrest *in rem* traditionally extends to include the ship’s tackle, apparel and furniture.<sup>44</sup> In *The Silia*,<sup>45</sup> Justice Sheen was faced with the argument that the ship’s bunkers were not part of the ship. He said:

What I have to decide is whether the word ‘ship’ in s 3 has a limited meaning, and means no more than the hull, machinery and spare parts, or whether ‘ship’ has a wider meaning and means the hull, machinery and everything on board which is the property of her owners ... I have no doubt that in the context of an action *in rem* the word ‘ship’ includes all property aboard the ship other than that which is owned by someone other than the owner of the ship.<sup>46</sup>

He went on to ask rhetorically why ‘any property of the shipowner which is on board for the prosecution of the maritime adventure should be exempt from arrest and not made available to pay the creditors’.<sup>47</sup> The decision does not address the issue whether property aboard the ship is included when it is owned by someone other than the ship’s owner, but that other person would have been liable had the action been brought *in personam*. Although difficult questions may arise, particularly between owners and charterers, as to who owns a particular item of stores or bunkers,<sup>48</sup> the principle as expounded by Justice Sheen is sufficiently clear. Accordingly it is unnecessary to define this aspect of ‘ship’ in the proposed legislation.<sup>49</sup>

108. **Ships Under Construction.** A further question is whether the proposed definition of ‘ship’ should attempt to define when a vessel under construction becomes a ‘ship’ for admiralty purposes. Although the maxim ‘a ship is born when it is launched’ is sometimes encountered,<sup>50</sup> the position is by no means clear. Most of the relevant cases turn on the definition of ‘ship’ for a purpose other than admiralty.<sup>51</sup> In one unreported decision in New South Wales a yacht which had been launched and moved under its auxiliary motor but had not been fully fitted out was held not to be a ‘ship’ within the meaning of the Admiralty Courts Acts of 1840 and 1861.<sup>52</sup> The Court took the view that the definition in s 2 of the 1861 Act ‘... vessel used in navigation ...’ required ‘a use of a vessel in its character as a ship in navigation and not merely its motivation under power’. This would seem to suggest that the end of the fitting out period, rather than the moment of launch, is when a ship is born.<sup>53</sup> But the result does not seem desirable. A person with claims against the vessel in respect of goods supplied, or damage done during or shortly after launching, should not be expected to wait until the indeterminate time when fitting out is sufficiently complete before commencing proceedings. The moment of launch is the most appropriate time, for it is then that the ship becomes mobile and arrest in admiralty becomes particularly useful. It is true that, until a ship is complete its tonnage cannot be measured, that it cannot therefore generally be registered<sup>54</sup> and that (at least arguably) its owner cannot apply to limit liability.<sup>55</sup> But these factors should not be determining. Accordingly, the definition of ‘ship’ should fix on the time of launch as the time when the vessel becomes a ‘ship’. It should also be made clear that a claim relating to the construction of a ship before it was launched can be commenced against the ship after launching.<sup>56</sup>

## Cargo, Freight and Other Types of *Res*

109. **Need to Specify Cargo and Freight?** Typically actions *in rem* are brought against ships. The 1952 Arrest Convention addresses only such actions. But English admiralty law has long recognised other types of *res*. Yet the recent United Kingdom legislation on admiralty jurisdiction makes no reference to what these other things are. References to arrest of ships ‘and other property’<sup>57</sup> make it clear that ships are not the only type of thing which may be arrested, but beyond that the legislation is silent. The Rules of the Supreme Court indicate that in addition to a ship, the *res* may consist of cargo, freight or the fund in the possession of the court representing the proceeds of the sale of the *res*.<sup>58</sup> The position in New Zealand and Canada is similar. This approach provides one model which Australia might follow. In contrast, South African legislation explicitly provides for the arrest of

the following categories against or in respect of which the claim lies:

- ...
- (c) the whole or any part of the cargo;
  - (d) the freight.<sup>59</sup>

Two further additions might be made to such a provision. First, the terms ‘cargo’ and ‘freight’ might be defined. ‘Cargo’ simply refers to any goods carried by sea. The main area of difficulty is when, in the course of transit, goods become identifiable as ‘cargo’ and when, at the receiving end, they cease to be ‘cargo’.<sup>60</sup> The term ‘freight’, as used in the law of carriage by sea, refers to the ‘remuneration for the carriage of goods in a ship’.<sup>61</sup> In the context of marine insurance it has a wider meaning, including both ‘the price agreed to be paid by the charterer to the shipowner for the hire of his ship, and also the benefit which the shipowner expects to derive from the carriage of his own goods in his own ship, in the shape of their increased value to him at the point of delivery’.<sup>62</sup> Although judicial discussion of the meaning of ‘freight’ for the purposes of arrest *in rem* is extremely sparse and modern authority seems to be non-existent, it would appear that the wider definition is the appropriate one.<sup>63</sup> If the absence of modern cases can be taken as a guide, difficulties seldom arise with the definition of ‘freight’ or ‘cargo’. No definition is necessary on this point. A second issue involves the question of the kinds of claim that can be brought against different kinds of property. McGuffie states the English position as follows:

*Res* against which an action *in rem* may be brought include:

- (a) In all cases: a ship, that is to say any description of vessel used in navigation, and all her equipment and wreck of the ship or equipment, including flotsam, jetsam, lagan and derelict.
- (b) In salvage, in claims by shipowners for unpaid freight, in bottomry, in forfeiture and in condemnation: the cargo in a ship, or cargo landed from a ship and still identifiable as cargo and not delivered to consignees.
- (c) In salvage, collisions, and bottomry: freight at risk, viz., the money payable, and not yet paid, for carrying cargo in a ship and also, in salvage alone, passenger fares at risk.
- (d) ...
- (e) In all cases: the proceeds of sale by the court of any of the foregoing property except freight and passage money.
- (f) In cases under the Slave Trade Act, 1873, and similar Acts: slaves, goods and effects within the provisions of the Acts.<sup>64</sup>

Where the right to proceed *in rem* has been conferred by statute, what constitutes a *res* for that purpose should, in theory at least, be determined by reference to the statute. In practice the statute is generally silent on the point. For example, general average was added to the kinds of action which could be pursued *in rem* in England in 1956, but no reference was made to what property could constitute the *res*.<sup>65</sup> Before 1956 the shipowner had a possessory lien at common law on cargo for contributions in respect of general average. It is not clear that the ability to proceed *in rem* has added anything. The possessory lien would be lost once possession was surrendered, but it could also be argued that the goods carried ceased to be ‘cargo’ once they had been delivered up from the ship. A similar argument could be made in respect of claims against cargo under the head of admiralty jurisdiction relating to ‘agreement relating to the carriage of goods in a ship’: the shipowner’s common law possessory lien for freight together with other express liens<sup>66</sup> in the charterparty or bill of lading normally render *in rem* proceedings superfluous, and where these liens are lost by yielding

possession their subject matter at the same time ceases to be ‘cargo’. Under the South African provision quoted earlier it is not clear whether a right to arrest cargo is being conferred, or merely a facility to pursue a remedy, the source of which must be found elsewhere.<sup>67</sup> The position under the English legislation is also not clear.<sup>68</sup> The difficulty in trying to clarify the question what may be arrested in respect of which claim is the risk of erroneously restating the law. It is doubtful whether such a restatement is necessary. With respect to maritime liens on freight and cargo the position is reasonably clear.<sup>69</sup> Restatement for the purposes of clarification does not seem to be a pressing need. There seems virtually no occasion to arrest cargo apart from on a maritime lien because in most cases the potential plaintiff has a possessory lien.<sup>70</sup> The fact that the way in which such a lien relates to arrest in admiralty is not altogether clear will seldom, if ever, cause concern. If the rationale for arresting freight is that it is an incident of the ship or part of the maritime adventure<sup>71</sup> there seems to be no reason why, when the ship itself is insufficient to meet the claim,<sup>72</sup> the pending freight should not be arrested. As already mentioned, problems associated with the arrest of freight appear to be very rare. Where freight has been prepaid<sup>73</sup> or will not be earned until the voyage is complete<sup>74</sup> there can be no freight outstanding against which to proceed. Equally, if there is no cargo present which can be arrested to secure payment of freight, the question of proceeding *in rem* against the freight cannot arise.<sup>75</sup>

110. **Conclusion.** Apart from the rarity with which these issues are likely to arise, there could also be difficulties with property owned by a person who is not the shipowner, but who may be liable in respect of the claim. On balance, it is undesirable to spell out what would be a complex definition, one which will rarely be needed but which would not necessarily resolve the difficult problems that could arise. Accordingly it should be sufficient to refer to a right to proceed *in rem* against a ship or other property. However the practice of commencing proceedings against the proceeds in court of the sale of a ship<sup>76</sup> is a valuable one, and should be specifically provided for.

## The Geographical Scope of Admiralty

111. **Introduction.** In drafting legislation based primarily on the power to confer ‘admiralty and maritime jurisdiction’, questions of the geographical scope of the jurisdiction arise. These do not concern the question of any nexus between the forum and the cause of action: it is well established that admiralty jurisdiction *in rem* is universal. However there are questions about where service of process in an action *in rem* needs to be effected for jurisdiction to be attracted,<sup>77</sup> and where arrest of the *res* can properly be carried out. There are also questions about the extension of admiralty jurisdiction to claims arising ‘internally’ within Australia (that is, on internal waters).

112. **Service and Arrest of Ships in Motion.** Service on and the arrest of a ship is normally effected while the ship is alongside a wharf or at anchor in a port. The question whether a ship may be arrested while in motion or while stopped but not at anchor (for example, to pick up or drop a pilot) has only rarely arisen. There are two aspects to the question. The first is whether the rules of court would allow such arrest. This in turn largely depends on whether an arrest can, as a matter of fact, be made effective without resorting to the use of force.<sup>78</sup> It is suggested that the question of what constitutes an effective arrest should be left to courts to resolve on the particular facts if a case arises. The proposed legislation (and rules of court) should not explicitly prohibit arrest of a moving vessel, but should simply leave the point open.<sup>79</sup>

113. **Service and Arrest in the Territorial Sea.** The second aspect of the question of arresting ships outside ports is where the ship must be in order to fulfil the requirement for a valid arrest that the *res* must be ‘so situated as to be within the lawful control of the state under the authority of which the court sits’.<sup>80</sup> It is a question of international law how far off-shore and under what circumstances Australia may assert jurisdiction over foreign ships. There is a further question whether the particular Australian court is empowered by Australian law to assert jurisdiction in ways which are internationally permitted. This latter question is presently addressed by s 380(1) of the Navigation Act 1912 (Cth). This provides:

Where any district within which any Court has jurisdiction is situate on the sea coast, or abuts on or projects onto any navigable water, the Court shall have jurisdiction over any ship being on or lying or passing off that coast, or being in or near that navigable water, and over all persons thereon or belonging thereto, in the same manner as if the ship or persons were within the limits of the original jurisdiction of the Court.<sup>81</sup>

The international law constraints on arrest of foreign ships in the territorial sea are set out in art 20(2)-(3) of the 1958 Territorial Sea Convention,<sup>82</sup> which provide:

2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.

3. The provisions of the previous paragraph are without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

Australia is a party to this Convention. In practice attempts to serve or arrest foreign ships on continuous passage have been very rare.<sup>83</sup> In areas beyond the territorial sea international law would not permit any general assertion of civil jurisdiction in the form of arrest of foreign vessels. While the coastal state has the right to make and enforce laws for the management and exploitation of the exclusive economic zone and the continental shelf,<sup>84</sup> this right would not allow arrest in admiralty on an ordinary civil claim. Neither would it appear to allow arrest even where the claim is directly related to an activity involving exploitation of the resources of the zone or shelf, though there may be room for argument on the point. Even if off-shore oil drilling rigs are defined as ‘ships’ for the purposes of the proposed legislation, they would not appear to be subject to admiralty arrest while moving or while drilling outside territorial waters.

114. **Conclusion.** Australian admiralty jurisdiction should be extended to allow service and arrest in the territorial sea, subject to the limitation in favour of ships in innocent passage provided for in art 20(2) of the 1958 Convention. However it is far from clear that s 380(1) of the Navigation Act 1912 (Cth) extends to the whole territorial sea. The term ‘ship being on or lying or passing off that coast<sup>85</sup> in s 380(1) might well be held to refer to ships which are adjacent or even close to the coast, and it is doubtful whether its meaning would expand to cover any future seaward extension of the Australian territorial sea (say from the present three miles to 12 miles) that might be effected. Since s 380(1) applies to all jurisdictions of the specified courts, not just their admiralty jurisdiction, it should continue in force pending reconsideration as part of the overall reform of the Navigation Act 1912 (Cth). But a specific provision should be inserted in the proposed legislation making it clear that the admiralty jurisdiction of Australian courts extends to service and arrest of ships in the territorial sea, subject to the limits on arrest of ships in innocent passage under art 20(2) of the 1958 Convention. There should be no power to serve process on or arrest a ship outside the territorial sea in respect of claims relating to the continental shelf or exclusive economic zone. The matter may however need to be reconsidered later, when the question of the propriety of such extraterritorial service and arrest is better settled internationally.

115. **Inland Waters Claims.** Finally it needs to be considered whether there should be any limitation on admiralty jurisdiction with respect to claims relating to the use of a ship on inland waters. Even with the exclusion of inland waterways vessels recommended in para 106, the broad definition of ‘ship’ adopted would mean, in the absence of any further limitation expressed in the legislation or implied through some constitutional restrictions in s 76(iii), that many inland waters claims would be included. A speedboat or yacht used both at sea and on inland waters is not an inland waterways vessel<sup>86</sup> and without such a restriction any maritime claim arising with respect to it on inland waters, would be within admiralty. It could be argued that this is desirable. The Admiralty Act 1973 (NZ) apparently applies to all New Zealand inland waters, and there is no indication that this has caused difficulties.<sup>87</sup> The tendency has been for admiralty jurisdiction to be extended, for certain purposes at least, to inland waters in both the United States<sup>88</sup> and England. In *The Goring*,<sup>89</sup> for example, Justice Sheen held that a salvage claim arising on the Thames at Reading was within admiralty, on the basis that there was ‘no justification for an artificial rule which would differentiate between services rendered to a ship in tidal waters and identical services rendered to a ship in non-tidal waters’.<sup>90</sup> On the other hand the salvage provisions of the Navigation Act 1912 (Cth) only apply to the sea or ‘tidal water’.<sup>91</sup> The general tenor of the views expressed to the Commission was that there was no need to extend admiralty jurisdiction to local Australian claims arising on inland waters. There is also doubt about the extent to which s 76(iii) would support such an extension.<sup>92</sup> For these reasons it is recommended that the proposed legislation not apply where the cause of action arose in respect of the use or intended use of a ship exclusively on Australian inland waters unless the ship concerned is a foreign ship. Arrest of a foreign ship should be possible because it may sail away, never to return, after having been, for example, involved in a collision on a navigable river upstream of tidal waters.

## 8. Maritime Liens and Statutory Rights of Action *In rem*

### The Distinction Between Jurisdiction and Substantive Law

116. **Introduction.** The discussion in chapter 6 leads to the conclusion that Australian interests are best served by a widening of admiralty jurisdiction, and that, while there are some international constraints, there is considerable scope for such an increase. So far as the subject matter of admiralty jurisdiction is concerned this conclusion is uncontroversial.<sup>1</sup> This is not the case so far as the expansion of admiralty rights of arrest in respect of liabilities of charterers is concerned. Similarly, there is no consensus on the need to expand the present range of maritime liens (which, once created, ‘travel’ with the ship and rank over mortgages in priority). In addition to arguments about policy and uniformity, there are constitutional factors and the Commission’s Terms of Reference to be considered. As pointed out in chapter 5, it is probable that the High Court would not interpret s 76(iii) of the Constitution as giving any distinct or substantive legislative power over maritime law, but as essentially a jurisdictional provision.<sup>2</sup> On the other hand, the distinction between substantive admiralty law and admiralty jurisdiction is very difficult to make with any clarity. In effect the whole history of admiralty has been one of altering substantive rights by decreasing, or, since the early 19th century, increasing, the jurisdiction of admiralty courts. In a unitary system this presents no special difficulty, but if reliance is to be had on a constitutional power which entails a distinction between ‘jurisdiction’ and ‘substance’, the position may be different.

117. **Scope of this Chapter.** The underlying reason why distinctions between jurisdiction and substantive law, between remedies and rights, present special difficulties for the reform of admiralty is the problem of the relationship between what may be described as ‘*in rem* liability’ and ‘*in personam* liability’. The common law has focused almost exclusively on the latter, but the principal focus of admiralty, since the 17th century at least, has been the former. The amalgamation of the jurisdiction of admiralty and common law courts by the Judicature Acts has led to a tendency to assimilate the two.<sup>3</sup> But the action *in rem* remains an accepted and distinct method of enforcing maritime claims. Moreover, especially when modern methods of ship operating and ship financing are taken into account, the action *in rem* inevitably tends to affect third parties. The legal owner of a ship may be a financier, with the ‘beneficial owner’ a demise charterer.<sup>4</sup> There may be a line of sub-charterers of different kinds.<sup>5</sup> ‘One-ship’ companies, holding companies and other corporate devices are frequently involved. The use of open registries or ‘flags of convenience’,<sup>6</sup> and of company laws ‘under which the real ownership of shares or the location of control is secret or difficult to determine, further complicates the situation. This chapter discusses the following issues, all of them arising from the relationship between *in rem* and *in personam* liability, or from associated difficulties of distinguishing between substance and procedure in admiralty:

- the treatment of maritime liens (including foreign maritime liens) in the proposed legislation (para 119-23);
- the need for a specific nexus between a ship and the cause of action (para 124-5);
- the relationship that should exist, in the case of statutory rights of action *in rem*, between the ‘wrongdoing’ ship and *in personam* liability (para 126-37);
- the need to lift the ‘corporate veil’ in certain circumstances to allow actions *in rem* to reflect the reality of ship-operating through linked companies (para 138-41);
- the relation between actions *in rem* and *in personam* in admiralty (para 142-4).

118. **Terminology.** It is helpful to begin by adopting some shorthand terminology, which will be used throughout this Report. The ‘wrongdoing’ ship refers to the ship in connection with which the cause of action arises.<sup>7</sup> The ‘surrogate’ ship (often loosely called a sister ship’) is any ship other than the wrongdoing ship which it is sought to arrest in respect of that cause of action.<sup>8</sup> A ‘relevant person’ is a person who would have been liable (whether solely or jointly with other persons) had the action been brought *in personam* rather than *in rem*.<sup>9</sup> Even with maritime liens there will almost invariably be someone personally liable.<sup>10</sup> The only exceptions appear to be the liens for bottomry and respondentia, with respect to which no action *in*

*personam* is available. But if, apart from these cases, there will always be a relevant person in every action *in rem* on a maritime lien, that person will not always be the owner of the ship.<sup>11</sup> Equally the relevant person in maritime claims which do not give rise to maritime liens may be a demise charterer,<sup>12</sup> time charterer<sup>13</sup> or possibly a voyage charterer.<sup>14</sup>

## Maritime Liens

119. **The Present Law of Maritime Liens.**<sup>15</sup> The history of maritime liens in Anglo-Australian law was outlined briefly in para 14. The claims which give rise to maritime liens in Australia today<sup>16</sup> are claims for salvage, collision damage, seamen's wages, bottomry and respondentia, master's wages and master's disbursements. Four of these (salvage, collision damage, seamen's wages, bottomry and respondentia) are creations of the Admiralty Court.<sup>17</sup> The other two, the liens for master's wages and for master's disbursements, were created by statute in the 19th century. Although there is no recent explicit authority, it is safe to say that in the absence of statute no additional maritime liens would be recognised by Australian courts.<sup>18</sup> The position with respect to the two liens of statutory origin, master's wages and master's disbursements, is a complicated one. The statutes creating the liens only purported to apply to masters of British-registered ships.<sup>19</sup> But Dr Lushington in *The Milford*<sup>20</sup> managed to avoid the fairly plain statutory language, interpreting it so as to allow a foreign ship's master a maritime lien for wages. English courts consistently followed that interpretation, though not without some misgivings.<sup>21</sup> It is fully accepted in the United Kingdom that the liens for wages and for disbursements are both available to foreign masters.<sup>22</sup> It is not clear whether Australian courts would follow *The Milford*<sup>23</sup> in interpreting the Merchant Shipping Act 1894 (UK) s 260, or whether they would only apply the liens created by s 167 of that Act to British-registered ships. The Navigation Act 1912 (Cth) s 94 creates both the wages and disbursement liens but is only expressed to do so for Australian ships,<sup>24</sup> and it is doubtful whether an Australian court would follow the logic used in *The Milford* to apply s 94 to masters of foreign ships. In 1905 a South Australian court held that the Merchant Shipping Act 1894 (UK) did not extend to give a maritime lien to the master of British ship registered in a part of the King's dominions other than Britain; no maritime lien existed for disbursements by the master of a vessel registered in South Australia.<sup>25</sup> State and Territory legislation has attempted to overcome this gap in various ways.<sup>26</sup> It is also possible that the courts will themselves extend the common law lien for wages to cover master's wages.<sup>27</sup>

120. **Characteristics of Maritime Liens.** All claims which give rise to maritime liens may be enforced in admiralty by the arrest of the wrongdoing vessel. This right to arrest survives any change in the ownership of the vessel, whether the change in ownership took place before or after the proceedings were commenced. In situations of insolvency maritime liens rank above mortgages and other claims in the admiralty order of priorities.<sup>28</sup> Despite these attributes, Anglo-Australian admiralty law has never made it clear whether a maritime lien is merely a procedural device by which to compel the defendant to appear<sup>29</sup> or 'a right of property given by way of security for a maritime claim'.<sup>30</sup> The result seems to be that, while for some purposes the procedural view is correct, it is recognised that some characteristics point 'in the direction of a maritime lien partaking of the nature of a proprietary right in the ship'.<sup>31</sup> This is particularly true of the ability to enforce by action *in rem* a maritime lien despite a change in ownership of the ship (the so-called '*droit de suite*').

Although the point is not free of uncertainty it is probably the case that a maritime lien is a substantive right whereas a statutory right of action *in rem* is in essence a procedural remedy.<sup>32</sup>

121. **The Creation of New Maritime Liens.** Against this background, a number of questions arise. The first is whether the proposed legislation should seek to extend the range of maritime liens beyond those presently existing under Australian law.<sup>33</sup> The view that maritime liens are substantive or proprietary rights might appear to imply that new maritime liens could not be created in reliance only on the power to confer admiralty jurisdiction under s 76(iii) of the Constitution.<sup>34</sup> Even if this view is accepted, it does not follow that the creation of new maritime liens falls outside the Commission's Terms of Reference. These require it to report upon 'all aspects of the Admiralty jurisdiction in Australia'. The term 'the Admiralty jurisdiction' is to be construed broadly, so as to include the creation or extinction of maritime liens: it would be strange to treat maritime liens as not being an aspect of the admiralty jurisdiction. On this basis, the question is whether the Commission should recommend the creation of new maritime liens, either in particular cases or (on the

model of the United States<sup>35</sup>) all cases, of admiralty jurisdiction. Leaving aside for the moment questions of constitutional power, the following considerations apply:

- The policy of the English courts, so far followed in Australia, has been not to create new classes of maritime liens.<sup>36</sup>
- The United States position is exceptional. International efforts at the unification of maritime law have been unsuccessful in achieving agreement on the appropriate range of maritime liens.<sup>37</sup> By contrast, expanding the scope of rights to arrest ships without creating new maritime liens is less likely to meet with international objections,<sup>38</sup> since statutory rights of action *in rem* rank below maritime liens and mortgages in the admiralty order of priorities, and do not (unless carried into effect by the commencement of proceedings) prevail against a new owner of the ship.
- There is little indication of a demand or need in Australia for creation of new maritime liens.
- A problem which sometimes occurs is that of third parties dealing with persons apparently authorised to act on behalf of the ship but who may not be legally the agents of the owners. Whatever provision is necessary to deal with this problem,<sup>39</sup> it does not require the creation of new maritime liens.<sup>40</sup>

For these reasons, and pending agreement at the international level on the proper scope of maritime liens, new maritime liens should not be created.

122. ***The Treatment of Maritime Liens in the Proposed Legislation.*** Whatever the appropriate classification of maritime liens, if there is no head of jurisdiction under which the only courts in Australia with power to order arrest *in rem* may order arrest on a particular maritime lien, the lien is effectively negated in Australian law. It is clear therefore that jurisdiction has to be conferred over claims to enforce maritime liens. The question is what form that provision should take.

- *Restatement of Law relating to Maritime Liens.* One possibility is to define with some precision the claims which give rise to maritime liens under Australian law, with a view to conferring jurisdiction only over those liens. While the conclusion that new maritime liens should not be created gained general support during the Commission's consultations, there was also some support for an exhaustive definition or restatement of the law. The present position remains obscure in a number of respects.<sup>41</sup> This is especially the case with the two liens with a statutory origin, master's wages and master's disbursements.<sup>42</sup>
- *Conferral of Jurisdiction over 'Maritime Liens' without Definition.* The alternative is simply to confer jurisdiction over maritime liens either without any attempt at definition,<sup>43</sup> or with only an indicative or inclusive definition,<sup>44</sup> leaving the substance of the law to be derived from other sources.

There are, no doubt, difficulties whichever course is taken. An initial problem with a restatement of the law of maritime liens is its extent, since it involves a codification of what has historically been the major element of admiralty law. There would be difficulty in performing this task in a reasonably concise way in legislation which is primarily jurisdictional in scope. Moreover the legislation will confer a parallel statutory right of action *in rem* with respect to almost all claims giving rise to maritime liens.<sup>45</sup> So far as these claims are concerned, it will only be necessary to rely on a maritime lien rather than a statutory right of action *in rem* where the relevant person was not the owner when the proceedings were commenced, or where priorities issues arise. These situations are exceptional. It does not seem necessary to define maritime liens in detail merely to provide for them. This conclusion is reinforced by the doubts about the extent of power in s 76(iii) to codify the law relating to maritime liens.<sup>46</sup> For these reasons the proposed legislation is not the appropriate place to attempt either to reform, or comprehensively to restate, the existing law of maritime liens. If the uncertainties as to the scope of the liens for master's wages and disbursements are of concern (and there is no indication that they are) consideration should be given to amending s 94 of the Navigation Act 1912 (Cth) so as to make it clear that masters of foreign vessels in Australian ports have a maritime lien on their ship for their wages and disbursements. Accordingly, the legislation should merely state that an action *in rem* may be brought in any case in which there is a maritime lien or other charge on any ship or other property.<sup>47</sup> To help those unfamiliar with admiralty jurisdiction, an indicative list of the four significant categories of lien

(salvage, damage, wages and master's disbursements) should be added. The legislation should also make it clear that no new class of maritime lien is being created. The expression 'other charge' in the proposed provision is intended to cover statutory charges created by the formula '[the amount] shall be a charge upon the ship' which is found in Commonwealth, Imperial and State legislation.<sup>48</sup> It would be possible to omit the expression. In most situations in which the formula is used the legislation creates its own means of enforcement, either by creating a power of detention or by assimilating the 'charge' to a maritime lien.<sup>49</sup> A possible advantage of omitting 'other charge' would be that it would force legislatures wishing to take advantage of the admiralty procedure explicitly to create new maritime liens<sup>50</sup> (or at least not to rely upon the word 'charge', which arguably leaves it unclear whether or not a full maritime lien is being created). On the other hand the term is used without elaboration in all relevant overseas legislation. It is desirable that the admiralty courts have jurisdiction over statutory charges analogous to liens, especially in dealing with insolvent ships, where priorities issues are likely to arise involving such charges. The term 'other charge' should be included without elaboration in the proposed legislation.

123. **Foreign Maritime Liens.** A separate issue that remains uncertain in Australia concerns maritime liens arising outside the forum. Where an act or event that gives rise to a maritime lien under the relevant foreign law would not have given rise to a maritime lien under Australian law, should an Australian court nonetheless treat it as a maritime lien and thereby acquire jurisdiction over the matter? This question, so far as it concerns the law of Singapore, was answered in the negative by the Privy Council in *The Halcyon Isle*.<sup>51</sup> But the decision was by a bare majority<sup>52</sup> and the position in other common law countries is different. In particular, the Canadian courts have answered the question in the opposite way,<sup>53</sup> as have the courts of South Africa.<sup>54</sup> As the majority and dissenting judgments in *The Halcyon Isle* reveal, the arguments supporting the alternative positions are fairly evenly balanced. On the one hand, the minority view is more consistent with general conflicts of law principles, assuming that maritime liens are properly classified as substantive rather than procedural rights for this purpose. On the other hand, the consequences of recognising a foreign maritime lien (for example for goods supplied to a ship) where the equivalent local claim does not give rise to a lien is to give the foreign claimant priority over the local one, even where the foreign law's classification of the claim as a lien is out of line with any international consensus on the scope of liens.<sup>55</sup> Indeed, a foreign lien might attach to a claim which was not a maritime claim as defined in the Brussels Arrest Convention of 1952,<sup>56</sup> in which case to allow arrest on the lien would appear to contravene art 2 of that Convention.<sup>57</sup> Although the dominant view expressed to the Commission favoured the Canadian and South African approach rather than that of the majority in *The Halcyon Isle*,<sup>58</sup> the matter is best left to be resolved through further attempts at international unification (either through amendments to the Arrest Convention or through a further and more satisfactory Convention on Maritime Liens and Mortgages). In the absence of formal international agreement (and consistently with the recommendation in para 122 relating to liens generally) the question is best left to the courts to resolve, taking into account developments in other jurisdictions.

## **Statutory Rights *in rem*: Extent of Enforceability**

124. **Identifying the Wrongdoing Ship.** The recommendations as to maritime liens in para 121 and 123 will mean that the bulk of admiralty jurisdiction (including cargo claims and claims by ship repairers or suppliers) will continue to involve statutory rights of action *in rem* rather than maritime liens. The following paragraphs deal with the question when such an action can be brought against a ship, in particular where the owner of the ship is not the relevant person.<sup>59</sup> The first issue to be decided is whether there is any need for the concept of a 'wrongdoing ship' as a basis for determining which ship may be arrested on a particular maritime claim. Like questions involving the enforceability of maritime liens, this issue is often discussed in terms of the two main rival theories concerning the nature of the action *in rem*.<sup>60</sup> Under the personification theory the ship itself is seen as the wrongdoer and hence as the defendant in an action *in rem*. Under this theory the wrongdoing ship is the starting point and, under the theory in its pure form, the finishing point, in considering what ship may be arrested.<sup>61</sup> Under the procedural theory in its widest form 'the process *in rem* against the ship is in the nature of foreign attachment to compel the owner's appearance by subjecting to the court's control property within its territorial jurisdiction'.<sup>62</sup> Because arrest *in rem* confers jurisdiction in Anglo Australian admiralty law two requirements appear necessary to prevent such arrest being nothing more than the exorbitant and internationally unacceptable arrest *ad fundam jurisdictionem*.<sup>63</sup> The first is that the cause of action should be a maritime claim. The second is that the *res* should be of a maritime character, a ship or its cargo, freight or wreck. These requirements ensure that the arrest *in rem* fits into the internationally recognised exception to the general principle of territorial jurisdiction.<sup>64</sup> But the procedural

theory, even as constrained by these requirements, does not identify the particular ship which may be arrested in the way in which the personification theory does. Although, broadly, the claim must have arisen in connection with a ship and only a ship may be arrested on the claim, there is no requirement imposed by the strict logic of the procedural theory that the same ship be arrested as is connected with the claim. In other words, the issue is whether, if the defendant happens to own a ship, the plaintiff can arrest that ship. The claim arises in respect of a ship and a ship, though not necessarily the same ship, is arrested. The admiralty exception is invoked and exorbitant assertion of jurisdiction is avoided. On this theory, the answer would appear to be that such arrest should be allowed. English courts have approached the question as one of statutory interpretation. The Administration of Justice Act 1956 (UK) s 3(4) appeared to allow proceedings *in rem* under s 1(1)(e), that is for ‘any claim for damage received by a ship’. However Lord Diplock pointed out in *The Eschersheim* that

the description ‘any claim for any damage received by a ship’ describes a claim arising ‘in connection with’ the ship that receives the damage. In such a claim the owners of the ship that receives the damage would be plaintiffs. They cannot invoke Admiralty jurisdiction by an action *in rem* against their own ship; and any claim to arrest some other ship must be founded upon some paragraph other than (e). Had the draftsman of section 3(4) been meticulous he would have omitted any reference to para (e) of section 1(1); but the other requirements of the subsection prevent any right of arrest arising under that paragraph.<sup>65</sup>

As a matter of the interpretation of s 1(1)(e), this reasoning seems correct, and the Supreme Court Act 1981 (UK) s 21(4) is worded so as to reflect Lord Diplock’s reasoning.<sup>66</sup> But it should be noted that in two earlier decisions Justice Brandon had adopted a rather different interpretation. Both involved the head of jurisdiction ‘use or hire of a ship’<sup>67</sup>: in both cases the owner of the ship hired was allowed, without any real argument on the point, to proceed *in rem*. In *The Queen of the South* the claim was by a small boat operator whose launch was hired to assist in mooring the ship which was the subject of *in rem* proceedings.<sup>68</sup> In *The Conoco Britannia* the claim was by a tug owner whose tug was hired to assist in berthing a ship; again it was that ship against which the writ *in rem* was issued.<sup>69</sup> The status of these decisions is now doubtful.<sup>70</sup> The reasoning in *The Eschersheim* is applicable to all heads of admiralty jurisdiction, not merely ‘damage received by a ship’.<sup>71</sup> The language of the 1952 Arrest Convention<sup>72</sup> and of other overseas legislation<sup>73</sup> lends itself to similar interpretation.

**125. The Competing Arguments.** It is helpful to set out the competing arguments in some detail, since they shed light on the nature of the action *in rem* itself.

- *Arguments for Identifying a Wrongdoing Ship.* As a matter of policy, clearly one argument is that Australia should adhere to the position taken by countries whose legal systems are similar to Australia’s, and by the 1952 Arrest Convention. The other main argument in favour of a requirement that the ship which is the subject of the action *in rem* should be identified with the ship in respect of which the claim arose, is that the alternative approach would lead to a very random availability of remedies in admiralty. The advantage of the requirement is that for any valid admiralty claim there will be an identifiable ship which can be named in *in rem* proceedings as the wrongdoing ship.<sup>74</sup> In the absence of such a requirement, the owner of the ship referred to in any head of admiralty jurisdiction can proceed *in rem* if the defendant happens to own a ship. If the ship repairer, supplier of necessities, cargo owner, pilot or mortgagee happens to own a ship within the jurisdiction, an action *in rem* can be brought. For example, if a dispute about overpayment of wages arose between a ship’s master and its owner, the owner could proceed *in rem* against a yacht which the master happened to own. The strangeness of this result is underlined by the fact that the relevant head of admiralty jurisdiction in other countries allows only claims by a master for wages;<sup>75</sup> the possibility of an owner proceeding *in rem* against the master has never been considered. To take another example, assume A and B agree to a joint venture for the charter of a ship from C and that the joint venture agreement is within admiralty jurisdiction.<sup>76</sup> If disputes arise, the ability of A to proceed against B *in rem* will depend on the purely fortuitous circumstance whether B owns a ship. Where one joint venturer owns a ship and the other does not, the ability to proceed *in rem* in relation to disputes arising out of the joint venture will be asymmetrical as well as fortuitous. Given the superiority of proceeding *in rem* over *in personam* in many cases, there would be considerable incentive for a plaintiff to attempt to cast the claim as a maritime claim whenever the defendant happens to own a ship. A final argument against relaxing the nexus requirement is that doing so would serve no real need. It is owners of ships who tend to be foreign based and to have mobile and perhaps elusive assets. Those whom the owner of the ship in

respect of which the claim arises might sue tend to be firmly based with fixed assets in one place, even if they happen also to own a ship.

- *Arguments against a Wrongdoing Ship Requirement.* The arguments in favour of abandoning the requirement that the ship subject to proceedings *in rem* should be the ship in respect of which the claim arose are partly rebuttals of the arguments already made and partly arguments based on the need for some general consistency in the theory of when an action *in rem* should be available. The ‘accidental’ way in which the expanded ability to proceed *in rem* would be available is not necessarily fatal. The fact that a right to proceed *in rem* will only sometimes be available on the facts, it can be argued, is no reason to deny the right in any given case. There is also a question of consistency. In chapter 10 it is recommended that surrogate ship arrest be introduced in Australia. The availability of surrogate ship arrest depends upon the fortuitous ownership of another ship by the person liable in respect of the wrongdoing ship. An action *in rem* against a surrogate ship will allow the arrest of that ship even though there is no wrongdoing ship (for example, because it has sunk) or even where on the facts no proceeding could ever have been brought against the wrongdoing ship.<sup>77</sup> The whole notion of actions *in rem* against surrogate ships relies on the rejection of the personification theory and acceptance of the procedural theory. Arguably, allowing actions *in rem* against surrogate ships marks merely another step in a long process of abandoning the personification theory. The next step in this process would be to abandon the nexus between the ship in respect of which the claim arose and the ship which may be proceeded against *in rem*. At present Australian admiralty jurisdiction lags well behind in this process. But it could be argued that proper reform should not only take the catch-up step of allowing surrogate ship arrest, but should go a step further and allow arrest without the hitherto required nexus.

As these arguments might suggest, arguing in terms of competing theories is confusing rather than helpful.<sup>78</sup> The fact that the scope of arrest is extended in one direction (surrogate ship arrest) is not of great significance in considering extension in a different way. The issue is one of the need for and effectiveness of remedies. The proposed Australian legislation should adopt the solution embodied in the overseas legislation. Consistency with these models has considerable value. The abandonment of a nexus requirement would tend to favour ship owners as against ship repairers, suppliers of necessities, pilots or mortgagees, who ‘fortuitously’ own a ship. It is not in Australia’s interests unilaterally to develop the right of arrest in this way, and it is hard to see any need for such a development. To the extent that cases such as *The Queen of the South*<sup>79</sup> and *The Conoco Britannia*<sup>80</sup> have revealed gaps in the law where a ship of the plaintiff’s and a ship of the defendant’s are both involved in the facts out of which the claim arises, these gaps can best be filled by selective rewording of particular heads of admiralty Jurisdiction, so as to make it clear that the defendant’s ship is a (or the) relevant ‘ship’ referred to.<sup>81</sup>

## Nexus Between Wrongdoing Ship and *In personam* Liability

126. **Introduction.** Compared with maritime liens, statutory rights of action *in rem* have always been regarded as ‘procedural’ rather than substantive rights. They have been thought of as a method of pursuing the owner of a ship with respect to the owner’s personal liabilities arising in connection with the ship.<sup>82</sup> This was the basis on which the Acts of 1840 and 1861 were held not to create maritime liens over new subjects of admiralty jurisdiction. In interpreting the Admiralty Court Act 1840 (UK) Lord Watson said:

The whole of the provisions of the Act 3 & 4 Vict. c 65 appear to me to relate to the remedies and not to the rights of suitors. Sect 6 merely confers ‘jurisdiction to decide’ certain claims which the Court of Admiralty had previously no power to entertain. The enactment enables every person having a claim of the nature of one or other of those specified in sect 6 to bring an action for its recovery in the Admiralty Court, but it cannot in my opinion have the effect of altering the nature and legal incidents of the claim.<sup>83</sup>

The creation of new statutory rights of action *in rem* would clearly be a matter of procedure (and thus of ‘jurisdiction’ in the narrowest sense) if the action is provided to enable satisfaction of claims against a person or persons with a recognisable legal interest (for example, as owner) in the relevant ship at the time the action is commenced. However, it is not so clear that the establishment of new statutory rights of action *in rem* would be merely procedural or jurisdictional if no link were established between the owner’s *in personam* liability at the time the action was commenced and the cause of action *in rem*. But there may be good reasons for not having such a link in all or some cases. That is, there seems to be a need to be able to

arrest the vessel with respect to which the claim arose even though its owner is not the person who would have been personally liable had the action been brought *in personam*, for example in some cases where that person is a time charterer. Thus there may be good reasons for extending statutory rights of action *in rem* so as to create something analogous to a droit de suite against the owner of the ship. That right need not be equivalent to a maritime lien. The priorities of competing claims need not be affected, and a change of ownership before the commencement of the action could extinguish the right to proceed *in rem* against the ship in question. Nevertheless, so far as it goes such a right would appear to have a ‘substantive’ effect. The position at common law appears to be that a statutory right of action *in rem* does not lie unless —

- the owner is liable *in personam* on the claim,<sup>84</sup> or
- the owner can be treated as if liable by virtue of a form of implied consent (for example, in some cases of liabilities of demise charterers).<sup>85</sup>

The provision of an action *in rem* in cases the common law rule does not cover would require a rule to be expressed or implied to the effect that a plaintiff who can establish a claim relating to the ship in one of the specified ways is entitled to satisfaction from the proceeds of the sale of the ship (or any bond or other security substituted for the ship), notwithstanding that the owner of the ship is not liable *in personam* on the claim.<sup>86</sup> As was pointed out in chapter 5, it is not clear whether such a rule would be regarded as merely ‘jurisdictional’ or ‘procedural’ for the purposes of s 76(iii), even though it is a matter of admiralty jurisdiction in the broad sense.<sup>87</sup> In England the solution to this potential problem is merely one of drafting technique, of making it clear that the legislation relates both to ‘the remedies’ and ‘the rights of suitors’.<sup>88</sup> But in Australia legislation dealing with ‘the rights of suitors’ might be found to be outside s 76(iii) of the Constitution and only capable of being upheld by powers such as those in Constitution s 51(1), (20), (29).<sup>89</sup> On the other hand, this argument is by no means convincing. It has always been a characteristic of admiralty jurisdiction that it affected or was capable of affecting third parties. In other contexts the courts have declined to accept that s 76(iii) can be confined to a ‘stereotyped common law admiralty jurisdiction’.<sup>90</sup> Admiralty legislation in other countries has extended the right of action *in rem* to cases where the owner is not liable *in personam*. In the following discussion it is assumed that constitutional means can be found to create new statutory rights of action *in rem* in appropriate cases.<sup>91</sup> The issues of principle and policy need to be considered on their merits.

**127. *The Need for Reform?*** The principal argument for reform arises from the complex and often obscure ways in which control over especially foreign trading ships is exercised. A person dealing in Australia with a foreign ship is likely to be dealing with an agent who may be an agent for a demise charterer or sub-charterer, for an associated company or for a range of other persons. For example, in *Cramb Tariff Service v Hoko Senpaku KK*<sup>92</sup> the first defendant was the owner of the ship and the employer of the master; the second defendant was a time charterer; the third defendant was a time charterer; the fourth defendant was the agent of the demise charterer; and the fifth defendant was the demise charterer. The first four defendants were Japanese companies, the fifth was Panamanian. All appear to have cooperated to prevent the plaintiff from discovering the correct party to sue, provoking the judge into commenting:

It is self evident that the entire method of procedure whereby shippers are entitled to make claims against those who carry their goods at sea is in urgent need of revision in order to ensure that this sort of situation cannot arise.<sup>93</sup>

The Commission has been told of other cases where the identity of the relevant person and that person’s relationship to the vessel have been difficult or even impossible to discover, at least in time for proceedings *in rem* to be commenced. There have also been cases where effective control over a vessel has been vested not in the owner but in a long-term time charterer.<sup>94</sup> It can be argued that an effective admiralty regime should not cast the burden of determining ownership or other relationship with the vessel on the person dealing with the vessel. The vessel should be able to be served and arrested, with the effective liability to meet any judgment a matter to be resolved between the various persons with interests in the ship.

**128. *The Options.*** It is helpful to consider these issues in the context of the provisions which have been adopted or proposed in other jurisdictions. It is clear that a statutory right of action should be able to be brought where the owner of the wrongdoing ship is the relevant person. The question is under what heads of admiralty and maritime jurisdiction (if at all) should it be possible to commence proceedings *in rem* against a wrongdoing ship where its owner is not the relevant person. The options include:

- (a) owner's liabilities only (present Australian position; 1983 South African Act);
- (b) under all heads, with service of process conferring jurisdiction over the merits (Brussels Arrest Convention on one view of English text; 1981 UK Bill before its amendment in the House of Lords);
- (c) under all or most heads of jurisdiction where a demise charterer is the relevant person (1981 UK Act; 1973 NZ Act);
- (d) in respect of traditional maritime liens plus a limited number of other cases (1970 Canadian Act);
- (e) in respect of maritime liens, owner's liabilities, and also of charterer's liabilities with right of arrest limited to duration of charter (no overseas equivalent).

Some of these options may be combined.

**129. No Action In rem without Owner's In personam Liability.** Option (a) represents a long-standing status quo. In the words of Justice Menzies, describing this status quo in *Shell Oil Co v The Ship 'Lastrigoni'*:

Proceedings in admiralty are intended to facilitate the enforcement of liabilities, not to allow pressure to be put upon a person who is himself under no liability in respect of the liabilities of others.<sup>95</sup>

Putting pressure may be precisely the effect of a maritime lien.<sup>96</sup> But these are relatively few and well-established, and courts (outside the United States) have been reluctant to create new maritime liens. The United Kingdom only moved from option (a) in 1981,<sup>97</sup> primarily in response to criticisms that its law did not comply with the 1952 Arrest Convention to which it is a party. At present Australia is not considering becoming a party to that Convention.<sup>98</sup> To one not versed in admiralty law option (a) seems most appropriate. Why should a ship belonging to one person be arrested on a claim for which someone else is personally liable? It might also be thought that admiralty is already more generous to plaintiffs in Australia than the general Australian law. To widen the scope of arrest would be to increase the gap even further. But the fact that ordinary plaintiffs may have greater difficulty in bringing foreign defendants to court and obtaining execution seems irrelevant. It is no reason not to improve the position of maritime plaintiffs if this can otherwise be shown to be desirable and internationally acceptable. The current position was developed largely by English courts in a very ad hoc, and even to some extent accidental, way.<sup>99</sup> Although long-standing, it does not follow that the position serves Australia's interests. Both the 1952 Arrest Convention and the variety displayed by recent overseas legislation show that an Australian assertion of wider powers of arrest would not necessarily be treated as an exorbitant assertion of jurisdiction. Reflecting the fact that Australia is a nation of shippers, not shipowners, the power of arrest should, it can be argued, be as wide as possible consistent with fairness to shipowners.<sup>100</sup>

**130. Action in rem in All Cases Irrespective of Owner's Liability.** Option (b) would allow an action to be commenced against the wrongdoing ship under all heads of admiralty jurisdiction where the relevant person has some connection with the ship, whether as its owner, charterer or whatever type, operator or as a person lawfully in possession or control of the ship at the time the action is commenced. The 1952 Arrest Convention art 3 gives this result if the English text is relied upon, if art 7 (which prescribes the courts with jurisdiction to deal with the merits) is treated as irrelevant in the common law context where jurisdiction derives from arrest, and if 'arrest' is given its normal admiralty operation, that is, giving jurisdiction to the arresting court to try the merits.<sup>101</sup> It is the option least favourable to shipowners and correspondingly most favourable to shippers and those dealing with ships. In this regard it might be thought most suited to Australian interests. The main reason for not adopting it would be that it was thought unfair on the shipowner, or (and perhaps this is merely stating the same point another way) that it may be internationally unacceptable. It is relevant here to consider English developments. Under the 1956 Act the wrongdoing ship could be arrested 'if at the time when the action is brought it is beneficially owned as respects all the shares therein' by the relevant person.<sup>102</sup> The main uncertainty in interpreting this was whether 'beneficially owned' could be stretched to include demise charterers.<sup>103</sup> This uncertainty was resolved in the 1981 Act by explicitly allowing arrest of the wrongdoing ship where the demise charterer is the relevant person. As originally drafted the Bill would have followed the 1952 Arrest Convention and allowed the arrest of the wrongdoing ship on all types of admiralty claim. But Lord Diplock objected, on behalf of the General Council of Shipping, the British Maritime Law Association and the P & I clubs; that such a change was both out of place in a consolidating measure and, more importantly, represented a significant change in British commercial policy.<sup>104</sup> A further objection was that, while maritime liens have only a short lifespan, the

claims underlying the extended powers of arrest were mostly simple contract debts subject to ordinary limitation of actions time bars. Unless special provision was made they would last for six years. In the face of this opposition the clause was redrafted. Of the reasons advanced by Lord Diplock, the point that most maritime claims could have a longer life-span (6 years before becoming time-barred) than full maritime liens is certainly relevant to Australia. Perhaps this is only a major concern if all claims are allowed to survive so as to allow arrest *in rem* despite a change in ownership of the wrongdoing vessel. In any event the argument depends on what general provision should be made for time limitations, a matter which is considered in chapter 12.

**131. Action in rem on Owner's and Demise Charterer's Liabilities.** Option (c) would allow an action to be commenced against the wrongdoing ship where either the owner or the charterer by demise is the relevant person.<sup>105</sup> This option would provide (from Australia's point of view) a valuable extension to the present right of action *in rem*, given the position of demise charterers as persons effectively in control of the ship. One difficulty with it is explaining why the extension should apply only to demise charterers. The problem of, for example, the supplier of necessities, can arise with time charterers as well as demise charterers.<sup>106</sup> Historically, it was sometimes possible to stretch the term 'owner' to include demise charterer, when interpreting the term 'owner' in statutes such as the Merchant Shipping Act 1894 (UK) in the context of limitation of liability (s 502-9)<sup>107</sup> or 'beneficially owned' in the Administration of Justice Act 1956 (UK) s 3(4)(a).<sup>108</sup> Hence there has been a tendency to emphasise the ways in which a demise charterer, because he has legal possession of the ship, is similar to an 'owner' and in a legally different position to other charterers.<sup>109</sup> But statute has long overtaken this process in the context of limitation actions<sup>110</sup> and it is difficult to find relevant analogies in other contexts.<sup>111</sup> The fact that some overseas legislation continues to draw a distinction between demise and other charterers for the purposes of arrest might be thought not to be a sufficient reason for Australia to do likewise, especially when such a distinction is not made in the 1952 Arrest Convention.

**132. Action in rem in Some Cases Only.** A further option would be to permit an action *in rem* to be commenced against the wrongdoing ship without reference to the identity of the relevant person but only in respect of certain heads of admiralty jurisdiction. The question would arise which heads of jurisdiction are to be selected. The choices made by the Federal Court Act 1970 (Can) s 43(3) exhibit no clear rationale. To the extent that they go beyond maritime liens, the heads chosen seem to be either proprietary claims (for example, disputes between owners and co-owners as to ownership; disputes in respect of mortgages<sup>112</sup>) which are acknowledged as a separate category anyway, or to reflect the interests of governments rather than private plaintiffs (pilotage, port, harbour dues, canal tolls and other charges<sup>113</sup>). Only the head relating to the claims in respect of general average<sup>114</sup> appears to benefit the private plaintiff. Perhaps a more defensible basis of choice would be to distinguish between those claims which arose from consensual dealing with the ship and those that did not. A personal injury claim would give a right of arrest without regard to the identity of the relevant person. Because the tortious relationship between plaintiff and ship is non-consensual the question whether the plaintiff knew that the ship was on charter seems irrelevant. But a claim for the supply of necessities would only permit arrest where the party who requested the necessities was the owner of the ship or someone acting on the owner's behalf. This would prevent what might be thought to be the unjust situation of the supplier who deals with someone who is known to have no authority to deal on the credit of the ship<sup>115</sup> being able nonetheless to look to the ship and its owner for recovery. But this tort/contract dichotomy is inexact: the plaintiff may be able to elect how the cause of action is to be framed. The dichotomy has caused difficulties in the United States both in its common law and subsequent statutory forms. If the supplier of necessities must have actual knowledge of the authority of the charterer to rely on the credit of the ship there is no incentive to enquire and the test is arguably too harsh on shipowners. If the supplier of necessities is required to inquire diligently as to the authority of the charterer the test is arguably too harsh. In the United States at least, striking a balance between the two positions has proven difficult.<sup>116</sup>

**133. Action in rem on Charterer's Liabilities while Charter Subsists.** The fifth option is to allow an action *in rem* to be brought against the wrongdoing ship in respect of claims for which the charterer, not the owner, is the relevant person only during the currency of the charter.<sup>117</sup> Although none of the overseas laws considered in this Report employs this option there is a limited precedent. The Merchant Shipping (Stevedores and Trimmers) Act 1911 (UK) s 2 allowed ships to be arrested on claims with respect to the loading and unloading of ships where the charterer by demise was the relevant person 'provided that no ship shall be detained on a claim against the charterers of the ship after the expiration of the term for which the

ship was demised to them'.<sup>118</sup> The main advantage of this option is that it would only allow an action to be brought in respect of a charterer's liabilities against the wrongdoing ship while the charterer had at least some financial interest in that ship. In principle, it can be argued, the appropriate place to draw the line is where the charterer has a stake. To the extent that this option allows charterers to be reached through arrest of the ship it does so at a time when the owner is best placed to pass on any loss suffered in the process to the charterer. The chance of the burden of liabilities incurred by the charterer remaining with the owner is reduced, though by how much will vary widely from case to case.

## Evaluation of the Arguments

134. **The Effect of an Extended Right of Action in rem.** Underlying any extension beyond existing maritime liens of the ability to arrest the wrongdoing ship where its owner is not the relevant person is a pragmatic argument, which to some extent provides a rationale for maritime liens themselves. For a person dealing with a ship, the identity of the relevant person may be difficult to discover. If it is discovered that the charterer rather than the owner is the relevant person, this person may be difficult to locate, or may be in a distant country, thereby creating difficulties in effecting service *in personam*. Even if the plaintiff succeeds in obtaining judgment, assets against which to execute may prove elusive or non-existent. It is easier if the plaintiff can serve and arrest the ship and execute against it or the security put up to secure release. In some situations this security will be put up by a charterer, whose financial stake in the ship sailing on schedule may well be greater than the owner's. In other situations it will be the owner (or the owner's P & I club) who will be compelled for commercial reasons to put up the security even though the charterer is the relevant person. This is arguably an efficient solution. The prudent owner will be aware of the identity and location of the relevant person and will be protected by means of an indemnity clause in the charter-party.<sup>119</sup> Under this the charterer will be obliged to reimburse the owner for costs incurred where the charterer is the relevant person with respect to arrest. If the charterer is a \$2 company, the owner will be protected by guarantees, perhaps from the principals behind the company. Therefore, the argument goes, allowing arrest of the wrongdoing vessel will always ensure that the liability ends up either directly or indirectly where it belongs. This argument is difficult to evaluate. In some cases it will no doubt provide a just and convenient solution. But this will by no means always be so. For example, Lord Diplock has suggested that the owner cannot insure against the risk that the charterer will not honour the indemnity clause.<sup>120</sup> There may be a chain of charterers and sub-charterers between the owner and the relevant person. The situation created by a change of ownership does not seem to be adequately catered for by a rule which allows the arrest of the wrongdoing ship irrespective of the identity of the relevant person. It is possible to have a corollary to the basic rule under which the right of arrest does not survive the change in ownership of the wrongdoing vessel.<sup>121</sup> Alternatively, the basic argument can simply be extended. The new owner simply extracts an indemnity from the old.<sup>122</sup> The chain of indemnities becomes longer but still brings home liability to the relevant person. But the longer the chain, the less likely it is in practice that it will remain effective. In practice complex chains of charters and sub-charters of various types are not uncommon. Even where there is only an owner-demise charterer link, the latter may, if the charter is almost over, or a frustrating event has occurred, have little practical incentive to put up security. From the owner's point of view, wider ability to arrest has the effect of making the owner a guarantor of whoever may be the relevant person on the particular claim, up to the value of the owner's interest in the ship.<sup>123</sup> In some situations at least the owner could argue that this merely encourages commercial irresponsibility on the part of those dealing with the ship. For example, suppliers of stores or fuel to ships should, it can be argued, be able to protect their interests adequately through such available commercial options as insisting on payment in advance, use of letters of credit or obtaining bank guarantees. They should have a duty to enquire as to the identity of the party with whom they are dealing. On this view they do not need and should not have recourse to the wrongdoing vessel where the relevant person is only a charterer.<sup>124</sup>

135. **Views Expressed to the Commission.** A wide range of views was expressed to the Commission on these arguments and in response to the tentative view expressed in the Commission's consultative papers in favour of the broad right of action *in rem* (option b) described in para 130.<sup>125</sup> There was a general agreement that a right of action *in rem* should exist where the relevant person is, when the action is commenced, either the owner or the demise charterer of the ship in question. Beyond that there was no consensus. The Australian Shippers' Council commented:

It is unsatisfactory that at present a ship may only be arrested where its owner is the relevant person, except where claims give rise to maritime liens ... [A] wider power of arrest is desirable, redressing any present imbalance between the rights of the shipowners and rights of a person dealing with a ship. ... A higher degree of self-policing within the industry would be encouraged by provision for claims against a charterer or owner(s) or persons in control of the ship at the time the proceeding was commenced.<sup>126</sup>

Similarly S Westgarth was

unconvinced that the claims of ship owning interests that Australia will be economically disadvantaged by the adoption of such a jurisdiction will, in fact occur. There may be cases where it is difficult to determine whether a charterer is a time or demise charterer and the appropriate evidence to the effect that the charterer is a demise charterer may be equivocal. It seems to me that there is little difference in principle between extending the ability to arrest in respect of demise charterers and extending that ability in respect of time charterers. For these reasons it seems to me that it would be appropriate for the Commission to consider extending the jurisdiction to arrest in respect of time charterers' debts.<sup>127</sup>

On the other hand, strong views to the contrary were also expressed. The Chairman of Universal Shipbrokers (Aust) Pty Ltd commented that the proposal would tend to encourage exports to be shipped from Australia on fob rather than cif terms, to Australia's disadvantage:

should legislation as proposed go through international shipowners will be faced with trying to obtain open ended Bank Guarantees from Australian Charterers to cover any possible misdemeanours and this will cost a lot of money. Exporters who feel that they are unable to obtain such wide guarantees will of necessity have to fall back on shipping FOB thus the Charterer of the ship will be the receiver of the goods in another country and a shipbroker in another country acting on behalf of the receiver will earn brokerage in US Dollars that was once paid to an Australian company. [W]e have many examples to hand ... that when a market falls and the contract is an FOB purchase all that has to be done is not send the ships to collect the goods. The legalities of obtaining redress from buyers in another country seem to us far more onerous than that of a stevedore or agent not having the wit or commercial acumen to obtain payment for his services in advance for duties to be performed for a voyage or time charterer.<sup>128</sup>

The need for an extended right of arrest was also questioned.

I am not aware of any substantial class of case in which an action *in rem* would not be available were the right to be limited [to owners and demise charterers]. Reference is frequently made to 'operators' of ships as a class in respect of whom a right *in rem* should exist. In my experience, such persons are invariably the agents of the owners or demise charterers, as is any 'person in lawful possession or control' of a vessel who is not himself an owner or demise charterer. ... [A] supplier of bunkers or services at the instance of a time or voyage charterer has other means of protection available to him and there do not seem to be sufficient grounds for extending the right to proceed *in rem* against the vessel to such a case.<sup>129</sup>

**136. Recommendation.** As these views suggest, the matter involves a basic question of trade or transport policy for Australia, and one on which different views can reasonably be held. The Commission has concluded that, on balance, it is not desirable at the present stage to go beyond the generally accepted scope of the statutory right of action *in rem* in comparable countries. The justification for admiralty jurisdiction, as a universal jurisdiction dependent only on local service of process on the *res*, depends on its broad international acceptance. Admiralty jurisdiction, as an exception to a basic principle of territoriality, is clearly in Australia's interests.<sup>130</sup> There would be little justification for relying on the international consensus supporting admiralty for one purpose and to reject it for another, closely related one. It is true that the Brussels Convention can be construed as allowing arrest on a maritime claim without reference to *in personam* liability. But, apart from the question whether this is the better interpretation of art 3 and 7, having regard to the French text of the Convention,<sup>131</sup> the Convention has not been taken to this extent in countries such as the United Kingdom, Canada, Singapore or New Zealand. Moreover, at the Lisbon meeting of the *Comite Maritime International* in 1985 which produced a draft revision of the Arrest Convention, there was finally very substantial support — after strong earlier disagreements on this issue — on a text which limits the right of arrest to liabilities of owners and demise charterers.<sup>132</sup> Jurisdictions such as Singapore, Hong Kong, New Zealand, South Africa<sup>133</sup> and Canada<sup>134</sup> have not extended the right of action *in rem* to any greater extent. The provisions of the Supreme Court Act 1981 (UK) which provide for an action *in rem* with respect to demise charterers' liabilities have been said to be working well and resolving most difficulties.<sup>135</sup> For these reasons a statutory right of action *in rem* with respect to any claim, other than a claim directly involving the possession of or a proprietary interest in the ship,<sup>136</sup> should only be able to be brought where, when the action is commenced, the owner or a demise charterer of the ship is a relevant person in respect of the claim. In accordance with the view expressed in para 80 and 127, a provision to this effect will not present constitutional difficulties under s 76(iii), since, even if the narrower 'procedural' view of s 76(iii)

were to be taken, the liability in question would be the liability of a person with a proprietary interest (that is, as owner or demise charterer) in the ship at the relevant time. The enforcement by an action *in rem* of this liability can properly be described as procedural, having regard to the history of admiralty jurisdiction.

**137. An Alternative View: Time Charterers Operating Ships.** If this recommendation is not accepted, on the ground that a wider right of action *in rem* is desirable in Australia's interests, then it would be within the admittedly broad and flexible international consensus on the scope of admiralty, as well as within the scope of Commonwealth power under s 76(iii) of the Constitution, to provide for a right of action *in rem* with respect to the liabilities of any person who is the operator of the ship (including a time charterer who is the operator). A compromise proposal to this effect gained some support at the Lisbon CMI Conference.<sup>137</sup> Equating ship owners and operators for this purpose would also be consistent with s 6(4) of the Navigation Act 1912 (Cth) and with provisions in a number of maritime conventions.<sup>138</sup> If this course is adopted, it may be desirable to impose a relatively short time limit (such as 12 months) for service of process after the commencement of proceedings, to avoid unnecessarily affecting third parties where the time charterer as relevant person has ceased to be the operator of the ship.<sup>139</sup>

## Lifting the Corporate Veil

**138. The Present Position.** One method of resolving some of the difficulties referred to in para 127 in identifying the relevant person in respect of a maritime claim would be to enact a special provision treating related companies or entities as the same person for this purpose. A similar question arises with respect to the identification of 'sister' ships or surrogate ships, for example, where a group of 'one-ship' companies is effectively under the control of a holding company.<sup>140</sup> In its Report on the Review of the Law of Admiralty the South African Law Commission took the view that, in determining whether the ownership of the surrogate vessel was in the hands of the relevant person, a court should be able to lift the corporate veil. The Commission argued that since the drafting of Brussels Convention,

... its provisions have been defeated by the proliferation of 'one ship companies', that is to say, companies owning only one ship and therefore avoiding the Convention. The extension is, it is thought, a logical extension of the Convention ...<sup>141</sup>

The Convention itself describes as the prerequisite linkage to determine common ownership 'when all the shares therein are owned by the same person or persons, (art 3(2)). 'Shares' refers to shares in the ship itself, not merely in the company which owns the ship.<sup>142</sup> Therefore, if the 'relevant person' is company X, a wholly owned subsidiary of company Y, a ship owned by Y (or by Z, another company wholly owned by Y) cannot be arrested on a claim against X. In England the question of lifting the corporate veil in order to arrest a ship has arisen in two situations. The first arises because a statutory right to proceed *in rem* against the wrongdoing ship does not survive a change in ownership. It has been argued that the court should disregard a change in ownership where the new owner is a company forming part of the same group as the old owner.<sup>143</sup> The other situation concerns the arrest of a ship owned by a subsidiary of the company which was the relevant person.<sup>144</sup> Both questions have had to be resolved by interpreting the relevant provisions of the legislation then in force, the Administration of Justice Act 1956 (UK). This Act used the expression 'beneficially owned'<sup>145</sup> and similar language is used by its successor, the Supreme Court Act 1981 (UK).<sup>146</sup> It has caused some judicial puzzlement. As Justice Brandon observed, 'trusts of ships, express or implied are ... rare'.<sup>147</sup> It is unnecessary to cater for them in the proposed legislation.<sup>148</sup> in the event the English courts declined to interpret the expression as a mandate for any general lifting of the corporate veil beyond situations of trusteeship or nominee holdings.<sup>149</sup> Justice Sheen said that he 'would not hesitate to lift that veil if the evidence suggested that it obscured from view a mask of fraud rather than the true face of the corporation'.<sup>150</sup> But merely because a shipping group chose to operate through a number of one ship companies was, in his view, insufficient reason. If, when the plaintiffs agreed to charter the wrongdoing ship, they had been concerned about the assets of its owners, they would or could have found out that the ship they were now seeking to arrest was not part of those assets. In The Maritime Trader Justice Sheen implied that a sham might be found to exist if the one ship company had been set up solely to defraud the plaintiff.<sup>151</sup> But as a critic of his decision has pointed out, the 'one ship company is a widespread maritime institution with sound other commercial reasons behind it: proving its use with the specific intention of evading s 3(4) would be a quite exceptional feat'.<sup>152</sup> As the general reluctance to lift the corporate veil in Australia is at least as great as it is in England,<sup>153</sup> it may be assumed that similar decisions will be reached in admiralty here unless the proposed legislation clearly directs otherwise.

**139. Arguments About Lifting the Corporate Veil.** The arguments for and against a special provision in the proposed legislation should be briefly summarised. There are quite powerful arguments for leaving questions of lifting the corporate veil to be determined by general Australian company law. The first is the desirability of retaining harmony and consistency with that law. It can be argued that the issue has no particular or peculiar maritime aspect, but is a general issue raised by the ability to set up corporate bodies. This being so, the problem should be dealt with as a matter of general law, not of admiralty jurisdiction. Arguably, the general law at present strikes the appropriate balance in leaving the corporate veil intact, cases of fraud apart. Secondly, allowing the veil to be lifted in admiralty has the potential to complicate further what is already a highly complicated matter.<sup>154</sup> Even further complications would occur when there is an insolvency in admiralty involving some or all of the same assets as a corporate insolvency under general law.<sup>155</sup> Third, there is no overseas precedent for any general lifting of the corporate veil in regard to the arrest of ships, with the sole exception of the Admiralty Jurisdiction Regulation Act 1983 (S Af) s 3(7) (which deals only with the identification of associated ships, and not with the more fundamental question, whose liability allows the arrest of the wrongdoing ship). On the other hand, this point is not necessarily impressive: if the law is ever to change someone has to be first (or second). A fourth argument is that legislation lifting the corporate veil may be difficult to apply. The South African provision relies on the concept of control: ‘A person shall be deemed to control a company if he has the power, directly or indirectly, to control the company’.<sup>156</sup> One might ask how ‘indirect’ the control may be: for example, are the votes of family members within the control of the senior member of the family? Again it could be said that this point is unimpressive. Even if the outer reaches of the provision are uncertain, it will at least catch the more common situation of a holding company or wholly owned subsidiary. The South African courts appear so far to have been able to apply this aspect of s 3(7)(b)(ii) without undue difficulty.<sup>157</sup>

**140. Difficulties of Application.** The principal argument in favour of a special provision for lifting of the corporate veil in admiralty is the pragmatic point that it will assist Australian shippers and ship suppliers, in a few cases at least, to recover from foreign shipowners. Just how many cases it is difficult to estimate. In order to take out a warrant of arrest in this situation an affidavit will have to be sworn by or on behalf of the plaintiff stating that the ship it is sought to arrest is owned by a company which (assuming for the moment that the South African wording is used) is ‘directly or indirectly’ controlled by or controls the ‘relevant person’. Lloyd’s and similar agencies have a long-standing record of keeping track of both the movement and ownership of vessels. But there is no readily available source by which a solicitor in Australia could easily go behind formal ownership. People who set up elaborate corporate structures through open registry or tax haven countries often do so partly to preserve their anonymity. In any event they are likely to seek to preserve that anonymity.<sup>158</sup> The onus will be on the plaintiff to show that the requisite connection exists, not only to aver in the affidavit, but also to discharge the burden of proof should the owners of the arrested vessel seek to have the writ set aside.<sup>159</sup> Because speed may often be of the essence in arresting a ship practical problems are likely to surround attempts to lift the corporate veil. The provision also has the potential to discriminate in its effect against shipowners based in countries where information about shareholdings and corporate structures are public.

**141. Conclusion.** Again, differing views were expressed to the Commission about the desirability of a corporate veil provision, either confined to the identification of surrogate ships, or applying more generally.<sup>160</sup> The predominant view was that a special provision in the legislation was undesirable. It was suggested that the right to proceed *in rem* with respect to owners’ and demise charterers’ liabilities, combined with the existing law of maritime liens, covered most situations. But the fundamental consideration, in the Commission’s view, is the undesirability of making special provision with respect to the corporate veil in legislation dealing with admiralty jurisdiction. If questions of the liability or indebtedness of corporate groups are to be addressed this is properly done through company or insolvency law rather than in specific legislative contexts such as admiralty jurisdiction.<sup>161</sup> Accordingly there should be no special provision dealing with the corporate veil, or defining ‘related’ or ‘associated’ companies, in the proposed legislation.<sup>162</sup>

## **Relationship between Actions *In rem* and *In personam***

**142. The Need to Preserve Admiralty Actions *In personam*.** As pointed out in para 88, the ability to proceed *in rem* is the key feature of admiralty jurisdiction. It is perhaps not immediately clear why there should be any facility in admiralty to sue *in personam*. The rules for service outside the jurisdiction in such an action

are the same as the general rules of court, so that obtaining jurisdiction over a foreign defendant is no easier. Unlike the action *in rem*, the admiralty action *in personam* confers no security interest in the defendant's property pending judgment. Nor can any question of priorities arise: in a proceeding in admiralty commenced *in personam* there is no *res* in the hands of the court whose proceeds have to be distributed amongst competing claimants. Historically the action *in personam* was infrequently used even in the pre-19th century period when it involved arresting the defendant.<sup>163</sup> The Admiralty Court Act 1861 (UK) s 35 expressly allowed all the jurisdiction conferred by the Act to be exercised either *in rem* or *in personam*.<sup>164</sup> Clearly this was not intended to revive the arrest of persons; instead it brought about the development of the modern admiralty action *in personam*.<sup>165</sup> Admiralty proceedings *in personam* are in most respects similar to general Supreme Court actions. They begin by personal service of originating process on a named defendant. They culminate in a judgment which, if in the plaintiffs favour, allows execution against the property of the defendant. It is important to distinguish this type of proceeding from the anomalous type of proceeding variously described as 'a quasi action *in personam*',<sup>166</sup> or an action '*para-in-rem*'.<sup>167</sup> This latter is numerically the most common type of action in modern admiralty jurisdiction. It results when the writ of summons *in rem* is served on the defendant *res* owner personally or on the owner's local representative. No writ of arrest is ever executed because the defendant has given an undertaking to appear backed by an acceptable form of guarantee. Although begun by a writ *in rem* there is never at any stage any *res* in the custody of the court. Whatever the juristic difficulties with this procedure, it is a well accepted one which should clearly be retained. The question here, however, is whether a distinct *in personam* admiralty jurisdiction should be retained. It is clear that it should be so retained, for several reasons. Some advantages of *in personam* petitions in admiralty are procedural. For example, in an action for collision damage, whether *in personam* or *in rem*, preliminary acts have normally to be produced.<sup>168</sup> Limitation actions can only be commenced *in personam* yet there may be cases where the shipowner needs to commence a limitation action before the anticipated proceedings *in rem* have been commenced.<sup>169</sup> Proceedings for apportionment of salvage can only be commenced in *personam*, yet it may be useful if they can be brought in admiralty. Some of the substantive law administered in admiralty is unique to admiralty. For example, it is far from clear whether, in the absence of a salvage agreement, a salvage claim could be effectively pursued *in personam* in a court not having admiralty jurisdiction.<sup>170</sup> Yet there seems to be no virtue in requiring all salvage actions to be brought *in rem*. Admiralty actions cannot be brought *in rem* against the Crown<sup>171</sup> so the ability to sue *in personam* is the only means of suing the Crown in admiralty. There are other jurisdictional advantages, especially in a country such as Australia where admiralty jurisdiction will be federal jurisdiction.<sup>172</sup> As these examples show, *in personam* admiralty jurisdiction serves useful functions. It should be conferred in the proposed legislation.

143. **Effect of Appearance.** It was established in *The Dictator*<sup>173</sup> in 1892 that judgment given in a proceeding *in rem* could be personally enforced against a defendant who had appeared in the proceeding, irrespective of the value of the *res*. Thus the effect of appearance is to convert the proceedings into a combined form of *in rem* and *in personam* action. This was not the case in the pre-Judicature Act period, when the Admiralty court was a separate court with no access to ordinary *in personam* actions commenced by personal service, and in the United States *in rem* liability remains completely distinct from *in personam* liability.<sup>174</sup> However the rule is a convenient one, which avoids the need for multiplicity of proceedings.<sup>175</sup> Curiously, it seems never to have been decided that appearance does not give rise to a judgment enforceable *in personam* where someone other than the relevant person (that is, the person who would be liable in an action *in personam*) appears, yet it is clear that this must be the rule.<sup>176</sup> It is desirable to spell out in the proposed legislation both the rule about the *in personam* liability of a relevant person who has appeared as a defendant, and the absence of any *in personam* liability for the payment of money (other than by way of costs) of a person who has appeared in the proceeding but is not a relevant person.<sup>177</sup>

144. **Separate Actions?** Although an *in rem* action can give rise to *in personam* liability, there remain important substantive and procedural differences between actions *in personam* and actions *in rem*. To take one example, it is not possible to serve a writ *in rem* outside the jurisdiction, whereas a writ or other initiating process *in personam* will often need to be so served. To avoid confusing the two kinds of proceeding, it is necessary to stipulate in the proposed legislation<sup>178</sup> that an action *in rem* in respect of a particular claim is to be commenced by a separate writ and not joined with an action *in personam* on the same claim in the same originating process.<sup>179</sup>

## 9. The Scope of Statutory Rights of Action *In rem*

### General Considerations

145. **Introduction.** This chapter deals with the question which types of claims (apart from claims in respect of maritime liens) may be brought in admiralty jurisdiction. One of the aims in setting out specific heads of admiralty jurisdiction is to gather together provisions at present scattered through a number of 19th century Imperial Acts. Another aim is to extend existing heads, and (where necessary) to add new heads to bring admiralty jurisdiction into line with Australian interests and requirements, viewed in the light of international acceptability as indicated by legislation in comparable jurisdictions. The question whether and to what extent the proposed legislation should provide for jurisdiction over maritime liens was discussed in chapter 8.<sup>1</sup> But admiralty jurisdiction in England has long covered more than merely claims giving rise to maritime liens. The 1952 Arrest Convention sets out 17 categories of subject matter which give rise to a ‘maritime claim’.<sup>2</sup> The United Kingdom legislation has 18 categories,<sup>3</sup> Canada and New Zealand 19,<sup>4</sup> and South Africa 26.<sup>5</sup> From the 1952 Arrest Convention and this overseas legislation a common core can be extracted. The categories which make up the core are set out in the following section, with a brief discussion of each category. Simply from the fact of their commonality it can be safely assumed that these categories should be included in the proposed Australian jurisdiction. The discussion therefore focuses more on the precise formulation of each category, noting variations in the overseas texts and possible reasons for them (para 149-71). The next section then discusses heads of jurisdiction found only in some of the overseas models, and other possible categories which might be included in the proposed legislation (para 172-92). Separate consideration is given to the need for a provision dealing with ancillary jurisdiction or providing for a ‘residual’ jurisdiction over any other matters historically within admiralty (para 193-5). A final section discusses the question what limitations there should be on the admiralty jurisdiction so defined, by reference to particular classes of defendant (for example the Crown, local residents) (para 196-200).

146. **Overlap Between Heads of Jurisdiction.** In interpreting the heads of admiralty jurisdiction in English legislation the courts give the words used ‘their ordinary wide meaning’.<sup>6</sup> It can be assumed that Australian courts will interpret the proposed provisions in the same broad way. The various heads of jurisdiction are to be interpreted disjunctively: it is no objection that a claim brought under one head might also fit under another head. Indeed there is a large degree of overlap between the heads of jurisdiction in all the overseas legislation. Major areas of overlap and redundancy are indicated as each head is discussed. Unless a particular provision is completely redundant, such overlap does no harm and ensures that the heads of jurisdiction proposed are broadly similar in number and wording to the overseas legislation.

147. **Two Classes of Arrest?** Under present Australian law, claims can only be brought in admiralty on some types of subject matter where the ship is already under arrest.<sup>7</sup> The apparent rationale for such a requirement is that some claims are insufficiently important or lack adequate connection with the forum to warrant the arrest of a ship, but nonetheless should be able to be brought against a ship which has already been arrested on another type of claim. Since claims for small amounts of money can be brought under other heads of jurisdiction, this rationale is not persuasive. No ‘second class’ heads of jurisdiction of this sort are included in the proposed jurisdiction. Where the reason for the ‘second class’ status is the possible lack of sufficient nexus with the forum, the doctrine of *forum non conveniens* will be available in a proper case. It may be that some types of claim are too trivial to justify arrest. But in practice there does not appear to be any problem of arrest on trivial claims in other jurisdictions where the restrictions which now exist in Australia have been abolished. Courts already have the ability, through imposing costs, to discourage unnecessary arrests on trivial claims, and the question whether further procedural restrictions should be imposed is discussed in chapter 14.<sup>8</sup>

148. **Geographical restrictions.** A final general consideration is whether there should be any geographical restrictions built into the subject matter of admiralty jurisdiction. For most types of subject matter the exclusion of causes of action arising within the body of a county was ended in the 19th century.<sup>9</sup> But restrictions still remain on some maritime contracts and torts.<sup>10</sup> These restrictions should be removed.<sup>11</sup> No similar restrictions need to be placed on any new heads of jurisdiction created by the proposed legislation. The restrictions already proposed for inland waters claims,<sup>12</sup> and the exclusion of inland waterways vessels from the definition of ‘ship’,<sup>13</sup> are together sufficient to avoid problems arising.

## **Proposed Heads of Jurisdiction — Statutory Rights of Action *In rem***

149. **Vessel Ownership and Title Disputes.** All the overseas Acts contain very similar wording in describing this head of jurisdiction. Similar provision should be made for Australia, covering claims to ‘title to, or ownership or possession of, a ship or a share in a ship’.<sup>14</sup> It should be made clear that the jurisdiction is not restricted to Australian registered ships.<sup>15</sup> At present the power to order rectification of the register under the Shipping Registration Act 1981 (Cth) s 59<sup>16</sup> is vested only in State and Territory Supreme Courts. The same power should be expressly vested in any other superior court exercising original jurisdiction.<sup>17</sup>

150. **Disputes Between Co-owners of Ships.** Some issues of co-ownership will be capable of being brought under the previous head, as disputes as to the ownership of a share in a ship. There should also be provision to cover in addition disputes relating to the employment and earnings of a ship, including actions for restraint or possession.<sup>18</sup> There is no reason to limit the jurisdiction to disputes involving Australian-registered ships, as the removal of a similar restrictions in England in 1956<sup>19</sup> would suggest. A provision should be added along the lines of s 20(4) of the Supreme Court Act 1981 (UK), so that jurisdiction under this head will include power ‘to settle any account outstanding and unsettled between the parties in relation to the ship, and to direct that the ship, or any share thereof, shall be sold, and to make such other order as the court thinks fit’.<sup>20</sup>

151. **Mortgages.** All the over seas texts make explicit provision for mortgages, and all except the 1952 Arrest Convention couple ‘mortgage’ with ‘charge’. This is further elaborated (in all but the South African Act) by providing that claims in respect of mortgages and charges apply ‘to all mortgages or charges, whether registered or not and whether legal or equitable, including mortgages and charges created under foreign law’.<sup>21</sup> Australian legislation should be in similar terms, so as to remove the restrictions with respect to foreign mortgages which presently exists in Australia.<sup>22</sup> Apart from the provision just quoted, ‘charge’ is not defined. However, English courts have resisted any inclination to interpret it expansively; it ‘relates to a charge in the nature of a mortgage, and would not cover a charge or lien for wages’.<sup>23</sup> Nor would it, on this view, extend to charges created by the foreign equivalent of statutes such as the Protection of the Sea (Civil Liability) Act 1981 (Cth) s 21 in respect of clean-up costs following oil pollution from the ship. It is preferable to deal with such matters specifically rather than to stretch the meaning of ‘charge’ in a provision dealing primarily with mortgages. The 1952 Arrest Convention and the Canadian and South African Acts all refer to ‘hypothecation’ as well as ‘mortgage or charge’. Hypothecation is in most respects the functional equivalent in civil law to mortgage in the common law, though its legal characteristics are rather different.<sup>24</sup> The provision already recommended to the effect that foreign mortgages and charges be included within the head of jurisdiction sufficiently suggests that functional equivalents are not excluded. Explicit reference to ‘hypothecation’ and ‘pledge’ is useful both to underline this and to make clear that ‘charge’ is used in a *ejusdern generis* manner rather than broadly. In *The Camosun* the Privy Council observed that the provisions in the Admiralty Court Acts of 1840 and 1861 giving admiralty jurisdiction over mortgages ‘seemed to be confined to claims by mortgagees’.<sup>25</sup> This dictum would be equally applicable to the current English admiralty jurisdiction<sup>26</sup> which merely repeats the language of the earlier legislation. Though not stated by the Privy Council, the reason for the limitation appears to be that set out in general terms in *The Eschersheim*,<sup>27</sup> that is, the need for the ship arrested to be the same ship as that in respect of which the claim arose. This requirement was discussed and accepted in chapter 8,<sup>28</sup> and there is no reason to depart from that general conclusion in the particular case of mortgages. It is not clear why a mortgagor would ever want to proceed *in rem*. On the other hand the restrictions flows from the prerequisites for an action *in rem*, and not from the language of the head of jurisdiction dealing with mortgages. Accordingly *in personam* claims by mortgagors would be within admiralty jurisdiction. It is possible to mortgage or charge cargo or freight<sup>29</sup> and the proposed legislation should give jurisdiction to admiralty over disputes involving such mortgages.

152. **Effect of Shipping Registration Act (1981) (Cth).** The Shipping Registration Act 1981 (Cth) s 94A at present confers admiralty jurisdiction over Australian-registered mortgages.<sup>30</sup> On passage of the proposed legislation s 94A will become redundant and can be repealed. Section 41 of the Act deals with a mortgagee’s power of sale. In some circumstances a second or subsequent mortgagee is required to obtain an ‘order of a court of competent jurisdiction’ before exercising a power of sale. The proposed provision for mortgages would make any court exercising jurisdiction under it ‘competent’ for the purposes of granting such an order. No special provision is necessary. In contrast, s 47B and 47C of the Act give to State and Territory Supreme Courts jurisdiction with respect to the caveat system associated with the Shipping Register. Special provision

would be needed if admiralty courts are to have this jurisdiction. Similarly s 66 of the Act allows a mortgagee who is notified by the Registrar that the ship which is the security for the mortgage is no longer entitled to be registered to apply to ‘the Supreme Court of a State or Territory’ for any of a variety of orders including an order for the sale of the ship. It might be thought appropriate that applications for orders under s 66 should be able to be made to any court exercising admiralty jurisdiction. On the other hand, s 66 proceedings are in the nature of execution pursuant to a court order; there are none of the characteristics of arrest *in rem* whereby jurisdiction over a possibly foreign defendant is asserted and security for any resulting judgment is obtained. With one exception there seems to be no need to alter the jurisdictional provisions of the Shipping Registration Act 1981 (Cth). Under the proposals in chapter 11, the courts given jurisdiction under the Act will also have admiralty jurisdiction. If a matter arises involving both the Act and admiralty it can be brought in those courts and a complete remedy obtained in the one proceeding. In the case of the Federal Court (which, as proposed in chapter 11, will also have original admiralty jurisdiction) it will usually be sufficient to rely on the power over ‘associated’ federal matters given by the Federal Court of Australia Act 1976 (Cth) s 32.<sup>31</sup> Section 66(6)(b) also empowers a court to make ‘such other orders for and in relation to the distribution of the proceeds of sale as it thinks fit’. It is not clear how distribution under this provision would operate in a court exercising admiralty jurisdiction. Would admiralty rules on the distribution of proceeds of the sale of the *res* (including rules on priorities) apply? If so, the distribution might, depending on the facts, be different to a distribution made by a court not exercising admiralty jurisdiction. This would open up the possibility of forum shopping by the mortgagee. In chapter 12 the overlap between general distribution on insolvency and bankruptcy and the special admiralty rules is discussed. The conclusion there is that it is unnecessary to make any provision to deal with this overlap in the proposed legislation.<sup>32</sup> The same would appear to be true of the potential conflict created by s 66(6)(b) of the 1981 Act. The exception relates to s 59 of the Act, which gives Supreme Courts power to rectify the register. This power will commonly be used in connection with proprietary maritime claims in admiralty, and express power should be conferred on the Federal Court to order rectification of the register.

153. **Towage.** The 1952 Arrest Convention art 1(1)(i) allows jurisdiction over claims for ‘towage’. The overseas legislation refers to ‘any claim in the nature of towage’.<sup>33</sup> The latter, broader, wording is to be preferred, as it makes it clear that claims in respect of escorting services by tugs are within admiralty even though no actual towage is performed or, emergencies apart, expressly contemplated.<sup>34</sup> In *The Conoco Britannia* it was said to be arguable whether admiralty jurisdiction under this head included a claim by a tugboat operator for an indemnity from the owner of the towed ship in respect of the tugboat operator’s liabilities to the tugboat owner.<sup>35</sup> Under the reasoning in *The Eschersheim*<sup>36</sup> the only ship (apart from any provision on surrogate ships) which could be served or arrested under this head as worded in the Supreme Court Act 1981 (UK) s 20(2)(k) is the ship being towed. If the owner of the tow wishes to proceed *in rem* against the tugboat, some other head of jurisdiction must be relied upon. A contract for the ‘use or hire of a ship’<sup>37</sup> is the obvious one. Because towing is almost invariably under contract other heads will be available and expansion of this head of jurisdiction so as to allow the owner of the tow to sue *in rem* under it is unnecessary.

154. **Pilotage.** Most pilotage in Australia is conducted by State governments through various Harbour Boards and Marine Boards.<sup>38</sup> Statutes making provision for pilotage often make provision for collection of pilotage charges,<sup>39</sup> including in some cases allowing for the detention of the vessel.<sup>40</sup> A head of jurisdiction relating to pilotage is not essential. But it will give an additional avenue of recovery, and will also allow claims for pilotage services performed abroad to be recovered. It should therefore be available.

155. **Salvage.** There are two major areas of uncertainty to be resolved. First, there is the problem of the overlap<sup>41</sup> between the present admiralty jurisdiction and the salvage jurisdiction (including life salvage) conferred by the Navigation Act 1912 (Cth). Secondly, there is the question whether the description ‘claim in the nature of salvage’<sup>42</sup> is broad enough. In particular, problems have arisen with claims for negligently performed salvage operations. On the first point, one option would be simply to continue the overlap. It has been in existence in its present form since the enactment of the Navigation Act 1912 (Cth) and appears to have caused no difficulty in practice.<sup>43</sup> On the other hand, it is, to put it mildly, conceptually untidy. A second option would be to remove the salvage jurisdiction provisions from the Navigation Act 1912 (Cth)<sup>44</sup> and require all salvage claims to be brought in admiralty. This would be acceptable if admiralty jurisdiction was conferred on courts of summary jurisdiction in the same way as at present under the Navigation and Merchant Shipping Acts. Although these Acts impose uniform money and venue limits on salvage actions,<sup>45</sup>

there seems to be no advantage in forcing into Supreme Courts matters which at present can be heard in lower courts. In chapter 11 it is recommended that lower courts be given admiralty jurisdiction *in personam*, subject to their ordinary limits on size of claim and venue, and this principle should apply to salvage as to other maritime claims. This would still leave salvage law split between three Acts. The Navigation Act and the Merchant Shipping Act would continue to deal with the substantive law of salvage, conflict of laws<sup>46</sup> and the powers and functions of the receiver of wreck in respect of salvage,<sup>47</sup> while the proposed legislation would deal with jurisdiction of courts and related matters. A third option would be to have no salvage provision in the proposed legislation, leaving the whole topic to the Navigation Act and, to the extent that it still applies, the Merchant Shipping Act 1894 (UK). But it is unsatisfactory to propose an Act dealing with admiralty jurisdiction which contains no reference to salvage. The fact that most salvage claims give rise to maritime liens underlines the incongruity. In the absence of a thorough reform of the substantive law of salvage there can be no ideal solution. But the second option is the most appropriate, pending a complete overhaul of the Navigation Act and repeal of the Merchant Shipping Act.<sup>48</sup>

156. **Scope of Salvage Jurisdiction.** Turning to the second issue, what matters connected with salvage should fall within the scope of the proposed provision, the Navigation Act 1912 (Cth) s 328 grants jurisdiction in ‘all claims whatsoever relating to salvage’. Most of the overseas legislation uses the phrase ‘claim in the nature of salvage’. In England it is unclear whether this latter wording

embraces the totality of questions and claims which may arise within the province of salvage or whether it has a more limited connotation. It is probable that the phrase ‘any claim in the nature of salvage’ bears a restricted meaning and is confined to a claim for a salvage award arising from beneficial service. Given the format adopted under the Administration of Justice Act 1956, section 1, and in particular the ‘sweeping-up’ jurisdiction clause, it seems unnecessary to give the phrase a more extended and strained construction. Thus the court’s jurisdiction over matters ancillary to a claim for salvage such as its power to apportion an award, or its power to abate or extinguish an award or condemn a salvor in costs upon evidence of negligence or misconduct, and which were established under the original jurisdiction, is expressly retained by the Admiralty Court by virtue of the ‘sweeping-up’ clause. The same is equally the case with regard to the court’s jurisdiction to order contribution or to grant an injunction to protect any possessory interest a salvor may enjoy.<sup>49</sup>

It is recommended below that the proposed legislation contain no ‘sweeping-up’ clause.<sup>50</sup> Quite apart from that recommendation, it is undesirable to rely on a sweeping-up clause to pick up matters which presently fall within the admiralty jurisdiction under the rubric of ‘salvage’. Accordingly the broader language of the Navigation Act 1912 (Cth) s 328 is to be preferred.<sup>51</sup> This definition will cover claims for life salvage.<sup>52</sup> The broader definition will raise the question whether it will be possible to proceed *in rem* under the salvage head for a claim for negligently performed salvage. Under the United Kingdom legislation the answer is no, not because of the way in which the head of jurisdiction is worded but because of the general requirement, explained in *The Eschersheim*,<sup>53</sup> that the *res* against which the claim is brought must be the *res* in respect of which the claim arose. In a claim for negligently performed salvage the owner of the *res* involved (the salved property) appears as plaintiff. In most cases where there is a salvage agreement the plaintiff can sue *in rem* under the head of jurisdiction ‘agreement for the use or hire of a ship’.<sup>54</sup> It seems that today most major salvage operations are contractual, but even in the absence of an agreement it may be possible to sue *in rem* for negligent salvage where, for example, the negligence resulted in a collision between the salving and the salved vessels.<sup>55</sup> But there will be some very rare situations in which it will be impossible to proceed *in rem* against the negligent salvor.<sup>56</sup> The South African legislation expands the head of jurisdiction to include ‘any claim by any person having a right in respect of property salved or which would but for the negligence or default of the salvor or would-be salvor, have been salved’.<sup>57</sup> It is not clear whether such a claim could be pursued *in rem* under this provision. One view it could not because the wording makes no reference to a ship and thus fails to identify the ship which may be arrested: only jurisdiction *in personam* is conferred. On another view the negligent salvage claim could be pursued *in rem* against any ship which the negligent salvor happens to own; no specific nexus between the negligent act and the ship would have to be shown. A middle view would allow arrest only of the ship (if any) used in the act of negligent salvage. This is the view most consistent with the nexus requirements discussed above.<sup>58</sup> But it still leaves unclear what sort of connection is required between the salvor’s vessel and the negligent act. Most cases of damage in which a ship is ‘used’ would appear to fall within other heads of jurisdiction.<sup>59</sup> Accordingly there is no need for a specific head of jurisdiction dealing with negligent salvage.<sup>60</sup>

157. **Liability Salvage.** It would also be premature to make any express provision for the controversial topic of ‘liability salvage’.<sup>61</sup> If that concept becomes part of the substantive Australian law of salvage, that will be

the appropriate time to add jurisdiction over ‘liability salvage’ claims to the admiralty jurisdiction. It should be noted that the salvage head of jurisdiction is not intended to deal with wreck other than salvage claims in respect of wreck. Other aspects of wreck arise under the head of jurisdiction dealing with droits of Admiralty.<sup>62</sup>

158. **General Average.** As defined by the Marine Insurance Act 1909 (Cth) s 72(2) ‘there is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled [normally a ship or cargo] in the common adventure’. Broadly, claims for general average may involve shipowners suing owners of surviving cargo for contribution, or owners of lost or damaged cargo suing either the shipowner or other cargo owners (or both).<sup>63</sup> Admiralty jurisdiction in Australia does not at present include general average. The Admiralty Court in the 19th century disclaimed any such jurisdiction<sup>64</sup> except when a general average claim was made against a fund in the custody of the court.<sup>65</sup> The reason for disclaiming jurisdiction, seems to have been partly deference to tradition but also ‘that in all cases of average it is essential that the tribunal which is to adjust it should have the power to compel all the parties interested to come in and pay their quota. I possess no such power’.<sup>66</sup> Although the Admiralty Court acquired increased powers in 1861,<sup>67</sup> it was not until 1956 that admiralty jurisdiction was conferred by statute over ‘any claim arising out of an act which is or is claimed to be a general average act’.<sup>68</sup> It would seem that the provision was inserted in order to conform to the 1952 Arrest Convention. There do not appear to have been any difficulties caused by the earlier lack of jurisdiction over general average and the necessity for such a provision does not seem to be marked.<sup>69</sup> Goods are normally carried on board ship under contract and another head of jurisdiction is available to cover contract disputes.<sup>70</sup> Even in the absence of a contract an admiralty tort provision would often be adequate to give jurisdiction.<sup>71</sup> But some gaps may remain, particularly under the tort provision where it is the shipowner who is plaintiff and cargo owners the defendants.<sup>72</sup> There seems no reason not to follow the 1952 Arrest Convention and all the overseas legislation, and include general average as a head of jurisdiction.

159. **Wages of Masters and Crew Members.** In devising a suitable provision for admiralty jurisdiction over wages the main concerns are to ensure that the wording used enables courts to continue their broad interpretation of who is, in the earlier terminology, a ‘seaman’, to determine who is allowed to sue on behalf of the seaman, and to define what constitutes ‘wages’ (including the status of the 19th century rule that wages must be earned aboard ship). In resolving these matters it is important to ensure that the proposed jurisdiction harmonises with the provisions of other Commonwealth and State legislation which deal with the same subject matter.

160. **Definition of Master and Crew Members.** The definition of master causes no difficulty: the definition used in the Navigation Act 1912 (Cth) s 6 should be used.<sup>73</sup> The definition of ‘seaman’ in the context of admiralty jurisdiction is less straightforward because many people work aboard ships (some only while the ship is in port) who play no direct part in the navigation or operation of the ship. The Navigation Act 1912 (Cth) s 6 defines seaman’ as

a person employed or engaged in any capacity on board a ship on the business of the ship, other than -

- (a) the master of the ship;
- (b) a pilot;
- (c) an apprentice; or
- (d) a person temporarily employed on the ship in port.<sup>74</sup>

This is not coextensive with the definition applied in the context of admiralty jurisdiction. For example, apprentices are included in the Admiralty Court’s jurisdiction over seamen’s wages.<sup>75</sup> Admiralty also treated as a seaman a person who was employed as a caretaker on a ship in port.<sup>76</sup> It is not clear whether such a person would be excluded by para (d) of the Navigation Act definition. On the other hand the breadth of the opening part of this definition parallels the broad view taken in admiralty. Cooks,<sup>77</sup> pursers and surgeons<sup>78</sup> and carpenters<sup>79</sup> have all been treated as seamen in suits for seamen’s wages. There are three options. The first is to adopt the Navigation Act definition but to omit para (c) of that definition, thus including apprentices. This may perhaps result in a slight narrowing of the jurisdiction by omitting caretakers, an

omission which seems of little significance. The second option would be to use a term such as ‘seaman’ in the proposed legislation without any definition. This will pick up the earlier case law and allow some flexibility. But it has the corresponding disadvantage of uncertainty and places reliance on early 19th century English cases which are in some respects obscure.<sup>80</sup> This seems sufficient reason for not recommending this option. A third option would be to follow the United Kingdom model. The Administration of Justice Act 1956 (UK) substituted ‘member of the crew’<sup>81</sup> for the use of ‘seaman’ in earlier legislation.<sup>82</sup> The other overseas legislation also uses the former expression in preference to ‘seaman’. It has been suggested that ‘member of the crew’ (which is not defined in any of the legislation) may be a narrower concept than ‘seaman’.<sup>83</sup> It would perhaps exclude people such as caretakers who are employed on ships in port but do not in any meaningful sense form part of a crew. Any narrowing effect might be seen as useful in limiting the focus of admiralty jurisdiction primarily to the sea-going operations of ships. Given that the differences between the options are marginal, the simplest solution is to adopt the definition in the Navigation Act but to include apprentices within the definition. The expression ‘members of the crew’ should be used rather than ‘seamen’, consistently with the adoption of non-sexist terminology in Commonwealth legislation.

**161. Allotment of Wages; Recovery on Behalf of Deceased Crew Members.** A second issue is the possible need to draft the head of jurisdiction to cover claims for wages where the master or crew member is not the plaintiff. Two situations in which this occurs are allotment of wages and recovery by the government on behalf of deceased crew members. On the latter point no difficulty occurs because the relevant legislation provides that recovery shall be ‘in the same Court and in the same manner as that in which seamen’s wages are recoverable’.<sup>84</sup> Under statutory provisions allowing allotment of wages the allottee is given the right to sue for the wages in ordinary courts but no reference is made to courts exercising admiralty jurisdiction.<sup>85</sup> The issue is whether such suits should also be brought within admiralty jurisdiction. The effect of doing so would be to allow the allottee to arrest the ship. The 1956 United Kingdom legislation specifically incorporates allotment claims within admiralty jurisdiction.<sup>86</sup> However the 1981 Act appears to exclude such claims.<sup>87</sup> Although the point is minor, the exclusion from the proposed head of any jurisdiction which would allow an allottee to arrest a ship is preferable.<sup>88</sup>

**162. Need to Define Wages.** A third issue is what may be included within the term ‘wages’ when making a claim for wages within admiralty jurisdiction. The present theoretically restrictive requirement that, in order to be wages, the sums must have been earned on board ship has been so generously interpreted as to be virtually meaningless.<sup>89</sup> It can safely be omitted from the proposed provision.<sup>90</sup> In other respects

the policy of the Admiralty has been a recognition of a large number of benefits and allowances which flow under a contract of employment, and which have tended to increase in number with changing conditions of employment and welfare, as wages. These include conditional payments; victualling allowances provided for under the contract of employment; profit sharing payments; vocational pay, sick pay and overtime payments; employee and employer pension fund contributions; national health insurance contributions; social benefit contributions; provident fund contributions; income tax; trade union dues; legal expenses, eg stamp duty, related to any head of claim.<sup>91</sup>

It has also been held that, under this head of jurisdiction, admiralty courts can hear claims for damages for breach of a seaman’s contract of employment whether the breach has the effect of terminating the contract<sup>92</sup> or leaves it subsisting.<sup>93</sup> These cases would no doubt be followed in Australia, but on this point there is some virtue in the legislation being as clear and informative as possible. Accordingly the legislation should specifically include claims by masters or members of the crew for any sums that a person, as employer, is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or under Australian or foreign law.

**163. Relationship to Other Legislation.** The Navigation Act 1912 (Cth) s 91 deals with jurisdiction as to wages of masters, seamen, apprentices and, when certain amendments are proclaimed,<sup>94</sup> workers on self-propelled offshore mobile drilling units. The jurisdiction arises, it would appear, only with respect to a ‘ship’ as defined for the purposes of the relevant Part of the Act, broadly an Australian registered or owned ship.<sup>95</sup> The jurisdiction is given to Supreme Courts, courts having Admiralty jurisdiction and courts having civil jurisdiction in respect of the amount of the claim. In addition some State legislation deals generally with jurisdiction over wages of seamen and masters.<sup>96</sup> There is no reason for admiralty to have exclusive jurisdiction over seamen’s wages, and thus no need in this Reference to recommend alterations to s 91 or similar provisions in other legislation.<sup>97</sup> There are also a number of items which can be recovered under statute ‘in the Court and manner in which the wages of seamen may be recovered under this Act’.<sup>98</sup> Other

provisions in Commonwealth, Imperial and State Acts omit the final three words of the formula.<sup>99</sup> These Acts may expand the ambit of the maritime lien for wages, although in the light of the broad definition proposed in para 162 they do not do so to any great extent. No specific recommendation is called for on these provisions.<sup>100</sup>

164. **Disbursements.** The rather fragmented statutory underpinning in Australia for the maritime lien for master's disbursements has already been discussed, as has the proposed provision for its enforcement as a maritime lien.<sup>101</sup> This head of jurisdiction will give a parallel statutory right of action *in rem* to the master. The question is whether a similar statutory right should be allowed in respect of claims for disbursements by a person other than the master. All the overseas Acts allow claims in admiralty jurisdiction for disbursements by shippers, charterers or agents. The 1952 Arrest Convention art 1(1)(n) and the Admiralty Jurisdiction Regulation Act (SM) s 1(1)(ii)(o) refer to disbursements on account of a ship or its owner. The remaining Acts refer more narrowly only to disbursements on account of a ship.<sup>102</sup> The issue is whether any extension beyond disbursements by a master is required or desirable in Australia, and whether disbursements not made on account of a ship should be included. With respect to the master's lien for disbursements:

[g]iven the facility of modern communication, the wide international spread of shipping companies and world proliferation of specialist agents, the circumstances when a master will be required to assume a personal responsibility for the demands and contingencies of a voyage are probably diminishing.<sup>103</sup>

To the extent that agents are now making disbursements rather than masters it seems reasonable to allow agents to recover in admiralty. The argument for widening the class of people whose disbursement claims are within admiralty is simply to improve their chances of recovery against foreign shipowners. The argument against extension similarly parallels the more general argument for not extending admiralty jurisdiction; unlike the master, most agents, shippers and charterers are well able to protect themselves by ordinary commercial means (such as letters of credit or bank guarantees) against elusive shipowners. It follows from the position taken on the more general argument that the recommendation should be for wider jurisdiction. The categories used in the overseas texts should be followed in the interest of uniformity. The reference to charterers and shippers is perhaps redundant since any disbursements made by these categories of people would normally be pursuant to a charterparty or contract for the carriage of goods by sea. As such it could be recovered under other heads of jurisdiction. But their inclusion will do no harm. The term 'agent' would appear sufficiently elastic to cover not only those trading as ship's agents but others making payments on behalf of the ship.<sup>104</sup> To the extent that these payments are for necessities or other goods and materials supplied on the request of the owner or master to a ship they could be claimed under the head of 'jurisdiction covering goods or materials supplied to a ship'. But the overlap may not be complete<sup>105</sup> and again the redundancy seems harmless. It is less clear that disbursements should extend beyond the current definition of payments made 'on account of the ship'.<sup>106</sup> As mentioned above, only the 1952 Arrest Convention and the South African legislation allows extension to disbursements on behalf of the ship's owner. Such an extension apparently covers disbursements made on behalf of someone who happens to own a ship. This seems overbroad. The provision should cover only claims which are made on behalf of a ship.

165. **Damage Done by a Ship.** This head of jurisdiction should repeat in identical terms the jurisdiction given by the Admiralty Court Act 1861 (UK) s 7. 'The figurative phrase "damage done by a ship" is a term of art in maritime law whose meaning is well settled by authority'.<sup>107</sup> While the jurisdiction conferred by this phrase has been found in other countries to be too narrow, the legislative reaction has been to add further heads of jurisdiction to fill perceived gaps rather than to alter the wording of the hallowed phrase. The proposed legislation should follow the same course.

166. **Personal Injury.** Personal injury is capable of being 'damage done by a ship' for the purposes of admiralty jurisdiction where the ship is the 'instrument' of the damage but not otherwise.<sup>108</sup> Justice Dixon long ago observed that:

[t]he distinction between loss or injury inflicted by the ship regarded as an active agent and loss or injury which, though occurring on or in connection with the ship and attributable to the negligence of the master or crew, is not 'done by the ship' may appear artificial and unreal. For, after all, whether, for example, a plaintiff's complaint is that he fell down an uncovered hatchway on the vessel or suffered immersion because his dinghy was overturned or swamped by the movement of the ship, negligence in or about the management of the ship by her master, officers or crew or one or some of them is the foundation of his cause of action, if any.<sup>109</sup>

Although the contrary view has occasionally been expressed,<sup>110</sup> there is no justification for excluding from admiralty jurisdiction the whole range of personal injury claims involving the operation of ships. To do so would be to give an unjustified preference to property damage claims over personal injury claims. Accordingly the ‘artificial and unreal’ distinction between different kinds of personal injury claims should be abolished by widening admiralty jurisdiction. In creating a new head of jurisdiction the overseas Acts follow one of two approaches. In addition to personal injury both approaches allow recovery for loss of life and both would be equally effective in overcoming doubts as to the validity of s 262 of the Navigation Act 1912 (Cth).<sup>111</sup> One approach simply requires the loss of life or personal injury to have been ‘caused by a ship’ (thereby partially overlapping the previous head of jurisdiction proposed) or to have occurred ‘in connection with the operation of any ship’.<sup>112</sup> The second, more detailed approach, seeks to avoid the uncertainty of this latter phrase by providing considerable elaboration.<sup>113</sup> One of two types of nexus are required between the injury and a ship. The first is that the injury has resulted ‘in consequence of any defect in a ship or in her apparel or equipment’.<sup>114</sup> This overcomes the limitation under the head of ‘damage done by a ship’ that excluded recovery where the injury resulted from the ship considered as premises or as a structure.<sup>115</sup> As set out in the Supreme Court Act 1981 (UK) s 20(2)(f) the alternative nexus required is that the injury occurred

in consequence of the wrongful act, neglect or default<sup>116</sup> of -

- (i) the owners, charterers or persons in possession or control of a ship; or
- (ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, the charterers or persons in possession or control of a ship are responsible,

being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods<sup>117</sup> on, in or from the ship or in the embarkation, carriage or disembarkation of persons<sup>118</sup> on, in or from the ship.

The language of s 20(2)(f) ‘is sufficiently wide to refer to loss of life or personal injury whether suffered on board the wrongdoing ship or some other ship, or even by a person with no connection with a ship’.<sup>119</sup> But this is not overly broad. The second, more detailed, formula is to be preferred, so as to include within admiralty all personal injury claims linked to the operation of a ship.<sup>120</sup>

**167. *Loss or Damage to Goods Carried in a Ship.*** The head of jurisdiction ‘damage done by a ship’ does not extend to cover damage to cargo aboard that ship. In a collision case in which one vessel was wholly to blame the owners of cargo aboard that ship could not arrest the ship for damage to their cargo.<sup>121</sup> The proposed provision, an equivalent to which is found in all the overseas legislation, fills the gap. It is at least arguable that ‘loss or damage’ extends to conversion of the goods by the carrier.<sup>122</sup> In most of the overseas Acts ‘baggage’ is included within ‘goods’.<sup>123</sup> However, ‘baggage’ does not include ‘the belongings of those who are on board a ship, not as passengers or travellers, but as employees of the shipowners in order to man and operate her’.<sup>124</sup> On one view the gap is not significant: in most cases the crew’s ‘loss of personal effects will have arisen from collision or other damage to one ship, of which another ship was the physical instrument and, in such cases, a claim for loss will come within [the provision on] damage done by a ship’.<sup>125</sup> However this will not be true where the carrying ship was entirely to blame for the collision. Nor will it be true where, in situations in which the owner of the ship is vicariously liable, one crew member damages the personal property of another. Arguably such situations are too trivial to contemplate allowing the arrest of the ship. However under the provision as so far proposed (and under the equivalent provision in overseas Acts) it would be possible for a passenger to arrest the ship if a cabin steward dropped and thereby damaged a passenger’s suitcase. Both types of property should be treated in the same way. A further problem is that the definition of ‘goods’/‘baggage’ would not appear to include the stock-in-trade of concessionaires on passenger ships<sup>126</sup> or the tools and equipment of independent contractors.<sup>127</sup> The belongings of seamen, concessionaires, independent contractors and the like should all be brought within the definition of ‘goods’ for the purposes of the proposed provision.

**168. *Agreements for Carriage of Goods by Ship.*** There is a considerable degree of overlap between the previous provision and the provision proposed here. Most goods lost or damaged in or on a ship would be lost in breach of an agreement for their carriage. The principal object of the proposed provision

is to bring within the Admiralty jurisdiction the range of other claims, as for example claims arising out of the misperformance of an agreement, which may arise and which are not connected with the care of the cargo. Included

among such claims would be, for example, a claim for freight and demurrage, a claim for failure to perform a full number of voyages, and a claim for refusal to carry specified cargo. The agreements referred to ... include charterparties, bills of lading and variants thereof.<sup>128</sup>

The claims may be in tort arising out of the agreement as well as in contract,<sup>129</sup> provided that there is a sufficient nexus with the ship in question.<sup>130</sup> On the other hand a claim for insurance premiums for goods carried by sea is not sufficiently connected, and is accordingly not a claim arising out of an agreement ‘for’ the carriage of goods by ship.<sup>131</sup> It is recommended that the proposed head of jurisdiction follow the language of the Supreme Court Act 1981 (UK) s 20(2)(h).

**169. Agreements for the Use or Hire of a Ship.** The 1952 Arrest Convention art 1(1)(d) and the Admiralty Jurisdiction Regulation Act 1983 (S Af) s 1(1)(ii)(i) treat agreements for the use or hire of a ship as a separate head of jurisdiction. The other overseas Acts incorporate this with the previous head,<sup>132</sup> though not so as to restrict this head to the use of hire of a ship for the purpose of carrying goods.<sup>133</sup> The agreements referred to include charterparties and thus this proposed provision overlaps to some extent with the previous one. But they also include agreements for all other uses to which a ship may be put, including salvage services,<sup>134</sup> towage<sup>135</sup> and mooring services,<sup>136</sup> as long as the use of a ship is more than merely a minor or incidental part of the provision of the services.<sup>137</sup> It would seem that joint venture agreements involving the use of a ship are capable of coming within the head of jurisdiction.<sup>138</sup> As with previous heads, the fact that the jurisdiction is defined in terms of ‘claims arising out of any agreement’ does not confine the jurisdiction to claims brought in contract but includes tort claims.<sup>139</sup> Provided that there is a sufficiently close nexus between the agreement and the cause of action the agreement does not have to be between the plaintiff and the shipowner.<sup>140</sup> Again it is sufficient to follow the language of the Supreme Court Act 1981 (UK) s 20(2)(h).

**170. Construction, Repair, Alteration or Equipping of a Ship.** This provision will preserve and extend the jurisdiction presently available under s 4 of the Admiralty Court Act 1861 (UK).<sup>141</sup> Under s 4 jurisdiction over the subject matter arises only where the ship in question is already under arrest or the proceeds of its sale are in the control of the court. Consistently with the overseas Acts this requirement should be deleted. Where the constructor or repairer has possession of the ship and has a possessory lien, the right to proceed *in rem* is perhaps superfluous. But not all repairers and equippers have such possession so that the proposed head is useful.<sup>142</sup> The question has arisen whether subcontracts for the supply of equipment for a ship are within the Federal Court Act 1970 (Can) s 22(2)(n). Justice Addy stated:

It seems absolutely clear to me that the claim is one which ‘arises out of a contract relating to the construction of ... a ship’. It may be true that it is not a contract of construction of a ship, nor a contract for the construction of a ship, since it is one for the supply and installation of the propulsion system, but the supply and installation of the system constitute an integral part of the actual construction itself and it, therefore, certainly ‘relates’ to the construction of a ship and could not do so more directly without being a contract for the construction of the entire ship.<sup>143</sup>

It is not clear that much is achieved by bringing such subcontracts within admiralty because the occasion for proceeding *in rem* will not often arise. The subcontractor will not own that or any other ship in most situations, and it has already been concluded that (apart from surrogate ship arrest) identity be required between the ship referred to in the head of jurisdiction and the ship arrested.<sup>144</sup> The subcontractor will normally not be able to proceed against the ship in question because the contractual dispute will generally be with the prime contractor, not the owner of the vessel. But some scope for arrest may exist during the period after a new ship has been launched (that is, has become a ‘ship’ for admiralty purposes) but before it is handed over to its ultimate owner. During this period (in respect of either the wrongdoing or a surrogate ship) the subcontractor will be able to pursue claims against the contractor by an action *in rem* if the claims fall within this proposed head. For this reason, and for consistency with overseas legislation, a broad provision should be inserted, extending to all claims (including claims by subcontractors) relating to the construction, alteration, repair or equipping of a ship.

**171. Goods, Materials or Services Supplied to a Ship.** There is a degree of overlap between the previous proposed head of jurisdiction and a provision giving jurisdiction over ‘any claim in respect of goods or materials supplied to a ship for her operation or maintenance’,<sup>145</sup> in that what is supplied may be ‘equipment’ and thus covered by the previous head.<sup>146</sup> This proposed provision would broaden the present jurisdiction by eliminating the requirement that what is supplied fall into the category of ‘necessaries’ and allow actions even where the necessities were supplied in the ship’s home port or its owner was a local resident.<sup>147</sup>

‘Maintenance’ for example, would cover non-essential maintenance. Things which are ‘necessaries’ at present would, it seems, all fall within the proposed provision.<sup>148</sup> It is unclear whether the supply of services can ever come within the head of jurisdiction as defined in the United Kingdom legislation.<sup>149</sup> The supply of many services would fall under other proposed heads: for example, pilotage, towage, salvage, repairs and agent’s disbursements. The major form of service not covered is that of loading and unloading of ships. The Merchant Shipping (Stevedores and Trimmers) Act 1911 (UK) s 3 gave admiralty jurisdiction over such claims. But it has since been repealed<sup>150</sup> and not replaced, in order that the United Kingdom might conform to the 1952 Arrest Convention which does not allow arrest on such claims.<sup>151</sup> Similar legislation in New Zealand<sup>152</sup> has also been repealed and replaced by a provision giving admiralty jurisdiction only *in personam* over stevedores’ claims.<sup>153</sup> This provides a rare example of legislation in this century reducing the scope of admiralty jurisdiction. The Canadian legislation explicitly gives jurisdiction *in rem* over claims or questions arising out of ‘stevedoring and lighterage’ services as well as other services for the ‘operation or maintenance’ of a ship.<sup>154</sup> This is worded sufficiently broadly to allow claims not only in respect of services actually rendered but also for anticipatory breaches by ship operators of contracts to render services.<sup>155</sup> In contrast the relevant South African provision refers to ‘services rendered to a ship for the employment or maintenance thereof’,<sup>156</sup> and makes no specific reference to stevedoring claims. There is no reason in principle why the supply of services should not be put on the same basis as the supply of goods and materials.<sup>157</sup> The proposed legislation is not being drafted with a view to putting Australia in a position to ratify the 1952 Arrest Convention. Accordingly, it is recommended that claims for services supplied or to be supplied to a ship be included in the provision.<sup>158</sup> Specific reference should be made to stevedoring and lighterage services.

## Other Possible Heads of Jurisdiction

172. **Damage Done to a Ship.** The 1952 Arrest Convention contains no head of jurisdiction for damage ‘received by’ or ‘done to’ a ship. All the overseas legislation examined in this Report does. However the Supreme Court Act 1981 (UK) allows only *in personam* actions under this head. The reason why the ability to proceed *in rem* was removed has already been discussed.<sup>159</sup> The relevant ship under this head of jurisdiction is the one that receives the damage, that is, the plaintiff’s ship. For an action *in rem* to lie it is necessary to identify a ship belonging or demise chartered to the relevant person (that is, the potential defendant).<sup>160</sup> A head of jurisdiction for ‘damage done to a ship’ does not do this. But there are good reasons for including such a head of jurisdiction in admiralty so as to allow actions *in personam*. For example, a collision between a ship and some object other than a ship may well give rise to a dispute as to liability. The shipowner’s claim or counterclaim for damage to the ship should be within admiralty jurisdiction just as much as the claim by the owner of the other object involved.<sup>161</sup> Accordingly *in personam* admiralty jurisdiction with respect to claims for damage done to a ship should be conferred in the proposed legislation.

173. **Marine Insurance.** Only the Canadian and South African legislation amongst the overseas Acts considered in this Report contain provisions specifically giving to admiralty courts jurisdiction over marine insurance.<sup>162</sup> It was suggested in the course of drafting the 1952 Arrest Convention that a right of arrest be given in respect of insurance premiums but this was not accepted.<sup>163</sup> Partly in reliance on the *travaux préparatoires* of the Brussels Convention the House of Lords held that claims for unpaid insurance premiums for cargo were not within admiralty jurisdiction under s 47(2)(e) of the 1956 Act (still in force in Scotland), because they were not sufficiently clearly described as relating to an agreement for the carriage of goods in a ship.<sup>164</sup> Similar reasoning would apply to the argument that an insurance contract for the ship itself related to the use of the ship.<sup>165</sup> The earlier view was that insurance companies and P & I clubs had other ways of securing payment of insurance premiums or calls than through *in rem* proceedings.<sup>166</sup> More recently, changes in market conditions and the insolvency of one P & I club have contributed to a change of view, and the consensus of opinions expressed to the Commission was that a head of jurisdiction covering insurance premiums and P & I club calls is desirable.<sup>167</sup> Problems can arise from the way in which P & I clubs operate. A member of a club may have to pay an initial call in respect of each ship entered in the club, possibly further ‘back calls’ during the course of the year (depending on the rate of claims against the club during the year), and, on withdrawal of the ship from the club, a release call which releases the member from liability for any further calls. The club has no difficulty in collecting the initial call; if the owner fails to pay the ship is simply not covered. But back and release calls can be more difficult to collect, especially if the shipowner disposes of the vessel entered. If the club has had a run of claims and a substantial back call becomes necessary, the unscrupulous owner has every incentive to avoid payment and seek cover elsewhere.

The ability to arrest *in rem* by the club claiming in respect of back or release calls is thus useful, as is clear from the inclusion of a provision covering ‘insurance premiums (including mutual insurance calls) in respect of the ship’ in art 1(1)(q) of the CMI Draft revision of the Brussels Convention (1985).<sup>168</sup> For these reasons the proposed legislation should allow an action *in rem* to recover an insurance premium or mutual insurance call in respect of a ship.<sup>169</sup> A further question is whether the right to proceed *in rem* should extend to actions against cargo for unpaid cargo insurance.<sup>170</sup> The 1985 CMI draft provision does not extend so far, and on balance such an extension does not seem necessary. For most purposes admiralty jurisdiction focuses on the ship in question and its equipment: there is no general facility (apart from specific provisions such as salvage and general average) to proceed *in rem* against cargo, and no clear need for such an extension in the case of cargo insurance.<sup>171</sup>

174. **Dock and Harbour Dues.** The 1952 Arrest Convention and the overseas legislation examined in this Report all confer jurisdiction in admiralty over claims for dock and harbour dues.<sup>172</sup> The Acts under which the various public port authorities operate in Australia contain their own provisions for securing the payment of port charges.<sup>173</sup> What happens when the exercise of these provisions conflicts with the custody of the admiralty Marshal is discussed in chapter 12.<sup>174</sup> The provisions typically allow ships to be detained as security and it might be questioned whether there is any need to attempt to duplicate, still less to replace, these provisions in the proposed legislation. On the other hand where a ship is insolvent, it is desirable that the court have power to deal with all claims involving the ship, including claims for dock and harbour dues. A further reason for such jurisdiction is that it may help ease the conflict between the exercise of statutory powers and admiralty powers of detention and sale.<sup>175</sup> Jurisdiction should accordingly be given over claims for dock and harbour dues and charges, and over similar dues and charges (for example, light dues).<sup>176</sup>

175. **Pollution from Ships.** The 1952 Arrest Convention contains no head of jurisdiction specifically dealing with pollution claims. It is unclear whether the head ‘damage caused by any ship either in collision or otherwise’,<sup>177</sup> covers claims for pollution damage:

Certainly the phrase is capable of a wide enough interpretation to cover oil pollution damage if more weight is given to the words ‘or otherwise’ than to the words ‘by any ship’; but equally, if the weighting is reversed, the conclusion would be that oil pollution damage is caused, not by a ship, but by oil, and so is excluded.<sup>178</sup>

Of the overseas legislation being considered in this Report only the South African legislation contains a separate head of jurisdiction dealing with pollution. It allows claims arising under specific legislation and also ‘any claim relating to the pollution of the sea or the seashore by oil or any other similar substance’.<sup>179</sup> This does not require that the source of the pollution be a ship and it is therefore too broad for the purposes of the proposed legislation. The Supreme Court Act 1981 (UK) is the only other legislation to deal with pollution. Section 20(5) does so indirectly by defining the head of jurisdiction ‘damage done by a ship’ so as to include ‘any claim in respect of a liability incurred under the Merchant Shipping (Oil Pollution) Act 1971’ and any claims in respect of a liability falling on the International Oil Pollution Compensation Fund. The 1971 Act implements the International Convention on Civil Liability for Oil Pollution Damage<sup>180</sup> and the Compensation Fund is associated with that Convention.<sup>181</sup> Australia has ratified the Convention but is not a party to the Compensation Fund.<sup>182</sup> The obligations arising under the Convention are reflected in the Protection of the Sea (Civil Liability) Act 1981 (Cth)<sup>183</sup> which is one of a number of Acts passed in 1981 to deal with maritime oil pollution.<sup>184</sup> The Convention imposes what is essentially a strict liability on shipowners in respect of pollution damage but gives a right to limit liability according to a formula contained in the Convention where the damage occurred without the actual fault or privity of the owner.<sup>185</sup> Only courts in the country where damage has occurred have jurisdiction over claims in respect of that damage.<sup>186</sup> ‘No claim for compensation for pollution damage shall be made against the owner otherwise than in accordance with this Convention’.<sup>187</sup> Australia would be in breach of its obligations were it to allow arrest of (thereby asserting jurisdiction over) a ship of a Convention country in respect of an oil pollution damage claim which arose in the waters of another country. At present, jurisdiction over *in personam* claims arising under the Convention is conferred on State and Territory Courts,<sup>188</sup> and there is no specific facility to pursue Convention-based claims *in rem*. The fact that the scheme, with its jurisdictional nexus requirement, is stated to be the exclusive method of recovery presumably overrides whatever wider admiralty jurisdiction over oil pollution otherwise would be available under the rubric of ‘damage done by a ship’.<sup>189</sup> The Act must also be taken to have impliedly amended the wider power to detain a ship which has caused damage contained in s 383 of the Navigation Act 1912 (Cth).<sup>190</sup> The scheme is recent and complex, and it gives effect to international treaty obligations. It should not be altered by the proposed legislation. However, the proposed

legislation should spell out precisely how that scheme interrelates with admiralty jurisdiction. It should specifically include as claims which can be enforced by proceedings *in rem* claims for pollution damage under the Protection of the Sea (Civil Liability) Act 1981 (Cth), but should provide that any such claims must satisfy the jurisdictional nexus requirements in art IX. It will follow that an action *in rem* will be available for ‘pollution damage’,<sup>191</sup> occurring in Australian waters but not for ‘pollution damage’ occurring elsewhere.<sup>192</sup> This leaves open the question of claims for damage by pollution done by a ship which is not ‘pollution damage’ as defined. Some such claims may fall within the rubric ‘damage done by a ship’ or, if they involve personal injury, within the head of jurisdiction recommended in para 166. In particular cases other heads of jurisdiction may also be available. The question whether a more general provision is desirable covering a shipowner’s liability for damage or loss more generally is discussed in para 179-84.

**176. Limitation of Liability Actions.** The Australian law governing the rights of owners and operators of ships to limit the amount of their liability with respect to damage claims is set out in the 1957 Liability Convention,<sup>193</sup> which is made part of the law of the Commonwealth by s 333 of the Navigation Act 1912 (Cth). Section 335 gives jurisdiction over applications to limit liability under the Convention to State and Territory Supreme Courts. A separate regime covers applications to limit liability in respect of oil pollution damage but jurisdiction is given to the same courts.<sup>194</sup> In both cases there is power to transfer applications to other courts.<sup>195</sup> The absence of jurisdiction in admiralty courts (other than State and Territory Supreme Courts) to entertain applications would therefore not be fatal. But it would be inconvenient if the defendant in an admiralty action had to go to another court to apply to limit. It is clearly desirable to hear the application to limit and the substantive action in the same proceeding because the ability to limit is contingent on an absence of ‘the actual fault or privity of the owner’<sup>196</sup> in respect of the acts which form the basis of the underlying claim. Determining the presence or absence of fault will usually require investigation of the same issues as are relevant to the underlying claim. It is also necessary to cater for the fact that limitation proceedings may be commenced *in personam* by the shipowner (for example in relation to ‘apprehended’ claims<sup>197</sup>) or by way of a defence to proceedings *in rem* or *in personam* against the shipowner, and for the possibility that the legislation giving rights to limit liability may be State or Territory legislation.<sup>198</sup> ‘Substantive’ applications to limit liability should be restricted to Supreme Courts and any other superior court exercising admiralty jurisdiction.<sup>199</sup> However all courts exercising admiralty jurisdiction should have the power (subject to provisions for remittal or transfer of proceedings) to hear ‘defensive’ limitation claims in respect of cases within the court’s jurisdiction. The definition of limitation proceeding should be broad enough to extend to State or Territory legislation which is parallel to the two Commonwealth Acts giving rights to limit.

**177. Forfeiture or Condemnation of a Ship.** The equivalent English provision on this topic allows within admiralty

any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.<sup>200</sup>

It is necessary to deal separately with forfeiture and condemnation and with droits of admiralty. At present in Australia it is not clear what admiralty jurisdiction exists over forfeiture of ships and goods. It is established that not all statutory provisions which empower the forfeiture of a ship fall within admiralty jurisdiction. For example, fisheries legislation commonly provides for forfeiture.<sup>201</sup> In relation to the forfeiture provisions of the Fisheries Act 1925 (Tas) it has been argued that

the Police Magistrate in ordering forfeiture would be exercising a limited Admiralty Jurisdiction conferred by the Fisheries Act and as the Fisheries Act was not reserved for the Royal Assent or approved by His Majesty through a Secretary of State, the conferring of such Jurisdiction would have been done without complying with Section 4 of ‘The Colonial Courts of Admiralty Act, 1890’, and would have been of no force, and the Police Magistrate would have no jurisdiction to condemn the boat.<sup>202</sup>

The Tasmanian Supreme Court rejected the argument:

If this is a revenue case the matter is not one for the Admiralty Jurisdiction. An examination of the many Acts relating to smuggling shows a long series of enactments by which goods, ships and boats might be forfeited, but it always is done by the ordinary Courts upon proceedings laid by a Customs Officer, and the Statutes never have treated such forfeitures as subjects for an Admiralty case. Neither can I find a trace of any question relating purely to breaches of the fisheries laws having come before an Admiralty Court during the last few centuries; I omit reference

to ‘Royal Fish’ and Droits of Admiralty because no question of that sort arises here ... Taking our Admiralty Jurisdiction therefore to be that of the High Court of England in 1890 this Court as a Colonial Court of Admiralty has no jurisdiction over a boat offending merely against fisheries or revenue laws and the jurisdiction given to the Courts of Petty Sessions could be and was properly given without a reservation of the Act for the Royal Assent.<sup>203</sup>

Even if this reasoning were to be followed,<sup>204</sup> a provision in terms of the English provision on forfeiture would leave it unclear just which kinds of forfeiture of ships would fall within it. With respect to the registration of ships, the Shipping Registration Act 1981 (Cth) s 181 gives jurisdiction over forfeiture exclusively to State and Territory Supreme Courts.<sup>205</sup> With respect to improper use of ships some State legislation gives jurisdiction over forfeiture to the Supreme Court.<sup>206</sup> With respect to forfeiture of dangerous goods shipped illegally by sea, the Merchant Shipping Act 1894 (UK) s 449 gives jurisdiction to ‘any court having Admiralty jurisdiction’. Similar jurisdiction is given by the Navigation Act 1912 (Cth) s 252 and by some State legislation.<sup>207</sup> In other States the jurisdiction is given to magistrates courts.<sup>208</sup> Jurisdiction over forfeiture is also given to admiralty courts by the Piracy Act 1850 (UK), the Foreign Enlistment Act 1870 (UK), the Slave Trade Act 1873 (UK) and the Pacific Islanders Protection Act 1875 (UK).<sup>209</sup> The proposed legislation should not confer jurisdiction over forfeiture. Forfeiture is a penal remedy which is out of place in what is basically a civil jurisdiction. The omission will avoid the need to explore 19th century admiralty decisions in order to discover just what kinds of forfeiture are covered by admiralty jurisdiction. If this recommendation is accepted, the question arises of what to do about existing legislation which confers forfeiture jurisdiction on admiralty courts. Section 252 of the Navigation Act 1912 (Cth) should be amended to give jurisdiction instead to State and Territory Supreme Courts. The position with respect to equivalent State legislation is more difficult. That legislation appears to operate merely to grant jurisdiction over forfeiture to a State court identified by reference to its having admiralty jurisdiction. No addition is made to admiralty jurisdiction by such a provision. Therefore the proposed legislation need make no reference to this legislation or attempt to affect it in any way.

178. ***Wreck and Droits of Admiralty.*** There is no need to confer admiralty jurisdiction in respect of the droits of admiralty. The category is a residual one covering rights to Royal fish and other obscure vestiges of the prerogatives of the Crown in right of admiralty.<sup>210</sup> There is no evidence that admiralty jurisdiction is ever exercised in respect of these matters or that any inconvenience would result from its abolition. On the other hand jurisdiction over matters concerning wreck clearly remains important. It is undesirable to perpetuate the present situation in which the inherent jurisdiction of admiralty over wreck exists alongside the statutory jurisdiction contained in the Navigation Act 1912 (Cth).<sup>211</sup> If it is accepted that the overlap should be removed the question of method arises. One possible solution would be to repeat the recommendation made for salvage jurisdiction, that is to leave all the substantive provisions in the Navigation Act 1912 (Cth) but to transfer all the jurisdictional provisions to the proposed legislation.<sup>212</sup> But the better alternative is to leave the whole matter to be dealt with by the Navigation Act. That Act provides for a receiver of wreck and it would be difficult to carve out of it provisions dealing only with jurisdiction and transfer them to admiralty. Some of the jurisdiction with respect to wreck is criminal in nature.<sup>213</sup> Moreover there seems to be little or no need for the remedy peculiar to admiralty, the action *in rem*, in disputes involving wreck. It is true that 19th century admiralty decisions support the proposition that a maritime lien is not lost if the *res* is destroyed as long as any identifiable part remains.<sup>214</sup> This in turn suggests that the lien holder might wish to proceed *in rem* against a ‘wreck’ as defined by s 294 of the Navigation Act 1912 (Cth). It is possible to envisage problems arising due to the overlap between the law of wreck and of salvage on both substantive and procedural levels.<sup>215</sup> The wreck provisions of the Navigation Act 1912 (Cth) do not appear to have been drafted with admiralty procedure in mind.<sup>216</sup> It may be advantageous if admiralty courts continue to have full jurisdiction over wreck so that difficulty arising could be dealt with. On the other hand, in selecting courts to exercise admiralty jurisdiction the power of plaintiffs to select an appropriate forum, and the powers to be conferred in the proposed legislation to transfer matters between courts, will greatly reduce the prospect of an admiralty court being unable to deal with all aspects of a dispute.<sup>217</sup> All matters of wreck jurisdiction should be left to the Navigation Act 1912 (Cth) (and State and Territory legislation where the Navigation Act does not cover the field).<sup>218</sup>

## General Tortious Claims

179. ***Sources of Jurisdiction over Maritime Torts.*** In Australia a wide range of torts at sea already fall within specific statutory heads of jurisdiction, such as damage to or by a ship and damage to cargo.<sup>219</sup> The expansion of the number and scope of heads of jurisdiction recommended in this Report will increase the

range of torts specifically within jurisdiction, in particular the suggested heads covering claims for personal injury and loss of life and loss of or damage to goods carried by ships.<sup>220</sup> As pointed out in para 49, Australian Colonial Courts of Admiralty also possess the ill-defined inherent jurisdiction of the High Court of Admiralty over certain torts on the high seas, a jurisdiction retained by the present English Supreme Court through a residual or ‘sweeping-up’ clause in the Supreme Court Act 1981 (UK).<sup>221</sup> However it is recommended below<sup>222</sup> that no residual clause be included in the proposed Australian legislation. The question therefore arises whether there is anything in the inherent jurisdiction over torts on the high seas that has not been covered by the expanded specific heads of jurisdiction, and that should be included. There is also the related question whether there are other tortious claims of a broadly maritime character which may be outside the proposed specific heads of admiralty jurisdiction and which should be included in the proposed legislation.

**180. Scope of Inherent Jurisdiction.** The very nature of the inherent jurisdiction makes the first question difficult to answer. References to the ‘torts at sea’ aspect of the inherent jurisdiction have often been in general terms, and have ranged from the restrictive or negative to the relatively expansive. In *R v Judge of City of London Court*, Lord Esher MR stated that the judges of the Admiralty Court had ‘given up their original claim to exercise jurisdiction over every tort committed on the high seas’.<sup>223</sup> While not going quite so far, Lord Herschell in *The Zeta* was clearly reluctant to concede the old claims to jurisdiction.<sup>224</sup> Since then, however, there have been a number of broad statements tending the other way. Sir Henry Duke declared in *The Tubantia* that ‘a suit in respect of injurious acts done upon the high seas was within the undisputed jurisdiction of the Court of Admiralty’,<sup>225</sup> and similar pronouncements, with a similar lack of precision, can be found in Canadian<sup>226</sup> and Australian decisions.<sup>227</sup> Clear instances of torts actually held to fall within the inherent jurisdiction, though, are rare. In *The Tubantia*,<sup>228</sup> an action *in personam* for trespass to a wreck and interference with salvage operations succeeded under the residual head of jurisdiction. Actions *in personam* for assaults by masters upon crewmen<sup>229</sup> and passengers<sup>230</sup> would also apparently succeed<sup>231</sup> (though actions *in rem* would not).<sup>232</sup> Little else appears to have been decided. Conversion of a cargo at sea has been raised as a possibility but no conclusion has yet been reached.<sup>233</sup> Of these three instances, at least two will probably now be included under the proposed specific heads of jurisdiction. Assaults causing physical injury by masters upon crewmen or by masters and even crewmen upon passengers will fall within the personal injury head, in those cases where they occur in the course of employment.<sup>234</sup> Conversion of cargo at sea will arguably fall within the proposed head of loss of or damage to goods carried by a ship.<sup>235</sup> Actions both *in rem* and *in personam* will therefore now lie for these torts, provided the person liable *in personam* is the owner or demise charterer of the ship when the action is commenced. Trespass to wreck in the possession of a salvor or tortious interference in the operations of a salvor, on the other hand, would probably not fall within any of the heads of jurisdiction proposed so far.<sup>236</sup> As regards actions *in rem* this is arguably the correct result. Where there is interference with a wreck in the possession of a salvor or deliberate interference with salvage operations, there will not necessarily be any nexus between a vessel of the tortfeasor and the trespass or other tort committed. To allow an action *in rem* in these circumstances would run contrary to the nexus requirements discussed in para 124-5. But where there is a connection between a vessel of the tortfeasor and the relevant interference, there is no reason why admiralty jurisdiction *in rem* should not exist.<sup>237</sup>

**181. Maritime Torts Not resulting in Physical Injury.** A related question is whether there are other torts (whether or not within the inherent jurisdiction) which should be included in admiralty. Several possibilities have been suggested. One concerns torts that do not involve physical injury, such as false imprisonment, or assaults not in fact causing physical harm. Another concerns torts resulting in purely economic loss, as, for example, in the case of one ship blocking another in a harbour. At present, Australian courts with jurisdiction under the Colonial Courts of Admiralty Act 1890 (UK) have inherent jurisdiction *in personam* over assaults by masters upon crewmen and passengers.<sup>238</sup> This would presumably include assaults not resulting in physical injury, though there is no authority on the point. No action *in rem* will lie.<sup>239</sup> The question of false imprisonment does not seem to have arisen. The principal English actions for false imprisonment at sea have been brought at common law,<sup>240</sup> including the most recent decision in 1957.<sup>241</sup> In the United States, torts at sea, including the torts of assault<sup>242</sup> and false imprisonment have long formed an important part of Admiralty jurisdiction.<sup>243</sup> It is now settled that such torts give rise to a maritime lien and can therefore be pursued *in rem*.<sup>244</sup> As pointed out earlier, a right of action *in rem* will only be available in Australia for these torts where ‘personal injury’ results.<sup>245</sup> Little judicial guidance is available on the meaning of ‘personal injury’ in this context; in fact there seems to have been no relevant decision upon its ambit either in relation to s 20(2)(f) of

the Supreme Court Act 1981 (UK) (and its predecessors)<sup>246</sup> or its Canadian and New Zealand counterparts.<sup>247</sup> In other contexts ‘personal injury’ has sometimes been taken to include psychological injuries such as nervous shock,<sup>248</sup> but has sometimes been held to exclude non-physical injury.<sup>249</sup> It is difficult to see why claims for physical injury attributable to the owner or charterer of a ship and arising in the operation of the ship should be within jurisdiction, whereas other claims for damages meeting these conditions should not. Whatever distinction presently exists (and the precise distinction is obscure) is the result not of any considered view of the scope of admiralty jurisdiction but of the accidents of its evolution.<sup>250</sup> These uncertainties would be avoided by the addition of a head of jurisdiction allowing claims for damages generally, rather than simply for personal injury, where there is wrongdoing on the part of the owner, charterer or operator of the ship (or those for whom they are responsible) arising from the navigation or management of the vessel.

182. ***Exclusion of Economic Loss?*** One effect of a generally worded provision of this kind will be to confer admiralty jurisdiction over maritime claims (such as in negligence) where the loss involved has been purely economic. Many such actions already fall within established heads of jurisdiction. For example, time or voyage charterers may seek to claim in negligence for wasted hire (or lost profits) where the chartered vessel has had to be repaired following a collision.<sup>251</sup> The question is not whether such claims will succeed as a matter of substantive law,<sup>252</sup> but whether the courts have jurisdiction to entertain them should an *in rem* be brought to enforce them. In the example given, jurisdiction over actions *in rem* is conferred under the rubric of ‘damage done by a ship’. In most cases where economic loss claims are made — whether based on negligence or on some other cause of action in tort — one of the heads of jurisdiction will be available. In some instances, however, that will not be the case. Where one ship negligently blocks another’s exit from an anchorage, for example, the injury caused will almost certainly not fall within any of the existing heads of jurisdiction. The most likely head is that of ‘damage done by a ship’. Under this head the damage caused must be the ‘direct result or natural consequence of something done by those engaged in the navigation of the ship’ and the ship itself must be the actual instrument by which the damage is done.<sup>253</sup> There need be no physical contact between the ship and whatever sustains the damage but it appears that physical damage must result for this head of jurisdiction to apply.<sup>254</sup> Mere economic loss is insufficient. As a result, admiralty jurisdiction may not extend to actions *in rem* or *in personam* for economic loss resulting from blocking. The few negligent ‘blocking’ cases that have been decided appear to indicate that no recovery will be permitted.<sup>255</sup> Nevertheless, should such an action be available as a matter of substantive law there is no reason for preventing the enforcement of such a claim through an action *in rem*. In the case of a deliberate blocking that results in economic loss, an action in tort would clearly lie as a matter of substantive law<sup>256</sup> and an action *in rem* should be available. In each of these cases the wrongdoing ship is clearly identified, and the other conditions for an action *in rem* (that is, a link between ship and relevant person when the cause of action arose and when the proceedings were commenced) are met. The provision proposed in para 181 covering all claims for damages where these conditions are met has the further advantage of including various cases within the residual admiralty jurisdiction which would otherwise be excluded.<sup>257</sup>

183. ***Arguments Against Including Economic Loss Claims.*** On the other hand, claims for economic loss have long been a cause of considerable disquiet among defendants and their insurers. Unlike claims for physical damage, such claims can be both difficult to quantify and virtually unlimited in size. Any expansion of their scope is therefore regarded by some with suspicion and alarm. A number of submissions argued that the proposed legislation should not attempt to pre-empt the debate over economic loss claims in the maritime context by creating a new and controversial head of admiralty jurisdiction.<sup>258</sup> The answer to the latter argument is that to confer such jurisdiction would not create, and should be clearly expressed not to create, any new cause of action. Unless the right to claim for economic loss exists as a matter of substantive law no claim will succeed under the proposed Act. In addition, as was pointed out earlier, most recognised claims for economic loss already fall within existing heads of jurisdiction. To permit jurisdiction in admiralty over these claims but to deny jurisdiction over others of a maritime character (such as, for example, the deliberate blocking of a ship in harbour) is unwarranted.

184. ***Conclusion.*** For these reasons, there should be a right of action *in rem* for damages arising from acts on the part of owners, charterers or operators in navigating or managing a ship. The provision need make no specific reference to economic loss claims as such. This, and a provision making it clear that the legislation creates no new causes of action, will avoid the concern that the general law of tort would be indirectly influenced by the legislation. Such a head of jurisdiction is supported by the adoption, in the CMI Draft

Revision to the Brussels Convention, of generic language in the definition of ‘maritime claim’ which would undoubtedly include claims such as those envisaged.<sup>259</sup>

## Maritime Arbitrations and Other Proceedings

185. ***Arbitration or Other Proceedings and Admiralty.*** The 1952 Arrest Convention does not refer to arbitration. The only overseas legislation examined in this Report which does is the Admiralty Jurisdiction Regulation Act 1983 (SAf) s 1(1)(ii)(x), which gives jurisdiction in admiralty over ‘any claim for the enforcement of, or arising out of, any judgment or arbitration award relating to a maritime claim, whether given or made in the Republic or elsewhere’. In considering the need for such a provision, three distinct situations need to be distinguished. In ascending order of difficulty these are, first, the enforcement of arbitration awards, given in Australia or elsewhere, involving maritime claims; secondly, the commencement of an action *in rem* so as to obtain security in pending proceedings, judicial or arbitral, local or foreign; and thirdly, the enforcement of judgments given against a ship in local or foreign proceedings by action *in rem*. These situations will be dealt with separately.

186. ***Enforcement of Arbitration Awards.*** The first situation relates to an arbitration of a maritime claim, where an award has been made which remains unsatisfied. Whether or not a cause of action *in personam* which has been adjudicated upon in a local arbitration merges in the award of that tribunal, it is clear

that a cause of action *in rem*, being of a different character from a cause of action *in personam*, does not merge in a judgment *in personam*, but remains available to the person who has it so long as, and to the extent that, such judgment remains unsatisfied.<sup>260</sup>

It could be argued that no special provision is necessary for the protection of someone who has agreed to arbitration but failed to obtain satisfaction of the award. If they had a right of arrest before the arbitration that right continues.<sup>261</sup> But it is desirable to ensure proper co-ordination between the admiralty jurisdiction and maritime arbitration, so that plaintiffs are neither unduly prejudiced by the loss of security in the *res* while arbitration is pending, nor given an inducement to litigate in admiralty in breach of an arbitration agreement in order to obtain security not available in the arbitration proceedings. Moreover, it is better to acknowledge the reality that proceedings on a cause of action which is the subject of an unsatisfied award are in substance proceedings on the award itself.<sup>262</sup> Finally, a plaintiff who complies with an arbitration agreement may be prejudiced in being out of time in bringing subsequent *in rem* proceedings on the cause of action,<sup>263</sup> the defendant having failed to comply with the award. For these reasons the admiralty jurisdiction should expressly extend to the enforcement of local or foreign arbitration awards given in respect of a maritime claim as defined in the legislation. This will enable an action *in rem* to be commenced against the ship in question, provided that it is still owned by or demise chartered to the party liable under the award.<sup>264</sup> The question whether the award in question is enforceable in Australian courts is a matter of substance, governed in the case of foreign awards by the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth). The effect of the proposed provision is jurisdictional only.

187. ***Obtaining Security Pending Arbitration or Foreign Court Proceedings.*** More difficult problems can occur when an attempt is made to combine the security aspect of an action *in rem* with determination of the merits by some tribunal other than the local admiralty court. This may arise in several ways. One is where the plaintiff has agreed to arbitrate the claim but is concerned that assets may not be available when the award is made or judgment given either to satisfy the award or judgment or to arrest *in rem* should the award or judgment remain unsatisfied.<sup>265</sup> The plaintiff therefore wishes to arrest *in rem* at the outset so as to preserve the *res* (or the security put up to secure its release) in the event that the arbitration award remains unsatisfied. Alternatively the plaintiff may arrest the ship in support of the admiralty action with every intention of pursuing that action and with no intention of arbitrating. The defendant will then seek a stay of the admiralty proceedings under the relevant Arbitration Act<sup>266</sup> on the basis that the plaintiff had earlier agreed to submit the dispute to arbitration.<sup>267</sup> A similar problem arises where the defendant seeks a stay on the basis that the parties had agreed to submit the dispute to the jurisdiction of a foreign court<sup>268</sup> or on *forum non conveniens* or *lis abili pendens* grounds. In all these situations the issue is, assuming the stay is granted, what to do with the *res* (or the security put up to secure its release). In *The Golden Trader*, Justice Brandon said:

There are, as it seems to me, in principle, three ways in which the problem ... can be dealt with. First, the security can be retained to satisfy any judgment or award of the other tribunal. Secondly, the security can be released, but only on condition that the defendant provides other equivalent security outside the court to satisfy the judgment or award of the other tribunal. Thirdly, the security can be released unconditionally.<sup>269</sup>

The 1952 Arrest Convention art 7 necessarily implies that

where the court of arrest has no jurisdiction on the merits, or where the parties have agreed to submit the dispute to a foreign court or to arbitration, then, provided that the plaintiff brings proceedings in a court which has jurisdiction on the merits, or in the agreed foreign court, or before the agreed arbitration tribunal, within a time allowed by the court of arrest the security will not be released, but will remain in the court of arrest to satisfy any judgment in the other court or any award in the arbitration.<sup>270</sup>

In England, resolution of the point has been complicated by legislation which makes mandatory the granting of a stay of court proceedings where it has been agreed that arbitration shall take place in a State party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).<sup>271</sup> This complication does not arise in Australia because the 1974 Act allows a stay in New York Convention cases upon such terms as the court thinks fit.<sup>272</sup> Free of this complication, it has become clear from the English decisions that, whenever a stay is discretionary, the court may make it a condition of granting the stay that the *res* (or security in its stead) will remain available.<sup>273</sup> Under the Supreme Court Act 1981 (UK) there is no power to arrest simply to provide security for a maritime arbitration (or presumably to provide security for foreign litigation). However, the power to order arrest under the ordinary heads of admiralty jurisdiction remains available although one motive for the action is to obtain security in other proceedings.<sup>274</sup> The jurisdiction exists irrespective of the motive. But it has been held that, although possessing jurisdiction, the court may as a matter of discretion decline to exercise it. Alternatively if the arrest had already taken place the court had a discretionary power to order the release of the *res*.<sup>275</sup> The test in exercising this discretion 'is whether, if the plaintiff should obtain an award ... the defendant might well be unable to satisfy it'.<sup>276</sup> In theory the security is not held by the admiralty court to provide a fund from which any amount awarded in arbitration is to be paid. Rather it is held against the possibility that the arbitration will fail to run its course, and that the stay on the *in rem* proceedings will be lifted and a judgment in favour of the plaintiff given in admiralty.<sup>277</sup> The practical effect however will be that the admiralty arrest will result in the plaintiff obtaining security for the arbitration whenever the plaintiff can show a real prospect of difficulty in recovering the amount of any award.<sup>278</sup> Section 26 of the Civil Jurisdiction and Judgments Act 1982 (UK) having since come into force, English admiralty courts now have the discretionary power directly to order that property be arrested and held as security for the satisfaction of any award or judgment of another tribunal which can be locally enforced.<sup>279</sup> A similar power exists under s 5(3) of the South African Act,<sup>280</sup> although there are a number of differences between the two provisions.<sup>281</sup>

188. **Reform Options.** One option would be to make no reference to the problem. Presumably (there being no Australian authority on the point) Australian courts would follow the English decisions referred to in para 187.<sup>282</sup> These decisions allow an admiralty court in most cases to achieve in practice a result whereby the plaintiff can obtain security for a pending arbitration or foreign proceeding. This option is not recommended. That result has only been reached after considerable litigation. It is better to confer on admiralty courts explicit power to maintain security despite a stay of proceedings. An express provision would avoid what might be regarded as a fiction in the judicial reasoning outlined in para 187. It would also allow problems which might arise from that reasoning to be explicitly addressed. For example, at present the court in theory stays the admiralty action but retains the *res* in custody. It might be that further steps have to be taken and hearings held concerning the custody.<sup>283</sup> It may be awkward to deal with these matters in what is supposed to be a stayed action.<sup>284</sup> Another option would be explicitly to prevent admiralty process being used directly or indirectly to obtain security in a dispute whose merits are to be settled by another tribunal. This rule could be imposed in the full range of situations covering arbitration, *forum non conveniens* or *lis alibi pendens*. Alternatively, a distinction could be drawn between situations where the dispute resolution tribunal or forum was chosen by agreement between the parties and other situations where the forum was chosen unilaterally. For the former category it can be argued that where the agreement makes no provision for the defendant to lodge security, the plaintiff should not be able to use admiralty process to obtain an advantage that could have been but was not in fact bargained for. This argument does not apply where, for example, the plaintiff has selected the forum and obtained security in that forum while the defendant asserts that the forum is not convenient. If it is determined that the plaintiff must abandon the choice of forum, it does not follow that he should also have to give up the security.

189. **The Commission's View.** The legislation should adopt the second option outlined in para 188, by explicitly providing that admiralty may be used to obtain and retain security even though the merits of the dispute are to be determined elsewhere, where the subject matter of the dispute lies within admiralty jurisdiction. Such a solution will do most to ensure that the award of the tribunal that decides upon the merits is satisfied, and hence that a just result is obtained. The law has a strong interest in compliance with arbitral awards duly made, and in achieving co-operation between courts and arbitrators to this end. This option is more limited in scope than the general introduction of *saisie conservatoire*, canvassed in chapter 6.<sup>285</sup> Under the option proposed here the court always has jurisdiction to hear the merits. It has a discretion to decline to exercise that jurisdiction on a number of defined grounds (forum non conveniens, lis alibi pendens and agreement that another tribunal should hear the merits). If this recommendation is accepted a further choice is required. It seems desirable that the court have some discretion as to whether it should retain the security pending the outcome of the merits in the other tribunal. It could be argued that the plaintiff is entitled to security as of right if the entire action is to be heard in admiralty, and should be similarly entitled where the merits are to be heard elsewhere. The fact that s 26 of the United Kingdom Act of 1982 (like the common law) gives a discretion can be explained as a consequence of the way in which the issue has developed: the issue of what to do with the security has arisen in the context of a discretion to stay. Nonetheless, retention of security should remain a matter of discretion, which can be stated in a neutral way, leaving it to the court to take into account all relevant circumstances.<sup>286</sup> The court should also be given express power to make consequential orders to give effect to any award or judgment which is enforceable under Australian law.

190. **Enforcing Local and Foreign Admiralty Judgments.** A relevant person who appears in respect of a claim in an action *in rem* will be personally liable.<sup>287</sup> If the judgment exceeds the value of the *res* the excess can be recovered by ordinary methods of execution; a writ of *fi fa* can be obtained against any of the defendant's goods.<sup>288</sup> Where the *res* was retained as security in the action *in rem* and was sold in that action it will no longer form part of the defendant's property and cannot be seized on the writ of *fi fa*. Where bail or other security put up to secure the release of the ship proves insufficient, however, there is no reason why the ship cannot be seized in execution.<sup>289</sup> Until recently this was considered the only mode of execution available in the case of local *in rem* judgments. In particular, attempts to enforce such judgments through actions *in rem* met with little success. The English High Court in *The Alletta* held that the time for arrest was 'before and not after a pronouncement on liability'.<sup>290</sup> The right of arrest merged in the judgment and could not be enforced thereafter. The one major exception<sup>291</sup> to this has always been in the case of foreign judgments *in rem*. Such judgments, to the extent that they give rise to *in personam* liability,<sup>292</sup> can be enforced in the local jurisdiction subject to the usual private international rules for the enforcement of foreign judgments. But under the inherent admiralty jurisdiction<sup>293</sup> they have long been able to be enforced through an action *in rem*.<sup>294</sup> The rationale has been that it is the duty of one admiralty court, as a matter of international comity, to enforce the decree of another such court upon a subject over which the latter had jurisdiction.<sup>295</sup> No such rationale existed in the case of local judgments. However, the High Court of Singapore has refused to follow *The Alletta*: while agreeing that a claim did merge in a judgment, Justice Thean in *The Daien Maru No 18*<sup>296</sup> held that the right to security in the ship did not. Both the lien and the corresponding right of arrest remained in existence. Hence an action *in rem* did lie to enforce a local *in rem* judgment (provided that adequate bail had not already been substituted for the *res*). The present position is therefore that, while a foreign *in rem* judgment can be enforced through an action *in rem* under the inherent admiralty jurisdiction, the enforcement of local judgments is an open question.<sup>297</sup>

191. **An Action *in rem*?** Given that no inherent jurisdiction is to be retained under the Australian Act,<sup>298</sup> a number of issues arise for consideration. Should the *in rem* enforcement of foreign judgments continue, and if so, should that right of action be extended to local *in rem* judgments? On the first question, it can be argued that the 'international comity' argument no longer provides a convincing rationale for the *in rem* enforcement of foreign *in rem* judgments. It is arguable that the ordinary methods of recognising and enforcing foreign judgments by actions *in personam* are adequate to discharge any duty flowing from 'comity' between admiralty courts in different countries. Certainly the duty provides little justification for distinguishing between foreign and local *in rem* judgments.<sup>299</sup> It seems clear that the two should either stand or fall together. Either the action *in rem* should be available to enforce all *in rem* judgments, foreign and local, or none at all. The arguments for and against the action *in rem* in these circumstances as a matter of legal principle are canvassed in the cases referred to.<sup>300</sup> As a matter of logic the argument of Justice Thean in *The Daien Maru No 18* is compelling: if a plaintiff can assert against all the world that a ship is security for an (as yet untried) claim and can arrest the ship on that basis, it should be possible to make the same

assertion and arrest on the basis of a judgment. Otherwise the plaintiff is placed in a worse position through winning the case.<sup>301</sup> Moreover in an action *in rem* no one may appear, and accordingly no one may be personally liable on the judgment. Although the ranking of a plaintiff *in rem* to enforce a judgment is unlikely to be superior to the position of an *in personam* execution creditor,<sup>302</sup> this should not exclude the provision of an alternative mode of execution. To permit an action *in rem* is also consistent with the recent English move towards permitting the use of Mareva injunctions to enforce judgments.<sup>303</sup> The one clear disadvantage of permitting arrest lies in possible unfairness to innocent purchasers of the ship in question.<sup>304</sup> Where a lien has come into existence prior to the sale of the ship to a purchaser without knowledge of the lien, and arrest takes place after sale but before judgment, the innocent purchaser at least has the opportunity to be joined or intervene on the question of liability. If arrest is permitted after judgment, the purchaser will have no such opportunity. Nor will a mortgagee.<sup>305</sup> In most cases however, the purchaser will be protected by an indemnity clause, and a mortgagee will usually have notice of the lien prior to judgment. The balance of arguments favours including a right to arrest to enforce both local and foreign admiralty judgments *in rem*.<sup>306</sup>

192. **Extent of Right of Arrest.** The question is what form that right of arrest should take. When discussing the right to arrest to enforce a foreign judgment *in rem* in *The Despina GK*,<sup>307</sup> Justice Sheen implied that the right (under the inherent jurisdiction) existed for claims against shipowners only, and that the ship still had to be the property of the owner at the time of the arrest.<sup>308</sup> There seems little justification for these restrictions. Claims against persons other than shipowners can be brought within admiralty jurisdiction in certain circumstances (whether on maritime liens or statutory rights of action *in rem*). Even if the relevant person has ceased to own the ship, jurisdiction *in rem* exists to enforce a maritime lien or a statutory lien (that is, a statutory right of action *in rem* where proceedings were commenced before sale).<sup>309</sup> In such cases a judgment *in rem* may be enforced by sale of the ship. Even where the relevant person is the owner when judgment is given, if the owner has not appeared the only way of enforcing the judgment is against the *res*,<sup>310</sup> To impose additional requirements relating to the identity of the shipowner as relevant person after judgment which do not apply, under the *lex fori*, before judgment is unwarranted.<sup>311</sup> Provided that a judgment can properly be classified as a judgment *in rem* in admiralty, that judgment ought to be able to be enforced by proceedings against the *res*, whether it is a local or a foreign judgment. Claims for the enforcement of foreign or local judgments *in rem* should therefore be included in the class of proprietary maritime claims in the proposed legislation. This will effectively overcome the restrictions outlined above.<sup>312</sup> On the other hand it is not proposed to follow the South African Act in establishing *in rem* jurisdiction to enforce local or foreign *in personam* judgments involving maritime claims. Under the present law an *in personam* judgment on a maritime claim does not prevent proceedings *in rem* being brought with respect to the claim, whether it constitutes a maritime lien or statutory right of action *in rem*, provided that the normal preconditions for an action *in rem* are satisfied. As with arbitrations, the doctrine of merger does not operate.<sup>313</sup> It might be thought that, consistently with the position taken on arbitrations in para 189, an action *in rem* should be available to enforce a local or foreign *in personam* judgment. But the effect of such a provision would be to double the time limit available for proceeding *in rem*, in a context where *in personam* proceedings are much more obviously an alternative to, rather than, as with arbitrations, a preliminary to, subsequent enforcement proceedings by way of an action *in rem*. For these reasons no extension of jurisdiction to enforce *in personam* judgments is proposed.

## A Residual Head of Jurisdiction?

193. **Need For A residual Clause.** The remaining question to be considered is whether the heads of *in rem* jurisdiction proposed in this chapter should be exclusive, or whether some residual or generic jurisdiction over ‘admiralty’ or ‘maritime’ cases should be included. A residual clause would catch any part of the inherent jurisdiction of the Court of Admiralty which is not covered by the specific heads of jurisdiction. This has been done in England and elsewhere. The 1956 UK Act preserved ‘any other jurisdiction which ... was vested in the High Court of Admiralty’ before the establishment of the Supreme Court structure in 1875.<sup>314</sup> Similarly s 20(c) of the 1981 UK Act preserved ‘any other Admiralty jurisdiction’ which the High Court had prior to the commencement of that Act. There is no ability to arrest surrogate ships when relying on this inherent jurisdiction. The effect of this type of ‘sweeping-up’,<sup>315</sup> provision is to force anyone wishing to know the full scope of the admiralty jurisdiction to be familiar with, or to search through, all the old cases which have a bearing on the inherent jurisdiction of the old Admiralty Court.<sup>316</sup> A major point of the proposed legislation is to avoid the uncertainty, not to mention the work, which this creates.<sup>317</sup> A sweeping-up clause is only necessary to preserve bits of jurisdiction which either have long been in disuse and

forgotten, or which are still used but for some reason have not been included explicitly as a head of jurisdiction. What is forgotten or never used it seems unnecessary to preserve. What is worth preserving should be explicitly preserved. In fact the cases which, it has been suggested, should be included in admiralty jurisdiction by way of a residual clause have mostly, if not entirely, related to the various tortious claims for non-physical injury discussed in para 179-84. A review of other, cases within the residual jurisdiction and of the development of admiralty has not revealed any situations which clearly ought to be within jurisdiction. If such cases should come to light (for example, as a result of further developments in the law) it is better to include them specifically by amendment to the legislation than to attempt to cater for them in advance by a vague and elusive formula the meaning of which cannot be discovered without much historical inquiry.<sup>318</sup> No residual clause, referring to matters previously within the inherent admiralty jurisdiction should be included in the proposed legislation.

194. **An Exhaustive List?** A slightly different question is whether the defined heads of admiralty jurisdiction should purport to be exhaustive of the jurisdiction conferred. The Federal Court Act 1970 (Can) s 22 is a possible model. This provides that there shall be original jurisdiction conferred over all matters falling within the Federal government's constitutional power over 'navigation and shipping'. Without limiting the generality of this, the section then provides for greater certainty by listing specific heads of jurisdiction. Similarly the CMI Draft Revision of the Brussels Convention (1985) defines 'maritime claims' in the following, non-exhaustive, way:

1. (1) 'Maritime claim' means any claim concerning or arising out of the ownership, construction, possession, management, operation or trading of any ship, or out of a mortgage or an 'hypotheque' or a charge of the same nature on any ship, such as any claim in respect of:

(a) damage caused by the ship, whether in collision or otherwise, ...

This contrasts with the exhaustive language of art 1 of the Brussels Convention itself. The main argument against defining admiralty jurisdiction in this generic way is that it leaves a penumbra of uncertainty around the core of defined heads. The contrary argument is that it gives an opportunity for judicial development of the law. In the Australian context it would allow the courts to give an expansive reading to 'Admiralty and maritime jurisdiction' in s 76(iii) of the Constitution and thereby to enlarge the admiralty jurisdiction conferred under the proposed legislation. While there is something to be said for this, if the proposed legislation does not purport to be exhaustive the practical result will be that courts will need to canvass the 19th century case law to determine what has historically been regarded as within admiralty. Only matters defined in specific heads of jurisdiction (or specifically conferred by other legislations<sup>319</sup>) should be within admiralty.

195. **Need for Ancillary Jurisdiction.** The discussion in para 193-4 concerns whether there should be any independent but undefined heads of *in rem* jurisdiction. Ancillary jurisdiction is a separate matter, since it concerns only matters incidental to a case already within the specified heads of jurisdiction. Allowing ancillary jurisdiction to a court exercising admiralty jurisdiction in proceedings properly brought under one or more of the heads of subject matter discussed earlier in this chapter would enable it to determine a question not falling under any of those heads if, as quite often happens, such a question arises in the course of the proceedings.<sup>320</sup> Where the admiralty jurisdiction is exercised by a court whose jurisdiction is otherwise general (for example, a State Supreme Court) any matter outside the admiralty heads of subject matter might be expected to be within the court's ordinary subject matter jurisdiction. Hence the legislation dealing with admiralty jurisdiction in the United Kingdom and New Zealand conferring jurisdiction on Supreme Courts contains no provision conferring ancillary jurisdiction.<sup>321</sup> It is recommended in chapter 11 that concurrent admiralty jurisdiction be conferred on the Federal Court of Australia, a court whose jurisdiction is not general. The general doctrine of 'accrued jurisdiction' developed by the High Court with respect to federal courts<sup>322</sup> (taken in conjunction with the federal jurisdiction in 'associated' matters conferred by s 32 of the Federal Court of Australia Act 1976<sup>323</sup>) will solve most demarcation problems. However it is desirable to restate the effect of s 32, so far as it relates to admiralty and maritime jurisdiction, in the proposed legislation, to make it clear that such an ancillary jurisdiction over matters covered by s 76(iii) of the Constitution exists, and this ancillary jurisdiction should be conferred on all courts exercising jurisdiction under the legislation. Accordingly it should be provided that the jurisdiction of courts extends to jurisdiction in respect of any associated matter of admiralty and maritime jurisdiction not otherwise within jurisdiction.

## Restrictions on Admiralty Actions against Particular Defendants

196. **Introduction.** As a basic rule, admiralty jurisdiction *in rem* can be asserted where the *res* has been served with originating process within the territory of the forum.<sup>324</sup> *In personam* jurisdiction in admiralty is based upon the ability to serve the defendant according to the relevant general rules of court either within the territory or outside. The issue is whether this basic position should be modified in particular situations.

197. **Exclusion of Jurisdiction over Local residents?** As a result of competition between common law and admiralty courts some restrictions remain at present on proceeding *in rem* against a ship owned by a local defendant.<sup>325</sup> The approach overseas has been to remove these residual restrictions and allow claims ‘in relation to all ships ...’ whether British or not and wherever the residence or domicile of their owners may be ... [and] to all mortgages ... including mortgages or charges created under foreign law.<sup>326</sup> The present restrictions are historical anomalies attaching only to certain heads of jurisdiction. Clearly they should be abolished. Restrictions, if any, should be based on a general principle applied to all appropriate heads of admiralty jurisdiction. The argument for restricting the availability of admiralty remedies against local defendants is that made in chapter 6: it would avoid the disparity in remedies available when a local resident is sued in respect of a truck or car on the one hand and a boat on the other.<sup>327</sup> The restriction would at the same time resolve another issue, whether disputes involving small local pleasure craft such as runabouts or sailing dinghies, should be capable of being brought in admiralty.<sup>328</sup> An alternative distinction would be between cases in which the relevant person (the defendant, had the case been brought *in personam*) is resident within or amenable to the jurisdiction, and other cases. However, in some cases this distinction would present problems: where the decision to arrest had to be taken quickly it might be that very little could be discovered as to the identity, let alone domicile, of the relevant person. But there are other good reasons for not adopting that distinction. In such a bald form it has not been adopted overseas. It might give the appearance of discriminating against foreign ships, creating potential problems of non-recognition of the exercise of Australian admiralty jurisdiction. Moreover it would deprive claimants of the valuable remedy of arrest in many cases. The proposed legislation should accordingly confer jurisdiction with respect to local as well as foreign vessels.<sup>329</sup>

198. **Collision Cases: Suits *In personam* Against Foreign Defendants.** The need to consider restricting admiralty jurisdiction in relation to actions arising out of collisions of sea-going vessels arises because of the provisions of the 1952 Collision Convention.<sup>330</sup> Article 1(3) bars a claimant from bringing any ‘further action against the same defendant on the same facts in another jurisdiction, without discontinuing an action already instituted’. Article 1(1) allows collision actions to be commenced at the plaintiff’s option

- (a) either before the Court where the defendant has his habitual residence or place of business;
- (b) or before the Court of the place where the arrest has been effected of the defendant ship or of any other ship belonging to the defendant which can be lawfully arrested, or where arrest could have been effected and bail or other security has been furnished;
- (c) or before the Court of the place of collision when the collision has occurred within the limits of a port or in inland waters.

The effect of art 1(1)(b) is not to require any modification of the ordinary admiralty rule for actions *in rem*. However, for actions *in personam* the requirements are narrower than the ordinary rules for service outside the jurisdiction in respect of torts. Only with respect to a collision which occurred in the waters described in art 1(1)(c) would service out be allowed under the Convention. The Convention has not been widely ratified.<sup>331</sup> Australia is not a party, and has not expressed any intention of becoming a party. The United Kingdom is a party and its admiralty jurisdiction *in personam* reflects the terms of the Convention.<sup>332</sup> Although not parties, the legislation of Canada, New Zealand and South Africa also reflects the Convention requirements.<sup>333</sup> There are difficulties in the way of recommending a similar policy for Australia. One is the question of defining the actions intended to be restricted. ‘Collision’ is not as such a head of jurisdiction proposed for the legislation. Even if it were, the fact that the proposed heads are to be read disjunctively means that the restriction could not operate simply by reference to this head without running the risk of being outflanked by actions brought under other heads. This is a drafting problem and is not insoluble. But if the restriction on *in personam* actions is to be effective it will also have to apply to actions brought in State and Territory courts sitting other than as admiralty courts. The restriction would thus affect all courts and, if it is

to be reflected in the rules of court governing service out, would involve alteration to all those rules.<sup>334</sup> Because the restriction would only operate on foreign defendants the Commonwealth has the constitutional power<sup>335</sup> to impose such a restriction independently of whether it ratifies the 1952 Collision Convention. The issue is whether it should use that power. On balance the disadvantages of restricting jurisdiction outweigh the limited benefits to be gained by conforming to an international scheme which is itself by no means universally, or even widely, accepted. Accordingly no special restriction is recommended on the bringing of *in personam* actions in collision cases.

199. ***Actions in rem Against the Crown.*** There is no difficulty about suing the Crown *in personam* in Australia and it is not suggested that admiralty actions *in personam* require special treatment.<sup>336</sup> The immunity of the Crown in actions *in rem* was firmly established in the 19th century<sup>337</sup> as part of the more general immunity enjoyed by the Crown at that time. The Navigation Act 1912 (Cth) s 405A assumes this immunity and provides that nothing in that Act ‘authorizes proceedings *in rem* in respect of a claim against the Commonwealth or a State or Territory ...’ Sub-section 405A(2) does provide however, that if, through reasonable inadvertence, proceedings *in rem* are commenced against a government vessel, a court may treat such proceedings as if they had been duly instituted *in personam*. The proposed legislation should contain a provision to similar effect.<sup>338</sup> However the protection of such a provision should not extend to separate statutory agencies operating ships for commercial purposes.<sup>339</sup> Indeed an argument can be made that Crown ships in commercial or trading use should also not be immune. In the absence of any evidence of difficulty caused by the present rules, and in light of the difficulty in some cases of determining whether Crown ships used for various purposes are in use for commercial purposes, the present position appears satisfactory.

200. ***Foreign State Vessels.*** The question of suits *in personam* and *in rem* against foreign state-owned vessels was comprehensively dealt with in the Commission’s Reference on Foreign State Immunity.<sup>340</sup> Now that the relevant provisions of the Draft Bill proposed in that Reference have been enacted, nothing need be done in the proposed admiralty legislation on the point.<sup>341</sup>

## 10. Surrogate Ships and Multiple Arrest

201. **Introduction.** Chapters 8 and 9 have been concerned with the preconditions for exercise of admiralty jurisdiction, and the scope of that jurisdiction, so far as the ‘wrong-doing’ ship is concerned. The basic question considered in this chapter is the extent which admiralty jurisdiction can be exercised against other ships or property, or through the arrest of more than one ship (or the rearrest of the same ship).

### Arrest of ‘Surrogate Ships’

202. **Development of Actions *in rem* against Surrogate Ships.** The objective of all these forms of multiple arrest, and of actions against sister ships or surrogate ships in particular, is to improve the plaintiffs chance of recovery by invoking both the jurisdiction and security aspects of the action *in rem*.<sup>1</sup> In the United States only the wrongdoing ship may be the subject of an action *in rem*. Because all maritime claims give rise to maritime liens under United States law the wrongdoing vessel can nearly always be sued and rested even though the relevant person is not the owner.<sup>2</sup> Any need for surrogate ship rest is accommodated by the procedure, parallel to arrest *in rem*, of maritime attachment which operates against any property within the jurisdiction belonging to an absent defendant.<sup>3</sup> In Canada there is no right to proceed against any but the wrongdoing vessel<sup>4</sup> although Mareva injunctions are apparently used with some frequency against other ships.<sup>5</sup> In Australia at present the position is as it was in England before 1956: under no circumstances can any other ship be served or arrested in place of the wrongdoing ship.<sup>6</sup> However, actions *in rem* against surrogate ships have become increasingly available in comparable jurisdictions such as New Zealand, England, Singapore and South Africa. They are also permitted under the 1952 Arrest Convention: indeed, it was the express provision for surrogate ship arrest in the Arrest Convention that led to its introduction in the United Kingdom and subsequently in other countries where the admiralty provisions of the Administration of Justice Act 1956 (UK) were adopted. In determining whether it should be available in Australia and if so, in what form, it is necessary to distinguish a number of different questions. Some aspects of actions *in rem* against surrogate ships, which may affect the usefulness of the facility, are discussed in chapter 12 in the context of time bars and priorities. Any overall conclusion on the utility of actions *in rem* against surrogate ships must also consider those aspects.

203. **Permissibility of Proceeding against Other Ships.** The personification theory of action *in rem* envisages an admiralty action *in rem* as a right of action against the wrongdoing ship. An apparent corollary is that only the wrongdoing ship may be arrested, a further corollary is that the value of the *res* represents the maximum recovery which may be obtained in the action. The procedural theory, on the other hand, ‘is based on premise that maritime liens evolved out of the process of arrest of a vessel in order to compel the appearance of the *res* owner and to obtain security’.<sup>7</sup> An apparent corollary of this view would seem to be that any property of the relevant person should be able to be arrested up to the value of the claim. English admiralty law has, in this century at least, generally preferred the procedural theory,<sup>8</sup> but there are a number of features of admiralty law which are inconsistent with it.<sup>9</sup> One such inconsistency is that admiralty law allowed only the wrongdoing ship to be served and arrested; its value represented maximum recovery unless the defendant appeared.<sup>10</sup> In *The Beldis*, although the court was not put in terms of competition between the two theories, the English Court of Appeal was asked to allow the arrest of any property of the relevant person.<sup>11</sup> The argument was emphatically rejected. The President, Sir Boyd Merriman, justified his rejection reference to precedent but also observed:

I for one am not prepared, to quote Lord Esher’s words in *R v Judge of the City of London Court*<sup>12</sup> to ‘re-open the floodgates of Admiralty jurisdiction’ upon the public, especially when that public is an international public and I can see that the innovation would be disastrous to the prestige of the Court.<sup>13</sup>

The implications of allowing actions against any property may help elucidate the rather cryptic reference to the ‘prestige of the court’.

The action *in rem* was the life-boat of Admiralty jurisdiction. Should it become a purely procedural device to secure jurisdiction over a defendant there is little need to associate it with a specialist jurisdiction in Admiralty and it could spawn a common law device of arresting any property as a means of obtaining jurisdiction over a defendant who is not otherwise within the jurisdiction of the court.<sup>14</sup>

But the situation has, since 1936, changed greatly, with the endorsement of surrogate ship arrest in the Brussels Arrest Convention 1952 and its subsequent adoption in the law of most comparable countries. The distinction between arrest of surrogate ships on maritime claims and the broader assertion of jurisdiction based on attachment of any property of the defendant is now well established. There is thus no good reason to accept Sir Boyd Merriman P's argument in favour of the status quo, so far as actions *in rem* against surrogate ships on maritime claims are concerned. It is not consistent with Australian interests. Other countries allow actions *in rem* to be brought against what are described as 'sister ships' or 'associated' ships. If the possession of these wider powers leads to analogous developments in the common law courts these will have to be judged (as the Mareva injunction has been judged) on their own merits.

**204. *The Definition of 'Surrogate Ship'*.** For this reason, actions *in rem* against surrogate ships<sup>15</sup> should be introduced in Australia. This conclusion received universal support in the Commission's consultations. Apparently it frequently happens under the present law that claims are not pursued before Australian admiralty courts because of the absence of surrogate ship arrest. It remains to determine what links should be required between the surrogate ship, the wrongdoing ship and the relevant person. It would be possible to restrict the surrogate ship to a true 'sister ship' of the wrongdoing ship, that is, the two ships would have to have had the same owner at the time the claim arose. In England under the 1956 Act an action could be brought against any other ship which at the time when the action was brought 'was beneficially owned as aforesaid'.<sup>16</sup> In its statutory context, this could have been interpreted to require that the relevant person be the owner of the wrongdoing ship, its owner or demise charterer, or still more broadly its owner or any type of charterer. The first of these is the only situation in which the wrongdoing and the other ship are bound to be 'sister ships', that is, in the same ownership. But though the provision was spoken of as allowing 'sister ship arrest' the courts never authoritatively decided which of these possible interpretations was correct.<sup>17</sup> The 1981 UK Act<sup>18</sup> adopted the broadest of the three alternative interpretations of that phrase which had been suggested. It allows an action *in rem* to be commenced against any vessel beneficially owned by the person who is the relevant person with respect to the wrongdoing vessel. This corresponds to the 1952 Arrest Convention art 3(4).<sup>19</sup> It allows an action *in rem* against a ship owned by the relevant person who was a charterer rather than an owner of the wrongdoing ship, thereby filling what had been called 'a lacuna in the law'.<sup>20</sup> It also permits an action *in rem* against a ship which had been purchased after the sale or loss of the wrongdoing ship. A similarly broad approach should be taken in the Australian legislation.

**205. *The Appropriate Nexus*.** If the purpose of the action *in rem* against a surrogate ship is to persuade the relevant person to appear and to provide security, the appropriate nexus is not with the wrongdoing ship but rather with the relevant person. In other words, the proper nexus requirements are, first, between the claim and the wrongdoing ship,<sup>21</sup> then between the wrongdoing ship and the relevant person and finally between that person and that person's other ships. There is no reason to demand any direct nexus between the wrongdoing and surrogate ships, and the use of the expression 'sister ship' is erroneous and confusing. The appropriate rule is one which, as an alternative to allowing an action *in rem* to be commenced against the wrongdoing ship, allows such an action against a ship owned by the relevant person even though this person is not the owner of the wrongdoing ship.<sup>22</sup> This will occasionally allow an action against a surrogate ship even where there could be no action against the wrongdoing ship. The most obvious examples are where the wrongdoing ship has sunk or been sold (where there is no *droit de suite*).<sup>23</sup> But another case would be where the claim is by an owner against someone using the owner's ship on a time or voyage charter. In such a case the owner has already got possession of his own ship, but he could, under the recommended provision, proceed against any other ship owned by the defendant. This result is only illogical if one starts from the premise that the extended right of action should only provide a substitute for a right of action against the wrongdoing ship. But the surrogate ship action is a procedural facility, and there is nothing incongruous in allowing an action *in rem* against another ship even though in the particular circumstances of the case no action could be brought against the wrongdoing ship, provided that there is no disjunction between the 'relevant person' and the surrogate ship. It is less clear that the explanation, and indeed the whole notion of surrogate ships, is consistent with the reasoning used in para 124-5 to require that there be an identity between the ship in respect of which the cause of action arose and the ship proceeded against. Part of that argument involved rejecting the proposition that once a maritime claim had been found to exist, an action *in rem* could be brought against any ship which belonged to the person who would be liable were the claim to be brought *in personam*. Yet allowing an action *in rem* against a surrogate ship, when there is no wrongdoing ship which could be subject to the action, seems to involve accepting the same proposition. This objection can be met if the requirements for surrogate ship actions are such as to ensure that the owner of the surrogate

ship was, at the time the cause of action arose, the owner, charterer, operator or possessor of the wrongdoing ship. An action may be commenced against any of the ships of a relevant person whose involvement with the original claim was in the capacity of ship owner or charterer. Where the involvement was in some other capacity, none of the ships (if any exist) of the relevant person can be proceeded against. This avoids cases such as the provider of necessities being able to be sued *in rem* by the shipowner simply because the provider of necessities happens to own a yacht. There is thus a distinction between the earlier ‘identity of ship’ reasoning and the surrogate ship reasoning: the two sets of reasoning are consistent with each other, as well as consistent with the general principle of jurisdiction outlined in chapter 6.<sup>24</sup>

206. ***Co-ownership.*** If an action *in rem* against any ship owned by the relevant person is to be the basic rule, two further issues arise. The first involves questions of co-ownership. The second is whether any extension should be made beyond vessels owned by the relevant person to vessels under charter by that person. On the first issue there are two different situations to be considered.

- ***Surrogate Ship Part-Owned by Relevant Person.*** Where the other ship is only partly owned by the relevant person, neither the 1952 Arrest Convention art 3(2) nor any of the recent Acts<sup>25</sup> allow an action *in rem* to be brought. It might be argued that the capacity of co-owners to seek indemnity from each other, combined with the existence of at least some legal interest of the relevant person in the ship, should be sufficient to justify allowing an action *in rem* in such cases. If A is the relevant person and A and B own another ship in equal shares should not B be able to look to A for reimbursement if any loss is suffered where the ship is arrested? If it is thought unfair to the ‘innocent’ co-owner B that the ship should be liable to be arrested and stand security as a surrogate ship for A’s liabilities, the position could be modified. The security value of the ship, and hence the maximum bail which could be demanded to secure its release, could be limited to the value of A’s share.<sup>26</sup> In other words, if A is the relevant person in a claim for \$750 000 and A and B are equal owners of ship X, valued at \$1 million, ship X could be arrested, but only \$500 000 in bail would be required to secure its release. If sold, only \$500 000 could be appropriated to the claimant. In effect there are three options: no action *in rem*; an action *in rem* with B left to look to A for any loss that B suffers; and an action *in rem* but with B protected to the extent described. The issue will seldom arise. There are, it seems, few ships trading internationally which are co-owned as opposed to being owned by a corporate body with two or more shareholders. Local fishing craft are more frequently co-owned but their owners would probably only rarely also be co-owners with others of a second ship. Moreover the priorities consequences of allowing arrest in respect of one co-owner’s liabilities would be complex, whether the second or third of these alternatives was adopted. On balance there is no sufficient warrant for departing from the position adopted in the Brussels Convention and in all relevant overseas legislation. The proposed legislation should accordingly allow an action *in rem* against the other vessel only where all its co-owners are relevant persons on the original claim.
- ***Surrogate Ship Owned by One Co-owner.*** Co-ownership also becomes an issue in the converse situation, that is, where A, B and C are, as equal co-owners of the wrongdoing ship ‘relevant persons’ in respect of the claim and it is sought to proceed against a surrogate ship which is owned by A, or by A and B as co-owners. Unlike the previous situation, here there is no ‘innocent’ co-owner to be affected by the action. But neither the recent overseas Acts<sup>27</sup> nor the 1952 Arrest Convention<sup>28</sup> allow an action *in rem* in this situation. The proposed legislation should do likewise in the interests of international uniformity.

Accordingly, the Australian legislation should require that a relevant person be the only owner of the surrogate ship; where two or more persons are jointly the ‘relevant person’, identity of co-ownership should be required with respect to the surrogate ship. This does not mean that the proportion of co-ownership interest must be the same as the proportion of liability of the ‘relevant person’;<sup>29</sup> indeed this would rarely be the case. Identity of the persons involved should be all that is required.<sup>30</sup>

207. ***Surrogate Ships under Charter.*** The other issue is whether the category of surrogate ships which may be proceeded against in an action *in rem* should be extended beyond those owned to those on charter to the relevant person. The 1952 Arrest Convention does not go beyond ownership. Neither does the United Kingdom, Singapore or South African legislation. However, the legislation in New Zealand allows an action *in rem* against ships on charter by demise to the relevant person.<sup>31</sup> This appears to have come about due to a

misreading of the judgment of Justice Brandon in *The Andrea Ursula*,<sup>32</sup> where it was stated that demise charterers should be treated as ‘owners’ for the purposes of s 3(4) of the 1956 Act.<sup>33</sup> This was said in the context of establishing a nexus between the wrongdoing ship and the relevant person, not with reference to the nexus between the relevant person and surrogate ships. The judgment refers to the fact that the 1952 Arrest Convention allows arrest only of ‘any other ship of which the demise charterer is the legal owner’.<sup>34</sup> Because the underlying premise in that judgment was the need to bring English law more closely into line with the Convention, it seems clear that Justice Brandon did not intend to allow an action *in rem* to be brought against a surrogate ship where the relevant person was merely the demise charterer of the ship. On the other hand the doubtful origins of a particular provision do not prevent it from being justified as a matter of policy. It can be argued that the rationale for extending the action *in rem* against the wrongdoing ship to liabilities of the demise charterer of that ship<sup>35</sup> apply equally to actions *in rem* against a surrogate ship the demise charterer of which is the relevant person. The argument is not, however, persuasive. By definition a surrogate ship in such cases is a different ‘enterprise’ from the wrongdoing ship, with a different owner. It would be too great an extension of the relationship between owner and demise charterer of ship B to allow arrest of that ship in respect of the demise charterer’s liabilities arising with respect to ship A.<sup>36</sup> In the absence of any other international support for such an extension, Australian legislation should require that a surrogate ship be owned by the relevant person with respect to the claim.

**208. Claims not Subject to Actions against Surrogate Ships.** There is general agreement that certain claims should only be able to be pursued against the wrongdoing ship itself.

- *Ownership, Co-ownership, Mortgages.* All the overseas Acts which allow actions against surrogate ships make an exception with respect to claims relating to ownership, co-ownership and mortgages.<sup>37</sup> The proposed legislation should follow these Acts on this point. Service on a surrogate ship will give the court in question jurisdiction to determine the merits of the claim. It is inappropriate for a court to determine the issue of title to or possession of ship A simply because its surrogate ship, B, has been served. Ship A may not be within the territory of the arresting court and there would be serious difficulties in enforcing an order for possession against ship A. A court should refrain from determining title when the *res* itself is not before the court unless the dispute concerns a locally registered ship (and hence its owner is a local resident<sup>38</sup>). It is true that not all claims falling within the categories of ownership and co-ownership will involve determination of title or orders for possession. But it would be complicated to try to separate the sorts of issues which might arise into those upon which surrogate ships can be arrested and those upon which they cannot. Mortgages are excluded for similar reasons. Having lent money on the security of ship A it seems incongruous to allow the mortgagee to arrest ship B to enforce the security. In fairness to the mortgagee of ship B, the mortgage on ship A would have to rank after any mortgage on ship B. It would be a delicate question whether the mortgage on ship A should not also rank below any statutory liens which might exist on ship B at the time of its arrest.<sup>39</sup> The right to proceed *in rem* in respect of claims relating to mortgages should be restricted to the ship of which the plaintiff is mortgagee.
- *Enforcement of In rem Judgments.* Somewhat similar reasoning applies to the proposed head of jurisdiction allowing enforcement of judgments *in rem* of local or foreign admiralty courts.<sup>40</sup> Apart from historical arguments, this head of jurisdiction is best regarded as allowing the enforcement of a security interest by way of a lien against the ship concerned. The judgment *in rem* extinguishes the right to proceed *in rem* against any other ship,<sup>41</sup> and it is consistent with this that subsequent enforcement proceedings be limited to the ship concerned.
- *Enforcement of Maritime Liens.* As was pointed out in chapter 8, maritime liens are generally treated as distinct from statutory rights of action *in rem*, and as involving a form of inchoate security interest in the *res* not dependent on the commencement of proceedings *in rem*.<sup>42</sup> On this basis they are treated separately in the proposed legislation. Consistently with this treatment it is inappropriate to allow proceedings against surrogate ships in respect of the lien itself, and none of the overseas legislation does so. However there will usually be a correlative statutory right of action *in rem* where there is a lien,<sup>43</sup> and an action *in rem* against a surrogate ship may therefore be available on that basis.<sup>44</sup>
- *Forfeiture.* It was recommended in chapter 9 that there be no provision giving jurisdiction in respect of forfeiture.<sup>45</sup> If this recommendation is not accepted there should be no right to proceed against a

surrogate ship in forfeiture cases. Because of its penal nature it would be unsuitable to allow proceedings *in rem* against a different vessel.

It will be seen that each of the claims mentioned here have what may be broadly termed a ‘proprietary’ character, either by virtue of admiralty law or otherwise. For reasons explained in chapter 9, these ‘proprietary maritime claims’ require separate treatment in the legislation<sup>46</sup>: an aspect of that separate treatment is the exclusion of any facility to proceed against surrogate ships. On the other hand, with respect to all other heads of jurisdiction (‘general maritime claims’) it is recommended that an action *in rem* against a surrogate ship should be available. Under some heads it will be seldom used. In salvage cases the *res* as salved represents the limit of liability and is normally available to the plaintiff as security.<sup>47</sup> But there may be rare cases in which the facility to proceed against a surrogate ship may prove useful (for example, where the salved *res* is subsequently sold), and there seems no reason to exclude its availability. None of the overseas Acts does so.

**209. Actions *in rem* against Other Property: Surrogate Cargo and Freight.** If the right to proceed *in rem* is to extend beyond the wrongdoing ship, the question is whether it should also apply to surrogate cargo and freight.<sup>48</sup>

- *Surrogate Cargo.* No other admiralty legislation or relevant international convention has extended arrest beyond other ships. Moreover, the heads of claim within admiralty jurisdiction are such that occasions upon which ‘surrogate’ cargo could be arrested are likely to be few. On present information, there is no need to widen the ability to proceed *in rem* against cargo,<sup>49</sup> and no such extension is recommended.
- *Surrogate Freight.* Freight cannot be arrested without also having a right to arrest, and actually arresting, the ship on which the freight was earned.<sup>50</sup> The position where a surrogate ship is arrested instead of the wrongdoing ship has not been considered by either courts or writers. None of the overseas legislation suggests that the wrongdoing ship and its freight can be separated, or that the arrest of a surrogate ship allows the arrest also of its freight. The plaintiff apparently has a choice, to proceed *in rem* against the wrongdoing ship and its freight or against a surrogate ship (but no freight). The normal method of arresting freight (which is an intangible) is to arrest the cargo the carriage of which has earned the freight, so as to ensure that the cargo owners or consignees pay the freight owing into court rather than to the ship owner or operator. Great practical difficulties would arise in attempting to arrest the freight (and cargo) of one ship while arresting not that ship but a surrogate ship. It is less evident that practical difficulties would prevent the arrest of the surrogate ship and freight outstanding in respect of it. Historically, the rationale for allowing arrest of both ship and freight is that together they represented the assets at risk in the maritime adventure from the point of view of the owner. Where one is trying to recover in respect of that adventure there is something to be said, assuming the arrest of surrogate ships is itself sound, for allowing arrest of the freight owed in respect of the surrogate ship. In those situations where it is possible to arrest both wrongdoing ship and freight as a unit there is certain logic in allowing a surrogate ship/freight unit to be arrested instead. On the other hand there are no international precedents, and there is no evidence of any real need for such a facility. Accordingly an action against any but the wrongdoing ship should be an action against the ship only, not the ship and its freight.

## Multiple Arrest and Rearrest

**210. Multiple Arrest of Ships?** A basic issue, which underlies both the action *in rem* against surrogate ships and the questions of multiple arrest and rearrest, is how many ships may be arrested on a single cause of action. The 1952 Arrest Convention art 3, the Supreme Court Act 1981 (UK) s 21(4) and other recent legislation all make it clear that only one ship may be arrested.<sup>51</sup>

The principle of the *res* as the limit of a plaintiffs entitlement ... causes unease for it avails the defendant of a stratagem by which he may limit his liability, beyond that which may be sanctioned by statute, and so frustrate the just expectations of the claimant. Quite, simply, a prudent defendant weighs the value of his ship against the potential personal liability and, if the latter exceeds the former, withdraws appearance and surrenders the ship to the court. The upshot is a limitation of liability which may be difficult to justify on grounds of public policy.<sup>52</sup>

The ability to arrest more than one ship on a single claim would indirectly undercut the principle of the *res* as the limit of liability *in rem* in at least some factual situations. These would only be where all of the following applied: where limitation of liability provisions did not apply or, because of the dollar amounts involved, were not relevant,<sup>53</sup> where the claim was larger than the value of the first of the defendant's ships to be arrested, where the defendant did not appear *in personam*, and where a second vessel owned by the defendant was also to be found within the territory. The statistics on the sale by the court of arrested vessels indicate that failures to appear and post adequate security are rare.<sup>54</sup> There would therefore seem to be little need for the ability to arrest more than one ship. What need there is can be met, in some cases at least, by the use of a Mareva injunction to supplement the security obtained by the arrest of the first ship.<sup>55</sup> There would also be procedural questions to be resolved if a second ship could be arrested. For example, would the second ship have to be arrested within the statute of limitations or other time limit on bringing the action? Or should it be accepted that the first arrest puts the action on foot and subsequent arrests can be made outside the time period? Where two ships have been arrested by different courts in respect of the same cause of action, which court should have jurisdiction to determine the merits, and in what proportions should the proceeds of the two ships contribute to meet any liability found to exist? It may well be that machinery could be devised to deal with these issues, but no worked out regime for multiple arrest in admiralty exists at present. Rather surprisingly, however, the CMI draft revision to the Brussels Arrest Convention does permit multiple arrest up to the value of the claim. Art 5(2) provides that:

Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless:

(a) the nature or amount of the security already obtained in respect of the same claim is inadequate ...<sup>56</sup>

This provision occurs in a text which defines arrest to include Mareva injunctions and similar 'restrictions on removal' of a ship, and which specifies the conditions for arrest of a ship at the time of the arrest, not (as has historically been the case with admiralty jurisdiction) at the time the action is commenced.<sup>57</sup> The latter is probably essential if any regime for multiple arrest is to be introduced: the former is, for other reasons, controversial.<sup>58</sup> But the CMI draft revision is just a draft: until provisions for multiple arrest become definitively accepted at the international level it is premature to introduce them in Australia. The present position, which combines the jurisdictional and security consequences of the action *in rem* with the possibility of enforcement *in personam* (including Mareva injunctions) against the relevant person, is adequate.

**211. Rearrest of the Same Ship.** The question whether and in what circumstances an arrested ship can later be rearrested on the same claim is one that has caused some difficulty at common law. The issue is whether the proposed legislation should define the right to rearrest before judgment. At common law it appears that the mere release of a ship from arrest does not itself prevent rearrest.<sup>59</sup> If bail has been given to the value of the claim or of the ship,<sup>60</sup> however, the basic rule is that the ship is wholly released from the action, and the *res* may not be rearrested on that cause of action.<sup>61</sup> The same is probably true where security is given by way of a contractual guarantee rather than by bail.<sup>62</sup> Nevertheless there are exceptions to the basic rule.<sup>63</sup> Rearrest, it seems, can take place before judgment despite the provision of bail (or other security)

- where a surety becomes insolvent;
- where the original proceedings are discontinued prior to judgment and the plaintiff pays the defendant's costs relating to the original arrest; or
- at the court's discretion, where the original bail is discovered to be insufficient (as, for example, in *The Hero*,<sup>64</sup> where a clerical error was made in entering the claim and bail was consequently set at too low a level).<sup>65</sup>

There is no reason to think that any different rules would apply under the proposed Act and Rules if, as is the case in the United Kingdom,<sup>66</sup> no mention is made of rearrest. If, as is desirable, the Rules specify a right to seek the discharge of a warrant, any attempt to rearrest will be open to challenge, and the courts will no doubt require justification for the rearrest along the lines of the existing principles. The question is whether this represents an adequate provision for rearrest. An alternative would be to spell out the right to rearrest before judgment, and the circumstances in which that right can be exercised. That appears to be the intention

of the 1985 CMI draft revision of the 1952 Arrest Convention. Article 3(3) of the 1952 Convention provides that there is to be no rearrest (or bail or other security given more than once) except where any earlier bail has already been released at the time of the second arrest or where ‘good cause’ can be shown. Article 5 of the draft revision is more precise and to some extent reproduces the common law principles outlined above. It allows rearrest where the nature or amount of the existing security is inadequate, where the person who has given the existing security cannot or is unlikely to be able to fulfil the bail obligations, or where the earlier security has been released on reasonable grounds or in circumstances such that the claimant could not reasonably have prevented the release. The main advantage of such an approach is that it would remove any lingering uncertainty on the right to rearrest, and clarify its extent. The main disadvantage would be a loss of flexibility, including the danger of not anticipating all possible circumstances in which rearrest should be permitted. It is better to leave the court with a discretion whether to permit rearrest (and to confer the power to impose conditions on the right to rearrest), while specifying the most important of the grounds on which rearrest is likely to be permitted, that default has been made in the performance of a guarantee or undertaking given to procure the release of the ship. A provision to this effect should be included in the proposed legislation.

212. **‘Rearrest’ of a Different Ship.** If rearrest can take place in certain circumstances in a case where a surrogate ship could have been arrested in the first place, it can be argued that there is no reason for not allowing the arrest of a surrogate ship the second time around. Conversely, if the initial arrest was of a surrogate ship, and a surety becomes insolvent, there should be no objection to arresting the wrongdoing ship. The Admiralty courts have, however, long insisted that only one ship may be arrested on any single cause of action. Even where rearrest has been allowed it has always been rearrest of the ship initially arrested, In the United Kingdom before 1956, that ship was the ‘wrongdoing’ ship.<sup>67</sup> Since the introduction of sister ship arrest by the Administration of Justice Act 1956 (UK), the ship could be either the ‘wrongdoing’ ship or another ship, but not more than one ship.<sup>68</sup> This accords with art 3 of the 1952 Arrest Convention. The Supreme Court Act 1981 (UK) s 21(8) has now expressly enacted that rule.<sup>69</sup> The result appears to be that in the United Kingdom the ‘rearrest’ of a second ship would not be permitted, though there is little authority directly in point.<sup>70</sup> The same result could be expected under the proposed Australian legislation, particularly if it included an equivalent of s 21(8). If rearrest is to be extended to ships other than that originally arrested, therefore, the legislation should say so expressly. Article 5 of the 1985 CMI draft revision of the Arrest Convention not only spells out a right to rearrest (as mentioned in para 211) but also extends that right to the ‘rearrest’ of a different ship in each of the instances specified. Thus, where a ship has been arrested and released or security has been given to secure a maritime claim, any other ship which would otherwise be subject to arrest on that claim can be arrested if the nature or amount of the security already obtained is inadequate, if the person who has given the security is not able, or is unlikely to be able, to fulfil the security obligations, or if the ship earlier arrested or security previously given was released either by the claimant upon reasonable grounds or because it could not reasonably be prevented.<sup>71</sup> The problem with such an approach is that it undercuts the rule against multiple arrests. It is true that multiple arrests could, as in *The Banco*,<sup>72</sup> take place all at once. ‘Rearrests’ would presumably have to take place one after another until bail was adequate. It might be possible to restrict the ‘rearrest’ of other ships, for example, to situations of genuine mistake in accepting the initial bail. But the more restricted the rule the less likely it is to have any practical operation, and a less restricted rule will clash at least to some extent with the rule against multiple arrest.<sup>73</sup> This problem does not arise with the CMI draft revision since, as pointed out in para 210, art 5(2) of that draft proposes to allow multiple arrests. It has been recommended that that proposal not be followed in Australia. If the rule against multiple arrests is retained, the restriction of ‘rearrest’ to the ship originally arrested is desirable in the interests of consistency. Accordingly the right to rearrest a ship should be restricted to the ship originally arrested. However it is also desirable that certain limited exceptions be established to this general rule. Where the initial arrest is set aside (because the wrong ship was arrested) a second arrest is permissible,<sup>74</sup> and this should be expressly stated. In one other situation it may be that rearrest of a different ship is permitted under the present law. Where a surrogate ship is arrested in respect of a claim which also gives rise to a maritime lien, it may well be that the maritime lien is not extinguished by the arrest, as distinct from the satisfaction of the liability in question.<sup>75</sup> If the lien is not extinguished, it would follow that arrest of the ship subject to the maritime lien ought to be possible. Consistently with the position taken so far in this Report that the law of maritime liens should be left to the common law,<sup>76</sup> this possibility for rearrest should be left open. Finally, where an arrested ship has broken arrest and custody of it has not been regained it is unjust to deprive the plaintiff of the right to arrest another ship, and provision for rearrest in such cases should also be made.

213. ***Arrest after Judgment.*** The conflicting case law on whether arrest is permissible after judgment in the case has been entered was discussed briefly in para 192, in the context of the enforcement of *in rem* judgments by subsequent proceedings *in rem*. The English High Court in *The Alletta* held that arrest was permissible only prior to judgment: thereafter only in *personam* enforcement measures (if these are available), or arrest in some other jurisdiction which allows enforcement of foreign *in rem* judgments,<sup>77</sup> was permissible. On the other hand, the High Court of Singapore has refused to follow *The Alletta*.<sup>78</sup> The rule in *The Alletta* is anomalous in principle and undesirable in practice. It is anomalous that a plaintiff in an action *in rem* should be in a worse position after winning the case than before. It is difficult to reconcile the rule with the court's inherent power to enforce foreign *in rem* judgments: why should local judgment creditors be in a worse position? The rule is undesirable in practice because it places a premium upon arrest, whereas the aim of a modern admiralty jurisdiction should be to encourage reliance on the jurisdictional aspects of the action *in rem* while avoiding actual arrest unless this is really necessary.<sup>79</sup> The consensus of opinion expressed to the Commission supported the view that the rule in *The Alletta* should be abrogated.<sup>80</sup> It should be sufficient to provide in the proposed Admiralty Rules that a ship may be arrested either before or after judgment has been given in the proceeding.

## Procedural Consequences

214. ***Commencing Proceedings against Several Ships.*** It remains to consider a number of procedural issues arising from the conclusions in this chapter. The first concerns the practice which has developed in England of commencing proceedings *in rem* against more than one ship. That is to say, the writ lists all the arrestable ships with respect to the cause of action in question, and is then amended before or immediately after service to strike out all but the ship finally selected for service.<sup>81</sup> Since a writ issued in respect of a ship can be served on the ship irrespective of a later change of ownership,<sup>82</sup> the effect of this practice is to establish what might be described as a 'contingent statutory lien' in respect of all the ships named in the writ, the contingency being actual service on the ship in question. Nonetheless the practice is expressly preserved by s 21(8) of the Supreme Court Act 1981 (UK):

this subsection does not prevent the issue, in respect of any one such claim, of a writ naming more than one ship or of two or more writs each naming a different ship.<sup>83</sup>

Although it could be argued that the proliferation of statutory liens is undesirable, the practice does have the advantage of allowing persons interested in any of the ships named, through a search in the relevant court, to discover that a writ is pending but not served.<sup>84</sup> The practice would also be difficult to prevent (especially in the form of the issue of separate writs). From an Australian point of view, there seems no need to do so, and the effect of the proviso to s 21(8) of the 1981 UK Act should accordingly be achieved through a provision in the proposed Admiralty Rules.

215. ***Amendment of Writs.*** Courts which exercise admiralty jurisdiction have available to them their general powers to amend writs and other pleadings, including amendments which have the effect of adding or substituting a party or adding a new cause of action. The principles on which these powers are to be exercised in *in personam* actions (for example, in cases where a new action against the party added, or new proceedings on the additional cause of action, would be time-barred) are reasonably well settled. However actions *in rem* have as their object both the obtaining of jurisdiction and security against the *res* and, if the relevant person appears, the obtaining of jurisdiction and the possibility of subsequent enforcement action against the defendant personally.<sup>85</sup> This dual aspect of actions *in rem* is capable of presenting problems when it is sought to amend a writ to substitute a different ship, or a different person as the relevant person in respect of the claim. For example, in *The Kusu Island*,<sup>86</sup> the High Court of Singapore allowed an amendment to add two surrogate ships to a writ *in rem*, in a case where the wrongdoing ship which was originally named had been broken up, and despite the fact that the time limit in respect of the cause of action had expired. The Court treated the action *in rem* as a procedural device to acquire jurisdiction over the defendant, so that the amendment did not, in its view, have the effect of adding a new party.<sup>87</sup> But in that case the defendant (the relevant person in respect of the claim) was at all times the owner of the three ships in question. It would be a different matter if a ship was to be added after time had expired which was then under new ownership, especially if the effect if the amendment were to be treated as retrospective.<sup>88</sup> On the other hand it is undesirable to adopt rigid rules in this area, given the difficulty that can sometimes exist in discovering the identity of the relevant person and tracing surrogate ships. It should be sufficient to provide, in the proposed

Admiralty Rules, that the court's powers of amendment of process and joinder of parties extend to substituting for a defendant or a ship identified in the initiating process some other defendant or ship, provided that, unless the court otherwise orders, the proceeding should be treated as having been commenced against the substituted ship at the time when the order for substitution was made.

216. ***Multiple Service***. In addition to prohibiting multiple arrest of ships, s 21(8) of the Supreme Court Act 1981 (UK) prohibits multiple service on ships, whether in the same proceeding or in separate proceedings on the same cause of action. Although this rule is generally the appropriate one<sup>89</sup> (assuming, as recommended in para 210, that multiple arrest is not to be permitted), there may be circumstances when it works unfairly against a plaintiff. For example, ship A is served with a writ *in rem* but, due to undertakings given on its behalf, is not arrested. Ship A is then broken up or disappears. The plaintiff will then be precluded from arresting ship B (belonging to the same person as ship A), because, ship A having been duly served, no other ship can be served on the same cause of action, and because arrest without service is excluded. To overcome this difficulty it should be possible to serve a second ship with initiating process in respect of a particular cause of action if the service on the first ship has been set aside, or the proceeding so far as it concerned that ship discontinued, dismissed or struck out.

# 11. The Allocation of Admiralty Jurisdiction

217. **Introduction.** This chapter discusses which courts should exercise the Australian admiralty jurisdiction. It first sets out which courts presently exercise that jurisdiction. The position in a number of other countries is briefly described for comparative purposes. The constitutional constraints on Commonwealth re-allocation of jurisdiction are outlined. Several options for allocating jurisdiction are briefly canvassed and rejected, followed by a discussion of the allocation of admiralty jurisdiction *in personam*. The main part of the chapter focuses on the two possible ways of allocating *in rem* jurisdiction, either to State and Territory Supreme Courts alone or to those Courts concurrently with the Federal Court, and on related questions of interstate service and arrest. The question is considered whether some limited or more general *in rem* jurisdiction should be given to any courts below the level of Supreme Courts. Finally the question of appeals is dealt with.

## The Present Australian Position

218. **Courts Vested with Admiralty Jurisdiction under the Colonial Courts of Admiralty Act 1890 (UK).** The operation of the Colonial Courts of Admiralty Act 1890 (UK) in vesting Australian courts with admiralty jurisdiction was discussed in some detail in chapters 2 and 3. It is sufficient to summarise the position here. It is clear that the High Court and the Supreme Court of each State and Territory presently qualify as Colonial Courts of Admiralty under that Act. In addition, it is possible that other superior courts established by statute with original unlimited civil jurisdiction in particular matters (for example the Federal Court) also qualify as Colonial Courts of Admiralty. It is also possible that certain intermediate courts with unlimited civil jurisdiction in particular matters (for example the District Court of Western Australia) so qualify. On the other hand, although there is power under s 3(b) of the Act to confer limited admiralty jurisdiction on lower courts, this power can probably only be exercised by the Commonwealth, not the States. The validity of the Broome Local Court Admiralty Jurisdiction Act 1917 (WA), the only attempt to exercise this power, is therefore doubtful. The position with appeals to the Privy Council, before the Australia Acts 1986 (Cth and UK), was doubtful, but if those appeals survived they have now been abolished.

219. **The Admiralty Case-Load of Australian Courts.** The following table is a summary of statistics supplied in early 1984 by the Registrars of the various courts concerned. They do not cover litigation involving maritime matters in the general jurisdiction of the court: they deal only with actions actually commenced in admiralty. The large overlap between the admiralty and ordinary jurisdictions means that a plaintiff will often have a choice of jurisdiction in which to proceed.<sup>1</sup> No estimate has been attempted of cases which could have been brought in admiralty but were not.

TABLE  
Admiralty Proceedings in Australian Courts, 1974-1983<sup>2</sup>

Total Actions 1974-1983	High Court	NSW Supreme Court	Vic Supreme Court	Qld Supreme Court	Tas Supreme Court	SA Supreme Court	WA Supreme Court
Commenced	377 <sup>3</sup>	608 <sup>4</sup>	41 <sup>5</sup>	188 <sup>6</sup>	4 <sup>7</sup>	45 <sup>8</sup>	120 <sup>9</sup>
Coming to Trial	2	N/A	0	12	0	3	12
Involving Local Craft	N/A	N/A	N/A	94	2	11	52

These figures largely speak for themselves. Over the decade surveyed the annual number of admiralty actions commenced averaged about 140, although there were considerable fluctuations. Of the admiralty actions commenced, very few went to trial. In Queensland over the period covered, about 6.4% of actions commenced went to trial; the corresponding Victorian figure was nil. Admiralty appeals were even rarer.<sup>10</sup> The use of district registries and hearings outside the State capitals was minimal or non-existent in New South Wales, South Australia and Victoria. On the other hand, admiralty matters were less concentrated in the other States, in particular in Queensland.<sup>11</sup> The distribution of admiralty matters in 1983 between States (allocating actions commenced in the High Court to the State of the Registry in which the action was commenced) was as follows: New South Wales 39, Victoria 26, Queensland 17, Western Australia 16,

Tasmania 4 and South Australia 1. It should be remembered that the statistics apply to admiralty in its present unreformed and unsatisfactory state. No estimate has been attempted of the volume of business which might flow to courts exercising a reformed subject matter jurisdiction. The British statistics set out in para 222 suggest that even a reformed admiralty jurisdiction will not require a great deal of judicial time. Even if it is correct to say that ‘a large proportion of the commercial causes list of the Supreme Court [of Victoria] involved maritime law’,<sup>12</sup> it should not be assumed that all or most of these matters will be brought in the reformed admiralty jurisdiction.

220. ***Debate on the Allocation of Business between Courts.*** It has been said that until the 1960s Federal Parliament proceeded on no fixed principle in deciding which matters should be allocated to federal or State courts: ‘*ad hoc* decisions were made in most cases without any real thought given to this problem’.<sup>13</sup> Since the 1960s there has been a vigorous debate on the question,<sup>14</sup> but no consensus has emerged on the principles which should govern the selection of courts to deal with federal matters. For example, it has been said that the Commonwealth should not confer exclusive jurisdiction on any court, State or federal, but should confer only concurrent jurisdiction.<sup>15</sup> On the other hand, it has been suggested that the ‘conferring of further jurisdiction, original or appellate on the Federal Court should be avoided’.<sup>16</sup> The way in which admiralty and maritime jurisdiction is allocated is of concern not only to those directly interested in maritime matters, but also as an aspect of the larger debate on the allocation of jurisdiction and on the possibilities for a unified Australian court system. It is useful to set out briefly some of the arguments in this larger debate. Arguments favouring giving some federal matters to federal courts have included the following:

- The basic principle is said to be that ‘judges who are called upon to interpret and apply statutes should be appointed by governments responsible to the parliaments which passed those statutes ... On principle ... federal judges should interpret and apply federal laws’.<sup>17</sup> This has been criticised as being ‘in truth a rejection of the principle of judicial independence’, there being no evidence to suggest that judges appointed by the States have lacked either the intellectual capacity or the impartiality to interpret federal statutes.<sup>18</sup> Even where some force is accorded to this basic principle it is said that ‘it cannot be an absolute’.<sup>19</sup>
- In conferring jurisdiction on State courts the federal government has to accept them as they are ‘with all the variations between them and their limitations and traditions’.<sup>20</sup> Thus there are differences in the rules of evidence, in the rules of court, in rights of appeal, rights to jury trial, and in the availability of manpower and suitable premises to hear federal matters.<sup>21</sup> If an attempt is made to avoid problems by enacting federal procedural rules, the result may be to transfer the area of conflict to the issue of what matters are ‘federal’ for the purposes of those procedural rules.<sup>22</sup> In answer to this it is suggested that these problems are more theoretical than real, and that few anomalies actually arise in practice.<sup>23</sup>
- Uniform law rapidly ceases to be uniform when interpreted by a number of different courts.<sup>24</sup> The benefits of national legislation may tend to evaporate, yet there are many areas in which a uniform national regime is highly desirable.<sup>25</sup> Critics of this argument say that loss of uniformity ‘has not been the Australian experience’.<sup>26</sup> The High Court’s position as final arbiter is sufficient to guarantee uniformity.<sup>27</sup> The need for uniformity has itself been challenged. ‘One would have thought that in some matters the High Court would welcome the assistance of varying approaches ... In a country as vast as Australia is not too much emphasis being placed on the need for rigid uniformity?’<sup>28</sup>
- There are territorial limits on the operation of a State court’s process, orders and officials; the Federal Court in these respects operates Australia-wide.<sup>29</sup> On the other hand it can be argued that the availability of the Service and Execution of Process Act 1901 (Cth) eliminates serious problems in this area. To the extent that it does not, the answer is to amend that Act rather than confer jurisdiction on the Federal Court.<sup>30</sup>
- The areas of law in which the Federal Court is given jurisdiction are or should be special, in a sense other than having been enacted by the federal Parliament. This could mean ‘requiring special expertise’ or ‘of special interest to the Commonwealth’. But it can be said that it is far from evident what is or is not special in the required sense. At present, for example, income tax matters are given at first instance exclusively to State Supreme Courts, copyright concurrently to the Federal Court and Supreme Courts and trade practices exclusively to the Federal Court. Even if the requirement for

expertise is accepted, it can be argued that the appropriate solution is not to confer jurisdiction on a specialist court but rather ‘the setting up of ad hoc specialist divisions within the Supreme Courts’.<sup>31</sup>

Independent arguments against Federal Court jurisdiction are also made. These include the following:

- The basic criticism of any dual court system is that it creates ‘the menace of demarcation disputes between competing courts’.<sup>32</sup>

Whilst they may excite the technical skills of lawyers, disputes as to jurisdiction are of no benefit to the public, to the contrary are highly detrimental.<sup>33</sup>

In response to this two points are made. First, the ‘jurisdictional problems have been greatly exaggerated’.<sup>34</sup> Conflicts of jurisdiction can occur even between State courts.<sup>35</sup> But the reply is made that ‘reassuring statements that the jurisdictional problems of dual courts systems are “greatly exaggerated” provide no positive guidance upon the direction in which, ideally, we should be moving’.<sup>36</sup> There seems to be no agreement on the proportion of cases in which jurisdictional difficulties have arisen.<sup>37</sup> Nor is there agreement on the significance to be attached to those figures. A small number can be seen as the tip of the iceberg, or as of minor significance as a percentage of all litigation. Or it can be argued that justice is not a matter to be measured by percentages, that a single notorious case can bring the courts into disrepute. A second response to the basic criticism is to suggest that the jurisdictional problems which have arisen since the establishment of the Family and Federal Courts should be seen as teething problems which can be, and in substance have been, resolved by the courts. The ordinary mechanism of appeal is providing guidelines which resolve issues.<sup>38</sup> But, while guidelines are emerging, it can be argued that they are insufficiently precise to give effective guidance,<sup>39</sup> or that the problem of demarcation is inherent in a dual court system so the effect of appellate guidance is simply to postpone or relocate the difficulty.<sup>40</sup> Another way in which courts can minimise the demarcation problem is, it is suggested, by exercising judicial restraint, staying or declining to hear actions in their own courts which could be heard more completely elsewhere.<sup>41</sup> But the scope for judicial action in this direction has been doubted.<sup>42</sup>

- It is conceded that the vesting of concurrent rather than exclusive jurisdiction can resolve many demarcation disputes in a dual court system.<sup>43</sup> ‘But to adopt this expedient on a wide scale is likely to introduce a new set of problems. One is the problem of forum shopping’.<sup>44</sup> The assumption that forum shopping is a self-evident evil has not gone unquestioned. The virtues of competition between courts have been stressed by some.<sup>45</sup> Against this it might be suggested first, that the idea of dispensing justice should place courts above or outside the marketplace. For example, in defamation cases the media are always defendants, not plaintiffs. The choice of forum is made by the plaintiff and in order to attract business courts would tend according to this theory to compete in offering superior remedies to plaintiffs. One would expect the competitive model to produce a defamation law which increasingly favoured plaintiffs at the expense of defendants. Whether this is in accord with notions of justice is open to question. Whether a similar drift would occur in Australian admiralty law under concurrent jurisdiction needs to be considered, in the light of the fact that Australia is a country of cargo shippers and ship suppliers but has few deep-sea ship owners. A second criticism of the competition argument is that competition, between courts as elsewhere, tends to favour the strong. The plaintiff who can afford the best advice is more likely to select the court most suitable to its case. The government which has the greater financial resources is better placed to compete for business in terms of making available greater curial resources. It is not self-evident that such results are acceptable in the overall community interest. Concurrent jurisdiction also creates a problem of appropriate lines of appeal.<sup>46</sup> If appeals are from a State trial court to the Full Federal Court then, ‘if nothing else were done, that would have the consequence of transferring the jurisdictional problem from the first instance to the appellate level’.<sup>47</sup> It may be that a solution to this problem can be found — for example, cross-vesting of jurisdiction<sup>48</sup> — but it is a problem which has to be faced.
- The reality of a dual court system ‘would inevitably and seriously reduce the status of the State Supreme Courts’.<sup>49</sup> This is feared where new courts are given exclusive jurisdiction or from the effect of competition where jurisdiction is concurrent. In response it is said that substantial and prestigious matters remain in the jurisdiction of State courts and, in the context of competition, status will only be lost by the courts that fail to perform.<sup>50</sup>

- State courts are closer to the community and better able to reflect community interest.<sup>51</sup> This view has been criticised as question begging, in many areas of law the relevant community is the whole of Australia.<sup>52</sup>

221. ***Conclusions From the Debate.*** The prolonged debate has not resulted in any consensus. No agreed principles have emerged upon which the allocation of jurisdiction should be based. While it is sometimes argued that a single court structure would represent an ideal solution,<sup>53</sup> it is also recognised that such a solution will not be achieved at least in the short term, and that practical measures are required.<sup>54</sup> This chapter is premised on the proposition that there will be no immediate general restructuring of the Australian courts,<sup>55</sup> and that admiralty jurisdiction should be the subject of immediate reforms without waiting for any such general restructuring. In this chapter it is necessary to weigh up the particular arguments for conferring jurisdiction in admiralty on particular courts — arguments which, because of their particularity, may have no implications for other areas of jurisdiction or for the major controversy over Federal Court versus Supreme Court jurisdiction. In assessing these arguments it is useful to compare the experience with admiralty jurisdiction in some overseas countries.

## Overseas Comparisons

222. ***England and Wales.*** In England and Wales, original admiralty jurisdiction is now exercised by the High Court and the County Courts.

- ***The High Court.*** General jurisdiction in admiralty is exercised by the High Court. For administrative purposes the High Court consists of three Divisions; as part of the Queen's Bench Division there is an Admiralty Court and a Commercial Court.<sup>56</sup> The judges of the Admiralty Court are nominated from the judges of the High Court by the Lord Chancellor.<sup>57</sup> Despite varying court structures over the years, in practice a single 'admiralty' judge has been sufficient to deal with almost all the admiralty business of the High Court, thereby ensuring a generally high degree of expertise. In recent times the judge nominated has invariably practised at the admiralty bar before appointment.<sup>58</sup> Since about 1977 admiralty matters have taken up between a half and the whole time of the admiralty judge, with other judges occasionally hearing cases also.<sup>59</sup> The Admiralty Court has its own Registrar and an admiralty Marshal. All arrests of a ship or other property are made by the Marshal or, in ports distant from London, by Customs and Excise officers acting under direction. Although notice of all *in rem* proceedings is given to the Marshal and the central registry in order to preserve the integrity of the caveat against arrest and release system, there is no centralisation of admiralty proceedings either *in personam* or *in rem*; district registries, of which there are well over 100, may be used. Appeals from the Admiralty Court follow the ordinary channels to the Court of Appeal and House of Lords.
- ***County Courts.*** County Courts have exercised a limited jurisdiction in admiralty for over a century.<sup>60</sup> Certain County Courts nominated by the Lord Chancellor by order (in fact, over 40 courts) have admiralty jurisdiction.<sup>61</sup> This jurisdiction covers actions *in personam* and *in rem* subject to monetary limits.<sup>62</sup> General admiralty claims are limited to 5 000 pounds sterling; claims in the nature of salvage are limited to cases where the value of the property salved does not exceed 15 000 pounds sterling.<sup>63</sup> In the first category it is the value of the claim, not of the *res*, which is relevant. A very large vessel may therefore be arrested in County Court proceedings as long as the claim against it is small. Parties may confer jurisdiction outside these limits by a signed memorandum of agreement.<sup>64</sup> The types of subject matter within a County Court's admiralty jurisdiction are more limited than in the High Court. Claims or disputes concerning ownership, possession or mortgages of vessels or disputes between co-owners (proprietary maritime claims) are excluded. Nor can a County Court deal with bottomry claims, claims for droits of admiralty, claims for the forfeiture or condemnation of a ship or cargo or claims for the restoration of a ship or cargo after seizure. Not a great deal of use is made of the admiralty jurisdiction of the County Court. The number of actions commenced fluctuates between about 4.5% and 8.5% of the number of High Court actions. Warrants of arrest are infrequent, and court sales very rare. The arrests normally involve pleasure craft and may be carried out independently of the supervision of the High Court. Alternatively the admiralty Marshal may be ordered to effect an arrest by the County Court.<sup>65</sup> Comparing the types of matters brought in both courts, the number of collision claims roughly reflects the general distribution of business between them; cargo claims are almost never brought in the County Court; but between a quarter and two-fifths of all goods

supplied/repairs claims are made in the County Court. Provision is made for the transfer of cases in both directions between High Court and County Court.<sup>66</sup> There are also provisions allowing only limited costs to be recovered in the High Court if the action could conveniently have been brought in the County Court.<sup>67</sup> The County Court Rules contain provisions dealing with many of the special features of admiralty proceedings such as preliminary acts,<sup>68</sup> the use of assessors<sup>69</sup> and the appraisal and sale of vessels.<sup>70</sup> Appeals from decisions of County Courts in admiralty matters are not treated differently from other appeals, though special provision is made for the use of assessors by the Court of Appeal and for dealing with the *res* pending resolution of the appeal.<sup>71</sup>

223. **New Zealand.** The High Court has general jurisdiction in admiralty.<sup>72</sup> District Courts (until 1980 called Magistrates Courts) have jurisdiction over the full range of admiralty subject matter, but can only exercise jurisdiction *in personam*, not *in rem*.<sup>73</sup> The size of the claim must be within the monetary limits of the jurisdiction of the District Court unless the parties have agreed otherwise in writing.<sup>74</sup> The ordinary procedures of the District Courts apply to appeals on admiralty matters.<sup>75</sup> The District Court Rules, while providing that all actions are to commence as ordinary actions, make provision for some of the special features of admiralty procedure such as preliminary acts.<sup>76</sup> There is comprehensive provision for the transfer of cases in both directions between High Court and District Courts.

224. **United States.** The constitutional position in the United States was briefly described in para 69. Federal District Courts have exclusive jurisdiction over admiralty and maritime proceedings *in rem* but have concurrent jurisdiction with State courts *in personam*.<sup>77</sup> In practice the number of admiralty cases brought in State courts is minimal.<sup>78</sup> Until a merger was effected in 1966, the admiralty jurisdiction of District Courts was carried on under a set of procedural rules distinct from those governing its other business. Thus it was common to speak of Federal Courts on their ‘civil side’ and their ‘admiralty side’.<sup>79</sup> But there was never any emergence of a system of streaming cases within the Federal Courts so as to allow the development of specialist admiralty judges.<sup>80</sup> The merger of the admiralty rules with the ordinary Federal Rules of Civil Procedure in 1966 sharply reduced the esoteric features of admiralty procedure and thus made conducting admiralty litigation more feasible for the general legal practitioner. But it has been argued that this process did not go far enough and that traps for the unwary still exist.<sup>81</sup> Difficulties have been experienced in the area of ancillary and pendent jurisdiction.<sup>82</sup> Before the 1966 unification, admiralty procedure allowed broad joinder of related claims and parties as long as the claims were all maritime. However if the joined claim was not maritime, the courts were firm in denying jurisdiction.<sup>83</sup> The reasons for this were twofold: to allow broad joinder would infringe the constitutional limitations on the grant of admiralty jurisdiction, and could deprive third parties of their right to jury trial, as there is no such right in admiralty actions.<sup>84</sup> While the latter issue is not relevant to the Australian situation, the former may well be. Since the 1966 unification of rules the primary issue has been the extent to which the former admiralty position has been replaced by the more liberal joinder rules applying to the ‘ordinary’ jurisdiction of District Courts. A further issue is the uncertainty in the scope of these rules. It is difficult to estimate how much real concern these issues, particularly the former, cause in practice. There is a considerable volume of literature on the topic revealing a divergence of views but there are relatively few cases.<sup>85</sup> It does not seem that the conferring of exclusive *in rem* and concurrent *in personam* admiralty jurisdiction on Federal District Courts has led to any considerable number of borderline jurisdictional disputes between the entirely separate federal and State court systems.

225. **Canada.** Admiralty jurisdiction is exercised by the Trial Division of the Federal Court of Canada exclusively *in rem* and concurrently *in personam* with Provincial Supreme Courts, except in Newfoundland.<sup>86</sup> In British Columbia, Provincial County Courts also have admiralty jurisdiction limited both by subject matter and size of claim.<sup>87</sup> In practice almost all admiralty actions are brought in the Federal Court. The specialist admiralty bar in Canada is very small, and strongly favours Federal Court jurisdiction, because all Canadian counsel can appear in the Federal Court wherever located. The Federal Court may sit anywhere in Canada, not just in places where there are registries. Federal Court trial is much more prompt than trial in the Provincial Supreme Courts.<sup>88</sup> The ‘remedies available in the Federal Court are more effective in certain respects’.<sup>89</sup> Rules as to service ex juris are more liberal than in some of the provinces, and the process of execution is simplified if it proves necessary to go outside the jurisdiction to seek assets.<sup>90</sup> Only in British Columbia are admiralty actions brought to any extent in the Supreme Court. Only in that Province is there any great pressure for provincial courts to have concurrent jurisdiction with the Federal Court (including jurisdiction *in rem*).<sup>91</sup> Otherwise the weight of opinion in the legal profession appears to be against conferring *in rem* jurisdiction on the provincial courts.<sup>92</sup> There is no suggestion, even in British

Columbia, that the Federal Court should be divested of any of its existing admiralty jurisdiction in favour of provincial courts.<sup>93</sup>

- *The Federal Court of Canada.* There is no separate admiralty division within the Trial Division of the Federal Court. Admiralty rules have been integrated with the ordinary Federal Court Rules. Those elements which are unique to admiralty have been grouped in a separate Division within the Rules, but in most respects the general rules apply. There is a separate section within the Court's registry which specialises in admiralty matters. The registry is organised and treated as a single unit. There are local offices in the capital city of each Province (except British Columbia) and Territory and in five other cities.<sup>94</sup> Material filed in any office is deemed to be filed in the central office.<sup>95</sup> The system is computerised so it is a simple matter to discover what claims are outstanding against a particular ship and what arrest warrants are outstanding, and so to operate the caveat system. Only a Federal Court Marshal may arrest a ship, but provision is made for local provincial sheriffs and deputy sheriffs to act, *ex officio*, as marshals if no federal appointment has been made for the locality.<sup>96</sup>
- *The Judiciary.* There is no formal provision in the Federal Court for specialist judges in admiralty and the first Chief Justice of the Court was opposed to allowing *de facto* specialisation, a view which has been criticised.<sup>97</sup> In practice a degree of *de facto* specialisation has occurred with the bulk of the admiralty business being dealt with by three or four of the eleven Federal Court judges.<sup>98</sup> The Canadian Bar Association has not recommended any changes in this regard.<sup>99</sup>
- *Appeals.* Appeals from the Federal Court Trial Division on all matters including admiralty go to the Federal Court of Appeal and from there to the Supreme Court of Canada.<sup>100</sup> Appeals from provincial courts on admiralty matters follow the ordinary channels.
- *Current Problems.* A major area of dissatisfaction with the current allocation of jurisdiction between courts concerns the questions of ancillary and pendent jurisdiction, a problem which in Canada is not unique to admiralty matters. The Canadian Bar Association's Report gave as examples the impossibility of joining in admiralty cargo claims, the on-shore carrier, the warehouse operator, and other carriers such as lighter-operators, and the problem of obtaining complete relief in actions involving ship repairers.<sup>101</sup> But neither the Bar Association (reflecting the weight of submissions received from its members) nor the Canadian Maritime Law Association regarded the giving of *in rem* jurisdiction to provincial courts as a solution to this problem.<sup>102</sup> In addition there has been a large volume of litigation testing the scope of federal constitutional power to confer particular items of subject matter jurisdiction on the Federal Courts.<sup>103</sup> The more recent decisions show a trend in favour of upholding jurisdiction,<sup>104</sup> but the issues involved are peculiar to the Canadian Constitution and are not relevant to this Report. However it is said (at least in British Columbia) that there is a growing trend of avoiding admiralty jurisdiction altogether due to the alleged lack of expertise of Federal Court judges, the problem of pendent and ancillary jurisdiction and the constitutional uncertainties.<sup>105</sup> Unless remedies unique to admiralty are required it is thought better to frame a complaint (even one involving a salvage claim) as a common law action in a Provincial Supreme Court.<sup>106</sup>

## Constitutional Powers to Allocate Jurisdiction

226. **Broad Commonwealth Power.** The scope of Commonwealth constitutional power over matters of 'admiralty and maritime jurisdiction' was examined in chapter 5. The Commonwealth has general power to allocate federal jurisdiction over matters of 'admiralty and maritime jurisdiction' to appropriate Australian courts, and to regulate appeals, transfer and remittal between courts and other related matters. In particular, it may vest jurisdiction in existing State courts,<sup>107</sup> in existing or specially created federal courts,<sup>108</sup> or in Territory courts.<sup>109</sup> Certain limitations apply depending on which choice is made. The Commonwealth cannot alter the 'structure' or 'constitution' of a State court vested with federal jurisdiction,<sup>110</sup> although it has extensive power over the scope of jurisdiction (which need not be limited either in terms of subject matter or geographical extent to the jurisdiction otherwise exercisable by the court). In the case of federal courts the Commonwealth is, subject to Chapter III of the Constitution, fully competent to regulate the structure of the court. In the case of Territory courts the restrictions imposed by Chapter III do not apply,<sup>111</sup> but it appears that a Territory court can only be given jurisdiction by a law under s 122 of the Constitution: it cannot be given federal jurisdiction.<sup>112</sup> (However a federal court can be given jurisdiction by a law under s 122.<sup>113</sup>) This

is the most significant restriction on Commonwealth power for present purposes. It is difficult to envisage a federal admiralty law which would illicitly alter the ‘structure’ of a State court.<sup>114</sup> The restrictions on the creation of federal courts imposed by Chapter III relate for the most part to guarantees of judicial independence and tenure, and are readily complied with. Thus the Commonwealth could invest exclusive jurisdiction under Constitution s 76(iii) in State courts, or in the federal Court (or an Australian Admiralty Court specially created), or could invest jurisdiction in federal, State and Territory courts concurrently (with provision for transfer or remittal of cases between them). It could make the jurisdiction of each State Supreme Court (but not, however, any Territory court) an Australia-wide jurisdiction. It could provide for appeals from all such courts in admiralty matters to go to the Federal Court exclusively, or to the State Full Courts or Courts of Appeal (in the case of appeals from State courts at first instance).<sup>115</sup> It could provide for an appeal to the High Court as of right or by special leave only, and in some or all cases.<sup>116</sup>

**227. Pendent or Ancillary Jurisdiction.** Potentially the most significant constitutional difficulty is the problem of ‘accrued’, ‘pendent’ or ‘ancillary’ jurisdiction in cases with non-federal elements. It is possible for the same case to raise issues of ‘admiralty and maritime jurisdiction’ and other issues of a non-federal kind.<sup>117</sup> Where jurisdiction is vested in a State Supreme Court this presents no particular problems, since the non-federal aspects will usually be able to be dealt with at the same time. The problem occurs with federal courts, the jurisdiction of which must be derived from Chapter III of the Constitution and which are not, in the same way as Supreme Courts, courts of general jurisdiction. However, it is established that a federal court has jurisdiction to determine the entire case before it when it constitutes a single ‘matter’, and the High Court has adopted a very broad definition of when this is so.<sup>118</sup> Stated briefly, a federal court has jurisdiction over the non-federal aspects of a controversy if a federal claim over which it does have jurisdiction is an integral, and not insubstantial, part of that claim. In the words of Justice Mason, the non-federal and the federal claim may be related because they ‘so depend on common transactions and facts that they arise out of a common substratum of facts’.<sup>119</sup> That test was approved by the majority in *Fencott v Muller*, where the Court said:

What is and what is not part of the one controversy depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships. The scope of a controversy which constitutes a matter is not ascertained merely by reference to the proceedings which a party may institute, but may be illuminated by the conduct of those proceedings and especially by the pleadings in which the issues in controversy are defined and the claims for relief are set out. But in the end, it is a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter...<sup>120</sup>

This broad and flexible test has been applied in many subsequent cases, including cases both of ‘pendent subject matter’ and ‘pendent party’ jurisdiction. The question of pendent party jurisdiction is of particular significance in admiralty, due to the frequency with which third parties are joined in cargo and damage cases. *Fencott v Muller*<sup>121</sup> itself involved pendent party jurisdiction, and the same broad and flexible test was applied to that aspect of the case, and has been followed since.<sup>122</sup>

**228. Associated Claims.** A federal court exercising admiralty jurisdiction could also be given jurisdiction over any ‘associated’ claim (even if a ‘disparate’ one) which was itself a matter of federal jurisdiction, for example because it arose under a law made by the Parliament.<sup>123</sup> Gaps or uncertainties in the federal admiralty and maritime jurisdiction could, if necessary, be filled in this way through an exercise of substantive Commonwealth legislative powers. So far as the Federal Court of Australia is concerned, this has already been done. Section 32 of the Federal Court of Australia Act 1976 (Cth) provides that:

- (1) To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked.
- (2) The jurisdiction conferred by sub-section (1) extends to jurisdiction to hear and determine an appeal from a judgment of a court so far as it relates to a matter that is associated with a matter in respect of which an appeal from that judgment, or another judgment of that court, is brought.

The effect of s 32(1) is to confer ‘associated’ federal jurisdiction on the Court to the extent that the Constitution permits. As the High Court held in *United States Surgical Corporation v Hospital Products International Pty Ltd*,<sup>124</sup> this means that the Court has jurisdiction over any matter of federal jurisdiction (that is, those matters listed in s 75 and 76 of the Constitution) to the extent that the matter is ‘associated’ with a matter properly before the Court. In the present context, the effect would be to confer on the Court what may

be described as ‘contingent’ federal jurisdiction over matters (including matters of ‘Admiralty and maritime jurisdiction’) within s 75 and s 76, the contingency being that those matters are ‘associated’ with a proceeding before the Court. The High Court has not yet decided how the term ‘associated’ is to be construed,<sup>125</sup> but since s 32 only has effect after the already broad and flexible test for a ‘matter’ within the Court’s jurisdiction has been applied, it is likely that a broad interpretation will be adopted. In any event the ‘association’ in s 32(1) is a statutory, not a constitutional one. Jurisdiction could, for example, be conferred over any matter of federal jurisdiction arising between the original parties or between those parties and any other parties properly joined. It was recommended in para 195 that associated jurisdiction over all matters of admiralty and maritime jurisdiction be conferred on all courts exercising jurisdiction under the proposed legislation.

## The Allocation of Jurisdiction

229. ***Eliminating Certain Options.*** Constitutionally a large number of schemes could be devised for allocating admiralty jurisdiction in Australia. But when the opinions expressed to the Commission, the arguments contained in the Zelling Report, the nature of the more general debate about the structure of the Australian court system, the volume and geographical distribution of admiralty matters at present and the needs of litigants are considered, two plans of allocation are the prime candidates for consideration. These are either vesting State and Territory Supreme Courts with federal admiralty jurisdiction or vesting such jurisdiction concurrently in the Federal Court of Australia and in State and Territory Supreme Courts. Whichever option is selected, additional choices have to be made both as to the geographical scope of jurisdiction, the avenues of appeal and the possibility of conferring *in rem* jurisdiction on lower courts. Before giving detailed consideration to the two options and these supplementary matters, something should briefly be said about why other options have been excluded.

230. ***A Separate Australian Admiralty Court?*** In the late 1960s Justice Zelling advocated a separate federal court devoted to admiralty and maritime matters.<sup>126</sup> Such a court would have the potential to provide a high level of expertise, thereby enhancing Australia’s reputation as a forum in which to litigate admiralty matters. It would also have the potential to encourage uniform and consistent development of the law. From comments made at the time it was clear that the proposal did not command widespread support.<sup>127</sup> This continues to be the position.<sup>128</sup> There are certainly arguments in favour of centralisation as a method of achieving uniformity. The opinions of overseas admiralty lawyers and judges *expressed* to the Commission have been strongly in favour of all possible measures being taken to secure uniformity in the jurisdiction and procedure of the Admiralty Court and in its application of the law. But the argument for uniformity has to be balanced against other factors, including the administrative difficulties of providing Australia-wide access to the jurisdiction in urgent cases and the need to avoid demarcation disputes between courts. Moreover it is not necessarily the case that uniformity requires jurisdiction to be invested in a single court. In the United Kingdom (which is not a federation), admiralty jurisdiction is exercised in England and Wales by the High Court on the basis of the Supreme Court Act 1981, but in Scotland by Scottish courts based on the Administration of Justice Act 1956 (UK).<sup>129</sup> In England and Wales, admiralty jurisdiction both *in rem* and *in personam* can be exercised within the limits of their ordinary jurisdiction by County Courts, on the basis of separate provisions.<sup>130</sup> These variations from ‘uniformity’ do not appear to give rise to insuperable difficulties in practice. The argument for uniformity also assumes that, if admiralty jurisdiction is conferred upon a number of courts (say, the Federal Court and Supreme Courts), differences in the interpretation of admiralty law and practice will occur and persist. While there is some evidence for this,<sup>131</sup> on the whole Australian courts do have regard to decisions of courts in other Australian jurisdictions.<sup>132</sup> Moreover the volume of admiralty business is simply too small and too geographically dispersed to make a court devoted solely to admiralty matters a practical proposition. In England, where the volume of business is much greater, the admiralty business now occupies one Admiralty judge on a more-or-less full time basis, but it has not always done so.<sup>133</sup> For these reasons what might be thought the ideal solution of a specialist admiralty court is not realistically capable of being achieved in Australia.

231. ***Exclusive Federal Court Jurisdiction?*** There are several disadvantages in vesting admiralty jurisdiction exclusively in the Federal Court. One is the limited Federal Court presence in the smaller State capitals and its absence from the regional centres. The statistics outlined in para 219 indicate that a considerable volume of admiralty business arises outside Sydney and Melbourne. The Western Australian Branch of the Maritime Law Association commented that with only a single Federal Court judge based in

Perth there might be problems of access for what are often urgent applications due to the limited time a vessel is expected to be in port or the cost of delaying the departure of a vessel.<sup>134</sup> Under s 32A of the Federal Court of Australia Act 1976 (Cth) a State Supreme Court is invested with federal jurisdiction to hear and determine any application that may be made to a Federal Court judge sitting in Chambers. But it hardly seems satisfactory to confer exclusive admiralty jurisdiction on the Federal Court and then rely on s 32A to cope with what might be expected to be a significant number of Chambers applications in a jurisdiction in which urgent applications are common. In addition, as the Queensland Branch of the Association pointed out, the Federal Court does not have any registry outside Brisbane, whereas the Supreme Court has registries in Townsville and Rockhampton which handle a considerable amount of admiralty business.<sup>135</sup> The same point could be made in relation to Tasmania where the Federal Court has a registry only in Hobart. Admiralty matters arise at least as frequently in regional centres as in Hobart.<sup>136</sup> Though the Federal Court is continuing to grow there is no prospect that in the foreseeable future it will have a geographically dispersed presence to match that of some State Supreme Courts. In some cases exclusive Federal Court admiralty jurisdiction would result in difficulty of access, delay and greater witness travel time than is experienced at present. A second argument involves the problem of pendent jurisdiction. Giving exclusive jurisdiction to the Federal Court would raise problems of demarcation disputes between courts. As was noted in para 220 there is a wide range of opinion as to the number and significance of such disputes arising out of matters presently within the Federal Court's exclusive jurisdiction. Unless there are compelling advantages to be gained it would be unwise to add admiralty to these matters. Other, though perhaps less substantial, arguments have also been made. At present most Australian judicial expertise in admiralty is to be found in State and Territory Supreme Courts. Making Federal Court jurisdiction exclusive would, unless special arrangements were made, result in the loss of this expertise.<sup>137</sup> It has also been argued that depriving State and Territory courts of a jurisdiction which they have long possessed could be seen as a downgrading of those Courts and the breaking of historic ties.<sup>138</sup> While there are advantages to exclusive Federal Court jurisdiction they are not so significant as to outweigh these disadvantages. There is much to be said for vesting admiralty jurisdiction in a court whose ordinary jurisdiction is nationwide, in order to cater for the problem of ships moving from port to port around Australia. But it does not follow that the admiralty jurisdiction must be exclusive to such a court to obtain those benefits. In addition it is not clear that there is a federal interest in admiralty matters arising out of local events such as the collision of two local fishing or pleasure craft on Sydney Harbour, sufficient to justify vesting exclusive jurisdiction in the Federal Court.<sup>139</sup> Having all admiralty writs originate in a single court would be of some value in enabling potential litigants to discover whether arrest warrants were outstanding in Australia against, or had been served on, a particular ship, and to deal with other situations in which there are a multiplicity of claims against a single ship. Similarly, a single national register of caveats against arrest would clearly be of value. But while the Federal Court would be in the best position to create such a register, its ability to do so is not dependent upon a conferral of exclusive jurisdiction.<sup>140</sup> Although there are some arguments in favour of exclusive Federal Court jurisdiction the balance of considerations is clearly against exclusivity.

232. **High Court Jurisdiction?** During the decade from 1974 to 1983 just over a quarter of all admiralty matters commenced in Australia were commenced in the High Court. The Zelling Report recommended that the High Court retain its original jurisdiction in admiralty,<sup>141</sup> on the ground that there was a need to have original jurisdiction in a court whose jurisdiction was Australia-wide in order to cater for the problem of serving process on a ship that moved from State to State. It is clear that this need can be met equally well by giving admiralty jurisdiction to the Federal Court.<sup>142</sup> There has been an increasing trend in recent years to emphasise the High Court's role as a constitutional and final appellate court. The removal of as much of the Court's original jurisdiction as possible is a corollary.<sup>143</sup> It would be inappropriate to make an exception for admiralty matters when the only reason for seeking original High Court jurisdiction in such matters can be met equally well by the Federal Court. The proposed legislation should accordingly not give any original jurisdiction to the High Court.<sup>144</sup>

## **Allocating *In Personam* Admiralty Jurisdiction**

233. **Proposed Allocation.** Although the ability to proceed *in rem* is the unique characteristic of admiralty jurisdiction it is universally accepted that, where the subject matter permits, a plaintiff should be permitted also to proceed *in personam* in admiralty.<sup>145</sup> Admiralty jurisdiction *in personam* (apart from that over limitation actions) should be conferred on all courts in Australia within the ordinary limits of their civil jurisdiction, such as limits as to venue, size of claim, availability of equitable and other remedies. In those

jurisdictions which have a three-tier structure (for example a District Court and Courts of Petty Sessions) both intermediate and lower levels would be included. Cases brought in a higher court which could have appropriately been brought in a lower court would be subject to existing provisions as to transfer and costs. Jurisdiction would not be given to special purpose courts and tribunals such as the New South Wales Land and Environment Court. Some difficulties arise in relation to the Federal Court of Australia. It is best described as a specialist court although it has a considerable range of matters within its jurisdiction. If it is not to be given *in rem* jurisdiction there would appear to be no reason to confer on it *in personam* jurisdiction in admiralty. The question of the Federal Court being given *in rem* jurisdiction is considered later in this chapter, and it is concluded that *in rem* jurisdiction should be conferred on the Federal Court. If this is accepted it is clearly essential that the Federal Court also have correlative *in personam* jurisdiction. However, there is no minimum limit on the size of claims which may be brought in the Federal Court nor are there any venue restrictions. This problem exists already with the Federal Court's jurisdiction under the Trade Practices Act 1974 (Cth), where there is no lower limit on the size of claims. It is sufficient to rely on the Federal Court's discretion as to costs, and on the remittal and transfer provisions discussed in para 238 and 241 which would also allow the Federal Court to transfer or remit proceedings to inferior courts possessing admiralty jurisdiction.

234. **Reasons for Allocation.** Having set out the recommended scheme it remains to justify it. Basically the reasoning is negative: there seems no sufficient reason not to confer *in personam* jurisdiction in this way. There are good arguments for restricting to superior courts *in rem* admiralty jurisdiction. Arrest of a ship is clearly a fairly drastic step. Applications for arrest will frequently have to be treated as a matter of urgency. None of these characteristics apply to admiralty actions *in personam*. Jurisdiction in such actions has to be obtained by service of process on the defendant. Only courts whose ordinary rules allow such service to be made outside Australia will be able to entertain admiralty actions against overseas defendants. There is a large degree of overlap between those matters which can be brought in admiralty and in ordinary civil courts. While there are some special rules of law which are exclusively within the province of admiralty courts,<sup>146</sup> most admiralty disputes can be framed as actions in contract or tort or for possession. As such they can be brought outside admiralty in a court with ordinary civil jurisdiction. The argument is double-edged. If the matters can be framed as non-admiralty civil actions, what need is there to confer *in personam* admiralty jurisdiction on all courts exercising general civil jurisdiction? The answer is partly that the overlap between present ordinary civil jurisdiction and *in personam* admiralty jurisdiction is not complete. Partly it is a means of demystifying admiralty. If there is nothing esoteric about admiralty actions *in personam*, it is useful to acknowledge the fact by allowing jurisdiction over such actions to be allocated according to the general rules by which civil matters are allocated to courts.<sup>147</sup> There are however certain specific arguments against this view that need to be taken into account.

- *Need to Apply Special Procedures.* Special admiralty procedures apply to some actions *in personam*. The requirement for preliminary acts to be filed in collision cases is an example.<sup>148</sup> Perhaps more significant are the special procedures governing the conduct of limitation actions.<sup>149</sup> The need to comply with special procedures is not a strong argument against conferring *in personam* jurisdiction. There is no reason why lower courts should not be capable of applying the proposed uniform rules. However, there are strong arguments for excluding limitation actions from any general conferral of jurisdiction. The difficulty with such actions is the lack of any sum that would be clearly appropriate for determining lower court jurisdiction. In limitation actions the amount to which the defendant seeks to limit liability may be small, but the outstanding claims may be very large. It would be clearly inappropriate in such circumstances to allow the limitation amount to determine jurisdiction. It would be equally inappropriate to allow the defendant to select one small claim out of what may be many and bring the limitation action in a lower court on the basis of that claim. Limitation actions should therefore be restricted to superior courts. None of this applies to the hearing of a plea of limitation by way of defence to a specific claim. There can be no objection to an inferior court dealing with the right to limit raised as a defence to a specific action *in personam* that falls within that court's monetary limits: if established, the defence applies to that claim only. With this one exception, it can be concluded that questions of procedure do not preclude the conferral of *in personam* jurisdiction on courts of ordinary civil jurisdiction.
- *Need for Judicial Expertise.* A more difficult argument to deal with is one which stresses the need for expertise in courts hearing admiralty matters,<sup>150</sup> and hence the inappropriateness of conferring even *in*

*personam* admiralty jurisdiction on courts below Supreme Court level. But any area of law is capable of throwing up difficult cases. Neither in Australia nor elsewhere is subject matter jurisdiction allocated by reference to such a possibility. Insofar as there is any general principle governing the allocation of subject matter jurisdiction it is based on the monetary value of the disputed claim. It can always be argued that a particular subject would benefit from a specialist tribunal but in general this argument is not accepted. The need for specialised court officials, local equivalents to the English Admiralty Marshal and Registrar, is confined to actions *in rem*. It is not relevant to the allocation of *in personam* matters.

Accordingly there should be a general vesting of *in personam* admiralty jurisdiction (apart from limitation actions) in lower courts of ordinary civil jurisdiction.

## Allocating *In rem* Admiralty Jurisdiction among Superior Courts

235. **The Issue.** It follows from the earlier argument in this chapter that State and Territory Supreme Courts should continue to exercise admiralty jurisdiction. The question is whether this jurisdiction should be exclusive or concurrent with Federal Court jurisdiction. The general arguments for and against -Federal Court jurisdiction were summarised in para 220. More specific arguments favouring Federal Court jurisdiction in admiralty include the following:

- Federal Court process runs Australia-wide, thereby overcoming possible difficulties in serving process on and arresting ships moving from port to port around the Australian coast.
- Federal Court jurisdiction, even though only concurrent, goes some way to satisfying the demand that areas of law of international concern and over which federal legislative power is predominant should be within the jurisdiction of federal courts.
- There is a need for a centralised registry function in admiralty, especially for caveats against arrest.<sup>151</sup>
- Such an allocation gives the plaintiff a choice. Competition between courts will prove beneficial to litigants.
- Concurrent federal and Supreme Court jurisdiction in admiralty has been the status quo since 1903. It has not caused significant difficulties in practice; on the contrary, the facility of High Court originating process in admiralty is used to a considerable extent. The modern analogue of High Court original jurisdiction is Federal Court jurisdiction.

Apart from criticisms which can be made of these arguments the following particular arguments can be made against concurrent Federal Court jurisdiction:

- Because the Federal Court's ordinary jurisdiction is not general, problems of pendent and ancillary jurisdiction will arise.
- Concurrent jurisdiction creates problems in devising an avenue for intermediate appeals that does not create, at the appellate level, fresh issues of pendent and ancillary jurisdiction.

This last point, that of appellate structure, will be discussed later.<sup>152</sup> Before examining the remaining arguments it is useful to say something about how judges would be allocated to admiralty cases within the Federal Court. It is assumed that, were the Court to be given jurisdiction, there would be no formal specialisation of personnel but there would *de facto* be a small number of judges who would handle the bulk of the admiralty business of the Court. Any greater specialisation would impose intolerable travel burdens on the Federal Court's 'admiralty judge'. At least for matters arising at short notice, and perhaps for all admiralty matters, it would be prudent to assume that in those locations where there is only a single Federal Court judge it would be that judge who would deal with admiralty matters. Only in those centres where there is more than one resident Federal Court judge would a degree of specialisation be expected to occur.

236. **The Need for a Court with Australia-Wide Jurisdiction.** Apart from the general arguments summarised in para 220-1, two particular arguments for an Australia-wide admiralty jurisdiction have been made.

- *National Service and Execution of Process.* It is frequently asserted that there is a need to be able to take out a writ *in rem* and warrant of arrest which can be served or executed anywhere in Australia.<sup>153</sup> This need arises because some ships spend only a brief time in port before moving around the Australian coast to another port. Alternatively, bail might be given and service of the writ accepted in order to prevent arrest. The bail might then prove inadequate after the ship has sailed.<sup>154</sup> As appears from the figures set out in para 219, the High Court's original admiralty jurisdiction has been quite extensively used, although whether the reason for this relates to the Australia-wide jurisdiction of the High Court is not clear. Several unreported instances in which plaintiffs have resorted to the High Court for this reason were drawn to the attention of the Commission as illustrating this need.<sup>155</sup> It is probably a factor in choosing to commence proceedings in the High Court in some cases at least.
- *Need for National Registers.* In chapter 14, it is proposed that the system for caveats against arrest be retained and strengthened.<sup>156</sup> For this system to be fully effective it needs to operate with a national register of caveats, which would necessarily have to be based in the Federal Court.

On the other hand it is arguable that these functions are either not compelling arguments for Federal Court jurisdiction or can be met in other ways.

- *Interstate Service and Execution of Warrants of Arrest.* It is probable that the Service and Execution of Process Act 1901 (Cth) does not at present allow interstate service of Supreme Court writs *in rem* on ships, and virtually certain that it does not allow interstate arrest.<sup>157</sup> However there is no constitutional objection to the Commonwealth conferring Australia-wide federal admiralty jurisdiction on State Supreme Courts, and providing for interstate service and arrest either under the proposed legislation or the Service and Execution of Process Act 1901 (Cth).<sup>158</sup> In the absence of an Australia-wide Federal Court jurisdiction such a provision might well be desirable. But there are several reasons for preferring the Federal Court as a court to exercise a nationwide jurisdiction. If a writ *in rem* in the Supreme Court of State A could be served throughout Australia, the effect would be (since service creates jurisdiction in admiralty over the merits without any need for a territorial nexus between the forum and the dispute) to give each Supreme Court a universal jurisdiction in admiralty based on service of the writ anywhere in Australia. Although formally the basis for this jurisdiction would be that each Supreme Court was an agent of the Commonwealth for the purposes of admiralty jurisdiction, this would be at least an apparent breach of the basic principle of territoriality of service *in rem*, a principle which, it was concluded in chapter 6, it is clearly in Australia's interest to maintain.<sup>159</sup> This problem does not arise with respect to arrest, which is the execution of a jurisdiction already established. It is not obvious that the Supreme Court of a State is the appropriate agency for the exercise of admiralty jurisdiction over a ship which has never entered the waters of that State in relation to a dispute between parties with no connection with the State. Moreover, if this solution were to be adopted, there would be 7 superior courts each with Australia-wide jurisdiction. This could lead to forum shopping and to disputes between courts each of which would have jurisdiction over the same ship.<sup>160</sup>
- *Need for a Register of Caveats against Arrest.* At present caveats against arrest are virtually never used. It is uncertain to what extent this will change under the proposals in chapter 14. It would be possible, though admittedly more cumbersome, for each court to maintain its own register of caveats (perhaps with some interchange of information between them). No other national admiralty register is proposed. It can be argued that Federal Court jurisdiction should not be based on the need for a single register of caveats against arrest. At most the facility for a national register is an additional advantage of Federal Court jurisdiction, if it is desirable to confer such jurisdiction for other reasons.

237. **Avoiding Demarcation Disputes Between Courts.** The strongest of the particular arguments against Federal Court jurisdiction is that problems of pendent, ancillary or accrued jurisdiction are likely to arise. The Federal Court is a court of limited subject matter jurisdiction. If it were to be given admiralty jurisdiction, issues could arise between the parties in the course of admiralty proceedings that, had they arisen in isolation, would not have been within either admiralty jurisdiction or any other jurisdiction possessed by the Court. Similarly, there would be occasions when it was sought to join as a party someone

who could not have been sued directly within the limited jurisdiction of the Court. The rules relating to accrued or pendent jurisdiction (including pendent party jurisdiction) developed by the High Court were outlined in para 227. In addition the Federal Court has associated jurisdiction, under s 32 of the Federal Court of Australia Act 1976 (Cth), over all matters of federal jurisdiction, including all matters of admiralty and maritime jurisdiction.<sup>161</sup> On balance it is likely that the doctrine of accrued jurisdiction developed by the High Court, supported by the Federal Court's associated jurisdiction will avoid most of the problems. A further and important point is that under a scheme of concurrent jurisdiction the plaintiff has a choice of court in which to commence. Many of the difficulties of divided jurisdiction referred to in para 220-1 have occurred in cases where one or another court had exclusive jurisdiction over a particular claim.

238. **Transfer of Proceedings.** A further way of resolving any residual problems of accrued jurisdiction is through making adequate provision for the transfer of cases between courts exercising admiralty jurisdiction. A broad power of transfer is essential if the most appropriate venue is to be found, regardless of the courts involved. But with concurrent Federal Court jurisdiction, transfer to Supreme Courts may sometimes be necessary to avoid jurisdictional disputes. Provision should therefore be made for the Federal Court or a Supreme Court at any stage of any admiralty proceeding to transfer that proceeding to another court with admiralty jurisdiction in respect of the proceeding, either upon application or of its own motion. The action should then proceed as if it had been commenced in the court of transfer. The question which court should maintain custody of the *res* in this situation is a matter best left to the discretion of the transferring court, given the variety of situations that could arise. But if a ship under arrest is in the custody of the transferring court it will usually be simpler for that court to retain custody of it, and to deal with it as if the case had not been transferred, though subject to any final judgment or order of the court to which the case was transferred. Specific powers to this effect should be conferred in the proposed legislation.

239. **Conclusion.** In the Commission's view a clear case exists for concurrent *in rem* jurisdiction in admiralty to be vested in the Federal Court and in the Supreme Courts of each State and Territory. This meets the need for a court with Australia-wide jurisdiction, while avoiding any appearance of an infringement on the basic principle of territoriality of service in actions *in rem*. It also provides a basis for a national register of caveats against arrest, and for the growth of admiralty specialisation in the Federal Court, while retaining and maintaining the existing jurisdiction and expertise of Supreme Courts. Parallel federal and State court jurisdiction under the Colonial Courts of Admiralty Act 1890 (UK) seems to have worked reasonably well since 1903. This proposal was generally endorsed in submissions to the Commission;<sup>162</sup> indeed, with one exception, it can be said to represent a consensus view. The exception relates to the question of interstate service of Supreme Court writs *in rem*. A number of submissions urged this as an additional form of Australia-wide jurisdiction to the jurisdiction of the Federal Court.<sup>163</sup> For the reasons given in para 236, it is undesirable to provide for service ex juris of writs *in rem* without any requirement of a nexus with the State or Territory in question, and unnecessary to do so given that the Federal Court will have jurisdiction throughout Australia. However there may be some cases where, consistently with the arguments in para 236, service ex juris can properly be provided for. For example, a ship may be within the State or Territory when proceedings are commenced but may leave thereafter to avoid service and arrest.<sup>164</sup> To deal with cases such as this, service ex juris of Supreme Court writs *in rem* within Australia should be permissible where the *res* was within the State or Territory in question when the action was commenced, or at any later time during the currency of the writ. In addition, it is desirable to provide for interstate arrest of ships once service *in rem* has been effected within the State. Subsequent issues of custody of the *res* can be dealt with under the transfer power proposed in para 238. The legislation should accordingly contain a provision to the effect that the courts exercising jurisdiction under it are to act in aid of each other, and the proposed Act and Rules should be framed so as to allow interstate arrest and other forms of judicial assistance.<sup>165</sup>

## Allocating *in rem* Jurisdiction to Lower Courts

240. **Should *in rem* Jurisdiction be Conferred on Lower Courts?** No lower courts in Canada or the United States possess *in rem* jurisdiction. In New Zealand the Beattie Committee considered that 'because of the very nature of the action itself and its consequences', jurisdiction *in rem* ought not to be given to lower courts.<sup>166</sup> In England the County Courts have long exercised *in rem* jurisdiction subject to money limits and some fairly minor restrictions on subject matter.<sup>167</sup> However, suggestions for further devolution of *in rem*

jurisdiction have not been accepted.<sup>168</sup> In Australia the Zelling Committee referred to the long history of English County Courts exercising admiralty jurisdiction both *in rem* and *in personam* in these terms:

A similar historical basis does not exist in Australia. Here, admiralty jurisdiction began in, and has remained in, the Supreme Courts; and, after federation, the High Court also. So far as we are aware there has never been any call in Australia to confer a restricted, or any, admiralty jurisdiction on County or District Courts.<sup>169</sup>

Arguments based on history can never be fully persuasive in determining what the law should be. The absence of demand in the past might be explained by the uncertain and unsatisfactory nature of the admiralty jurisdiction of superior courts in Australia. Conferring admiralty jurisdiction on lower courts would not have resolved the major problems confronting potential admiralty litigants in Australia and might only have added to them. Once the major problems are overcome it is difficult to say with confidence that the more minor issue of litigants having to use costly Supreme Courts to pursue small admiralty claims *in rem* will not come in for criticism. It would certainly be unwise to draw any conclusions from the very limited and arguably invalid conferral of jurisdiction on the Broome Local Court.<sup>170</sup> The fact that, in some States at least, a significant proportion of the admiralty actions concern small vessels and occur outside the capital cities<sup>171</sup> suggests that devolution to locally situated courts may prove attractive. The relative lack of use made of the County Court's *in rem* jurisdiction in England is not a very meaningful guide as to how much use would be made of a similar facility in a geographically more dispersed country such as Australia.<sup>172</sup> On the other hand there are strong arguments against any general conferral of *in rem* jurisdiction on lower courts, including the international character of the jurisdiction, the absence (in most cases) of any clear need for such a conferral, and the dilution of expertise (especially in the arrest and custody of ships and associated questions) that would be likely to result.<sup>173</sup>

241. **Conclusion.** There is little justification for requiring what may be a straightforward claim for money due to proceed on a Supreme Court rather than lower court scale of costs just because a ship has been arrested as security. The cluttering of Supreme Court lists with small claims is also difficult to justify. At the same time a general conferral of *in rem* jurisdiction on lower courts is undesirable, in particular because of the dilution of expertise among court officials which would result. While the hearing on the merits of actions *in rem* in intermediate or lower courts may well be desirable, something more flexible than a general grant of *in rem* jurisdiction is called for. A more effective approach would be to restrict the commencement of actions *in rem* to superior courts but allow remittal of the hearing on the merits to inferior courts in appropriate cases. This would allow arrest, custody and sale to remain the province of superior courts and their officials, while permitting the merits to be decided in the court that would normally have tried an equivalent action *in personam*. This scheme would accommodate most of the arguments for and against *in rem* jurisdiction of lower courts, and this solution was generally supported during the Commission's consultations. The main drawback is that such a provision would not readily allow decentralisation of admiralty jurisdiction *in rem* in areas where neither the Supreme Courts nor the Federal Court have a local registry. There may, well be a need for a limited *in rem* jurisdiction over small claims in some ports where only magistrates or intermediate courts sit. To meet this need the Governor-General should be empowered to proclaim particular inferior courts as courts in which *in rem* jurisdiction (subject to any limits set out in the proclamation) can be exercised under the legislation.<sup>174</sup> Geographically isolated areas could thus be specifically catered for. Conferrals could if necessary be restricted to particular types or sizes of claim or to particular classes of vessel. A broad power should be conferred on superior courts to remit actions *in rem* for hearing on the merits by lower courts. There should also be power to proclaim specific lower courts as courts having defined *in rem* jurisdiction under the Act; a court exercising *in rem* jurisdiction by virtue of such a proclamation should have the power to transfer the proceeding to a superior court where appropriate.

## The Allocation of Appellate Jurisdiction

242. **Final Appeals.** The topic of final appeals is uncontroversial. Appeals to the Privy Council have been abolished.<sup>175</sup> Whether intermediate appeals go to the Full Court of the Federal Court or to Full Courts or Courts of Appeal of State Supreme Courts, there should be a final appeal to the High Court of Australia. This should be subject to the general restrictions on such appeals, and it follows that the special leave of the High Court will be required to bring an appeal. There is no reason why admiralty appeals should be treated differently to the general run of appeals.

243. ***Intermediate Appeals.*** Intermediate appeals can be put into two categories, those heard by a Full Court or Court of Appeal and those from lower levels of the hierarchy of courts which are heard by a single judge. It has not been suggested that any change be made in the second category. The question is what provision should be made for intermediate appeals. There are two possibilities. Appeals could follow the ordinary channel to the Full Court or Court of Appeal,<sup>176</sup> or all appeals could go to a Full Court of the Federal Court. The former preserves the status quo<sup>177</sup> and allows State Full Courts a role in the continuing development of admiralty law. It retains their existing expertise, limited though that necessarily is given the small number of admiralty actions currently heard, especially at the appellate level.<sup>178</sup> A disadvantage is the possibility that desirable uniformity could be threatened if the various Full Courts develop the law in different directions. Any differences that did develop could only be resolved if litigants were willing to bear the cost of a further appeal to the High Court. There is something to be said on the grounds of promotion of uniformity for having all admiralty appeals in the first category heard by a full bench of just one court. That court would have to be the Full Court of the Federal Court. On the other hand there seems to be a general judicial awareness of the international ramifications of admiralty and of the consequent need for uniformity. As was pointed out earlier, Australian courts do on the whole have regard to decisions of courts in other Australian jurisdictions.<sup>179</sup> Concentrating full court appeals in the Federal Court might also have at least some effect in promoting expertise in admiralty appeals. But to confer exclusive appellate jurisdiction on the Federal Court may raise demarcation problems, especially if that exclusive jurisdiction extended to admiralty actions *in personam*. There may well have been no need to distinguish in the original trial what was and was not an admiralty matter, because the ordinary jurisdiction of the Supreme Court would have covered any *in personam* claim that did not fall within admiralty jurisdiction. Strong arguments against Federal Court appeals were addressed to the Commission, on these and other grounds.<sup>180</sup> On balance it seems undesirable to risk creating demarcation problems with exclusive Federal Court appellate jurisdiction, especially in *in personam* cases. The ordinary channels of appeal should be retained.

## 12. Other Related Issues

### Remedies

244. **Introduction.** This chapter discusses a number of related issues arising in the exercise of admiralty jurisdiction. The issues are related both to the recommendations made earlier and to each other, in that they concern the relative effects of *in rem* and *in personam* actions, and especially their remedial effects. The issues to be discussed are:

- the relationship between arrest and Mareva injunctions;
- the applicability of *in personam* remedies in actions *in rem*;
- time limits in admiralty;
- priority of claims, and the relationship between admiralty priorities and insolvency or winding-up;
- the interaction of arrest, possessory liens and statutory rights of detention as remedies;
- the recovery of pre-judgment interest in admiralty.

### Arrest and Mareva Injunctions

245. **Arrest and Mareva Injunctions Compared.** A Mareva injunction is an order of a court to a party or other persons over whom the court has jurisdiction, directing the way in which property is to be retained or dealt with so as to ensure that the property will be available to satisfy any judgment in the action. Mareva injunctions are increasingly being obtained in relation to ships and cargo, both overseas and to a more limited extent in Australia. It is necessary to consider whether the proposed legislation should regulate the overlap between the availability of such injunctions and the ability to arrest *in rem*. Some preliminary points need to be made about Mareva injunctions. First, the Mareva injunction is an evolving remedy, and its precise contours have yet to be fixed.<sup>1</sup> In particular the possible conflict with established admiralty practice has not been adequately explored. The ability to grant such injunctions has only recently been fully accepted by superior courts in Australia.<sup>2</sup> Secondly, Mareva injunctions only overlap with the security aspect of arrest *in rem*, not the jurisdictional aspect. To obtain a Mareva injunction there must first be an action *in personam* properly commenced within the jurisdiction of the court.<sup>3</sup> Thirdly, despite suggestions by commentators that Mareva injunctions should not be allowed to intrude into the area normally covered by arrest *in rem*,<sup>4</sup> courts both in Australia and elsewhere have shown themselves willing, with little or no discussion on the point, to grant such injunctions to restrain ships, cargoes or bunkers from leaving the jurisdiction.<sup>5</sup>

- **Prerequisites.** Arrest is a legal remedy available as of right; the Mareva injunction is equitable and discretionary. In order to obtain a Mareva injunction the plaintiff will have to show that success is likely at the eventual trial, that there is a real danger that assets will be removed or dissipated so as render valueless any judgment obtained and that the injunction will not seriously interfere with the rights of third parties.<sup>6</sup> For example, there may be difficulties in using a Mareva injunction to block the departure of a vessel when the cargo on board is the property of third parties.<sup>7</sup> In admiralty, if the plaintiff is entitled to arrest the vessel, the inconvenience or damage caused to third parties is not relevant.<sup>8</sup> An injunction to prevent the only asset within the jurisdiction from departing may be refused if the defendant has substantial assets abroad which are unlikely to be dissipated and which can be reached by machinery for the reciprocal enforcement of foreign judgments.<sup>9</sup> The question of dissipation of assets does not arise when seeking to arrest the *res* in admiralty.
- **Subject Matter.** A major advantage of the Mareva injunction is that it may be obtained against all the defendant's assets within the jurisdiction. Only the wrongdoing ship or a surrogate ship may be arrested in admiralty<sup>10</sup> and only a single ship may be arrested on any single cause of action.<sup>11</sup> The Mareva injunction can be very useful where a foreign-owned wrongdoing vessel has sunk but the proceeds of its insurance are to be paid within the jurisdiction. Taking the money outside the

jurisdiction can be prevented, thereby forcing the owner to provide security.<sup>12</sup> The extent to which the Mareva injunction can be used, not as an alternative to arrest but simply to supplement inadequate security provided by a *res* which has been arrested, is unclear. But there seems to be no objection in principle to both arresting *in rem* and (provided jurisdiction has been obtained over the defendant *in personam*) blocking other assets with a Mareva injunction.<sup>13</sup>

- *Speed, Cost, Undertaking.* A Mareva injunction may be able to be obtained more quickly than a warrant of arrest. The latter can only be obtained during registry opening times; the former can be obtained whenever a judge is available. A Mareva injunction may be a cheaper remedy than arrest *in rem* because the cost of maintaining a vessel under arrest can be high.<sup>14</sup> But the commercial reality is that in most cases where either property is arrested or dealing with it is restrained by Mareva injunction a security or guarantee of some sort is offered to secure the immediate release of the property.<sup>15</sup> Only rarely will the cost of custody be an issue. On the other hand a plaintiff seeking a Mareva injunction will have to give an undertaking in damages to the defendant and normally also to indemnify any third parties who may be affected.<sup>16</sup> If it turns out that the injunction was unjustified the plaintiff may have to pay substantial damages.<sup>17</sup> In contrast the plaintiff proceeding *in rem* is not generally subject to such a risk.<sup>18</sup>
- *Effect.* A Mareva injunction does no more than prevent assets from being removed from the jurisdiction or dissipated within it. It does not give the plaintiff a preference as against other creditors.<sup>19</sup> Nor does it prevent the assets subject to the injunction being used to pay debts due to other creditors<sup>20</sup> or for legal or living expenses.<sup>21</sup> On the other hand, if the *res* is arrested, it or the proceeds of its sale remain intact in the hands of the court until judgment is obtained or bail or alternative security put up. The plaintiff who procured the arrest still runs the risk that other creditors will take priority under the system of priorities that operates in admiralty. In this respect arrest may not be much superior to a Mareva injunction from the point of view of a claimant who ranks low on the admiralty scale of priorities.
- *Summary.* There are many points of difference between arrest *in rem* and Mareva injunctions. From the point of view of the plaintiff the former is superior in most respects.<sup>22</sup> The major advantage of the injunction is that it is available to the full amount of the claim and against any or all of a defendant's property. But despite the conceptual and theoretical differences between the two remedies, both will achieve the same practical result in many factual situations. Both put strong pressure upon the ship's owner or operator to put up security acceptable to the plaintiff in order that the vessel may sail on schedule.<sup>23</sup> On the other hand there will always be situations in which the ability to arrest will be needed. Arrest 'is a powerful weapon and whatever other remedies may emerge it is unlikely to lose its value'.<sup>24</sup>

**246. Need for Reform?** On one view this overlap between the two remedies is no cause for concern. A plaintiff who is in the position of having additional, alternative or supplementary remedies is entitled to rely on them. At the end of the day no more than the amount adjudged to be due can be recovered. In examining the opposing view three situations need to be distinguished. The first is where a Mareva injunction obtained in an ordinary action *in personam* freezes a traditional admiralty type of *res*, a ship, cargo or freight, and the action could not, on the facts, have been brought *in rem*. One argument against the use of a Mareva injunction in such a situation is that admiralty should be the sole avenue by which ships may be detained by way of interim relief. If Australia were contemplating becoming a party to the 1952 Arrest Convention which, on one interpretation, purports to set out the exclusive basis upon which ships may be subject to *saisie conservatoire*, this argument would require serious consideration.<sup>25</sup> Since this is not the case, the argument has little weight. A second situation is where, on the facts, the plaintiff could arrest a ship in admiralty but instead relies upon a Mareva injunction. It might be said that, where admiralty provides a remedy, only that remedy should be available, in particular because admiralty has the experience of dealing with the problems ancillary to the detention of a ship.<sup>26</sup> But the grant of a Mareva injunction is discretionary and courts can readily tailor the 'terms of any injunction to the difficulties which may occur in a particular case. Those terms can also be readily varied. The third situation is less easily resolved. Here the plaintiff proceeds both *in rem* against a ship or cargo and at the same time proceeds *in personam* in the same matter and obtains a Mareva injunction against other assets of the defendant. It can be argued that the ability of a plaintiff to do this upsets a carefully balanced, internationally sanctioned, admiralty regime of *in rem*

proceedings in which one ship and one ship only can be arrested.<sup>27</sup> If this is proper, why should not more than one ship be arrested *in rem* on a single claim? If a ship is arrested and at the same time (or subsequently) a bank account is frozen under a Mareva injunction on the same claim, what is the point of restricting the categories of property which can be arrested to the traditional ones? One answer lies in the fact that admiralty actions, unlike Mareva injunctions, have jurisdictional and not only remedial consequences. The reasons for not extending the action *in rem* to non-maritime claims or property were outlined in chapter 6. On the other hand there is certainly no international consensus on restricting the detention of ships (including their detention through Mareva injunction) to maritime claims. Until such a consensus emerges, Mareva injunctions in addition to arrest *in rem* even on full maritime liens should be allowed. Certainly this is the position elsewhere: there is no good reason for Australia not to take a similar approach.<sup>28</sup>

**247. Need for Legislative Provision?** The question is whether some legislative provision is desirable to give effect to this conclusion. One possibility would be not to refer to the matter at all in the proposed legislation. The trend in the case law in Australia and other common law jurisdictions is fairly clearly in favour of allowing Mareva injunctions as a parallel interim remedy to arrest *in rem*. Although it might be asked why the point should be left to the vagaries of judicial development, especially by overseas judges, the Mareva injunction is itself a judicially-created remedial device which is still in the course of development. It would be premature to cast in legislative form any scheme involving such injunctions. A second objection to the laissez-faire solution is that the State Supreme Courts have shown little co-ordination in their approach to the existence and extent of the remedy until now. Acceptance of the Mareva injunction in some States has lagged well behind others and aspects of the remedy still vary considerably from jurisdiction to jurisdiction.<sup>29</sup> Unless the proposed legislation makes specific provision, the situation in practice may well be that on any given set of facts some courts exercising admiralty jurisdiction will have, as part of their ordinary jurisdiction, the power to issue Mareva injunctions while others will not. On the other hand it may well be that the argument for uniformity will induce those Australian jurisdictions which have not yet fully accepted Mareva injunctions to do so, at least when exercising federal admiralty jurisdiction. On balance the issue of Mareva injunctions and admiralty should be left to the courts. In the circumstances the advantage of leaving scope for judicial development in a developing area such as this is decisive.

### ***In personam* Remedies in Actions *in rem***

**248. The Issue.** In *The Conoco Britannia*<sup>30</sup> the plaintiff sought, amongst other remedies, an order for specific performance of a contractual obligation in a proceeding *in rem*. Justice Brandon considered the argument that such an order was beyond admiralty jurisdiction *in rem*, noting that

if a defendant does not appear to a claim for equitable relief, such as specific performance, a situation may arise where any order made would be unenforceable and therefore the court might refrain from making such order. It seems to me that this has nothing to do with jurisdiction. It may be that, if an action *in rem* for specific performance is brought, and if the defendant does not appear to it, and if the plaintiff then moves for judgment in default of appearance, a question will arise as to whether the court ought to make an order which it may not be able to enforce. I do not see, if I am right in what I have said up until now, how at that stage a question can arise as to whether the court has jurisdiction to make the order in the strict sense. It may be that, in some other case hereafter, the court will have to decide questions of that kind, but they do not arise for decision at the moment.<sup>31</sup>

Justice Brandon went on to observe that the issue is linked with the larger question of the nature of the action *in rem*, and the particular issue of the rule that the *res* is (apart from costs) the limit of liability in an action *in rem*.<sup>32</sup> The issue raised by Justice Brandon should not be resolved in the proposed legislation. Courts upon which admiralty jurisdiction is conferred under the proposed legislation will possess whatever equitable remedial powers they have as part of their ordinary jurisdiction. The way in which such powers are exercised in admiralty actions *in rem* should be left to those courts. Any alternative would involve an attempt in the proposed legislation exhaustively to define the characteristics of the action *in rem*, something not attempted in any of the overseas admiralty legislation examined in this Report, and something which would tend to produce an admiralty jurisdiction which was inflexible and not open to further development.

### **Time Limits**

**249. The Present Position.** The present position on limitation of actions in admiralty in Australia is unclear. In the 19th century the Admiralty Court did not apply any rule which fixed the time after which rights were

extinguished or remedies were no longer available. Rather a flexible doctrine of laches was used to prevent stale claims being litigated.<sup>33</sup> In practice laches is very rarely raised in admiralty.<sup>34</sup> The relevant English decisions all concern the extinguishment of maritime liens,<sup>35</sup> but it seems clear that laches applies also to statutory rights *in rem*.<sup>36</sup> The basic admiralty rule has been affected by statute in what can conveniently be categorised as three different ways: general limitation of actions legislation, limitation on particular topics without specific reference to admiralty, and provisions specifically directed at admiralty jurisdiction. One general point is that the Colonial Courts of Admiralty Act 1890 (UK) s 4 requires that any local law in a British possession which

affects the jurisdiction of or practice or procedure in any court of such possession in respect of the jurisdiction conferred by this Act, or alters any such Colonial Law as above in this section mentioned, which has been previously passed, shall, unless previously approved by Her Majesty through a Secretary of State, either be reserved for the signification of Her Majesty's pleasure thereon, or contain a suspending clause providing that such law shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.

Arguably any State law which alters limitation periods in admiralty falls within the ambit of s 4. None appear to have complied with its manner and form requirements. A second general point is that the limitation of actions legislation operates by reference to categories of actions based on common law concepts such as contract, tort, mortgage and so forth. While these are appropriate to describe the vast majority of actions which fit within either the present or an expanded admiralty jurisdiction, there are some exceptions to this. The most significant is salvage.<sup>37</sup> Salvage may be contractual but need not be. Hence a limitation Act purporting to cover the field may not in fact do so if it relies entirely on non-admiralty terminology.<sup>38</sup>

- *General Limitation of Actions Legislation.* Turning to the first category, general legislation, the Limitation Act 1974 (Tas) s 8(1), which copied the relevant English legislation,<sup>39</sup> provides that, apart from an action to recover seamen's wages, the relevant parts of the Act 'do not apply to a cause of action within the Admiralty jurisdiction of the courts of this State that is enforceable *in rem*'. It is not clear whether this applies only to actions actually commenced *in rem* or also covers actions brought *in personam* but which might have been brought *in rem*.<sup>40</sup> The New South Wales and Northern Territory Acts likewise apply to seamen's wages but not 'to a cause of action *in rem* in Admiralty'.<sup>41</sup> The Limitation of Actions Act 1974 (Qld) s 10(6)(a) omits any reference to actions for seamen's wages but does not apply to admiralty actions 'enforceable *in rem*'.<sup>42</sup> Equivalent legislation in the other Australian jurisdictions does not refer directly to admiralty jurisdiction. It may be possible to argue that admiralty actions fall outside the definition of 'action' in the Limitation Act 1935 (WA) s 38(3) for the purposes of limitation of tort and contract actions. This refers to 'such actions as are in the nature of actions at common law'. This argument is not open with respect to the South Australian and Victorian legislation.<sup>43</sup> The former Act, however, contains a specific provision in the section dealing with contract and tort, applying a six year limit to 'actions for seamen's wages'.<sup>44</sup> The fact that this particular type of admiralty action is singled out might perhaps be taken to reflect a view that the legislation is not otherwise intended to impose any limitation period in admiralty actions.
- *Limitation on Particular Topics without Reference to Admiralty.* A second category of legislation is that which creates either a new right of action or a special procedure on some topic and attaches to it a particular time limit within which the action must be brought.<sup>45</sup> In principle it might be expected that, if the right is asserted in admiralty, the limitation period attached to the right is equally applicable in admiralty.<sup>46</sup> This problem has not arisen in Australia, partly no doubt because the Colonial Courts of Admiralty Act 1890 (UK) has restricted additions to admiralty jurisdiction.<sup>47</sup>
- *Admiralty Limitation Legislation.* A third category of legislation is that specifically addressed to limitations of maritime actions. Where two Acts, one in this category and the other in the previous category, are both relevant to a particular action, it becomes a question of statutory interpretation to determine which is controlling.<sup>48</sup> The most important example of legislation in this third category is the Navigation Act 1912 (Cth) s 396 which governs actions both *in personam* and *in rem*.<sup>49</sup> This provides for a two year limit on all actions, whether in admiralty or otherwise, arising out of ship collisions<sup>50</sup> or salvage.<sup>51</sup> A one year limit from the time of payment is imposed on actions for 'contribution in respect of an over-paid proportion of any damages for loss of life or personal injuries'.

Sub-section(3) gives a general discretion to the court to extend these limits.<sup>52</sup> A proviso states that a court

shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant ship (not being a Government ship) within the jurisdiction of the Court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

There is a considerable body of English authority on how both the general discretion and the proviso are to operate,<sup>53</sup> though there do not appear to be any reported cases in Australia.

250. **International Considerations.** Some multilateral maritime conventions provide a fixed period of two years for claims arising under those conventions subject to whatever rules the forum deems appropriate for interruption to or suspension of this period.<sup>54</sup> A variation on this trend are treaties that stipulate that any extension or suspension of time under the local rules cannot extend the total limitation period beyond three years.<sup>55</sup> As already noted, the 1969 Pollution Convention provides for a basic limitation period of three years.<sup>56</sup> The 1926 Liens and Mortgages Convention art 9 provides that 'liens shall cease to exist, apart from other cases provided for by national laws, at the expiration of one year'. Liens for necessities have only a six month duration. These periods may be extended in cases when it has not been possible to arrest the wrongdoing vessel in the territorial waters of the claimant's state. But the maximum period even with an extension is three years from the date of origin of the claim. The 1967 Liens and Mortgages Convention art 8 provides a one year period for all claims, which 'shall not be subject to suspension or interruption, provided however that time shall not run during the period that the lienor is legally prevented from arresting the vessel'.<sup>57</sup> The 1952 Arrest Convention makes no reference to limitation periods.

251. **United Kingdom Reforms.** A British inquiry into the Limitation Act 1939 (UK) (the Orr Committee) examined the question of the exemption of admiralty actions from ordinary limitation periods.<sup>58</sup> The result of their inquiries

showed ... that there is no good reason for the retention of this exception from the normal rules of limitation ... We doubt whether abolition would create any difficulties in practice, and those whom we consulted were generally agreed that it would be desirable to apply the general law to Admiralty proceedings, whether *in personam* or *in rem*. One memorandum submitted to us suggested that there should be, for Admiralty proceedings, a short period coupled with a discretion to extend it in proper cases, but since the tenor of our evidence is that there is nothing in particular about Admiralty proceedings which distinguishes them, for limitation purposes, from other proceedings, we consider that we would not be justified in recommending a discretionary approach for Admiralty proceedings when we do not favour such an approach in general. The Admiralty Solicitors Group suggested that application of the normal rules of limitation could cause difficulty in the case of a mortgage of a ship, but it seems to us that the period of 12 years provided for by s 18 of the 1939 Act should suffice. We therefore recommend that the 1939 Act should be amended so as to repeal the specific exceptions for Admiralty matters.<sup>59</sup>

The Report noted that treaty provisions required special limitation periods for particular kinds of actions but recommended that any discretion given by the treaties to suspend or extend such periods should be used, as far as was possible consistently with the treaty obligations, to bring these periods into line with those applicable under the general law.<sup>60</sup> It is difficult to reconcile this view with that expressed by Lord Diplock during debate on the Supreme Court Bill 1981 (UK). The point was made in chapter 7 that, to the extent that ordinary limitation periods apply, expanding the number of claims upon which the wrongdoing ship could be arrested notwithstanding a change of ownership would be to convert ordinary contract debts into secret charges on the ship with a life of six years. In 1981 Lord Diplock took the view that it was inappropriate to create charges having such a long life 'compared with other maritime liens, whose duration is generally short — one year or, possibly, only one voyage'.<sup>61</sup> The short life given maritime liens under both the 1926 and the 1967 Liens Conventions has already been noted.<sup>62</sup> The effect of the legislative change consequent on the Orr Committee's recommendations<sup>63</sup> would appear to be to increase the duration of maritime liens to either three or six years depending on whether the cause of action on which the lien is based lies in tort or contract.

252. **Abolition of Special Admiralty Rules.** One option is to make no provision in the proposed legislation with respect to limitation of actions. None of the recent legislation on admiralty jurisdiction in Canada, New Zealand, South Africa<sup>64</sup> or the United Kingdom deals with the issue. Nor has the present position apparently created any difficulties in Australia. There appears to be no articulated need for reform at present, although this might change if the recommendation in chapter 10 for surrogate ship arrest is accepted. But it is

unsatisfactory to leave unresolved problems which have been clearly identified simply because these problems have remained largely theoretical so far. As a basic principle, and putting aside for the moment the requirements of conventions to which Australia is a party, actions in admiralty should conform as far as possible to the general limitation regime.<sup>65</sup> Because many of the causes of action can be brought either in admiralty or in ordinary courts it is undesirable that the choice of forum should be determined solely by the fact that limitation periods differ. This is clearly correct for actions *in personam*. The question how to achieve this result is discussed below. It is less clear that this argument should prevail for actions *in rem*. It is arguable that the action *in rem* is a special type of action which should follow its own limitation rules. In much the same way that a statutory right of action *in rem* may be defeated by a change in ownership of the *res*, thereby relegating the plaintiff to an action *in personam*, it is possible to have a right of action *in rem* defeated by a special time bar or by laches, the plaintiff likewise being relegated to an action *in personam*. This argument is more persuasive where the *in rem* action is barred before the *in personam* action than in the converse situation. To allow an action *in rem* to survive because, say, no opportunity to arrest has arisen through the continued absence of the ship, and yet not to allow an action *in personam* on the same incident or dispute because time had run out, seems incongruous. The rationale for limitation periods<sup>66</sup> appears to be defeated by an ability to bring an action *in rem* many years after the event simply because the *res* has not entered the jurisdiction since the claim arose.<sup>67</sup> To allow actions *in rem* to survive the limitation period which would bar the corresponding action *in personam* would be to add a further advantage to those already possessed by the action *in rem* over the action *in personam*. A ship should not in this respect be treated any better than a defendant *in personam* under the general law. In addition, whatever the position a century ago,<sup>68</sup> communications are neither so slow nor unreliable as to make a requirement that the plaintiff attempt to arrest the ship in other jurisdictions an unduly onerous one. That requirement might well be thought a corollary of the international character of admiralty, in particular the absence of any need for a nexus between the forum and the cause of action. For these reasons extension of time based on absence of the *res* from the jurisdiction is not justified. More generally the certainty of a fixed date after which the action can be brought neither *in rem* nor *in personam* (subject to whatever discretion to extend, suspend or interrupt the running of time exists under the general law) would outweigh whatever advantages might be gained by allowing extension under the doctrine of laches or through some general statutory discretion on a case by case basis. This leaves the question of allowing the doctrine of laches or some variation thereof to shorten the period in which the claim may be brought *in rem*. Not allowing this has the advantage of applying to admiralty actions the same regime that applies to all other actions. But it is open to the objection that this option gives maritime liens a longer life than may be desirable, as noted in para 251. However Australia is not a party to either the 1926 or the 1967 Maritime Liens and Mortgages Conventions, the main international texts which espouse a short (generally one year) period for enforcing maritime liens. Nor is there any suggestion that Australia should become a party. Even though the one year period represents such international consensus as there is on the duration of liens,<sup>69</sup> this should not necessarily determine Australia's position. Other conventions to which Australia is a party require different periods for actions arising out of salvage, collisions or some types of vessel-sourced oil pollution.<sup>70</sup> These special requirements will have to be adhered to in any event. But otherwise the proposed legislation should follow the English approach and apply the ordinary limitation rules to admiralty actions *in rem*. Australia can adjust the legal position to comply with other conventions if and when it decides to ratify them.

253. **Difficulties of Implementation.** If the ordinary limitation regime is to apply to admiralty actions *in rem* and *in personam*, the details of how this is to be achieved require some discussion. There are difficulties in merely stating in the proposed legislation that the general provisions of the limitation of actions legislation of the forum shall apply to all admiralty matters commenced within that jurisdiction. One difficulty — though a minor one — is that that legislation is not often drafted with admiralty terminology in mind. The main difficulty this might cause, non-contractual salvage actions, cannot occur because the Navigation Act 1912 (Cth) s 396(3) and the provision discussed in para 254 will cover the field with respect to salvage claims. Other rare types of admiralty actions may cause difficulty.<sup>71</sup> But the chief difficulty with applying the existing general State and Territory rules to admiralty actions is their lack of uniformity. The Limitation Act 1935 (WA) s 38 uses time periods of four, six, and twelve years on matters relevant to admiralty. The Limitation Act 1969 (NSW) would apply a six year period to most admiralty actions, with a twelve year period applying to ship mortgages if the present exclusions on admiralty actions were overridden. The Limitation Act (NT) would apply a three year period to most admiralty matters, with twelve years for ship mortgages. Quite apart from the different time periods, the provisions for suspension or interruption of time, the exercise of discretion to extend time and so forth vary considerably.<sup>72</sup> In addition there are variations in

time limits in the State and Territory legislation giving special rights of action (such as Lord Campbell's Act actions). When an action is commenced in the Federal Court the appropriate limitation period is determined by the limitation legislation of the State or Territory in which the action is commenced. Because Federal Court process runs Australia-wide the possibility of 'registry shopping' for an advantageous limitation period is obvious.<sup>73</sup> If this is thought undesirable, the proposed legislation could provide that limitation periods for actions commenced in the Federal Court be determined by the limitation legislation of, say, the Australian Capital Territory. This does, however, mean that most practitioners wishing to commence in the Federal Court will have to contend with an unfamiliar limitation Act. Reliance on the general legislation will confront practitioners commencing in a State or Territory Court with legislation which is already familiar. On the other hand the alternative of a complete admiralty limitation regime to be contained in the proposed legislation also has serious drawbacks. Drafting a complete limitation scheme is no easy task. It could be simplified by borrowing from one of the existing State or Territory Acts, but difficult choices would remain in selecting an appropriate Act from which to borrow. There is also the problem of choosing the appropriate periods. Perhaps a lowest common denominator approach could be used. This would ensure that the more powerful remedy of *in rem* proceedings could never be commenced when a time bar would prevent the litigation of the same issue *in personam* in any of the ordinary courts in Australia. This would result in a limitation periods of three years for all admiralty actions except those in respect of most aspects of mortgages where the period would be twelve years.<sup>74</sup> There is clearly room for disagreement over whether the three year period is too short. But in the light of the limitation periods in international maritime conventions three years is appropriate.<sup>75</sup> A further issue, if there is to be a special admiralty limitation scheme, is whether it should apply to admiralty actions brought *in personam* as well as *in rem*: should the dividing line be between admiralty and other actions or between actions *in personam* and *in rem*? In either case the practitioner will have to be familiar with a special admiralty regime as well as the general regime of the forum. On balance the better alternative, in the absence of a federal Limitation Act, is to rely on existing State and Territory limitation legislation. The proposed legislation should provide as follows:

- Time limits specifically applicable to admiralty actions under Commonwealth, State or Territory legislation (including time limits applicable under international conventions to which Australia is a party and which are part of Australian law) should continue to apply.
- In all other cases, general State and Territory limitation legislation should apply to all actions commenced in admiralty.
- Where State or Territory legislation fails to deal with a particular category of admiralty action the limitation period should be three years. This is needed to cater for those rare kinds of admiralty actions which do not fall within the common law-oriented wording of the general legislation.
- In exercising any discretion under the general legislation to suspend, interrupt or extend the running of time, the absence of the *res* from the jurisdiction should not be a relevant consideration.

254. ***The Salvage and Collision Conventions.*** Australia is a party to the 1910 Collision and Salvage Conventions. Article 10 of the Salvage Convention provides:

A salvage action is barred after an interval of two years from the day on which the operations of assistance or salvage terminate. The grounds upon which the said period of limitation may be suspended or interrupted are determined by the law of the court where the case is tried. The High Contracting Parties reserve to themselves the right to provide, by legislation in their respective countries, that the said period shall be extended in cases where it has not been possible to arrest the vessel assisted or salved in the territorial waters of the State in which the plaintiff has his domicile or principal place of business.

Art 7 of the Collision Convention is in virtually identical terms. Section 396 of the Navigation Act 1912 (Cth) gives effect to this, though in one respect it seems to be in breach of the Conventions.<sup>76</sup> The Conventions only permit local law to determine the circumstances under which the running of time may be interrupted or suspended: extensions of time may only be allowed by local rules on the ground that it has not been possible to arrest the ship within the specified jurisdictions. On the other hand s 396(3) provides that any court hearing a collision or salvage action 'may, in accordance with the rules of court, extend any period mentioned in this section to such an extent and on such conditions as it thinks fit'. The subsection also provides for a mandatory extension of time with no maximum limit where it has not been possible to arrest

the ship in the jurisdictions specified in the Conventions. Because collision and salvage actions may be brought in non-admiralty courts, s 396 needs to remain in the Navigation Act. If s 396 is to be retained, the provisions recommended in para 253 will preserve its operation in respect of admiralty actions, including actions *in rem*. Section 396 will need to be reviewed in the event of international developments (either the amendment of the Salvage and Collision Conventions or the adoption of a new and more widely accepted Convention on Maritime Liens and Mortgages). In the meantime it can be argued that the provision, which seems to have caused few problems in practice,<sup>77</sup> should be left alone. However, the recommendation in para 253 that an extension of time not be available on grounds ‘of the lack of opportunity to arrest the ship concerned locally might be thought to require some amendment to s 396(3), which allows an automatic and indefinite extension on this ground (the Conventions permit such an extension but do not require it). This aspect of s 396(3) presents other difficulties, since it is not clear whether reasonable opportunity to arrest includes a reasonable opportunity to arrest a surrogate ship<sup>78</sup> or (in the Australian context) to arrest the wrongdoing ship in another State.<sup>79</sup> Given the discrepancy between s 396(3) and the two Conventions, and the failure to revise those Conventions to take into account more recent developments in limitation of actions and surrogate ship arrest, there is no simple answer. On balance s 396 should be retained for the time being in its application both to actions *in personam* and *in rem*, but s 396(3) should be amended to delete the provision for an extension of time where it has not been possible to arrest the ship. If this is done, extensions of time will remain available under s 396(3) in appropriate cases, and the availability of arrest will be one factor to be taken into account in assessing the reasonableness of the plaintiffs application for an extension.

255. **Limitation Periods Applying to Certain Defendants.** In *The Burns*,<sup>80</sup> an action *in rem* was brought against a ship owned by the London County Council. The Council relied for its defence on a statute which required actions against it to be brought within six months of the cause of action arising.<sup>81</sup> The Court of Appeal held that the statute only protected the Council in actions brought against it *in personam*. An action *in rem* was an action against the ship, not against the Council, and was not barred by statute. The reasoning placed considerable reliance on the personification theory. Given the general swing away from that theory in the 20th century and the difficulty of reconciling *The Burns* with decisions in analogous cases,<sup>82</sup> it cannot be confidently said that *The Burns* would be followed by an Australian court. The point is of diminishing importance due to the modern trend of abolishing special limitation periods which apply by reference to the identity of the defendant.<sup>83</sup> But examples can still be found.<sup>84</sup> It would not be appropriate for the proposed legislation to suggest any repeal of these provisions in State legislation as they affect admiralty actions. Since most of these provisions concern government departments or non-commercial agencies, against whom an action *in rem* will not be available in any case,<sup>85</sup> the point seems of minor significance, and accordingly no provision need be made to deal with it.

## Ranking of Claims in Admiralty

256. **The Present Position.** Most commonly the amount of a claim made against the *res* will be less than the value of the *res*. Even where more than one claim is brought, the total of the claims will still usually be less than the value of the *res*. However there will be some cases in which, after all questions of validity of claims against the *res* have been determined, the value of the outstanding claims exceeds the value of the ship. In admiralty, claims are not paid rateably. The Admiralty Court has long had jurisdiction to determine the priorities between competing claims.<sup>86</sup> In exercising the jurisdiction courts have

adopted a broad discretionary approach with rival claims ranked by reference to considerations of equity, public policy and commercial expediency, with the ultimate aim of doing that which is just in the circumstance of each case. This is not however to suggest that the law is capricious, erratic or unpredictable. Arising from the ‘value’ framework within which the Courts operate there have emerged various principles which are capable of providing reliable signposts to the likely attitude of the Courts. Such indeed, on occasions, is the degree of predictability that many commentators have been tempted to represent the operative principles as firm ‘rules of ranking’. Whilst this approach is understandable it would appear not to be strictly accurate, for such ‘rules of ranking’ are no more than visible manifestations of an underlying equity, policy or other consideration. Upon the underlying equity, policy or other consideration being displaced, either for want of substantiation or from the competitiveness of a greater equity or policy, so also the ‘rule’ becomes inoperative or inapplicable. In the realm of priorities there would appear to be no immutable rules of law, but only a number of guiding principles ...<sup>87</sup>

In Australia legislation has made only very minor inroads on this general equitable policy.<sup>88</sup> The recent reforms of admiralty jurisdiction in Canada, New Zealand and the United Kingdom have not touched on the question of priorities. In contrast the Admiralty Jurisdiction Regulation Act 1983 (S Af) s 11 explicitly gives

to courts exercising jurisdiction under that Act jurisdiction to determine priorities on the application of any interested party. More importantly, it contains a complete set of rules for determining such priorities.<sup>89</sup> These rules are substantially those recommended by the American Maritime Law Association which in turn are based on the 1967 Maritime Liens and Mortgages Convention.<sup>90</sup> The general failure of both this Convention and its 1926 predecessor to secure widespread acceptance has already been noted.<sup>91</sup> There is therefore no single, agreed, international model which Australia should follow. Because of the great complexity of the topic it is not one upon which international agreement is likely to be forthcoming. Any comprehensive set of rules for ranking of claims has to cover the ranking *inter se* of claims of the same class and type, for example one wages claim with another, or one claim of necessaries with another; the ranking *inter se* of claims of the same class but of different types, for example, a maritime lien for seamen's wages with a maritime lien for salvage, or statutory rights *in rem* in respect of claims for necessaries and for towage; and the ranking as between the classes of claims, that is maritime liens, mortgages, and statutory rights *in rem*. In addition the rules have to cater for claims outside the normal scope of admiralty such as

the claim of a possessory licensee, of an undertaking such as a dock or harbour endowed with particular statutory rights and powers, of a corporate liquidator, of a trustee in bankruptcy or of a judgment creditor. Nor will the issues be necessarily confined to substantive claims for the priority of costs may equally be involved. In the realm of priorities the [Admiralty] Court is therefore frequently called upon to rank claims which are diverse in their legal source and nature, and to engage in a cautious diplomacy between itself and other divisions of the High Court. Further, the complexity of the Court's task may be made even more difficult by the appearance of one or more foreign claimants pursuing their remedy in the English Admiralty.<sup>92</sup>

The relationship between actions *in rem*, possessory liens and statutory powers to detain and sell ships will be considered in para 263-6.

**257. Options for Reform.** The basic options for dealing with the ranking of claims are:

- to bring admiralty actions under the ordinary rules of insolvency, in particular the Bankruptcy Act 1966 (Cth) and the Companies Act 1981 (Cth) and its State and Territory equivalents;
- to make no provision;
- to codify the law, either as it presently exists or with modifications;
- to deal with specific problems that have arisen or might be expected to arise, otherwise preserving (but not attempting to state) the existing law.

The main argument for ranking claims in admiralty according to the general law on insolvency is to demystify admiralty: what is appropriate for ordinary insolvencies ought to be equally applied to ship insolvency. This argument cannot be supported. Even if admiralty were to be abolished as a separate jurisdiction there would be good grounds for preserving at least some of the special admiralty rules of ranking.<sup>93</sup> The provisions of the Bankruptcy Act 1966 (Cth), particularly s 109 which creates a scale of priorities, were not drafted with maritime claims in mind.<sup>94</sup> In any event this Report does not recommend the abolition of admiralty jurisdiction.<sup>95</sup> There would appear to be no sufficient reason to dispense with one of the key characteristics of admiralty, its special rules of priorities. A disadvantage of making no provision at all is that it leaves the law inaccessible. In the absence of any Australian textbook or modern case law on the topic the practitioner is forced to rely on English substitutes.<sup>96</sup> Codification would avoid this problem. But a legislative restatement would tend to lack flexibility. It may not be able to do justice between the competing claims in novel or unusual fact situations. Nor would it be able to adapt over the course of time to changes in the maritime world.<sup>97</sup> Although the flexibility of the present rules has been criticised,<sup>98</sup> the balance of arguments supports making no provision in the present legislation. In the absence of evidence of deficiencies in the present rules, no case has been made out either for a codification which incorporates reforms or for provisions directed to reform of particular rules, leaving the general scheme in its present uncodified state. If in the future specific problems are brought to light the better option for dealing with them would be the narrower one, avoiding a general codification. However, two problems require more detailed discussion. The first is the relation between *in rem* proceedings and the bankruptcy or insolvency of the relevant person. The second is the effect of surrogate ship arrest on priorities.

258. ***Admiralty Proceedings and Bankruptcy or Insolvency.*** Although not all the problems under this heading directly affect priorities, it is convenient to discuss them together. The description by Thomas of the position in England is equally applicable to Australia:

The law of corporate liquidation and bankruptcy seems to have developed with little regard to the Admiralty proceeding *in rem*. Certainly it is difficult to fit the Admiralty proceeding into the legislative language of the relevant statutes which regulate the winding up of companies and bankruptcy. Yet the need for the latter to accommodate the action *in rem* and the potential conflict between the two processes is plain. A *res* may concurrently be the subject of an arrest in the Admiralty Court and an asset capable of liquidation in a company winding up or personal bankruptcy. In such a circumstance it is important for a maritime claimant to be able to ascertain whether it is the jurisdiction of the Admiralty Court or some other court which prevails and which mode of legal process is available for the satisfaction of the claim. Most ships today are operated by commercial companies, many of which are one-ship companies, and therefore in practice the inter-relationship between an action *in rem* and a winding up is likely to be of much greater importance than the relation the Admiralty proceeding bears to a bankruptcy proceeding.<sup>99</sup>

These issues are not addressed by the Supreme Court Act 1981 (UK).<sup>100</sup> If the law reports are a reliable guide, the theoretical uncertainties cause few problems in practice; there are few reported cases in England and none in Australia. However, it is useful to indicate problems, actual or potential, thrown up by the English cases.

- ***The Issues.*** In both bankruptcy and corporate liquidation the basic method of proceeding is to pool all the debtor's assets and to pay creditors according to their priority out of the pool. In order to make this workable it is necessary to restrict the right of creditors to proceed against the assets of a debtor other than through the pool.<sup>101</sup> An action *in rem* to enforce a maritime lien (and, in some cases, a statutory right *in rem*)<sup>102</sup> may be brought against a ship whether or not the shipowner would be personally liable. This raises the question whether such an action is nonetheless caught by insolvency provisions which bar actions against the debtor.<sup>103</sup> It appears that in this situation the theoretical distinctiveness of the action *in rem* is ignored; an action *in rem* is treated as an action against the debtor.<sup>104</sup> Another question which has arisen is when courts will exercise their discretion to allow actions to proceed independently.<sup>105</sup> A distinction has been drawn between actions to enforce a maritime lien and to enforce a statutory right *in rem*.<sup>106</sup> The maritime lien attaches to the *res* from the moment that the claim arises. The holder of the maritime lien ranks as a secured creditor under insolvency legislation and will always be given leave to enforce the charge despite the existence of a winding up order against the debtor shipowner.<sup>107</sup> The position is less clear when a statutory right *in rem* is involved. In part this is because of the uncertainty as to when an action to enforce a statutory right *in rem* can be said to be commenced.<sup>108</sup> In England the plaintiff becomes a secured creditor once the action has commenced.<sup>109</sup> Canadian courts have taken a different approach and do not allow a claimant to become a secured creditor by enforcing a statutory right *in rem*.<sup>110</sup> In England, if the plaintiff has acquired the status of secured creditor, the maritime lien rule applies. But even if the plaintiff has not yet formally acquired this status, the English courts may exceptionally exercise their discretion and allow the plaintiff to perfect security.<sup>111</sup> As a general proposition the English courts recognise that, where admiralty and general insolvency rules or courts are in competition and the issue of a sale of a ship arises, it is preferable that admiralty conduct the sale. For only it can sell the ship free of all liens and encumbrances and thus obtain the best price.<sup>112</sup>
- ***Need for Legislative Provision?*** The (admittedly few) decided English cases give sufficient guidance on the more obvious problems which are likely to arise. They also indicate a general spirit of co-operation between the Admiralty Court and those dealing with insolvency and winding up. There is no reason to assume that similar co-operation will be lacking in Australia. It is therefore recommended that the proposed legislation make no special provision on the point.

259. ***Priorities and Surrogate Ship Arrest.*** In chapter 10 it was recommended that an action *in rem* be able to be brought against a surrogate ship in the case of most maritime claims. When a surrogate ship has been arrested in a situation in which an admiralty court has to determine priorities, the question arises whether the priority which the claim would have possessed on the wrongdoing ship carries over to the surrogate ship or whether the claim ranks differently on the surrogate ship. In England the relevant legislation does not expressly deal with the point. English courts have yet to decide it authoritatively but it appears that when the claim is pursued against a surrogate ship it enjoys the same priority as a statutory right *in rem*. In *The Leoborg (No 2)*<sup>113</sup> one of the competing claims against the surrogate was for seamen's wages earned aboard

the wrongdoing ship. Although this would have ranked as a maritime lien on the wrongdoing ship it was ranked as a statutory right *in rem* against the surrogate. As Justice Hewson observed, the point had not been fully argued and it

raises matters which might have very far-reaching consequences. With these things in mind, I find it impossible for me in this motion to decide the point, which must expressly be left open for some future occasion in some other case.<sup>114</sup>

Counsel opposing the seaman's claim for priority of a maritime lien on the surrogate ship suggested that there would be no injustice to the seaman because, to the extent that he failed to recover from the surrogate, he would still have a maritime lien against the wrongdoing ship.<sup>115</sup> In addition it was suggested that the downgrading of the maritime lien to a statutory right *in rem* when brought against a surrogate ship was consistent with the policy of the English courts against the extension of maritime liens. The South African legislation requires all claims in respect of the 'associated ship' to be met in the order stipulated. Only then are claims which have been transferred from the wrongdoing ship to be met. These follow *inter se* the same order of ranking.<sup>116</sup> This produces a worse result from the point of view of a claimant proceeding against a surrogate ship than the position tentatively reached in England. Under the latter the claimant would rank equally with, but not below, statutory rights *in rem* which had arisen in respect of the surrogate ship itself. However, it is possible that the English courts might, if they have to deal with the question directly, adopt as an equitable rule of thumb for the ranking *inter se* of claims based on statutory rights *in rem* a principle similar to that stated in the South African legislation.

**260. Two Main Issues.** Two issues need to be resolved in deciding how the facility of surrogate ship arrest affects the ranking of claims. The first and most important is whether and to what extent a maritime claim is reduced in priority when pursued against a surrogate rather than the wrongdoing ship. The second is whether a maritime lien is extinguished if pursued against a surrogate ship and, because of the operation of the rules of ranking (or perhaps for other reasons), is either incompletely satisfied or not satisfied at all. To put matters in perspective, these questions only arise in the fairly rare cases in which a surrogate ship has been arrested and proves to be insolvent. It is also helpful to recall that, in matters of ranking of claims, the issue is one of justice between competing creditors, not between debtor and creditor. *Ex hypothesi* there will on any alternative be nothing left for the debtor after distribution.<sup>117</sup> It was recommended in chapter 10 that there be no right to arrest a surrogate ship on a claim arising out of a mortgage, in part because it would be inappropriate to allow someone who lent on the security of one vessel to recover against another.<sup>118</sup> The reasoning is relevant here. In addition the effect of this recommendation is to reduce the classes of claimants against the wrongdoing ship who can transfer their claims to a surrogate ship. Only maritime liens and statutory rights *in rem* need to be considered.

**261. Priority of Maritime Claim Transferred to Surrogate Ship.** One possible solution would be to make no provision. On this basis Australian courts would be in a position to develop their own solution or, as is more likely, to follow the solution suggested in *The Leoborg (No 2)*.<sup>119</sup> The advantage of any court-developed solution is that it will be based on the flexible equitable considerations already outlined. The corresponding disadvantage is the uncertainty which will prevail until the courts articulate particular guidelines to cover the point. Two distinct questions are involved: the ranking of transferred claims *inter se* and the ranking of transferred claims vis-a-vis claims which originated against the surrogate ship. But it is relevant to both questions that a claim pursued against a surrogate ship is by definition a statutory right of action *in rem* (even if, as against the wrongdoing ship, that claim also gives rise to a maritime lien). There is no right to proceed against a surrogate ship on a maritime lien. Since the distinction between maritime lien and statutory right is basic to the legislation (including its provisions for surrogate ship arrest),<sup>120</sup> it seems desirable to adopt the same approach to priorities. Moreover some of the reasons, at least, why maritime liens are given priority over mortgages (for example, with salvage, that the *res* was thereby preserved) do not apply to surrogate ships. It seems undesirable to give priority to the salvor of ship A over the mortgagee of ship B in respect of a fund constituted by the sale of ship B. The salvor has done nothing to preserve the ship in question: the salvage claim is able to be pursued against ship B only on the basis of the relevant person's personal liability. It follows that transferred claims should have the status of statutory rights *in rem* against the ship in question, and that maritime liens and mortgages over that ship should take priority over all transferred claims. On this basis it is likely that transferred claims will in principle be held to rank equally *inter se*,<sup>121</sup> since they are all asserted as statutory rights *in rem* based on the liability of the relevant person when the action was commenced. In other words, it is likely that this analysis of surrogate ship claims will reinforce the

conclusion reached in *The Leoborg (No 2)*<sup>122</sup> as to the equal ranking inter se of transferred and ‘wrongdoing ship’ claims. The South African provision, which adopts the contrary view, was arguably necessary to deal with the problem of ‘group ship’ claims under the corporate veil provision:<sup>123</sup> claims with respect to which the shipowner is not the relevant person might well need to rank below claims against the shipowner or related to the particular ship.<sup>124</sup> In the absence of a corporate veil provision, the Australian legislation need not face this additional difficulty. Finally, from an Australian point of view the subordination of transferred claims to wrongdoing ship claims would adversely affect the usefulness of surrogate ship arrest, which would be pointless from a security aspect wherever the ship in question was (having regard only to claims against it as a wrongdoing ship) insolvent. In the absence of a clear international consensus it is undesirable from an Australian point of view to devalue surrogate ship arrest in this way.<sup>125</sup> Consistently with the conclusion in para 258, the question of the ranking of (transferred or non-transferred) statutory rights *in rem* should be left to the courts. But it should be specifically provided that a transferred claim is not to be given a lower priority than a statutory right of action *in rem* against the ship in question merely because it is a transferred claim.

262. **Effect on Maritime Liens.** A consequential issue is whether a maritime lien on the wrongdoing ship is extinguished by a fruitless or only partially successful arrest of a surrogate ship, thereby leaving only *in personam* remedies available with which to seek any unsatisfied balance. This question was discussed in para 212 in the context of multiple arrest and rearrest. The conclusion reached was that the legislation should leave open the possibility of a second arrest in this case, leaving it for the courts to determine whether the lien survives in such circumstances. Consistently with that conclusion, the question of the priority of the lien on a second arrest should also be left open.

## Arrest, Possessory Liens and Statutory Rights of Detention

263. **Introduction.** Arrest by the admiralty Marshal may interfere with the possession of the holder of a possessory lien or a right of detention exercised under a statute (such as that of a port authority to secure payment of dock charges). Conversely, exercise of a statutory right of detention may clash with the custody of the Marshal. English admiralty courts have evolved some rules to resolve these often difficult conflicts. Although ostensibly about possession, these conflicts are often in reality concerned with priority.

264. **Arrest and Possessory Liens.** For possessory liens

[t]he evolved position has been to recognise the superior claim of the Admiralty Marshal subject to an effective judicial protection of the interest of the possessory licensee. It is the duty of the possessory licensee to surrender his possession of the *res* to the Admiralty Marshal whereupon the court undertakes to protect both his interest and priority against the *res* or any fund in the hands of the court which represents the *res*. The possessory licensee is thereby in no way prejudiced by being compelled to part with possession.<sup>126</sup>

Although it is not altogether clear just what priority the possessory lien enjoys in admiralty vis-a-vis a claim supported by statutory right of action *in rem*, this general solution is satisfactory. There appears to be no Australian decision on the point. The proposed legislation could give express power to local admiralty courts to adopt the solution developed in England. But the English courts have not required legislation to guide them on this point, and it is unnecessary to cover it in the proposed legislation.

265. **Arrest and Statutory Rights of Detention.** By contrast the English authorities on resolving conflicts between rights of detention and arrest are in conflict. In *The Queen of the South*, Justice Brandon reviewed these authorities and observed:

If the matter were free from authority, I should have thought in principle that the court should be able to deal with the statutory possessory lien of a dock or harbour authority in the same way as it deals with the common law possessory lien of a repairer and with the statutory right of sale of such an authority in the same way as it deals with the contractual or statutory right of sale of a mortgagee. That is to say, I should have thought that the court should have the power, in an action *in rem* against a ship, to sell her free of both rights, while transferring equivalent rights with equivalent priority to the proceeds of sale in court, and further should have the power to do this whether the dock or harbour authority consents or not. If the court does not have such power it is extremely inconvenient, for it means that, in any case where a dock or harbour authority has a right of detention or sale, the court cannot transfer the ship to a purchaser free of encumbrances ...<sup>127</sup>

At present the better view is that the admiralty court has no power to accord the claim giving rise to the statutory right of detention first priority if transferred to a claim in admiralty.<sup>128</sup> If, as recommended in para 174, port and harbour dues and similar fees and levies are made a head of jurisdiction in the proposed legislation, a claim brought in reliance on this head will rank below maritime liens and mortgages. Justice Brandon found it unnecessary to resolve the conflict of authority. Instead, he referred to a different line of authority<sup>129</sup> which showed that the court had the power to authorise the Marshal to pay the amount claimed by the holder of the statutory right of sale when this was for the benefit of all interested parties. The Marshal can then include this amount in his expenses and recoup them as first priority on the sale of the vessel.<sup>130</sup>

**266. Reform.** There are no reported Australian decisions on how statutory powers of detention relate to the admiralty power to arrest and sell the vessel. One option would be to make no provision in the proposed legislation on the point. Courts would be free either to follow the solution of Justice Brandon or to resolve the conflicting authorities in the way which he favoured. Alternatively the legislation could provide for either solution. Since the authorities are conflicting, and since the problem is quite likely to arise, especially where a ship is insolvent, express legislative provision should be made. Allowing the Marshal to buy off the claim may be risky in some situations. If the anticipated sale proceeds of the ship are not much more than the claim and costs of sale it may be imprudent of the Marshal to risk incurring a loss through buying it out. The inconvenient stand-off referred to by Justice Brandon would then result: the statutory claimant has the right to sell the vessel but could not, in practice, do so because any purchaser would take it subject to admiralty claims; admiralty could sell free of all claims but its right to sell is subordinate to that of the statutory claimant. For these reasons the best solution is to give the admiralty court power to override any statutory right of detention already exercised, on condition that the claim underlying that right is given the appropriate priority, which should (unless the court otherwise orders) be first priority after the expenses of sale in admiralty. In the converse (and less usual) situation, where a ship is arrested before a statutory right of detention is exercised, the power of detention should be excluded. This provision will have no application to rights of detention or seizure which exist for purposes other than the recovery of civil claims within admiralty jurisdiction.<sup>131</sup> For example it will not affect powers of forfeiture or seizure pursuant to customs, quarantine or similar legislation.

## Pre-Judgment Interest

**267. The Present Position.** Admiralty rules governing the award of pre-judgment interest differ from those of the common law as modified by statute. The question therefore arises whether these separate rules should be preserved. By pre-judgment interest is meant a payment of simple interest<sup>132</sup> in compensation for not having the use of the money ultimately awarded between the time the cause of action arises and the date of judgment.

- *At Common Law.* At common law the courts lacked the power to award such interest.<sup>133</sup> This has been remedied by statute in England<sup>134</sup> and in all Australian jurisdictions<sup>135</sup> except Tasmania.<sup>136</sup> The High Court and the Federal Court also have this power.<sup>137</sup> However the relevant statutes are not uniform.<sup>138</sup> In Victoria and South Australia a court is required to award interest unless good cause to the contrary is shown, In other jurisdictions the award of interest is entirely a matter of discretion. Interest may only be awarded from the date when the action commenced in South Australia and Victoria. In other jurisdictions the date the claim arose is the relevant date.<sup>139</sup> The rate at which interest is to be awarded is discretionary in all jurisdictions except Victoria where it is linked to the long-term bond rate. There are other minor variations between jurisdictions as well as procedural differences in the way in which interest is claimed.<sup>140</sup>
- *In Admiralty.* The Admiralty Court was never bound by the common law rule preventing the giving of pre-judgment interest, Although the wording of the English legislation which modified the common law rule is capable of including admiralty actions it is not regarded as having displaced earlier admiralty rules: a plaintiff in admiralty therefore has a choice whether to rely on the legislation or the admiralty rules.<sup>141</sup> The assumption is that the latter will prevail if conflict arises.<sup>142</sup> Because the wording of the relevant legislation in Australia is, on this point, similar to that in England the same situation presumably would be held to apply to admiralty in Australia.<sup>143</sup> Although not bound by the common law rule it has been open to question whether admiralty would allow pre-judgment interest in all types of claims. Almost all the cases concern collisions,<sup>144</sup> but it is clear that the rule applies more

widely. Such interest was allowed for the first time in 1975 in a salvage case,<sup>145</sup> and a suggestion that interest can only be awarded in tort cases<sup>146</sup> has been treated as erroneous.<sup>147</sup> The view that the general rule rather than the admiralty rule should apply to those matters over which admiralty only acquired jurisdiction after 1875 (when the separate Admiralty Court was abolished and admiralty jurisdiction given to the High Court) has also been rejected.<sup>148</sup> The better view therefore is that pre-judgment simple interest can be awarded in all matters heard in admiralty.<sup>149</sup> It should be assumed that this will be the case under the proposed legislation unless provision to the contrary is made.

- *Award of Interest Discretionary.* Awards of pre-judgment interest under the statutory provisions are, as already noted, discretionary in varying degrees. In admiralty such interest was generally regarded until recently as being available as of right in collision cases,<sup>150</sup> though perhaps not in other cases.<sup>151</sup> However in recent English cases the emphasis has been on the general equitable nature of the power to award interest, and it appears that English courts have the same degree of discretion in collision cases in admiralty as in cases under the general legislation.<sup>152</sup> The position in Australia is unclear but can probably be taken to reflect the shift which has taken place in England. In admiralty there is a rule that interest must be included with the damages when a party makes a payment into court in order to avoid being at risk as to costs for having paid in an inadequate sum.<sup>153</sup> Only recently has a similar rule applied to non-admiralty claims.<sup>154</sup> The position in the different Australian jurisdictions varies. But where there is a statutory regime governing the award of pre-judgment interest it seems that the position under statute is the same as in admiralty.<sup>155</sup> This creates something of a guessing game for the defendant in that, unlike the old admiralty rule where interest was as of right in collision cases, it is necessary to include, in calculating the appropriate amount to pay in, an estimate of how the discretion to award interest will be exercised. But the position is no worse in admiralty than under the statutes. Compared to the position under statute, admiralty in England has fairly precise rules on the period for which interest is payable in respect of collision actions.<sup>156</sup> The fact that a different rule on interest applies in admiralty creates the further question whether the interest rate to be applied is determined in a different way to that applied under statute. There was at one time a view in both England and Australia that this was the case, with the result that an unrealistically low rate prevailed.<sup>157</sup> But in recent years courts sitting in admiralty have shown the same awareness of inflation as other courts and the rates applied in admiralty are calculated in the same realistic way as in other courts.<sup>158</sup>

268. *Options for Reform.* One option is to make no provision at all in the proposed legislation. This would probably result in the preservation of the present admiralty rules. But it is conceivable that a court in a jurisdiction which has general legislation governing the award of pre-judgment interest would regard that legislation as extending to admiralty actions.<sup>159</sup> This possibility could be avoided if the proposed legislation preserved the operation of the admiralty rules. A second option is to abolish the admiralty rules. This would result in a lack of uniformity, and a possible lack of provision for interest in some courts. In England, where the lack of uniformity in the general law was not a factor, the Law Commission initially favoured abolishing the special admiralty rules.<sup>160</sup> However, after consultation with interested parties, the Law Commission reversed its position and recommended the retention of the special admiralty rules.<sup>161</sup> There were several reasons for this change of view. First, it was persuaded that modern admiralty courts did not award interest as of right even in collision cases. Rather, they had the same discretion as courts acting under the general legislation. Secondly, it was convinced that, in comparison with the ‘single rough and ready rule’ which applies outside admiralty, the admiralty rules ‘have been refined over the centuries and in the small area in which they apply they have been found to work with certainty and fairness’.<sup>162</sup> While there is some variation in the degree of guidance given by the statutes in Australia it would still be fair generally to characterise the guidance given as ‘rough and ready’. Third, the rule on whether payment into court should include an amount in respect of interest differed in England between admiralty and non-admiralty cases. The Law Commission favoured the admiralty rule that interest should be included and suggested that the general rule be altered to conform to the admiralty rules.<sup>163</sup> As noted in para 267, the general rule has been interpreted to this effect in those Australian jurisdictions where the operation of the general rule has had to be considered. It seems reasonable to suppose that other Australian jurisdictions will decide or legislate to similar effect. Hence on this point there is no real divergence in Australia between the admiralty and the general rules. The final consideration which influenced the Law Commission was the possible reduction in the flow of litigation brought to London if the special admiralty rules were abolished.

The rules applied in admiralty cases ... are well-known internationally and generally acceptable; this country is often chosen as the venue for legal proceedings rather than other countries where such proceedings might be brought. We

were warned by several persons and organisations who sent comments and who are closely involved with admiralty. litigation that changes in the existing rules and, in particular, changes that replaced comparative certainty of the existing rules with the different and less well-established guidelines that have been developed under the 1934 Act would make our courts less attractive to litigants from other countries.<sup>164</sup>

The force of this argument is much reduced in Australia because it is not, or not yet, a centre of maritime arbitration and litigation.<sup>165</sup> But there is no reason to adopt a rule which would discourage the flow of litigation to Australia unless some compensating factor can be identified. The main disadvantage of preserving the admiralty rules in Australia is their inaccessibility. There is so far no authoritative Australian judicial statement of the rule nor any local textbook. English sources have to be relied upon, including 19th century case law. If one of the aims of the proposed reforms is to make admiralty law more accessible it is not clear that preserving separate and relatively difficult to locate admiralty rules is appropriate. A third option is to restate the admiralty rules in the proposed legislation. This would solve the accessibility problem though it would still leave admiralty in a different position to the general law. But codification would endanger one of the reasons for preserving the separate rules, harmony with the admiralty rules applied overseas. Those rules are subject to evolution and refinement, and a codification could fall out of step.

**269. *Need for a Head of Jurisdiction Covering Interest.*** Before coming to any conclusion on this point, it is helpful to refer to a related problem, that of the need for a specific head of jurisdiction covering interest. If *The Medina Princess*<sup>166</sup> was correctly decided (and Lord Brandon has stated that it was<sup>167</sup>), there is a need for a head of admiralty jurisdiction under which a claim for interest can be heard independently of the underlying claim. In that case seamen's wages fell due in 1958, a writ was issued in 1959, the defendant paid the amounts due after pleadings had closed in 1961. When the matter was heard in 1962 the only claim remaining was for interest in respect of the period 1958-1961. The claim was found to be outside the jurisdiction of the court. The relevant general legislation referred to interest which 'shall be included in the sum for which judgment is given'.<sup>168</sup> As no judgment had been given there was nothing in which to include the interest. The alternative possible sources of jurisdiction, inherent or statutory admiralty jurisdiction, were not considered in detail. But it might be argued that a claim for interest, where the underlying wage claim has been settled, is not a claim for 'wages'. It was recommended in para 193 that the inherent jurisdiction of admiralty not be preserved. In any event it appears that the inherent jurisdiction of the court only allows pre-judgment interest to be awarded, in the same way as the general legislation, as part of a judgment.<sup>169</sup>

**270. *Conclusions on Pre-Judgment Interest.*** In the absence of any countervailing arguments, the reasons given by the English Law Commission for retaining the admiralty rules for pre-judgment interest suggest that a similar course should be adopted in Australia.<sup>170</sup> This would also avoid any problems created by gaps in the general remedial powers of courts, and associated forum shopping. No specific provision needs to be made to this effect, but it is desirable to have a separate head of jurisdiction governing interest claims to avoid situations such as in *The Medina Princess*,<sup>171</sup> where a defendant deprives the plaintiff of the money due until just before judgment and thus avoids paying interest on that money.

# 13. Relationship of Proposed Legislation to Other Laws

## Imperial Legislation

271. ***Repeal of Imperial Legislation.*** The proposed legislation should repeat the Colonial Courts of Admiralty Act 1890 (UK) insofar as it applies to Australia. There are other English Acts which have, or which may have, some relevance to admiralty jurisdiction in Australia. Reference has already been made to the statutes of 1389 and 1391,<sup>1</sup> to 2 Hen IV c 11,<sup>2</sup> and to admiralty jurisdiction provisions of the Merchant Shipping Act 1894 (UK) and its associated legislation.<sup>3</sup> Other statutes, probably no longer (and possibly never) in force here but not yet formally repealed in all parts of Australia, are 17 Edward 11, c 13 (1324) dealing with wreck<sup>4</sup> and 2 Wm & M sess 2, c 2 (1690) dealing with the appointment of admiralty commissioners.<sup>5</sup> The proposed legislation should repeal all English statutory provisions that affect, or may affect, admiralty jurisdiction in Australia.<sup>6</sup> One method of doing this would be to repeal by explicit reference to each of the relevant Acts or provisions. Another method would be simply to provide that all admiralty jurisdictional provisions in English legislation are repealed. This latter method is briefer and would ensure that any relevant provisions which had inadvertently been overlooked would nonetheless be repealed. However, this approach would leave it to those interpreting the legislation to decide if a particular admiralty provision could be properly characterised as ‘jurisdictional’. The uncertainty, if any, which might result is most likely to arise with respect to the Merchant Shipping Act 1894 (UK). It would be beyond the scope of this Reference to recommend the repeal of the 1894 Act entirely insofar as it effects Australia. Yet the distinction between admiralty and maritime jurisdiction on the one hand and substantive maritime law on the other is not always easy to draw.<sup>7</sup> Where a single provision combines substantive and jurisdictional elements it may be particularly difficult to decide what has and has not been repealed. Therefore repeal should be by explicit reference rather than by blanket provision.

## State and Territory Legislation

272. ***Introduction.*** Reference has already been made to State and Territory legislation which affects matters with which the proposed legislation will deal. In this section some general observations are made on the appropriate relationship between the two kinds of legislation.

273. ***Curing Possible Invalidity.*** Legislation and rules of court affecting admiralty jurisdiction in some States are valid if s 6 of the Statute of Westminster 1931 (UK) removed the need for State legislation and rules to comply with the manner and form requirements of s 4 of the Colonial Courts of Admiralty Act 1890 (UK).<sup>8</sup> Consideration was given to curing any possible invalidity arising from non-compliance with s 4. However there are difficulties with federal legislation seeking to validate State legislation.<sup>9</sup> Moreover the States can now, with the enactment of the Australia Act 1986 (Cth) and its United Kingdom counterpart, readily solve any problem of this kind themselves. Accordingly no recommendation for federal action is called for.

274. ***Adding to Admiralty Jurisdiction.*** The proposed legislation will, as indicated in chapter 9, contain a list of heads of subject matter which will fall within admiralty jurisdiction. It was not proposed that there should be included any express power which would allow State or Territory legislation to add to this list. Without such a power, any attempt by other than federal legislation to vary the list would fail. In this sense the proposed legislation will cover the field of civil arrest in admiralty. But it will not attempt to cover the field of substantive admiralty and maritime law. It will be open to a State or Territory acting within its legislative power to alter, for example, the substance of the law of contract or tort as it affects shipping, the law of salvage, or even the law of maritime liens so as to create new liens or abolish existing liens. Because of the way the proposed legislation will operate to pick up ‘maritime liens’ without attempting to define exhaustively what liens exist,<sup>10</sup> any State or Territory legislation on the substance of maritime liens will indirectly affect the scope of admiralty jurisdiction under the proposed legislation.<sup>11</sup> Apart from maritime liens it would be a matter of statutory interpretation whether any new cause of action so created came within any head of jurisdiction defined in the proposed legislation. If, for example, State or Territory legislation extends the ambit of salvage law, it will be a question of interpretation whether claims arising under the extension are within admiralty jurisdiction under the head, ‘claims relating to salvage’.<sup>12</sup> The point is mentioned simply to make clear the way in which the proposed legislation will operate. Nothing can or should be done in the proposed legislation to produce any different result. This limited and indirect ability of

non-federal legislation to affect the subject matter within federal admiralty jurisdiction is simply a consequence of the fact that control over the substance of maritime law is at present shared between the federal and State legislatures.

**275. Other Forms of Detention of Ships.** The 1952 Arrest Convention provides an exhaustive code of claims upon which and the manner in which ships may be arrested. Article 2 provides:

A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of a maritime claim, but in respect of no other claim; but nothing in this Convention shall be deemed to extend or restrict any right or powers vested in any Governments or their Departments, Public Authorities, or Dock or Harbour Authorities under their existing domestic laws or regulations to arrest, detain, or otherwise prevent the sailing of vessels within their jurisdiction.<sup>15</sup>

The question is whether the definition of maritime claims giving rise to a statutory right of action *in rem* in the proposed legislation (which, like art 2, is exhaustive) allows sufficient scope for analogous or parallel State remedies involving the arrest or detention of ships. It is useful to distinguish four ways in which a ship may be detained. The first is arrest in the admiralty sense. The second is detention pursuant to a judgment given by a court; such detention is part of the process of execution (or, in a criminal proceeding, the imposition of a penalty<sup>14</sup>) and may occur as a consequence of a judgment of a court other than an admiralty court. The third is a possessory lien (including any statutory power of a port authority to detain a ship until port charges are paid<sup>15</sup>) which is distinct from a maritime lien or statutory lien in admiralty. The fourth is what might be described as detention by the State in anticipation of a breach of laws or regulations to which penalties attach. A typical example would be the power to prevent a ship in breach of safety<sup>16</sup> or oil pollution prevention measures from sailing. There is no real difficulty distinguishing admiralty arrest from these other types of detention. However the Navigation Act 1912 (Cth) s 383 illustrates a further type of detention which is perhaps less easy to distinguish. This section gives a very broad power to State and Territory Supreme Courts, exercisable ‘summarily’, to detain a foreign ship found in Australia that has occasioned ‘injury to property belonging to the Queen, the Commonwealth, a State, a Territory, a Commonwealth country other than Australia, a British subject or a citizen of a prescribed country’. The owner or master of the vessel can either make satisfaction for the injury or give security for the claim approved by the court. Giving such security constitutes conclusive evidence of submission to the jurisdiction of the court. The choice is whether to leave the provision as it is,<sup>17</sup> to leave it intact in substance but to alter the courts referred to from State and Territory Supreme Courts to ‘courts exercising admiralty jurisdiction *in rem*’,<sup>18</sup> or to repeal the provision entirely.<sup>19</sup> Total repeal of s 383 is appropriate.<sup>20</sup> The arrest provisions in the proposed legislation cover the same ground, in that they will give a plaintiff proceeding in admiralty adequate power to detain a ship to provide security. If a speedy ex parte means of arrest is required, the appropriate place for it is the rules of court for the courts exercising admiralty jurisdiction under the proposed legislation. The question remains whether the proposed legislation should seek to prevent legislation by the States or Territories which, like s 383, aims at providing a power of detention to assist plaintiffs. It was suggested in para 246 that the detention of ships through the use of Mareva injunctions should be permitted to continue as an additional or alternative remedy to admiralty arrest. A similar laissez-faire view should be taken of whatever variations on s 383 lie within the constitutional powers of the States and Territories. Partly this is because there seems little likelihood that such legislation will be enacted. Partly it is because it would be difficult for the proposed legislation, without becoming over-intrusive in areas of legitimate State and Territory concern, to exclude such parallel remedies altogether. No further recommendation is called for.

## Commonwealth Legislation

**276. Navigation Act 1912 (Cth).** Most of the provisions in Commonwealth legislation which refer to admiralty jurisdiction have been already referred to in their specific contexts. A few matters remain to be discussed.

- *Removal of Master (s 385).* Section 385 of the Navigation Act 1912 (Cth) provides that ‘any Court having Admiralty jurisdiction may remove the master of any ship within the jurisdiction of the court if it thinks it necessary to do so’. Any owner, owner’s agent, officer of the ship, or one-third or more of the crew may apply to the court for removal. Provision is also made in the section for appointment of a new master by the court. The Summers Report observed that ‘[n]owadays it is difficult to imagine any circumstances in which the removal of a master by a Court would be necessary or desirable’.<sup>21</sup> In the

light of this, s 385 should be repeated and no equivalent provision needs to be included in the proposed legislation. The equivalent provision in the Merchant Shipping Act 1894 (UK), s 472, should also be repealed as it applies to Australia.<sup>22</sup>

- *Defence of Common Employment (s 59A).* Section 59A of the Act abolishes the defence of common employment. It appears to apply only to actions in respect of injury or damage suffered by seamen aboard ships registered in Australia, ships engaged in the Australian coasting trade and ships the majority of the crew of which are resident in Australia and are operated by an Australian resident or a person or company that has its principal place of business in Australia.<sup>23</sup> The question is whether this is adequate or whether s 59A should be extended to cover all actions brought in admiralty.<sup>24</sup> The State legislation which abolishes the common law defence of common employment generally has been held not to apply extraterritorially.<sup>25</sup> Thus where, under private international law rules, local tort law is the relevant law and the ship in question is one to which s 59A does not apply, the defence of common employment would appear to be still available. It is not clear that this happens sufficiently often to be of concern because the private international law rules would, in the view of most writers, apply the law of the flag to torts internal to a ship.<sup>26</sup> On the other hand where the tort arises from a collision between ships of differing flags, it would appear that the *lex fori* would apply.<sup>27</sup> Most actions in which the defence of common employment would be relevant might be expected to arise from actions internal to the ship. But, on the basis that there may be some situations in which the defence would be available and that there would not appear to be any disadvantages in extending the ambit of s 59A, it should cover all actions in admiralty.
- *Curing Possible Invalidity.* Reference has already been made to the long-standing question whether parts of the Navigation Act, enacted before the Statute of Westminster Adoption Act 1942 (Cth) became effective, are valid.<sup>28</sup> It would appear that all concerned operate on the basis that no part of the Navigation Act is invalid due to repugnancy to, or failure to conform to the manner and form requirements of, overriding Imperial legislation. However it is by no means clear that this is so, and it is desirable to avoid any doubt. The question is whether the Act should be validated with retrospective effect, or only with prospective effect.<sup>29</sup> Since settled expectations are, it appears, based upon the validity of that Act, there should be a complete retrospective validation.

277. ***Seamen's Compensation Act 1911 (Cth).*** This Act makes detailed provision for compensation to seamen for injuries arising in the course of their employment. The Act applies to seamen on Australian registered ships, to seamen employed in Australia on foreign registered ships engaged under licence in inter-State trade, and to seamen engaged in Australia to deliver a ship to or from Australia. A right of detention is given by s 3(1) where the owner of the relevant ship does not reside in Australia. A judge of a State or Territory Supreme Court may order the ship detained until the compensation has been paid or security for the amount given. This provision will rarely be relevant because the major class of ships to which it applies, Australian registered ships, will normally be owned by a local resident.<sup>30</sup> But the right of detention cannot be abolished without loss because some of the rights to compensation under the Act would not be covered by any proposed head of admiralty jurisdiction.<sup>31</sup> One option is simply to allow the power of detention to continue to co-exist with admiralty arrest. Another would be to transfer the power to order detention to any court having power to arrest *in rem* under the proposed legislation. A third option would be to convert the right of detention into a right of arrest by creating a statutory right of action *in rem* for all claims arising under the 1911 Act for which the detention power is presently available. However the overlap between the 1911 Act and admiralty has existed for a long time without apparently causing any difficulty. No change is recommended.

## **Law Maritime and International Law and Comity**

278. ***Need for Express Provision?*** It was noted in chapter 4 that s 2(2) of the Colonial Courts of Admiralty Act 1890 (UK) requires courts exercising jurisdiction under the Act to have the same regard as the High Court in England to 'international law and the comity of nations'. The question is whether the proposed legislation should contain any provision directing Australian courts exercising admiralty jurisdiction to have regard to international trends and requirements and the decisions of overseas maritime tribunals. On one view such a provision is unnecessary. There is no body of general maritime law which could be picked up by such a provision.<sup>32</sup> Nor does it seem desirable that Australian admiralty courts be given the power to import

rules of public international law into Australian law in any special way (that is, in circumstances where they would not do so at common law).<sup>33</sup> Where there are specific requirements of international law (or comity) which local courts exercising admiralty jurisdiction should have regard to, these should be stated in legislation.<sup>34</sup> Australian judges need no specific mandate in order to give due regard to international trends, and to the decisions of admiralty judges in overseas jurisdictions. Legislation in comparable overseas jurisdictions does not contain any equivalent provision, and there seems no sufficient need for provision in the proposed Australian legislation.

# **PART IV: CIVIL ADMIRALTY JURISDICTION: PROCEDURE AND RULES**

## **14. The Form and Content of Admiralty Rules**

279. ***Introduction.*** The Commission's Terms of Reference specifically require it to

formulate draft Rules of Court for possible application by courts upon which Admiralty jurisdiction may be conferred by the Admiralty Act as recommended by the Commission.

Rules, drafted in response to this requirement, are set out in Appendix A.<sup>1</sup> A number of key issues concerning the form and content of the proposed Rules require discussion, in particular:

- the basic issues of the need for uniform rules and their scope;
- the rule-making authority;
- the scope of judicial and administrative authority under the Rules (in particular the powers of Registrars and the use of nautical assessors);
- specific procedural issues arising under the Rules (including mode of trial, use of preliminary acts and notice to consuls); and
- provision for costs or damages for frivolous or vexatious arrests.

### **Uniform Admiralty Rules**

280. ***The Rules in Force at Present.*** The Colonial Courts of Admiralty Act 1890 (UK) s 7 provides that the Vice Admiralty Rules 1883 (UK) shall apply in default of any local rules. The 1890 Act permits local rule-making by whatever method rules are made for the ordinary business of the court which has admiralty jurisdiction under the Act. Before the entry into force of the Statute of Westminster Adoption Act 1942 (Cth), locally made rules were required by the 1890 Act to be approved by the Queen in Council. The Statute of Westminster 1931 (UK) s 6 removed 'in any Dominion' the need to seek such approval. The view that has been acted upon is that this allows State as well as Commonwealth rule-making without the need to seek approval.<sup>2</sup> While the Territories still rely on the 1883 Rules, all the States have made rules for the exercise of the admiralty jurisdiction conferred by the 1890 Act upon their Supreme Courts. In content these rules are broadly similar, being to a greater or lesser extent modernised versions of the 1883 Vice Admiralty Rules. In most States the admiralty rules are an Order or Chapter of the Supreme Court Rules. For the Queensland Supreme Court and the High Court, provisions relating to admiralty actions have been integrated into the relevant Orders of the general rules, service *in rem*, for example, being dealt with in the Order covering service.<sup>3</sup> Where the existing State rules apply only to proceedings instituted under the Colonial Courts of Admiralty Act 1890,<sup>4</sup> or where the Court continues to rely on the Vice Admiralty Rules 1883 (UK),<sup>5</sup> the repeal of the 1890 Act will mean that the Rules either lapse or cease to be relevant to the reformed admiralty jurisdiction. On the other hand in two States the Admiralty Rules apply to all cases where the Court is exercising its admiralty jurisdiction,<sup>6</sup> and these rules could accordingly remain relevant to any new federal admiralty jurisdiction vested in those Courts, so far as they were capable of applying and were not inconsistent with the federal Act or Rules. Similarly the other State and Territory Supreme Courts could make new admiralty rules to apply in such cases.

281. ***The Need for Uniform Rules.*** An initial question therefore is whether there should be a single uniform set of Admiralty Rules governing actions under the proposed legislation, or whether rules should be left to each Court to devise. The Terms of Reference themselves imply that there will be uniform rules, and this was also the view of the Zelling Committee.<sup>7</sup> The arguments for uniform rules are strong. It is unsatisfactory to have federal legislation dependent on the work of separate rules committees for its full and effective implementation. The legislation could not come into force until all the courts upon which jurisdiction was conferred had made new rules or amended existing rules. Similar problems would arise if the legislation

were subsequently amended. In addition local autonomy, if it is to be meaningful, would result in variations in an area in which there is much to be said for uniformity, and where the interaction between substance and procedure is exceptionally close. There would also be considerable duplication of drafting effort among the various rules committees. In discussions on the Reference there has been general support for federal Rules, for these and other reasons.<sup>8</sup>

**282. *The Rule Making Authority.*** Given that the Rules are to operate throughout Australia in relation to proceedings commenced under the proposed legislation in both the Federal Court and State courts, it is inappropriate to have the Rules made and amended by any one court. The obvious solution is to have the Rules made, and amended from time to time, by the Governor-General, as is the case with the Bankruptcy Rules 1966.<sup>9</sup> The Bankruptcy Rules provide a fairly close analogy, since they were intended to be applied both by the Federal Court (as successor to the former Federal Court of Bankruptcy) and by the Supreme Courts of the States and the Northern Territory. It is understood that the Bankruptcy Rules have worked well and that the provision for them to be made and amended by the Governor-General has been satisfactory. Accordingly, a similar provision is recommended for the Admiralty Rules. That leaves the question of who advises on the working and amendment of the Rules. The simplest solution would be for the Commonwealth Attorney-General to do so after informal consultation with judges of the various courts and other persons experienced in the operation of the Act and Rules.<sup>10</sup> The alternative would be to establish a more formal body such as a rules committee to advise on the exercise of rule-making powers. The latter would have the advantage of ensuring continuing supervision, a matter which will be of special importance during the ‘settling-in’ period for the legislation and Rules. There would be a specific body constituted with a direct interest in dealing with problems as they arise. The less formal approach would depend upon the Commonwealth maintaining a close interest over an extended period. It might also result in delays if there is no set pattern of consultation or if, for example, the relevant Department decides to accumulate amendments before submitting them to Executive Council.<sup>11</sup> On balance the more formal approach is preferable, especially given the close relationship between procedure and substance in admiralty and the increased significance of procedural questions that flows from this. The legislation should expressly provide for the establishment of a rules committee.<sup>12</sup> In light of the wide range of interests that could claim representation on such a committee and the need (in the interests of economy and efficiency) for the body to be reasonably small, the composition of the committee should not be fixed in the Act. It may be, for example, that some form of rotational system of representation will be needed. The composition of the committee should not be specified in the legislation but should be left to the discretion of the Commonwealth Attorney-General. However it should be provided that the membership of the Committee shall include at least one Supreme Court judge and at least one Federal Court judge.

**283. *The Scope of Uniform Rules.*** The remaining preliminary issue is how comprehensive the coverage of the Rules should be. A full set of rules governing all aspects of actions brought in the admiralty jurisdiction conferred under the proposed legislation would have certain advantages. It would avoid duplication of drafting effort. It would also produce uniformity and thereby, amongst other things, facilitate the transfer of cases between courts. However there are other aspects of a full set of admiralty rules which may be disadvantageous. The fact that it operates under separate rules would tend to set admiralty apart rather than help to assimilate it to general civil jurisdiction. There would be a large number of areas in which the admiralty rules differed from the ordinary rules of court simply because of the need to have comprehensive admiralty rules, even though there was no difference of policy or substance between the two sets of rules. In *in personam* actions in particular, there is no reason to make special admiralty rules unless there is some special feature of the action which requires it: one example is the provision for preliminary acts in collision cases, and there are a few others.<sup>13</sup> This raises the basic question of whether admiralty procedure should be assimilated as far as possible into the mainstream of general civil procedure, even if doing so results in a break with traditional admiralty practice and rules, or whether admiralty should be preserved as a distinct area of litigation, with Australian admiralty procedure reflecting whatever degree of uniformity can be found internationally. On balance it is suggested that the former represents the correct approach; that the benefits of assimilation outweigh its disadvantages.<sup>14</sup> Hence only where there is a strong case for preserving a distinct admiralty rule, or where considerations of convenience require it, should assimilation not be followed. This principle obviously operates differently with respect to *in rem* as distinct from *in personam* actions. *in rem* actions are the characteristic, and unique, feature of admiralty, and the procedures for commencing such actions and for arresting and releasing ships and other property have to be spelt out in some detail. But even with *in rem* actions, many matters are also dealt with in general rules, and if there is no reason for a special

admiralty rule on the matter none need be proposed. Accordingly, the Rules have been drafted on the basis that the ordinary rules of court will also apply to admiralty matters (unless they are inconsistent with the Act or Rules). Only those features unique to admiralty need be dealt with in the uniform admiralty rules. Provision should be made for any gaps created by the interaction of the admiralty or ordinary rules to be filled by order of the court on application.

**284. Consequential Amendments to Existing Rules.** If these recommendations are accepted consequential amendments to or repeals of existing admiralty rules will be necessary in some cases. The Vice Admiralty Rules 1883 (UK) will cease to have effect with the repeal of the Colonial Courts of Admiralty Act 1890 (UK), as will the local admiralty rules in the four States where these rules apply only to admiralty jurisdiction under that Act.<sup>15</sup> Cases commenced before the new legislation comes into force will continue to be governed by the 1890 Act, and these rules will accordingly need to be maintained in force for an appropriate transitional period, after which they can be repealed. To avoid confusion it would be preferable if the general Admiralty Rules in Victoria and Tasmania, and in the High Court,<sup>16</sup> were to be amended to apply only to admiralty proceedings commenced before the new Act comes into force. These rules could then also be repealed in due course.<sup>17</sup> It remains possible for the rule-making authorities of any court exercising jurisdiction under the new Act to make additional provision, not inconsistent with the Act or Rules, to cover other matters. However it would be desirable that such matters be raised first with the Commonwealth (either directly or through the proposed rules committee) with a view to the making of a general rule, so that all courts exercising admiralty jurisdiction can benefit from any reform, and to maintain uniformity. It may also be helpful to apply aspects of the rules to cases outside the scope of the proposed legislation. One example is the use of preliminary acts in collision cases. It is proposed that these be retained and their use expanded under the new Act and Rules.<sup>18</sup> However, collision actions to which the Act does not apply will not be governed by the uniform Rules. If the recommendations on the geographical scope of arrest under the Act are adopted, for instance, the Act will not apply to collisions between local vessels on internal waters.<sup>19</sup> Actions *in personam* arising out of such collisions will proceed under the general rules of court.<sup>20</sup> It will be a matter for the rule-making authorities of the States and Territories to decide to what extent they wish preliminary acts to apply or continue to apply to such actions.<sup>21</sup>

## **Judicial and Administrative Authority Under the Rules.**

**285. The Registrar and Marshal.** The basic structure for the administration of admiralty jurisdiction in Australia, as in the United Kingdom, has traditionally involved the use of two principal court officers: the Registrar and the Marshal. The Registrar, as the chief administrative officer of the jurisdiction, has been responsible for the issue of process and the keeping of records, and has also exercised a limited judicial function at the direction of the Court, notably in relation to the assessment of damages, the taking of accounts<sup>22</sup> and the taxation of accounts of sale.<sup>23</sup> The Marshal, on the other hand, has been the admiralty equivalent of the Sheriff, responsible primarily for the arrest, custody and ultimate disposal of the res. This broad division of function between two such officials (by whatever names they may be called) is a feature of the rules of all of the existing Australian Colonial Courts of Admiralty. No suggestion has been made that any change is either necessary or desirable, and a similar distribution of function under the proposed Rules is therefore recommended. The possible constitutional difficulties raised by this course, particularly the conferral of ancillary judicial powers upon officers of the Federal Court, are discussed below.<sup>24</sup> Some difficulty seems occasionally to have been experienced under existing rules of court by Marshals in determining their precise powers, especially in relation to the custody and sale of the *res*.<sup>25</sup> To avoid this it is clearly desirable that the Rules define as far as possible the obligations of both Marshals and Registrars and the powers that they can exercise, alone or on application to the court, in carrying out their functions.<sup>26</sup>

**286. Appointment of Admiralty Officials.** The selection of existing officers or the appointment of new officials to carry out these functions is a matter best left to the individual courts concerned, as these courts are in the best position to decide what will fit with their other administrative arrangements. The courts should be permitted to appoint or nominate a Registrar and a Marshal and such Deputies as they may require. For the Supreme Courts this will probably mean the appointment of the officers currently carrying out the relevant duties. Indeed, this is desirable, given the need to maintain and build upon existing administrative experience in the range of functions exercised by these officers. Although the incidental judicial powers of Registrars will need to be exercised by an officer of the court in question, there should be a broader power to appoint Deputy Marshals to perform particular tasks (for example, service and arrest in more remote areas).<sup>27</sup>

**287. Assessment of Damages and Other Ancillary Powers of Registrars.** In the United States the 1966 merger of the Federal Rules of Civil Procedure preserved the admiralty rule whereby complicated issues of damages could be referred to a master, referee, auditor or assessor and also extended the ambit of the rule to cover general civil cases.<sup>28</sup> However references are apparently very much the exception rather than the norm.<sup>29</sup> The question of using Registrars to assess damages is linked to the way in which admiralty permits representative actions.<sup>30</sup> Where the action is brought by ‘the owners of the cargo lately on board the ship ...’ or ‘the master, officers and crew of the ship ...’ it may considerably simplify the process of litigation if a court can determine the issue of liability and then leave the individual claimants such as cargo owners or seamen to itemise and prove their individual damage claims before the Registrar in separate hearings. For this reason there is considerable justification for preserving the admiralty tradition of referring assessment issues to Registrars.<sup>31</sup> Until recently, a provision to this effect would have been constitutionally suspect as a conferral of federal jurisdiction on officials of State courts who (in most States at least) do not constitute part of the State court in the strict sense.<sup>32</sup> However the earlier decisions to this effect have been overruled by the High Court<sup>33</sup> and there is accordingly no constitutional barrier to the conferral of such powers on Registrars of State courts. So far as the performance of ancillary judicial powers by officers of federal courts is concerned, the matter is more difficult. In *R v Davison*<sup>34</sup> the High Court held that the power of Deputy Registrars in Bankruptcy to make sequestration orders involved an exercise of judicial power which could only be vested in courts established under Chapter III of the Constitution. However the case is not authority for a rule that untenured court officers such as Masters or Registrars cannot exercise ancillary judicial powers under Chapter III. At least four of the majority justices in *R v Davison* held that the Deputy Registrars in Bankruptcy were not officers of the Federal Court of Bankruptcy at all, so that that issue did not arise for decision.<sup>35</sup> In Davison’s case Chief Justice Dixon and Justice McTiernan pointed out that there was ‘no distinct decision of this Court that under Chapter III no authority can be given by statute for discharge of certain duties failing upon a court, subject to judicial confirmation or review, by an officer of the court such as a master’, although they cited certain dicta to this effect.<sup>36</sup> The decisions in *Kotsis v Kotsis*<sup>37</sup> and *Knight v Knight*,<sup>38</sup> though concerned with State courts exercising federal jurisdiction, plainly implied this stricter view. Again, the matter did not directly arise for decision in the *Hospital Contribution Fund* case<sup>39</sup> where *Kotsis* and *Knight* were overruled. However the two judges who did discuss the point in that case thought that a correspondingly broader view should be taken for federal as well as for State courts. Justice Mason said that:

the vesting of judicial power in a High Court consisting of a Chief Justice and Justices should not necessarily exclude the exercise of some jurisdiction and powers by a master or registrar of the court, whether as a delegate or otherwise, provided that the exercise is subject to review or appeal, more particularly now that the court is autonomous by virtue of the High Court of Australia Act 1979 (Cth). In the case of other courts created by Parliament, whose membership is not confined by s 72 to judges, there is perhaps even less reason for denying that part of their jurisdiction and powers may be exercised by officers who are not judges, whether as delegates or otherwise, provided of course that they are officers who truly form part of the court’s Organisation.<sup>40</sup>

Similarly, Justice Murphy said that:

The Constitution, in vesting, or providing for the investing of, jurisdiction in courts, should not be taken as allowing the exercise of the jurisdiction only by those who, in the strictest sense, constitute the court, such as justices of the High Court and other federal courts; it should be taken as permitting the exercise by officers who are under the supervision of those who constitute the court. Traditionally, officers such as prothonotaries and registrars have exercised judicial power in taking of accounts, inquiries into or assessments of damages, and other interlocutory or preliminary matters.<sup>41</sup>

The practice of vesting ancillary judicial power in court officials is a particularly well established and prominent feature of admiralty jurisdiction. In this context it is significant that the High Court Rules, though circumspect in their vesting of ancillary judicial powers in court officers,<sup>42</sup> do confer on the Registrar the more extensive power usual in admiralty, for the assessment of damages or the taking of an account (either alone or assisted by a merchant or merchants).<sup>43</sup> Although there is no actual decision of the High Court on the point, there seems to be no constitutional objection to vesting incidental judicial powers, of a kind usual in admiralty in comparable countries, in the Registrar or other similar officer of the Federal Court, provided that the Registrar acts generally under the control of the Court and provided that there are adequate powers of review or appeal from his decision. As concluded above, there are good reasons for vesting a range of incidental or ancillary powers in the Registrar in admiralty, including the assessment of damages or the taking of an account, and this policy should be adopted (without distinction as between State Supreme Courts and the Federal Court) in the proposed Rules.

## Nautical Assessors

288. ***Nautical Assessors: England.*** In England nautical assessors are used as a matter of course in the admiralty division of the High Court to advise on matters of navigation and seamanship in collision and similar damage actions, salvage actions and actions in respect of personal injury or death aboard ship.<sup>44</sup> Nautical assessors are also able to be used in other admiralty actions in the High Court.<sup>45</sup> They are also available in admiralty actions in the County Court though their use is ‘not usual’.<sup>46</sup> Nautical assessors are normally used on appeal where they have been used at trial, unless a party requests otherwise, in which case the court decides.<sup>47</sup> Assessors are not called by the parties, are not sworn, and are not subject to cross-examination.<sup>48</sup> Their advice is given in private and is not usually disclosed to the parties.<sup>49</sup> The advice of nautical assessors is expert evidence.<sup>50</sup> It is treated as highly persuasive but nonetheless it is for the judge to assess its worth and to decide all matters of fact and law in the case.<sup>51</sup> A court assisted by nautical assessors has a discretion whether or not to allow the parties to bring expert evidence on matters within the expertise of the assessors. But the firm practice in England is not to allow such evidence<sup>52</sup> except in very unusual circumstances.<sup>53</sup>

289. ***Use of Nautical Assessors in Other Countries.*** In the United States the use of nautical assessors was discontinued in the 19th century.<sup>54</sup> In New Zealand provision is no longer made for the use of nautical assessors.<sup>55</sup> Instead elaborate provision is made for the appointment of a court expert, and where an expert is used no party may call more than one expert witness on any point referred to the court expert without leave of the court.<sup>56</sup> In Canada the use of nautical assessors ‘is authorised by statute and the tendency seems to have been to extend rather than to restrict or abolish it’.<sup>57</sup> Canadian admiralty courts have expressed dissatisfaction with the English practice under which the use of nautical assessors precludes the parties adducing expert evidence on matters within the area of expertise of the assessors.<sup>58</sup> However the Federal Court of Appeal, while taking note of these criticisms, has reaffirmed the practice.<sup>59</sup> The Court recognised that the whole system of nautical assessors was open to criticism and said that it ‘may be a matter for the legislature or perhaps for consideration and review at the highest judicial level’ whether the system as a whole should be retained.<sup>60</sup> However the Court took the view that ‘the system will not be improved by departing from the rule that expert evidence is not admissible on matters within the expertise of the assessors’.<sup>61</sup>

290. ***Nautical Assessors in Australia.*** Although it is possible to find examples of the use in Australia of nautical assessors in 19th century admiralty courts<sup>62</sup> there appear to be no modern examples.<sup>63</sup> In some jurisdictions the rules continue to make provision for the appointment of assessors in admiralty matters by the judge either on the application of a party or without such application.<sup>64</sup> In most of these jurisdictions, and in other jurisdictions, there is provision not specific to admiralty under which assessors may be appointed,<sup>65</sup> though in practice such appointments appear to be very rare. Courts of Marine Inquiry are required to sit with assessors in all cases,<sup>66</sup> or at least when a question of cancellation or suspension of a mariner’s licence is likely to arise.<sup>67</sup> But the presence of assessors does not prevent the parties at marine inquiries from calling expert witnesses on matters within the expertise of the assessors.<sup>68</sup> Under the Navigation Act 1912 (Cth) assessors are also required to assist a court before which proceedings are brought against a person for an offence against the collision regulations,<sup>69</sup> and assessors may be used in any court to which a dispute as to salvage is referred for summary determination.<sup>70</sup>

291. ***Retention of Nautical Assessors?*** Tradition apart, the chief reason for having nautical assessors:

... is that the court can obtain such assistance as it needs on nautical matters without the necessity of hearing long and conflicting and often unpersuasive opinion evidence on such matters. Moreover, the court can obtain such assistance from assessors right up to the time when judgment is pronounced.<sup>71</sup>

It is said that the function of a nautical assessor is ‘to provide the judge with such general information as will enable him to take judicial notice of facts which are notorious to those experienced in seamanship’.<sup>72</sup> Some judges have questioned whether they need this assistance.<sup>73</sup> From the court’s point of view the value of the assessor’s advice is reduced because it has not been tested by cross-examination.<sup>74</sup> But even if a system of nautical assessors is useful from the court’s point of view, from the point of view of the parties any reduction in hearing time (and therefore costs) must be off-set by the fact that they pay the fees of the assessors.<sup>75</sup> A more significant criticism from the point of view of the parties is that ‘they do not know before judgment, if they know even then what advice has been given to the court and they had had no opportunity to cross-

examine on it or to contradict it'.<sup>76</sup> The opportunity for cross-examination can be seen as important in terms of natural justice.<sup>77</sup> It may be the only way of bringing out the fact that an assessor, while not partisan, belongs to a particular school of thought on a subject in issue.

While the impartiality of the Court may, to some extent and to some eyes only, appear to assuage the hurt of not being able to cross-examine the assessors, this presumes omniscience in the particular Judge: that he will ask the proper questions and by judicial private cross-examination elicit thoughtful, unbiased opinions worthy perhaps of adoption in deciding the case.<sup>78</sup>

Possible compromise solutions include allowing expert evidence to be given even though assessors are used,<sup>79</sup> or requiring questions to and answers given by assessors to be in writing and available to counsel.<sup>80</sup> It is submitted that these compromises achieve the worst of both worlds. The former multiplies the number of experts involved; the latter loses the flexibility of constant informal interchange between judge and assessors. Neither should be adopted. The major options are:

- adoption of the English practice;
- the use of nautical assessors only where all parties request them;
- abolishing all special provisions for assessors in admiralty but leave the general rule (if any) of the court hearing the matter to apply;
- prohibiting the use of assessors in all cases heard in admiralty jurisdiction.

There is a degree of criticism of the English practice even in England,<sup>81</sup> and criticism by Canadian courts has already been noted.<sup>82</sup> In the light of this criticism and the fact that there is no local tradition of using nautical assessors in admiralty, the English practice should not be applied here.<sup>83</sup> In England Trinity House masters have traditionally been the principal source of nautical assessors used in admiralty. Australia lacks any equivalent institution. This in itself may not provide a reason for not recommending the adoption of the English practice. Presumably experienced mariners could be found in Australia to sit as assessors if required. But there is no existing institution similar to Trinity House to be called on, so that selection of assessors could present administrative difficulties.<sup>84</sup> The second option, assessors only on request of the parties, does not appear worthwhile. It appears that both here and overseas such support as the system of assessors enjoys comes from judges. Counsel for parties rarely if ever favour using assessors.<sup>85</sup> The third option (no special admiralty rule but the ordinary rule of the particular court to apply) is unlikely in practice to lead to any increase in the use of nautical assessors. However it does represent the least intrusion upon the ordinary powers of the courts and helps assimilate admiralty actions to other civil actions.<sup>86</sup> It would leave the fate of nautical assessors to be decided as part of any review of the function of assessors generally. The disadvantage of this option is that it introduces a degree of variation between courts exercising admiralty jurisdiction in Australia. However, that variation may be more theoretical than real. The actual use of assessors appears to be uniformly rare to the point of non-existence across Australia. In practice there is little difference therefore between this option and the fourth option, viz a bar on the use of assessors in admiralty actions. But given that there does appear to be at least some support for their retention,<sup>87</sup> the third option represents the desirable rule.

## Maintenance of Registers

292. **Registers Generally.** At present the Australian Supreme Courts and the High Court each maintain a separate register for their admiralty proceedings, usually called an admiralty minute book or process book.<sup>88</sup> The unique nature of actions *in rem* and the existence of special rules for conducting those actions do seem to justify some form of separate admiralty register. Admiralty actions involve the issue and filing of a range of instruments not to be found elsewhere (preliminary acts, warrants, releases and bail bonds, for example). In order to ensure uniformity the proposed Rules will also need specifically to regulate a number of ordinary procedural matters such as the endorsement, issue and service of initiating process in a manner that may differ from that currently in use in some of the courts concerned. To record these actions separately would seem to offer clear administrative advantages. It would also make a search for *in rem* actions commenced against a ship (especially prior to service on the ship) less difficult. This may be advantageous, for example, to potential purchasers of ships wishing to ensure that no outstanding statutory liens against the ship exist as

the result of the commencement of *in rem* proceedings in the court in question. The practice of maintaining separate records of admiralty proceedings should be continued. As to the precise content of those records, the current rules vary slightly in their requirements.<sup>89</sup> In the interests of flexibility it would appear appropriate to leave purely administrative matters to the individual courts. It is therefore recommended that provision be made for the maintenance of a separate record, to be known as the ‘Register of Admiralty Proceedings’, in each court, without specifying what that Register is to contain.

293. **Caveat Registers.** Besides a general record of actions, the exercise of admiralty jurisdiction has also required the maintenance of records peculiar to the jurisdiction, notably the caveat books. The admiralty caveat procedure requires the formal recording by the court of two types of instrument, caveats against arrest and caveats against release or payment out of court. A caveat against arrest consists of a promise to enter an appearance in an action that may be begun against the property in question and to provide security up to a specified amount within a short time — usually 3 days — of receiving notice of any such action.<sup>90</sup> This undertaking is recorded by the court in what is presently called a ‘Caveat Warrant Book’ and any party issuing a warrant against the property thereafter is liable to pay damages to the caveator if there was no good and sufficient reason for ignoring the caveat.<sup>91</sup> A caveat against release, on the other hand, allows a party to prevent the release of arrested property or the payment out of court of a fund representing that property<sup>92</sup> (at the risk of payment of damages if there was no good and sufficient reason for preventing that release).<sup>93</sup> Again, a record of the caveat is made in the registry in a ‘Caveat Release’ or ‘Caveat Payment’ Book. It is recommended below that a caveat procedure be retained under the new Act and Rules, but in modified form.<sup>94</sup> If this occurs the need for formal court records will remain. The question is how best to achieve the recording of both forms of caveat under the proposed new distribution of admiralty jurisdiction. In particular, the question is whether each court exercising jurisdiction should be required to maintain its own caveat registers or whether some form of central register would be desirable and practicable.

- *Caveats Against Arrest: A National Register?* For caveats against arrest it can be strongly argued that a central register is needed. Without a central register a ship owner, charterer or other interested person wishing to prevent the arrest of a vessel that is on its way to ports in a number of Australian States or Territories would have to file separate caveats in the Supreme Court of each State to be visited as well as in the Federal Court. This would be a real deterrent to use of the caveat procedure.<sup>95</sup> Similarly, a person seeking to arrest a ship entering an Australian port would have to check both the local Supreme Court and the Federal Court registers to determine whether any caveat against arrest was in force. A single national register of such caveats is clearly the most desirable solution. Equally clearly only the Federal Court (with its Australia-wide jurisdiction) is in a position to maintain such a register. The Federal Court should maintain a register for caveats against arrest, which should be open to inspection by anyone at any Registry of the Court. A caveat entered upon that register can constitute an undertaking to the Federal Court and to any other court in which proceedings may be commenced to enter an appearance and to provide security to a specified amount in any proceeding *in rem* against the relevant ship or property. Only one step will therefore be required under the new Rules either to enter an Australia-wide caveat against arrest or to determine whether such a caveat exists.<sup>96</sup>
- *Caveats Against Release: Separate Registers?* Caveats against release or payment out of court, on the other hand, do not require a national register. Only one court will ever be in possession of the *res* or the fund representing the *res* at any one time, and a person seeking to prevent release will need to be concerned only with that court. A national register would avoid duplication of effort in the initial setting up of a recording system, but any saving would be outweighed by the difficulties inherent in attempting to give the Federal Court control over property or funds in the custody of the other courts. Therefore, each court in which proceedings *in rem* can be commenced under the proposed Act<sup>97</sup> should be required to maintain its own Register of Caveats Against Release.

## Miscellaneous Procedural Issues

294. **Mode of Trial.** Trial of civil admiralty actions has traditionally been by judge alone,<sup>98</sup> or by a judge sitting with assessors.<sup>99</sup> Juries have almost never been used. After the passing of the Judicature Acts in the United Kingdom it theoretically became possible for juries to be used in the Admiralty Division of the High Court,<sup>100</sup> but their use was at the Court’s discretion and that discretion was rarely exercised in their favour.<sup>101</sup> In the United Kingdom today, the Admiralty Court can still order the use of a jury,<sup>102</sup> but again their use in

practice is virtually unknown.<sup>103</sup> Much the same can be said for Australia. In all of the Australian Colonial Courts of Admiralty it is possible for civil admiralty actions to be tried by jury. In the case of New South Wales, Victoria, Queensland and Tasmania the relevant admiralty rules themselves expressly make provision for jury trial at the Court's discretion.<sup>104</sup> The New South Wales and Queensland Admiralty Rules will cease to have effect upon the repeal of the Colonial Courts of Admiralty Act. Those of Victoria and Tasmania will remain.<sup>105</sup> Apart from that, all of the jurisdictions make at least some provision in local Acts and rules of court for jury trial in civil proceedings generally,<sup>106</sup> including admiralty proceedings. As far as can be ascertained, however, little if any use is made of any of these provisions.<sup>107</sup> In considering the future of jury trials under the new Act and Rules, three possibilities suggest themselves:

- introduce a special rule for admiralty actions, permitting the use of juries in enumerated circumstances (for example, with the consent of both parties);
- leave things as they are, allowing the possibility of jury trial where it is permitted for general civil actions in the relevant trial court;
- prohibit the use of juries in admiralty actions.

The first of these options contradicts the broad aim of assimilating admiralty actions as far as possible into general civil procedure, besides adding unnecessary complexity. It would also result in the possibility of jury trial in civil cases in jurisdictions in which that form of trial has virtually been abolished.<sup>108</sup> The second option does have the virtue of assimilating admiralty practice to general practice, but does so at the expense of perpetuating the current diversity between jurisdictions on an important procedural issue. It can be argued that uniformity on this question amongst courts exercising admiralty jurisdiction outweighs the need for assimilation to the general procedure of each individual court, just as it does in the case of the commencement of proceedings, appearance, service, arrest and other key procedural issues. The third option, on the other hand, besides being in line with the general trend in this country away from the use of juries in civil cases,<sup>109</sup> has the advantages of simplicity and compliance with both traditional and current admiralty practice.<sup>110</sup> It is recommended that the third option be adopted, so far as the trial of actions *in rem*, limitation actions, and any associated *in personam* claims is concerned.

295. **Preliminary Acts.** A preliminary act is a statement by a party to a collision action setting out information on a number of specified points such as speed, course, weather, tide, distance of first sighting the colliding vessel, alterations of course made and observed, signals made and received etc. It must be lodged with the court by the plaintiff shortly after the issue of the writ and by the defendant shortly after entry of appearance. The documents must be sealed and may not be opened until ordered by the court. A preliminary act is a formal admission binding on the party making it. It may only be departed from or the party making it may only introduce evidence that conflicts with it by leave of the court.<sup>111</sup> Preliminary acts were introduced into admiralty procedure in 1855<sup>112</sup> to get a statement from the parties while the circumstances were still fresh in their minds and 'to prevent the defendant from shaping his case to meet facts put forward by the plaintiff'.<sup>113</sup> Preliminary acts continue to be required in England in any admiralty action 'to enforce a claim for damage, loss of life or personal injury arising out of a collision between ships'.<sup>114</sup> Preliminary acts are also required in similar actions in Canada<sup>115</sup> and New Zealand.<sup>116</sup> There is no provision for preliminary acts in the United States. In Australia preliminary acts are required either in all actions for damage caused by collision between vessels,<sup>117</sup> or for admiralty actions on such claims,<sup>118</sup> or for admiralty actions for damage by collision.<sup>119</sup> The word 'damage' covers not only damage to vessels and cargo but claims for personal injury and loss of life.<sup>120</sup> While there are many minor drafting differences in the various Australian rules in setting out the matters which must be supplied in preliminary acts there are also some more significant differences. For example, some require a statement of 'what fault or default, if any, is attributed to the other ship'.<sup>121</sup>

296. **Retention of Preliminary Acts.** It has to be asked to what extent preliminary acts achieve their stated aims and also whether they create more problems than they solve. On the first point they clearly make it more difficult for parties, particularly defendants, to tailor their story to match the facts put forward by the other side. Because there will frequently not be any 'neutral' witnesses to ship collisions it may be that the opportunity for falsification would be particularly great but for the requirement to file a sealed statement before hearing the other side's version of events. The other aim, putting on paper a record of the relevant

facts while memories are fresh, is less often achieved. The requirement to file only runs from the commencement of the action, not the time of the collision.<sup>122</sup> This may be up to two years after the collision occurred. Even if an action is commenced immediately, the long-standing English requirement that the plaintiff file within 7 days of commencement and the defendant within 7 days of appearance was not achieved in practice.

In the great majority of cases ... a much longer time elapsed after either the issue of the writ or the entry of the appearance before the respective parties filed their preliminary acts. The present rules make provision for preliminary acts to be filed by the plaintiff within two months after the issue of the writ and by the defendant within two months after entering appearance and it is to be hoped that these times will be more rigidly observed than was the case previously.<sup>123</sup>

In Australia 7 days remains the norm. The system of preliminary acts may sometimes provide scope for argument as to the interpretation of what is required,<sup>124</sup> of the adequacy of a particular answer in meeting the requirement of full disclosure,<sup>125</sup> or the way in which what may be properly sought by interrogatories, discovery or by an order for further and better particulars relates to the contents of the sealed preliminary act.<sup>126</sup> These difficulties can be fairly characterised as peripheral. More serious questions arise as to who is required to file a preliminary act where either the plaintiff or a third party to the action was not responsible for the navigation of a vessel involved in the collision. One problem is that it may frequently be difficult for a court, which has not yet seen the pleadings, to determine the role of a third party in the events leading to the collision and hence the need for, or usefulness of, that party filing a preliminary act.<sup>127</sup> A further difficulty is that, because of the rule that there must be mutuality of filing, a party may be required to file notwithstanding that it cannot supply useful answers simply to extract more useful information from the other party or parties.<sup>128</sup> It has been suggested that only common law judges experience difficulty in deciding when non-vessel operating plaintiffs must file,<sup>129</sup> but even an experienced admiralty judge, Lord Merrivale, acknowledged the difficulty with non-vessel operating third parties.<sup>130</sup> However, it can be argued that these difficulties have either been resolved by judicial decisions or can be settled by more elaborate provision in the proposed rules of court. In addition there seems to be no evidence of serious difficulty in Australia. Opinions expressed to the Commission (both by Australian and overseas lawyers) have all favoured the retention — indeed, in some cases, the extension — of the procedure of preliminary acts.<sup>131</sup> Accordingly the proposed Rules should make provision for preliminary acts to be filed in the case of collision between ships both in actions *in rem* and *in personam*.<sup>132</sup>

**297. Extension to Other Cases.** As pointed out in para 295, the use of preliminary acts is currently confined to actions for damage (including loss of life or personal injury) caused by collisions between ships. Yet the principal advantage of the procedure — forcing a party to give their version of the events without being able to mould their story to match the facts put forward by the other side — would seem equally applicable to other actions in which damage is caused by or done to a ship.<sup>133</sup> Considerable support for such an extension has been expressed to the Commission. The main disadvantage of the proposal lies in its novelty. The filing of preliminary acts in collision cases has a long history. There is a large body of case law to resort to in the event of any difficulty. To require their use in other cases would mean raising old problems (such as their relationship with interrogatories, discovery and pleadings) in a new context. Their compulsory use in all damage cases might therefore be questionable. There seems no reason on the other hand not to at least permit their use in damage cases where it is thought likely to be helpful to the disposal of the action. Apart from requiring the use of preliminary acts in vessel collision cases, the Rules should also give the courts a discretion to order their use in any claim arising from the loss of or damage to or by a ship.

**298. Notice to Consul when Arresting Foreign Ship.** The English admiralty rules provide:

Except with the leave of the Court ... a warrant of arrest shall not be issued in an action *in rem* against a foreign ship belonging to a port of a State having a consulate in London, being an action for possession of the ship or for wages, until notice that the action has been begun has been sent to the consul.<sup>134</sup>

This rule continues what Dr Lushington described as the ‘ancient practice’ of the Admiralty Court.<sup>135</sup> Similar provision is made in the admiralty rules in Canada,<sup>136</sup> New Zealand<sup>137</sup> and in all the Australian jurisdictions.<sup>138</sup> There is, apparently, no equivalent requirement in the admiralty rules in the United States. Nor is there any suggestion that international law requires such a notification.<sup>139</sup> Rather the rationale derives from international comity,<sup>140</sup> and more specifically from the notion of *forum non conveniens*. The purpose of the requirement that notice be sent<sup>141</sup> is to give the consul the opportunity to present to the court reasons why

it should, in the exercise of its discretion, decline to exercise jurisdiction over the matter.<sup>142</sup> The requirement of notice is obsolete, With the speed of modern communications the owner or operator is sufficiently able to appear and argue *forum non conveniens*, and consular intervention for this purpose seems anomalous.<sup>143</sup> It is difficult to see why possession and wages claims should be singled out for special treatment. With respect to possession actions, Justice Hill suggested in 1919 that there was no justification for special treatment.<sup>144</sup> The basis for special treatment, that a local court cannot properly consider questions of the municipal law of another country and that actions for possession of foreign ships inevitably depend on that law, was even then no longer considered valid. The position with wages claims against foreign ships is rather more involved. It is not only that a question of foreign law may be involved but also that under that law the local consul of the flag state may be empowered to resolve wages disputes arising on ships of that state.<sup>145</sup> But on this basis it is anomalous that the notification provision applies only in actions *in rem*.<sup>146</sup> An action *in personam* for wages would seem to be no less an intrusion on the consul's 'jurisdiction' or functions. McGuffie notes that an informal practice has grown up in some district registries in England of giving notice to the local consulate of impending arrest: 'although it was not part of the original purpose of the rule requiring notice, early notice is often useful because questions of repatriation, provisioning, discipline, etc may often require the urgent attention of the local consulate'.<sup>147</sup> Logically, if notice is thought useful, it should be required in all cases of arrest, not merely possession and wages cases. Although the requirement to give notice does not appear to have proven burdensome, it should no longer be required either in its present form or extended to all actions *in rem*. The less that admiralty procedure is encumbered with special requirements of doubtful or marginal utility the better.

299. **Limitation Proceedings.** The question of jurisdiction over applications to limit liability was discussed in earlier chapters.<sup>148</sup> It was recommended that the Federal Court be given jurisdiction to hear anticipatory limitation applications, to match that already enjoyed by the Supreme Courts of the States and Territories. It was also recommended that anticipatory actions be excluded from lower courts. The question of procedure in limitation actions also has to be considered. These actions are dealt with in England and in New Zealand at present in accordance with detailed (and similar) rules of court.<sup>149</sup> By contrast, there appear to be no specific rules in force in any of the various Australian jurisdictions, though in practice it seems that the English procedure is followed.<sup>150</sup> The question is whether the conduct of limitation actions should now be expressly provided for, or whether the proposed Rules should remain silent on the point.<sup>151</sup> If the procedures are to be specified there is also the question of what form they should take.

- **Rules for Limitation Actions?** On the first point, there seems little reason not to spell out the limitation procedure. Uniformity on the question is clearly desirable, and the only guarantee of uniformity is through the inclusion of appropriate procedures in the draft Rules. As limitation actions are relatively uncommon, it is also desirable to give some guidance to courts dealing with them. As to the second question, the obvious answer is to adopt the current English and New Zealand practice, which, as mentioned, appears to be followed in Australia now. The question, however, is whether that procedure is as straightforward as it might be.
- **Procedure in the United Kingdom and New Zealand.** Under the English and New Zealand regime,<sup>152</sup> a person bringing an action to limit liability in the face of existing or threatened proceedings (as opposed to a person merely asserting the right to limit in a particular action)<sup>153</sup> must first issue a writ making at least one person with a claim against the plaintiff a defendant to the action, and identifying that defendant (or those defendants) by name. Where the right to limit is being asserted against a class of persons, the plaintiff may wish to add other defendants, describing them generally (for example, as 'owners of goods lately on board the MV Lollipop'). The writ then has to be served on at least one of the named defendants. Within a week of a named defendant appearing or of the time for appearance expiring, the plaintiff may apply for an order or decree limiting liability, supporting that application with affidavits establishing the right to limit and identifying anyone known to have a claim against the plaintiff arising out of the relevant incident (besides those identified by name in the writ). The summons and affidavit have to be served on any defendant who has appeared. If the right to limit is not disputed,<sup>154</sup> the hearing of the application<sup>155</sup> will result in the issue of a decree limiting the plaintiff's liability. If there is a dispute, however, an order will usually be made for pleadings<sup>156</sup> and the matter will go to trial.<sup>157</sup> A plaintiff who succeeds in obtaining a limitation decree<sup>158</sup> must pay into court or give bail<sup>159</sup> for the relevant sum:<sup>160</sup> upon doing so proceedings against the plaintiff arising out of the same incident will be stayed.<sup>161</sup> Once issued, the decree then has to be advertised, fixing a

period of at least two months<sup>162</sup> for claims to be brought against the fund in court and for persons not named in the writ (or if named, not served) to apply to set aside the decree. If no application is made to set aside, all claims are assessed<sup>163</sup> and the fund is eventually distributed. Late claims can be made, but only with leave of the Court<sup>164</sup> and only where the fund has not yet been distributed.<sup>165</sup> Where, however, someone seeks to set aside and files affidavits establishing a *bona fide* claim against the plaintiff and *prima facie* grounds for rejecting the plaintiffs right to limit, the decree has to be set aside and directions given for deciding the dispute.<sup>166</sup>

- *A Modified Procedure?* As can be seen, the procedure is lengthy and, it might be thought, cumbersome. It involves two (and possibly three) substantive hearings. An alternative would be to try to consolidate these hearings. The current procedure in the United States before the District Courts suggests a possible framework. There bail is given at the time of commencing the action for the maximum amount permitted under the relevant limitation legislation.<sup>167</sup> Full details are provided in the application of all claims commenced or pending and of all facts necessary to establish the right to limit and its extent.<sup>168</sup> The court then enjoins existing proceedings, notifies all relevant persons and advertises the application, setting a time for claims to be entered.<sup>169</sup> At trial the right to limit, the amount to which liability can be limited, the validity of the claims and the distribution of the fund are all decided.<sup>170</sup> Thus, it does appear possible for all major issues in a limitation dispute including the right to limit — to be argued at one hearing. Even under such an approach, however, preliminary decisions have to be made by the court on questions of bail, notification of claimants and the staying of existing proceedings.<sup>171</sup> Permitting the plaintiff to initially assess bail, too, requires provision to be made for challenges to that security prior to trial, both as to amount and reliability.<sup>172</sup> In addition, the single hearing will in some cases be a lengthier and more complex proceeding as a result of the additional issues. The advantages of combining all major questions into one hearing are not clear cut. The current English procedure has been in existence for some time. It is reinforced by a substantial body of case law, and appears to be relatively well understood in this country. If there are only marginal advantages in changing the present system there seems no sufficient reason to depart from the existing procedures. The present two-stage system should be retained,<sup>173</sup> with the basic structure of the English and New Zealand rules being incorporated in the proposed Rules.

300. **Caveats Against Arrest.** Caveats against arrest made their ‘first formal appearance’ in Rules of Court in the United Kingdom in 1855,<sup>174</sup> though their use in practice in one form or another can be traced back considerably further.<sup>175</sup> The caveat procedure was incorporated into the 1883 Vice Admiralty Rules,<sup>176</sup> and through them flowed, little changed, into the present rules of all of the Australian Colonial Courts of Admiralty. As outlined above,<sup>177</sup> the entry of a caveat against arrest in Australia constitutes an undertaking to appear in an action against the ship or property described in the caveat, and to give bail or pay money into court up to a specified amount in that action.<sup>178</sup> Where a claim is entered for an amount not exceeding the amount specified in the caveat, the caveator must then honor the undertaking to provide security within 3 days after the service of the writ in that action.<sup>179</sup> Failure to do so results in the possibility of a default judgment against the caveator (if the court is satisfied that the plaintiffs case is well founded), a judgment that can be enforced by the arrest of the *res* and by the committal of the caveator.<sup>180</sup> Failure to appear, or to put in bail or pay into court, will also render any solicitor responsible for such an undertaking liable to committal.<sup>181</sup> The caveat is entered by a person<sup>182</sup> filing a notice containing the undertaking in the registry. A caveat is then entered by the Registrar in the Caveat Warrant Book.<sup>183</sup> The entry of the caveat means that anyone who commences proceedings against the ship or other property will serve a copy of those proceedings upon the caveator,<sup>184</sup> thereby triggering the promise on the part of the caveator to put in bail or pay money into court where the amount claimed does not exceed the amount specified in the caveat. Where the claim is for an amount exceeding that specified in the caveat, the writ will be served upon the caveator, and negotiations can take place on whether the bail or other security promised should be increased.<sup>185</sup> Under the present law, however, the entry of the caveat does not actually prevent the arrest of the ship. The plaintiff can, despite the existence of the caveat and despite knowledge of its existence, proceed both to issue and to serve a warrant of arrest even if the amount claimed is less than that specified in the caveat.<sup>186</sup> The deterrent in such a case is that of liability to pay costs and damages, and to have the warrant set aside on the application of the caveator, should the person arresting the ship in defiance of the caveat have no ‘good and sufficient’ reason for doing so.<sup>187</sup> Good and sufficient reason in this context requires more than mere preference for the *res* over personal security.<sup>188</sup> Such authority as there is on the point suggest that some reasonable doubt as to the reliability of the undertaking<sup>189</sup> or its adequacy in relation to the claim<sup>190</sup> is

required.<sup>191</sup> The standard of liability to damages in this situation is thus much more favourable to the defendant than is the normal admiralty standard of *crassa negligentia*.<sup>192</sup>

- *Obsolescence of Caveats Against Arrest.* The disadvantages of this scheme from the point of view of the caveator are obvious. The entry of a caveat does not guarantee that the ship or other property will not be arrested. It may deter arrest — always assuming that the plaintiff searches the caveat warrant book<sup>193</sup> — but will not stop it. It is then up to the caveator to apply to set aside the warrant. The caveator will only succeed and recover costs and damages if the plaintiffs reasons for arresting are subsequently held not to be ‘good and sufficient’.<sup>194</sup> It may be partly as a result of this lack of immediate impact that the caveat against arrest has fallen into disuse.<sup>195</sup> In Australia there is at present the added factor of having to caveat in each State to be visited by the ship as well as in the High Court in order to gain protection.<sup>196</sup> Even more important, however, is the widespread use of P & I clubs, whose guarantees can be used to prevent threatened arrests or ensure the quick release of any property that is arrested, thus reducing the need for any formal means of protection.
- *Abolition of Caveats Against Arrest?* In the light of the very limited use of caveats against arrest, and the development of other forms of obtaining undertakings to prevent arrest, the question arises whether caveats against arrest are still needed. The current lack of use of caveats, and their lack of decisive effect, would appear to indicate not. Caveats against arrest require the maintenance of recording systems and add complexity to admiralty procedure. If they are not to be used to any great extent there would appear to be little point in keeping them. As against that, it might be argued that they do at least provide a formal procedure for giving some protection against arrest, for example, in cases where immediate access to a P & I club or other guarantor is not available to the caveator. Lack of use should not, on this view, be a decisive factor. Commercial practice has largely overtaken other formal procedures, such as the giving of bail itself,<sup>197</sup> but those procedures have been retained for use, since modern practice cannot readily be formalised and may not always be appropriate to the needs of potential defendants in admiralty. Moreover, the general thrust of the proposed Admiralty Bill is to provide for arrest in a much wider range of circumstances. In such a situation it can be argued that formal procedures for protection against arrest become correspondingly more significant. Comparable jurisdictions overseas — the United Kingdom, New Zealand and Canada — have all retained caveats against arrest.
- *Modified Caveats Against Arrest?* The arguments for and against retention are finely balanced. However, the arguments in favour of retention become much more compelling if some of the defects (from the caveator’s point of view) inherent in the present procedure are removed. One such defect — the need to enter caveats in more than one court — would, under the proposals outlined above, disappear with the establishment of a single national register of caveats against arrest in the Federal Court.<sup>198</sup> Another — the lack of definite effect of the filing of a caveat — would also disappear if the filing of a caveat (for an amount not less than the amount then or subsequently claimed) was actually to prevent the issue of a warrant rather than simply deter its issue. The caveator under such a scheme would have a much firmer guarantee that the ship will remain unmolested.<sup>199</sup> The danger in such an approach lies in the possibility of dishonest or frivolous caveatting; the caveator may have no real prospect of paying into Court the funds promised or of raising reliable bail for the relevant amount. This can be adequately guarded against by permitting arrest despite the existence of a caveat by leave of the court, and by the usual threat of committal of both solicitor and caveator responsible for any undertaking that is not complied with. Moreover, protection can be restricted to just one named ship (or other specified property) per caveat: blanket caveats to cover multiple ships could be forbidden. The plaintiff under this scheme loses the ability to press ahead with the arrest of a ship where there is doubt about the *bona fides* of the caveator. In reality, though, the plaintiff is simply being forced to raise those doubts in court before the issue of the warrant, something that currently happens occasionally anyway in order to avoid the possibility of later having to pay costs and damages.<sup>200</sup>
- *Conclusion.* Except with the leave of the court (and subject to the other safeguards outlined above), the issue of a warrant by the Registrar should be prohibited where a caveat against arrest for an amount not less than that claimed is in force.<sup>201</sup> The onus of determining the existence of such a caveat should lie with the applicant for the warrant rather than with the officers of the court. Similarly, if a caveat is entered after the issue but before the service of a warrant, no obligation should rest upon the Registrar

to attempt to cancel the warrant: the onus should be on the caveator to negotiate with the plaintiff to avoid arrest or apply to the court to set aside the warrant. A caveat should be able to be limited to a particular sum (as now) but also to a particular class of claims (such as wages claims) and to a particular period of time.

## Frivolous and Vexatious Arrests

301. **The Present Position.** The plaintiff in an action *in rem* may commence by arresting a ship, and this may be done even when there is no reason to believe that the defendant is insolvent, will not appear, or will not satisfy the claim. Arrest can be very costly if even a brief delay to the ship's sailing schedule is caused, and it can therefore put considerable pressure upon the owner of the vessel to settle the claim. Because in this regard an action *in rem* is much more plaintiff-oriented than an action *in personam*, the question needs to be asked whether the powers and practices of courts for dealing with frivolous and vexatious claims made *in personam* are adequate for actions *in rem*.<sup>202</sup> In the early history of Australia the answer was apparently no. In 1848 Governor Fitzroy of New South Wales wrote to the Colonial Office of

the objectionable practice ... [that] has been frequently resorted to by some of the unscrupulous practitioners of the Court, of arresting ships or the Commanders thereof on some false plea, just on the eve of their departure from the Colony, in the hope that, rather than incur the expense of detention of the ship, their unjust demands would be satisfied; and there is reason to believe that they have been but too successful in their base attempts thus to defraud the owners of ships trading to the Colony.<sup>203</sup>

The power of the local legislature to provide a remedy was limited by the fact that admiralty was an Imperial matter. Hence the Arrest of Ships Act 1848 (NSW), which was enacted to counter these abuses, affects only arrests 'by any process issuing out of the Vice Admiralty Court of New South Wales for any matter or thing not within the function of the said Court ...'.<sup>204</sup> The Act provides for awards of costs and damages not only against the plaintiff but also against the plaintiffs lawyer (proctor) by any court of competent jurisdiction in the Colony. This Act remains in force in Queensland<sup>205</sup> and legislation to similar effect is still in force in New South Wales.<sup>206</sup> The legislation in both States refers to Vice Admiralty Courts, which no longer exist in Australia. The Colonial Courts of Admiralty Act 1890 (UK) s 2(3) converts references to such courts to references to Colonial Courts of Admiralty. As it is proposed to repeal the 1890 Act in its entirety both State Acts will become inoperative. Apart from any special statutory provision an admiralty court has two types of sanction against a frivolous or vexatious plaintiff, an award of costs and an award of damages. These need to be discussed separately.

- **Costs of Arrest or Bail** The powers of admiralty courts to order one party to bear the legal costs incurred by another party to the action are similar, with one possible exception, to those of other courts. The exception relates to the cost of obtaining bail. In both England and Scotland courts took the view that the commission or fee paid to secure provision of bail was not recoverable under the heading of costs, but only as damages.<sup>207</sup> This position was altered in England in 1900 by amending the rules of court which now allow as costs a commission or fee of not more than 1% of the amount of the bail.<sup>208</sup> More recently Canadian courts have developed a practice of allowing bail costs (not, it seems, limited to 1%) to be claimed as costs.<sup>209</sup> Unlike the English decisions, where bail is merely regarded as something provided for the plaintiffs own convenience, the Canadian court treated it as a step in the proceedings and hence within the ambit of the rule that costs essential for the conduct of the action are recoverable.<sup>210</sup> In Australia the rules of court in some jurisdictions provide that the expense of securing bail is recoverable as a cost without limit,<sup>211</sup> or limited to 1%.<sup>212</sup> But in most jurisdictions no provision is made either in the admiralty rules or, where they are otherwise relevant, in the general rules of the Supreme Court. It may be that Australian courts would follow the Canadian example and treat the costs of obtaining bail as costs in the action. However the matter should be put beyond doubt by incorporating in the draft Rules an equivalent to O 11 r 20 of the High Court Rules. In practice bail is very rarely entered, so that the expense of obtaining bail might be thought not to be something which a litigant could realistically expect to bear on an adverse order for costs even in a jurisdiction where the expense of obtaining bail is included in costs. But this is a matter that can be left to the court's discretion in relation to costs in each case.
- **Damages for Vexatious Arrest.** Because the normal financial burden incurred by a defendant in a frivolous or vexatious action *in personam* is legal costs, this sanction is generally adequate in such

actions. However, where an action is commenced by the arrest of a ship legal costs may be insignificant compared to the costs incurred by having the ship lying idle or having to provide bail or some other type of financial guarantee.<sup>213</sup> Nonetheless admiralty courts will not award damages for what is ultimately shown to be an ill-founded arrest of a ship or cargo unless there is proof of bad faith or what is termed gross negligence (*crassa negligentia*).<sup>214</sup> There appear to be no recent reported cases, presumably because, as Lord Denning observed, ‘there have not been many claims for wrongful arrest recently’.<sup>215</sup> Wrongful arrest is very difficult to prove, so that in practice the vexatious or frivolous plaintiff will seldom need to be concerned with the risk of having to pay damages.<sup>216</sup>

**302. Need for Reform.** The question is whether special provision to deter vexatious or frivolous plaintiffs is required. In some cases the possibility of an adverse award of costs may be an adequate deterrent, even though such an award may be inadequate to compensate the defendant for any arrest which may otherwise have taken place. In order to obtain a warrant of arrest the plaintiff must file an affidavit setting out the basis of the action. Although this imposes no onerous requirements on a plaintiff it may nonetheless have some deterrent effect on the frivolous or vexatious. The provision for entry of a caveat against arrest can also be used to prevent arrest in appropriate cases.<sup>217</sup> In some situations there will be a contractual relationship between the plaintiff and the owner of the vessel it is sought to arrest. The arrest will constitute a breach of contract and damages calculated on ordinary contractual principles will be available to cover loss suffered due to arrest.<sup>218</sup> In England, Canada and New Zealand no special provision has been thought necessary to cater for vexatious arrests. But the Admiralty Jurisdiction Regulation Act 1983 (S Af) s 5(4) provides that ‘any person who ... without good cause obtains the arrest of property or an order of the court, shall be liable to any person suffering loss or damage as a result thereof for that loss or damage’. This is significantly more favourable to the owners or operators of ships than the test currently applied in Australia. It can be argued that it strikes a fairer balance between plaintiff and defendant. In addition it conforms to the principles upon which Mareva injunctions are granted. A central concern in the development of such injunctions as a remedial device has been to strike an equitable balance between the interests of the plaintiff and defendant.<sup>219</sup> Although it can be argued that the present law, combined with the new and more stringent provisions proposed for caveats against arrest (which will actually exclude arrest without an order of the court)<sup>220</sup> will provide an adequate safeguard, opinions expressed to the Commission have generally approved the insertion of some provision equivalent to s 5(4) of the South African Act.<sup>221</sup> However there has been criticism of the breadth and vagueness of the language used in the South African Act,<sup>222</sup> and accordingly the provision in the proposed legislation should attempt to strike a more precise balance between plaintiff and defendant. In particular it should apply only to arrests which are made unreasonably as well as ‘without good cause’, to avoid the possibility of a penalty where the arrest appeared reasonable at the time but turned out to be unjustified. In addition, rather than allowing recovery for anyone suffering loss or damage ‘as a result’ of the arrest as in the South African Act, the right to recover should be restricted to only those parties (or persons with an interest in the property) who have suffered loss or damage as a direct result of the arrest. Third parties (not having an interest in the property) or those suffering consequential loss, would thus be excluded.<sup>223</sup>

**303. Excessive Security; Refusal to Release.** ‘Unjustified arrest does not exhaust the possibilities for excessive behaviour on the part of a plaintiff in an action *in rem*. For example, the threat of what might otherwise be a justifiable arrest might be used to extract excessive security, or demands for excessive security might be made after a justified arrest in order to delay or prevent release. Release might also be unreasonably delayed through the entry of an unwarranted caveat against release by a third party. The latter situation is currently provided for in most rules by a provision for damages for the delay unless there was a ‘good and sufficient’ reason for the entry of the caveat.<sup>224</sup> Demands for excessive security on the other hand are not generally provided for by a specific provision in the rules. It seems clear that, where the amount of security (in whatever form) has not yet been agreed between the parties<sup>225</sup> or where security has actually been provided in the form of bail, an application can be made for moderation of the amount demanded as part of an application for release.<sup>226</sup> In the case of bail that has already been provided (either to prevent arrest or secure release) such an application can also be brought separately.<sup>227</sup> If security has already been provided in a form other than bail, on the other hand, the courts lack jurisdiction to moderate the amount or substitute alternative security, since the security is regarded as having been provided pursuant to a private agreement between the parties.<sup>228</sup> A plaintiff demanding excessive bail is liable for the cost of providing the excess bail,<sup>229</sup> though the plaintiffs liability in the case of excessive security provided in a form not sanctioned by

the court is less clear.<sup>230</sup> Security is not regarded as excessive if it simply turns out to exceed the sum recovered: it must have been an unreasonable amount at the time of the demand.<sup>231</sup>

304. **Conclusion.** There is no good reason to differentiate between an unjustified arrest and an unjustified refusal to release. They have the same effect from the point of view of the defendant. The entry of a caveat against release unreasonably and without good cause should be treated in the same manner as an unreasonable arrest. This will in effect simply maintain the liability to damages prevailing in most Australian rules, though it will define more clearly who is entitled to claim damages from the caveator.<sup>232</sup> The same approach should be adopted for an unreasonable refusal to release by the arresting party. The legislation should also spell out the liability to damages of a party demanding excessive security. The present law provides some safeguards against abuse, but in the light of the expanded right of arrest recommended for the proposed legislation, the responsibility of the arresting party to act in a reasonable manner should be expressly stated in the Act. Excessive demands for security (that is, demands that are unreasonable and without good cause at the time of the demand) should result in a liability for damages in the same manner as for an unreasonable arrest or caveat against release. This approach will also cater for the considerable overlap in practice between unreasonable demands for security and unreasonable arrests or refusals to release. However, excessive demands should only incur liability where the demand takes place after the commencement of proceedings. This will avoid the more speculative claims; the commencement of proceedings is a fixed time known to the plaintiff, and is thus a suitable point from which the obligation under the proposed provision can operate. The power of the court to modify bail should be spelt out in the proposed rules rather than being left to inference or to general court powers as at present. That power should not however be extended to non-court sanctioned agreements: private security arrangements should continue to remain a matter for the parties except to the extent that excessive demands give rise to a right to damages.

# **Appendix A: Draft Legislation**

- Draft Admiralty Bill 1986
- Draft Admiralty (Miscellaneous Provisions) Bill 1986
- Draft Admiralty Legislation: Explanatory Memorandum
- Draft Admiralty Rules

## **ADMIRALTY BILL 1986**

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## A Bill for an Act relating to Admiralty and Maritime Jurisdiction

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

## PART I — PRELIMINARY

### Short title

1. This Act may be cited as the *Admiralty Act 1986*

### Commencement

2. This Act shall come into operation on a day to be fixed by Proclamation.

### Interpretation

3. (1) In this Act, unless the contrary intention appears-

“Australia”, when used in a geographical sense, includes each external Territory;

“Civil Liability Convention” means-

(a) the International Convention on Civil Liability for Oil Pollution Damage done at Brussels on 29 November 1969, a copy of the English text of which is set out in Schedule I to the *Protection of the Sea (Civil Liability) Act 1981*; and

(b) the Protocol to that Convention done at London on 19 November 1976, a copy of the English text of which is set out in Schedule 2 to that Act;

“Federal Court” means the Federal Court of Australia;

“foreign ship” means a ship that is not registered, and is not permitted to be registered, under the *Shipping Registration Act 1981*;

“freight” includes passage money and hire;

“hovercraft” means a vessel that is an air-cushion vehicle, or a similar vehicle, used wholly or principally in navigation by water;

“initiating process” includes a third party notice;

“inland waters” means waters within Australia other than waters of the sea;

“inland waterways vessel” means a vessel that is used or intended to be used wholly on inland waters;

“Liability Convention” means-

(a) the Civil Liability Convention;

(b) the Limitation Convention; or

(c) any other international convention that is in force in relation to Australia and makes provision with respect to the limitation of liability in relation to maritime claims;

“Limitation Convention” means-

(a) the International Convention relating to the limitation of the liability of owners of sea-going ships signed at Brussels on 10 October 1957, a copy of the English text of which is set out in Schedule 6 to the Navigation Act 1912; and

(b) the Protocol amending the International Convention relating to the limitation of the liability of owners of sea-going ships signed at Brussels on 10 October 1957, being the Protocol done at Brussels on 21 December 1979, a copy of the English text of which is set out in Schedule 6A to the *Navigation Act 1912*;

“limitation proceeding” means a proceeding under-

- (a) section 25 of this Act;
- (b) section 335 of the *Navigation Act 1912*; or
- (c) section 10 of the *Protection of the Sea (Civil Liability) Act 1981*;

“master”, in relation to a ship, means a person who has command or charge of the ship;

“member of the crew”, in relation to a ship, means a person employed or engaged in any capacity on board the ship on the business of the ship, other than-

- (a) the master of the ship;
- (b) a person who has the conduct of the ship as the pilot of the ship; or
- (c) a person temporarily employed on the ship in port;

“mortgage”, in relation to a ship or a share in a ship, includes a hypothecation or pledge of, and a charge on, the ship or share, whether at law or in equity and whether arising under the law in force in a part of Australia or elsewhere;

“relevant person”, in relation to a maritime claim, means a person who would be liable on the claim in a proceeding commenced as an action *in personam*;

“sea” includes all waters within the ebb and flow of the tide;

“ship” means a vessel of any kind used or constructed for use in navigation by water, however it is propelled or moved, and includes-

- (a) a barge, lighter or other floating vessel;
- (b) a hovercraft;
- (c) an off-shore industry mobile unit within the meaning of the *Navigation Act 1912*; and
- (d) a vessel that has sunk or is stranded and the remains of such a vessel,

but does not include-

- (e) a seaplane;
- (f) an inland waterways vessel; or
- (g) a vessel under construction that has not been launched;

“this Act” includes the regulations and the rules made under this Act.

(2) A reference in this Act to the time when a proceeding is commenced is a reference to the time when the initiating process in relation to the proceeding is filed in, or issued by, a court.

(3) A reference in this Act to goods, in relation to a ship, includes a reference to the baggage and other possessions of a person who is on the ship, being baggage and possessions that are being carried or are to be carried on the ship.

(4) A reference in this Act to the entering of appearance includes a reference to any like procedure.

(5) A reference in this Act to the costs and expenses of the Marshal includes a reference to the amounts payable to a person acting in accordance with the Rules as a Marshal of a court.

(6) For the purposes of this Act, where-

(a) a proceeding on a maritime claim may be commenced against a ship under a provision of this Act (other than section 19); and

(b) under section 19, a proceeding on the claim may be commenced against some other ship, the other ship is, in relation to the claim, a surrogate ship.

## Maritime claims

4. (1) A reference in this Act to a maritime claim is a reference to a proprietary maritime claim or a general maritime claim.

(2) A reference in this Act to a proprietary maritime claim is a reference to-

- (a) a claim relating to-
  - (i) possession of a ship;
  - (ii) title to, or ownership of, a ship or a share in a ship;
  - (iii) a mortgage of a ship or of a share in a ship; or
  - (iv) a mortgage of a ship's freight;
- (b) a claim between co-owners of a ship relating to the possession, ownership, operation or earnings of the ship;
- (c) a claim for the satisfaction or enforcement of a judgment given by a court (including by a court of a foreign country) against a ship or other property in a proceeding *in rem* in the nature of a proceeding in admiralty; or
- (d) a claim for interest in respect of a claim referred to in paragraph (a), (b) or (c).

**(3)** A reference in this Act to a general maritime claim is a reference to-

(a) a claim for damage done by a ship (whether by collision or otherwise);  
 (b) a claim in respect of the liability of the owner of a ship arising under Part 11 or IV of the *Protection of the Sea (Civil Liability) Act 1981* or under a law of a State or Territory that makes provision as mentioned in sub-section 7(1) of that Act;

(c) a claim for loss of life, or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship;

(d) a claim (including a claim for loss of life or personal injury) arising out of an act or omission of-

(i) the owner or charterer of a ship;  
 (ii) a person in possession or control of a ship; or  
 (iii) a person for whose wrongful acts or omissions the owner, charterer or person in possession or control of a ship is liable,

being an act or omission in the navigation or management of the ship, including an act or omission in connection with-

(iv) the loading of goods on to, or the unloading of goods from, the ship;  
 (v) the embarkation of persons on to, or the disembarkation of persons from, the ship; and  
 (vi) the carriage of goods or persons on the ship;

(e) a claim for loss of, or damage to, goods carried by a ship;

(f) a claim arising out of an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise;

(g) a claim relating to salvage (including life salvage and salvage of cargo or wreck found on land);

(h) a claim in respect of general average;

(j) a claim in respect of towage of a ship;

(k) a claim in respect of pilotage of a ship;

(m) a claim in respect of goods, materials or services (including stevedoring and lightering services) supplied or to be supplied to a ship for its operation or maintenance;

(n) a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched);

(o) a claim in respect of the alteration, repair or equipping of a ship;

(p) a claim in respect of a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of a like kind, in relation to a ship;

(q) a claim in respect of a levy in relation to a ship, including a shipping levy imposed by the *Protection of the Sea (Shipping Levy) Act 1981*, being a levy in relation to which a power to detain the ship is conferred by a law in force in Australia or in a part of Australia;

(r) a claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship;

(s) a claim for an insurance premium, or for a mutual insurance call, in relation to a ship;

(t) a claim by a master, or a member of the crew, of a ship for-

(i) wages; or

(ii) an amount that a person, as employer, is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including by operation of the law of a foreign country;

- (u) a claim for the enforcement of, or a claim arising out of, an arbitral award (including a foreign award within the meaning of the *Arbitration (Foreign Awards and Agreements) Act 1974*) made in respect of a proprietary maritime claim or a claim referred to in one of the preceding paragraphs;
- (v) a claim for interest in respect of a claim referred to in one of the preceding paragraphs.

## **Application**

**5. (1)** Subject to the succeeding provisions of this section, this Act applies to and in relation to-

- (a) all ships, irrespective of the places of residence or domicile of their owners; and
- (b) all maritime claims, wherever arising.

**(2)** This Act does not apply to a proceeding commenced before the commencement of this Act.

**(3)** This Act does not apply in relation to a cause of action that arose-

- (a) in respect of an inland waterways vessel; or
- (b) in respect of the use or intended use of a ship on inland waters.

**(4)** Paragraph (3)(b) does not have effect in relation to a cause of action if, at the time when the cause of action arose, the vessel or ship concerned was a foreign ship.

## **Certain rights not created or affected**

**6.** The provisions of this Act (other than section 34) do not have effect to create-

- (a) a new maritime lien or other charge; or
- (b) a cause of action that would not have existed if this Act had not been passed.

## **External Territories**

**7.** This Act extends to each external Territory.

## **Act to bind Crown**

**8. (1)** This Act binds the Crown in all its capacities.

**(2)** This Act does not authorise-

- (a) a proceeding to be commenced as an action *in rem* against a government ship or government property; or
- (b) the arrest, detention or sale of a government ship or government property.

**(3)** Where a proceeding has been commenced as an action *in rem* against a government ship or government property, the court may, if it is satisfied that the proceeding was so commenced in the reasonable belief that the ship was not a government ship, or the property was not government property-

(a) order that the proceeding be treated as though it were a proceeding commenced as an action *in personam* on the claim against a person specified as defendant in the order; and

- (b) make such consequential orders as are necessary.

**(4)** In this section-

“government ship” means a ship that belongs, or is for the time being demised or sub-demised, to the Commonwealth, a State, the Northern Territory or the Administration of Norfolk Island and includes such a ship that is being used by or in connection with a part of the Defence Force but does not include a ship that belongs, or is for the time being demised or sub-demised, to a trading corporation that is an agency of the Commonwealth, a State, the Northern Territory or the Administration of Norfolk Island;

“government property” means cargo or other property that belongs to the Commonwealth, a State, the Northern Territory or the Administration of Norfolk Island but does not include cargo or other property that belongs to a trading corporation that is an agency of the Commonwealth, a State, the Northern Territory or the Administration of Norfolk Island.

## **PART II — JURISDICTION IN ADMIRALTY**

### **Admiralty jurisdiction *in personam***

**9. (1)** Jurisdiction is conferred on the Federal Court and on the courts of the Territories, and the courts of the States are invested with federal jurisdiction, in respect of proceedings commenced as actions *in personam* -

- (a) on a maritime claim; or
- (b) on a claim for damage done to a ship.

**(2)** Sub-section (1) does not have effect to confer on a court other than the Federal Court or a Supreme Court of a Territory, or to invest a court of a State other than the Supreme Court of a State with, jurisdiction in respect of limitation proceedings.

#### **Jurisdiction of superior courts in respect of Admiralty actions *in rem***

**10.** Jurisdiction is conferred on the Federal Court and on the Supreme Courts of the Territories, and the Supreme Courts of the States are invested with federal jurisdiction, in respect of proceedings that may, under this Act, be commenced as actions *in rem*.

#### **Jurisdiction of other courts in respect of Admiralty actions *in rem***

**11. (1)** The Governor-General may by Proclamation declare a court of a State or of a Territory to be a court to which this section applies.

**(2)** Subject to any condition or limitation (whether as to locality, subject-matter or otherwise) specified in the Proclamation, a court of a State to which this section applies is invested with federal jurisdiction, and jurisdiction is conferred on a court of a Territory to which this section applies, in respect of proceedings that may, under this Act, be commenced as actions *in rem*.

**(3)** Where a Proclamation has been varied or rescinded, the variation or rescission does not deprive a court of jurisdiction to hear and determine a proceeding that was pending in the court at the time of the variation or rescission.

#### **Jurisdiction in associated matters**

**12.** The jurisdiction that a court has under this Act extends to jurisdiction in respect of a matter of Admiralty and maritime jurisdiction not otherwise within its jurisdiction that is associated with a matter in which the jurisdiction of the court under this Act is invoked.

#### **Restriction to Admiralty and maritime jurisdiction**

**13.** This Act does not have effect to confer jurisdiction on a court, or to invest a court with jurisdiction, in a matter that is not a matter of a kind mentioned in paragraph 76(ii) or (iii) of the Constitution.

### **PART III — RIGHTS TO PROCEED IN ADMIRALTY**

#### **Admiralty actions *in rem* to be commenced under this Act**

**14.** In a matter of Admiralty or maritime jurisdiction, a proceeding shall not be commenced as an action *in rem* against a ship or other property except as provided by this Act.

#### **Right to proceed *in rem* on maritime liens, &c.**

**15. (1)** A proceeding on a maritime lien or other charge in respect of a ship or other property subject to the lien or charge may be commenced as an action *in rem* against the ship or property.

**(2)** A reference in sub-section (1) to a maritime lien includes a reference to a lien for-

- (a) salvage;
- (b) damage done by a ship;
- (c) wages of the master, or of a member of the crew, of a ship; or
- (d) master's disbursements.

#### **Right to proceed *in rem* on proprietary maritime claims**

**16.** A proceeding on a proprietary maritime claim concerning a ship or other property may be commenced as an action *in rem* against the ship or property.

### **Right to proceed *in rem* on owner's liabilities**

**17.** Where, in relation to a general maritime claim concerning a ship or other property, a relevant person-

(a) was, at the time when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property; and

(b) is, at the time when the proceeding is commenced, the owner of the ship or property, a proceeding on the claim may be commenced as an action *in rem* against the ship or property.

### **Right to proceed *in rem* on demise charterer's liabilities**

**18.** Where, in relation to a maritime claim concerning a ship, a relevant person-

(a) was, at the time when the cause of action arose, the owner or charterer, or in possession or control, of the ship; and

(b) is, at the time when the proceeding is commenced, a demise charterer of the ship, a proceeding on the claim may be commenced as an action *in rem* against the ship.

### **Right to proceed *in rem* against surrogate ship**

**19.** A proceeding on a general maritime claim concerning a ship may be commenced as an action *in rem* against some other ship if-

(a) a relevant person in relation to the claim was, at the time when the cause of action arose, the owner or charterer of, or in possession or control of, the first-mentioned ship; and

(b) that person is, at the time when the proceeding is commenced, the owner of the second-mentioned ship.

### **Service on and arrest of only one ship**

**20. (1)** Where service of initiating process in a proceeding commenced as mentioned in section 15, 17, 18 or 19 has been effected on a ship, service of initiating process in the proceeding may not be effected on some other ship unless the service on the first-mentioned ship has been set aside or the proceeding, so far as it relates to that ship, has been discontinued, dismissed or struck out.

**(2)** Where service of initiating process in a proceeding commenced as mentioned in section 15, 17, 18 or 19 has been effected on a ship, service of initiating process in some other proceeding on the same claim commenced as mentioned in any of those sections may not be effected on any other ship unless the first-mentioned proceeding has been discontinued, dismissed or struck out.

**(3)** Where a ship has been arrested in a proceeding commenced as mentioned in section 15, 17, 18 or 19, no other ship shall be arrested in the proceeding unless the first-mentioned ship-

(a) having been invalidly arrested, has been released from arrest; or

(b) has been unlawfully removed from the custody of the Marshal and the Marshal has not regained custody of the ship.

**(4)** Where-

(a) a person has a claim that is both-

(i) a claim on a maritime lien or other charge; and  
(ii) a general maritime claim,

in respect of a ship; and

(b) the person has commenced a proceeding under section 19 against a surrogate ship, sub-section (3) does not prevent the arrest of the first-mentioned ship in a proceeding on the maritime lien or other charge if the amount recovered by the person in the proceeding commenced under section 19 is less than the amount of the claim on the maritime lien or other charge.

### **Re-arrest**

**21. (1)** A ship or other property arrested in a proceeding on a maritime claim may not be re-arrested in the proceeding in relation to the claim unless the court so orders, whether because default has been made in the performance of a guarantee or undertaking given to procure the release of the ship or property from the earlier arrest or for some other sufficient reason.

**(2)** An order under sub-section (1) may be made subject to such conditions as are just.

### **Service and arrest out of jurisdiction**

**22. (1)** Subject to sub-section (4)-

(a) initiating process in a proceeding commenced as an action *in rem* in the Federal Court may be served on a ship or other property; and

(b) a ship or other property may be arrested in such a proceeding, at any place within Australia, including a place within the limits of the territorial sea of Australia.

**(2)** Subject to sub-section (4), initiating process in a proceeding commenced as an action *in rem* in a court of a State or a Territory may be served on a ship or other property-

(a) if, at a time when the process was effective for service, the ship or property was within the locality within which the court may exercise jurisdiction- at any place within Australia, including a place within the limits of the territorial sea of Australia; or

(b) in any case- at any place within the State or Territory, including a place within the limits of the territorial sea of Australia that is adjacent to the State or Territory.

**(3)** Subject to sub-section (4), in a proceeding commenced as an action *in rem* in a court of a State or Territory, a ship or other property may be arrested at any place within Australia, including a place within the limits of the territorial sea of Australia.

**(4)** Where the arrest of a foreign ship, or of cargo on board a foreign ship, would be inconsistent with a right of innocent passage that is being exercised by the ship, this Act does not authorise the service of process on the ship or the arrest of the ship or cargo.

**(5)** For the purposes of this section-

“innocent passage” has the meaning it has under the Convention on the Territorial Sea and the Contiguous Zone done at Geneva on 29 April 1958, a copy of the English text of which is set out in Schedule I to the *Seas and Submerged Lands Act 1973*;

“territorial sea of Australia” means the territorial sea of Australia as declared under sub-section 7(1) of the *Seas and Submerged Lands Act 1973*.

### **Service and Execution of Process Act not to apply**

**23.** *The Service and Execution of Process Act 1901* does not apply to the service of initiating process on, or the arrest of, a ship or other property under this Act.

### **Proceeds**

**24.** Where, but for the sale of a ship or other property under this Act, a proceeding could have been commenced as an action *in rem* against the ship or property, the proceeding may be commenced as an action *in rem* against the proceeds of the sale that have been paid into a court under this Act.

### **Limitation of Liability under Liability Conventions**

**25. (1)** A person who apprehends that a claim for compensation under a law (including a law of a State or a Territory) that gives effect to provisions of a Liability Convention may be made against the person by some other person may apply to the Federal Court to determine the question whether the liability of the first-mentioned person in respect of the claim may be limited under that law.

**(2)** Sub-section (1) does not affect the jurisdiction of any other court.

**(3)** Jurisdiction is conferred on the Federal Court in respect of proceedings under sub-section (1).

**(4)** On an application under sub-section (1), the Federal Court may, in accordance with the law referred to in that sub-section-

(a) determine whether the applicant’s liability may be so limited and, if it may be so limited, determine the limit of that liability;

(b) order the constitution of a limitation fund for the payment of claims in respect of which the applicant is entitled to limit his or her liability; and

(c) make such orders as are just with respect to the administration and distribution of that fund.

(5) Where a court has jurisdiction under this Act in respect of a proceeding, that jurisdiction extends to entertaining a defence in the proceeding by way of limitation of liability under a law that gives effect to provisions of a Liability Convention.

### **Proceedings under Civil Liability Convention**

26. A proceeding under this Act on a maritime claim referred to in paragraph 4(3)(b) shall not be brought otherwise than in accordance with paragraphs I and 3 of Article IX of the Civil Liability Convention, whether or not the proceeding also relates to a maritime claim or to a maritime lien or other charge.

## **PART IV — TRANSFER AND REMITTAL OF PROCEEDINGS**

### **Transfer**

27. (1) Where a proceeding commenced under this Act is pending in the Federal Court, in the Supreme Court of a State or Territory or in a court of a State or Territory that is exercising jurisdiction under section 11, the court (in this section called the first court) may, at any stage of the proceeding, upon application or of its own motion, by order, transfer the proceeding to some other court that has jurisdiction under this Act with respect to the subject-matter of the claim (in this section called the second court).

(2) Sub-section (1) does not authorise the transfer of a proceeding commenced as an action *in rem* to a court that does not, apart from the operation of sub-section 28(7), have jurisdiction in respect of proceedings so commenced.

(3) Where a proceeding has been so transferred, the second court shall proceed as if-

- (a) the proceeding had been commenced in that court;
- (b) the same or the like steps in the proceeding had been taken in that court as were taken in the first court; and
- (c) the orders and directions made by the first court in the proceeding had been made by the second court.

### **Remittal**

28. (1) Where a proceeding commenced under this Act as an action *in rem* against a ship or other property is pending in the Federal Court or in the Supreme Court of a State, the court may, at any stage of the proceeding, upon application or of its own motion, remit the proceeding for hearing to-

(a) a court of a State; or

(b) if service of the initiating process was effected on the ship or property in a Territory- a court of that Territory,

being a court that would have had jurisdiction in respect of the proceeding if-

(c) the proceeding had been commenced in that court as an action *in personam*; and

(d) service of initiating process in that proceeding had been effected within the locality within which the court to which the proceeding is remitted may exercise jurisdiction.

(2) Where a proceeding commenced under this Act as an action *in rem* is pending in the Supreme Court of a Territory, the court may, at any stage of the proceeding, upon application or of its own motion, remit the proceeding for hearing to some other court of the Territory that would have had jurisdiction in respect of the proceeding if-

(a) the proceeding had been commenced in that court as an action *in personam*; and

(b) service of initiating process in that proceeding had been effected in that Territory.

(3) The court from which the proceeding is remitted (in this section called the first court) may give such orders or directions as are appropriate in relation to the further steps to be taken in the proceeding and, subject to any such orders and directions, the court to which the proceeding is remitted (in this section called the second court) may give orders and directions of a like kind.

(4) Where a proceeding has been so remitted, then, subject to any orders and directions given under sub-section (3), the second court shall proceed as if-

- (a) the proceeding had been commenced in that court;
- (b) the same or the like steps in the proceeding had been taken in the second court as were taken in the first court; and
- (c) the orders and directions made by the first court in the proceeding had been made by the second court.

(5) The first court shall give effect to a judgment or order given in the proceeding, being a judgment or order that finally disposes of the proceeding, as though that judgment or order were a judgment or order of that court in the proceeding.

(6) Sub-section (5) does not affect-

- (a) a right of appeal that a party to the proceeding has; or
- (b) the power of a court to stay execution pending an appeal.

(7) A court to which a proceeding has been remitted under this section is invested with federal jurisdiction, or, if that court is a court of a Territory, jurisdiction is conferred on that court, in respect of the proceeding.

### **Security in relation to stayed or dismissed proceedings**

29. (1) Where-

(a) it appears to the court in which a proceeding commenced under this Act is pending that the proceeding should be stayed or dismissed on the ground that the claim concerned should be determined by arbitration (whether in Australia or elsewhere) or by a court of a foreign country; and

(b) a ship or other property is under arrest in the proceeding,

the court may order that the proceeding be stayed on condition that the ship or property be retained by the court as security for the satisfaction of any award or judgment that may be made in the arbitration or in a proceeding in the court of the foreign country.

(2) Sub-section (1) does not limit any other power of the court.

(3) The power of the court to stay or dismiss a proceeding commenced under this Act includes power to do so on such conditions as are just, including a condition-

(a) with respect to the institution or prosecution of the arbitration or proceeding in the court of the foreign country; and

(b) that equivalent security be provided for the satisfaction of any award or judgment that may be made in the arbitration or in the proceeding in the court of the foreign country.

(4) Where a court has made an order under sub-section (1) or (3), the court may make such interim or supplementary orders as are appropriate in relation to the ship or property for the purpose of preserving-

- (a) the ship or property; or
- (b) the rights of a party or of a person interested in the ship or property.

(5) Where-

(a) a ship or other property is under arrest in a proceeding;

(b) an award or judgment as mentioned in sub-section (1) has been made in favour of a party; and

(c) apart from this section, the award or judgment is enforceable in Australia, then, in addition to any other proceeding that may be taken by the party to enforce the award or judgment, the party may apply to the court in the stayed proceeding for an appropriate order in relation to the ship or property to give effect to the award or judgment.

### **Power to deal with ship or other property**

30. (1) This section applies where-

- (a) a proceeding has been transferred or remitted under the preceding provisions of this Part; and
- (b) a ship or other property is under arrest in the proceeding.

(2) The court from which the proceeding was transferred or remitted-

(a) may deal with the ship or property as though it were under arrest in a proceeding that had not been so transferred or remitted; and

(b) may make such orders as are necessary or convenient for transferring the custody of the ship or property to the court to which the proceeding has been so transferred or remitted.

(3) Notwithstanding any other provision of this Act, an order made under sub-section (2) has effect according to its tenor.

(4) Where a court has made an order under paragraph (2)(b), the court to which the proceeding has been transferred or remitted has the same powers in relation to the ship or property as it has in relation to a ship or other property that is under arrest in a proceeding commenced in that court.

## PART V — MISCELLANEOUS

### Effect of judgment

31. (1) Where judgment is given for the plaintiff in a proceeding on a maritime claim commenced as an action *in rem* against a ship or other property, the extent to which a defendant in the proceeding who has entered an appearance and is a relevant person in relation to the claim is personally liable on the judgment is not limited by the value of the ship or property.

(2) Where judgment is given for the plaintiff in a proceeding on a maritime claim commenced as an action *in rem* against a ship or other property, a defendant in the proceeding who has entered an appearance and is not a relevant person in relation to the claim is not personally liable on the judgment for the payment of money in respect of the claim except so far as the judgment is for costs against that defendant.

(3) Sub-section (2) does not prevent the sale, under this Act, of a ship or other property that is under arrest in a proceeding.

### Powers of Federal Court in relation to register

32. In a proceeding in the Federal Court on a proprietary maritime claim, the orders that the court may make include orders of the kind that a court may make under section 59 of the Shipping Registration Act 1981.

### Co-ownership disputes

33. In a proceeding on a maritime claim between co-owners of a ship relating to the possession, ownership, operation or earnings of the ship, the orders that the court may make include-

- (a) orders for the settlement of accounts outstanding and unsettled; and
- (b) an order directing that the ship, or a share in the ship, be sold.

### Damages for unjustified arrest, &c.

34. (1) Where, in relation to a proceeding commenced under this Act-

- (a) a party unreasonably and without good cause-
  - (i) demands excessive security in relation to the proceeding; or
  - (ii) obtains the arrest of a ship or other property under this Act; or

(b) a party or other person unreasonably and without good cause fails to give a consent required under this Act for the release from arrest of a ship or other property,  
the party or person is liable in damages to a party to the proceeding, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result.

(2) The jurisdiction of a court in which a proceeding was commenced under this Act extends to determining a claim arising under sub-section (1) in relation to the proceeding.

### Priorities: general maritime claims

35. (1) Where-

(a) a proceeding in respect of a general maritime claim concerning a ship has been commenced under this Act against a surrogate ship; or

(b) in relation to a proceeding commenced under this Act concerning a ship, a surrogate ship has been arrested,  
the order in which general maritime claims against both the ships shall be paid out of the proceeds of the sale of the surrogate ship shall be determined as if all the claims were general maritime claims against the surrogate ship.

(2) Sub-section (1) applies notwithstanding the provisions of any other law, including a law of a State or Territory.

#### **Statutory powers of detention**

**36. (1)** This section applies where-

(a) a law other than this Act (including a law of a State or Territory) confers on a person a power to detain a ship in relation to a civil claim; and  
(b) a proceeding on the civil claim may be commenced as an action *in rem* against the ship.

(2) Where the ship is under arrest under this Act, the power to detain the ship may not be exercised.

(3) The exercise of the power to detain the ship does not prevent the arrest of the ship under this Act.

(4) Where a ship that has been detained under such a power is arrested under this Act, then, by force of this sub-section, the detention is suspended for so long as the ship is under arrest.

(5) Where a ship that has been detained or would, but for sub-section (2), be liable to be detained, under such a power is arrested and sold under this Act, the civil claim is, unless the court otherwise directs, payable in priority to any claim against the ship other than the claim of a Marshal for expenses.

#### **Limitation periods**

**37. (1)** A proceeding may be brought under this Act on a maritime claim, or on a claim on a maritime lien or other charge, at any time before the end of-

(a) the limitation period that would have been applicable in relation to the claim if a proceeding on the claim had been brought otherwise than under this Act; or  
(b) if no proceeding on the claim could have been so brought- a period of 3 years after the cause of action arose.

(2) Sub-section (1) does not apply if a limitation period is fixed in relation to the claim by an Act, an Imperial Act, an Act of a State or an Act or Ordinance of a Territory, including such an Act or Ordinance in its application in a part of Australia.

(3) Where-

(a) but for this sub-section, a court would not have power to extend a limitation period in respect of a maritime claim or a claim of a particular kind on a maritime lien or other charge; and  
(b) the court has power to extend a limitation period in respect of a claim of the same kind, then, by force of this sub-section, the court has power, exercisable in the same way, and in the same kinds of circumstances, as the power referred to in paragraph (b), to extend the period fixed by sub-section (1) in respect of maritime claims, or claims on maritime liens or other charges, of a kind referred to in that sub-section.

(4) The absence of the ship or property concerned from the locality in which the court may exercise jurisdiction shall not be taken into account in relation to the exercise of the power conferred by sub-section (3).

(5) The law relating to laches does not apply in relation to a claim brought within a period fixed by or under this section.

#### **Mode of trial**

**38.** A proceeding under this Act commenced as an action *in rem*, a limitation proceeding and a proceeding under this Act that is associated with a proceeding under this Act commenced as an action *in rem* or a limitation proceeding shall be tried without a jury.

#### **Jurisdictional limits**

**39. (1)** Subject to any Proclamation made under sub-section 11(2), where a court of a State is invested with jurisdiction in relation to a proceeding commenced as an action *in rem*, or such jurisdiction is conferred on a court of a Territory, by or under a provision of this Act, then-

(a) in the case of a court of a State- the court is invested with the jurisdiction within the limits of the jurisdiction of that court as to the amount claimed and as to remedies, but not otherwise; and

(b) in the case of a court of a Territory- the jurisdiction is conferred on the court only so far as the Constitution permits and within the limits of the jurisdiction of that court as to the amount claimed, as to locality and as to remedies, but not otherwise.

(2) Where a court of a State is invested with jurisdiction in relation to a proceeding commenced under section 9 or such jurisdiction is conferred on a court of a Territory, the jurisdiction is invested or conferred within the limits of the jurisdiction of the court concerned and, in the case of a court of a Territory, only so far as the Constitution permits.

(3) Section 15C of the *Acts Interpretation Act 1901* does not apply in relation to proceedings to which this section applies.

#### **Courts to act in aid of each other**

**40.** All courts having jurisdiction under this Act, the judges of those courts and the officers of or under the control of those courts shall severally act in aid of, and be auxiliary to, each other in all matters arising under this Act.

#### **Rules**

**41. (1)** The Governor-General may make Rules, not inconsistent with this Act, making provision in relation to the practice and procedure to be followed in courts exercising jurisdiction under this Act and matters incidental to such practice and procedure.

(2) In particular, the Rules may make provision in relation to-

- (a) pleading;
- (b) parties;
- (c) appearance;
- (d) the service and execution of process;
- (e) bail;
- (f) caveats against arrest or release of ships and other property;
- (g) the arrest, custody and sale of ships and other property;
- (h) the furnishing of security;
- (j) the forms to be used;
- (k) records and registers and inspections of those records and registers;
- (m) limitation proceedings, including-
  - (i) the parties to those proceedings; and
  - (ii) the operation of determinations made in those proceedings;
- (n) evidence; and
- (o) enforcement and satisfaction of judgments of courts in matters under this Act.

(3) The Rules may prescribe penalties, not exceeding ... for offences against the Rules.

(4) Jurisdiction is conferred on the Federal Court and on the courts of the Territories, and the courts of the States are invested with federal jurisdiction, in respect of matters arising under the Rules.

(5) Part XII of the *Acts Interpretation Act 1901* applies in relation to Rules made under this section as it applies in relation to regulations.

**Rules committee**

**42. (1)** The Attorney-General may constitute a committee consisting of not more than 7 persons to advise the Attorney-General with respect to the Rules and may appoint a member of the committee to preside at meetings of the committee.

**(2)** The members of the committee shall include a Judge of the Supreme Court of a State or Territory and a Judge of the Federal Court.

**(3)** Subject to the directions, if any, of the Attorney-General, the procedure of the committee shall be as the committee determines.

**Regulations**

**43.** The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters-

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

## Appendix B: List of Written Submissions

1	GJ Lindell, Australian National University	16 December 1992
2	Professor DHN Johnson, University of Sydney	7 February 1983
3	P Foss, Stone James Stephen Jaques, Perth	4 May 1983
4	HG Fryberg QC, Brisbane	19 May 1983
5	Ebsworth & Ebsworth/Conaust (Australia) Pty Ltd	16 September 1983
6	Maritime Law Association of Australia & New Zealand	5 October 1983
7	D Shaw QC, South African Law Commission	23 August 1983
8	D Shaw QC, South African Law Commission	23 January 1984
9	NJ Harper, Qld Minister for Justice and Attorney-General	27 January 1984
10	PA Cornford, New Zealand Crown Law Office	15 March 1984
11	Professor DC Jackson, University of Southampton	31 May 1984
12	The Hon Sir Nigel Bowen, Chief Judge, Federal Court of Australia	25 July 1984
13	MA Hill, General Manager, Associated Marine Insurers Australia Pty Ltd	14 August 1984
14	PA Cornford, New Zealand Crown Law Office	5 September 1984
15	Garnock Engineering Company Pty Ltd	21 September 1984
16	Captain KT Butterworth RN, Director of Naval Legal Services	30 October 1984
17	The Hon Justice B McPherson, Chairman, Queensland Law Reform Commission	3 December 1984
18	Professor DHN Johnson, University of Sydney	15 January 1985
19	MA Hill, General Manager, Associated Marine Insurers Agents Pty Ltd	16 January 1985
20	D Shaw QC, South African Law Commission	15 January 1985
21	GPM Dabb, Attorney-General's Department	18 December 1985
22	The Hon Justice B Sheen, Admiralty Court, United Kingdom	29 January 1985
23	PG Willis, Deputy Corporate Solicitor, BHP Co Ltd	12 February 1985
24	D Shaw QC, South African Law Commission	13 February 1985
25	Professor DC Jackson, University of Southampton	14 February 1985
26	AW Wise, Department of Transport	12 February 1985
27	MA Hill, General Manager, Associated Marine Insurers Agents Pty Ltd	14 February 1985
28	MR Blair, President, Australian Shippers' Council	19 February 1985
29	The Rt Hon Sir Harry Gibbs, Chief Justice, High Court of Australia	21 February 1985
30	PA Cornford, New Zealand Crown Law Office	25 February 1985
31	Ebsworth & Ebsworth, Sydney	1 March 1985
32	AB Willings, Chairman, Universal Shipbrokers (Australia) Pty Ltd	6 March 1985
33	MA Hill, General Manager, Associated Marine Insurers Agents Pty Ltd	13 March 1985
34	JR Randall, P & O Australia Ltd	13 March 1985
35	M Calder, Dawson Waldron, Sydney	18 March 1985
36	South Australian Crown Solicitor	18 March 1985
37	B Davenport QC, Law Commission for England and Wales	19 March 1985
38	The Hon Justice B Sheen, Admiralty Court, United Kingdom	21 March 1985
39	D Shaw QC, South African Law Commission	25 March 1985

40	PM Troop QC, Canadian Department of Justice	26 March 1985
41	WE Paterson QC, Melbourne	1 April 1985.
42	S Westgarth, Westgarth Baldick, Sydney	12 April 1985
43	MWD White, Barrister, Brisbane	26 April 1985
44	MA Hill, General Manager, Associated Marine Insurers Agents Pty Ltd	29 April 1985
45	FG Turner, Hon Secretary, Maritime Law Association of Australia and New Zealand, Qld Branch	29 April 1985
46	JJ Hockley, Hon Secretary, Law Reform Committee of the Victorian Bar	23 April 1985
47	The Hon Sir Harry Gibbs, Chief Justice, High Court of Australia	16 May 1985
48	The Hon T Sheahan MLA, NSW Attorney General	23 May 1985
49	DJL Watkins, Secretary, British Maritime Law Association	12 June 1985
50	South Australian Crown Solicitor	2 October 1985
51	The Hon Justice DA Yeldham, Supreme Court of NSW	10 October 1985
52	MA Hill, General Manager, Associated Marine Insurers Agents Pty Ltd	11 October 1985
53	MR Blair, President, Australian Shippers' Council	31 October 1985
54	Professor DC Jackson, University of Southampton	28 October 1985
55	SD Westgarth, Westgarth Baldick, Sydney	1 November 1985
56	The Hon Sir John Young, Chief Justice, Supreme Court of Victoria	4 November 1985
57	FMB Reynolds, Gen Editor, Lloyd's Maritime and Commercial Law Quarterly	6 November 1985
58	CJ Blower, Department of Transport	7 November 1985
59	Dr J Wong, Tasmanian State Institute of Technology	10 November 1985
60	R Salter and A Tulloch, Phillips Fox, Melbourne	12 November 1985
61	AT Scotford, Ebsworth & Ebsworth, Sydney	18 November 1985
62	WE Paterson QC, Melbourne	18 November 1985
63	The Hon Sir Laurence Street, Chief Justice, Supreme Court of NSW	20 November 1985
64	JP Marchant, Mouldens, Adelaide	13 November 1985
65	RS Kneebone, Legal Manager, Australian National Line	14 November 1985
66	The Hon DG Andrews, Chief Justice, Supreme Court of Queensland	14 November 1985
67	PA Cornford, New Zealand Crown Law Office	14 November 1985
68	PG Willis, Deputy Corporate Solicitor, BHP Co Ltd	15 November 1985
69	The Hon Justice KJ Carruthers, Supreme Court of NSW	27 November 1985
70	R Cooper QC, Brisbane	6 December 1985
71	The Hon LJ King, Chief Justice, Supreme Court of South Australia	10 December 1985
72	The Hon RW Fox, Chief Justice, Supreme Court of Norfolk Island	10 December 1985
73	The Hon T Sheahan MLA, NSW Attorney General	16 December 1985
74	The Hon Justice B Sheen, Admiralty Court, United Kingdom 6 January 1986	
75	The Hon NJ Harper MP, Qld Minister for Justice and Attorney-General	7 January 1986
76	DJL Watkins, Secretary, International Group of P & I Clubs	22 January 1986
77	South Australian Crown Solicitor	5 February 1986
78	P Foss, Stephen Jaques Stone James, Perth	6 February 1986

79	The Hon Justice IF Sheppard, Federal Court of Australia	24 February 1986
80	MM Cohen, Burlingham Underwood & Lord, New York	29 January 1986
81	PG Willis, Deputy Corporate Solicitor, BHP Co Ltd	15 April 1986
82	W McK Ross, Executive Secretary, National Bulk Commodities Group	18 April 1986
83	P Foss, Stephen Jaques Stone James, Perth	22 April 1986
84	PG Willis, Deputy Corporate Solicitor, BHP Co Ltd	30 April 1986
85	W McK Ross, Executive Secretary, National Bulk Commodities Group	9 May 1986
86	Australian Mining Industry Council	13 May 1986

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## Chapter 1

1 On the Joint Committee's Report see the note in (1982) 56 *ALJ* 617. Three members of the Committee prepared a Supplementary Memorandum advocating further provision for arrest of 'sister ships' including ships under charter.

2 See the Hon Justice H Zelling, 'Of Admiralty and Maritime Jurisdiction' (1982) 56 *ALJ* 101, and 'Constitutional Problems of Admiralty Jurisdiction' (1984) 58 *ALJ* 8.

3 See Australian Law Reform Agencies Conferences 1981-83, *Minutes and Records*, AGPS, Canberra, 1984, 179-82.

4 Zelling (1984).

5 Crawford, 'Admiralty Jurisdiction in Australia: The Australian Law Reform Commission's Reference' (1983) 1(2) *MLAANZJ* 4.

6 See [1983] *Reform* 86. This was a request for advice rather than a formal reference to the QLRC. This Commission has been kept informed of the QLRC's work on the topic.

7 These research Papers were as follows:

- Ad RP 1 (S Curran and D Cremeann), *An Australian Admiralty Act: The Ambit of Admiralty Jurisdiction*, November 1984.
- Ad RP 2 (S Curran), *Admiralty Jurisdiction in Australia: The Courts Exercising Original and Appellate Jurisdiction*, June 1984.
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8 Admiralty Act 1973 (NZ), following the Report of the Special Law Reform Committee (Chairman: Beattie J), *Admiralty Jurisdiction*, Wellington, 1972. See DJ Beattie, 'The Admiralty Act 1973' (1976) *NZLJ* 365.

9 Federal Court Act 1970 (Can). See DN Rogers, 'Admiralty Jurisdiction in Canada: Is there a Need for Reform?' (1985) 16 *JMLC* 467.

10 International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships, Brussels, 10 May 1952, 439 *UNTS* 193.

11 See DC Jackson, 'Admiralty Jurisdiction — The Supreme Court Act 1981' [1982] *LMCLQ* 236.

12 The meeting produced a Draft Revision of the Brussels Convention of 1952: see LIS/ARREST — 30 (1985). See further para 94.

13 Act No 105 of 1983. See South African Law Commission, *Report on the Review of the Law of Admiralty*, Project 32, 1982; H Staniland, 'The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa' [1985] *LMCLQ* 462

14 See Ad RP 5 (S Curran), *Prize Law, Jurisdiction and Procedure*, December 1984.

## Chapter 2

1 RG Marsden, *Select Pleas in the Court of Admiralty*, Selden Society, London, 1894, vol 1, xiv. On the history of the Court generally see also W Holdsworth, *A History of English Law*, 7th edn, Methuen, London, 1956, vol 1, 544-68; FL Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800*, CUP, London, 1970, 4-11; CW O'Hare, 'Admiralty Jurisdiction' (1979) 6 *Monash ULR* 91, 195.

2 The background is described in R v Keyn (1876) 2 Ex D 63, 167-8.

3 13 Ric II, st 1, c 5, repealed in England by the Statute Law Revision and Civil Procedure Act 1881 (UK) as being spent. But the repeal 'shall not affect ... any jurisdiction ... established or confirmed ... under any enactment repealed by this Act' (s 4). Earlier in the 19th century various Acts had effected partial implied repeals of the 1389 Act: see particularly Admiralty Courts Act 1840 (UK) s 6. The South Australian Law Reform Committee, Report No 61, *Inherited Imperial Law and Civil Jurisdiction and Procedure of the Supreme Court*, 1980, 7 recommended against repeal of the 1389 Act: 'we think that the statute should remain for the time being until the whole question of admiralty jurisdiction has been dealt with'. Contrast NSWLRC, Report No 4, *Application of Imperial Acts*, 1967, 76-7; ACTLRC, Report on Imperial Acts in Force in the Australian Capital Territory, 1973, 27, which recommended repeal. In NSW the repeal was effected by the Imperial Acts Application Act 1969 (NSW). There has not yet been any repeal in the ACT. For Victoria see Imperial Acts Application Acts 1922 and 1980 (Vic).

4 15 Ric 11, c 3, repealed in England as to the part quoted (ie, civil jurisdiction) by the Civil Procedure Acts Repeal Act 1879 (UK). As to the Australian position, all the points made in n 3 apply. The Imperial Acts Application Act 1922 (Vic) s 6 read with Schedule 2 preserves the status quo with respect to this Act: it makes no reference to 13 Ric II, st 1, c 3. Both the 1389 and 1391 Acts are listed in ACT, Table of Imperial and New South Wales Acts that could be in force in the Territory, AGPS, Canberra, 1983.

- 5      2 Hen IV, c 11. This Act was repealed by the Admiralty Court Act 1861 (UK) s 31 and is therefore no longer in force in Australia. While  
6      noting this, the SALRC 61, 7 recommended in 1980 that ‘for certainty it might be as well to repeal it in South Australia’.
- 7      RG Marsden, *Select Pleas in the Court of Admiralty*, Selden Society, London, 1897, vol 2, lvii-lix.
- 8      id, lvii-lviii.
- 9      id, xli.
- 10     Holdsworth (1956) 553; O’Hare (1979) 94-5.
- 11     Marsden (1897) xli; O’Hare (1979) 93-4.
- 12     id, 550.
- 13     Thomlinson’s Case (1605) 12 Co Rep 104; 77 ER 1379.
- 14     Holdsworth (1956) 553.
- 15     id, 555.
- 16     id, 556.
- 17     Wiswall (1970) 6.
- 18     id, 7.
- 19     See the Frauds by Boatmen Act 1813 (53 Geo 111, c 87) (UK); Wiswall (1970) 22.
- 20     s 3.
- 21     s 4, 6.
- 22     s 18.
- 23     s 14, 15.
- 24     s 4, 6, 8
- 25     s 35.
- 26     Administration of Justice Act 1920 (UK) consolidated in Supreme Court of Judicature (Consolidation) Act 1925 (UK) s 22-3.  
439 UNTS 217, 193 respectively. See para 5.
- 27     s 6, 20-4, 62. The Administration of Justice Act 1956 (UK) continues to apply in Scotland and in some British colonies, including Hong Kong.
- 28     See First Report of the Commission on the Judicature, British Parliamentary Papers, 1868-74, 7, 9; O’Hare (1979) 108-9.
- 29     Administration of Justice Act 1970 (UK) s 2. See now Supreme Court Act 1981 (UK) s 6.
- 30     Wiswall (1970) 155.
- 31     (1851) 7 Moo PC 267, 283-5; 13 ER 884, 890-1.
- 32     See The Henrich Bjorn (1886) 11 App Cas 270, 283 (Lord Bramwell), 286 (Lord Fitzgerald) where it is asserted that the proposition was inaccurate even as regards the pre-1840 jurisdiction of admiralty. As a contemporary writer put it, ‘[t]he question has been much agitated whether during the period immediately preceding the extension of its jurisdiction, which was begun in 1840, the Court of Admiralty entertained suits in rem in any case in which there was not an existing maritime lien’: J Mansfield, ‘Maritime Lien’ (1888) 4 LQR 379, 381. See also para 46 n 73 on the doubtful status of the maritime lien for pilotage. However the proposition was and remains accurate for the admiralty law of the United States.
- 33     See eg The Two Ellens (1871) LR 3 A & E 345, 355-7 where Sir Robert Phillimore traces the various shifts in the view of his predecessor, Dr Lushington, on the point. See also The Heinrich Bjorn (1885) 10 PD 44, 60 (Fry LJ) for another survey.
- 34     eg, Admiralty Court Act 1840 (UK) s 5 which removed the exclusion of admiralty jurisdiction over collisions occurring within the body of a county.
- 35     The Two Ellens (1872) LR 4 PC 161, 167 (PC); The Henrich Bjorn (1886) 11 App Cas 270, 282-3 (Lord Bramwell); The Sara (1889) 14 App Cas 209, 216 (Lord Halsbury).
- 36     The Two Ellens (1872) LR 4 PC 161; The Pieve Superiore (1874) LR 5 PC 482; The Henrich Bjorn (1886) It App Cas 270.
- 37     But cf no 33.
- 38     On terminology see The St Merriel [1963] P 247, 253 (Hewson J); The Monica S [1968] P 741, 768 (Brandon J). See also DC Jackson, *Enforcement of Maritime Claims*, Lloyd’s of London Press, London, 1985, 253-5.
- 39     On the other hand once proceedings have been commenced on a statutory right of action in rem they are not defeated by subsequent sale of the res (even if it has not been served): The Monica S [1968] P 741. There is thus a form of security interest once proceedings are commenced, which is sometimes referred to as a ‘statutory lien’.
- 40     G Price, ‘Statutory Rights in rem in English Admiralty Law’ (1945) 27 J of Comp Leg & Int Law 21, 24.
- 41     Mansfield (1888) 379. But there is nothing inevitable about this distinction between maritime liens and statutory rights in rem : cf ibid; Price (1945) 24.
- 42     See eg The Mary Ann (1865) LR 1 A & E 8; The Pieve Superiore (1874) LR 5 PC 482; The Henrich Bjorn (1886) 11 App Cas 270, 277 (Lord Watson) 283 (Lord Bramwell) (the Admiralty Court Act 1861 (UK) gave, as it says, jurisdiction and jurisdiction only’).
- 43     See eg The Henrich Bjorn (1886) 11 App Cas 270, 278 (Lord Watson). See also The Monica S [1968] P 741, 768 (Brandon J) (‘a statutory right of action in rem is a procedural right’). But cf Jackson (1985) 253-5, pointing out that both classes of right are as much substantive as procedural.
- 44     (1886) 11 App Cas 270, 278. See also The Alexander (1842) 1 Wm Rob 346, 360; 166 ER 602, 608 (Dr Lushington).
- 45     (1851) 7 Moo PC 267; 13 ER 884.
- 46     O’Hare (1979) 202.
- 47     [1892] P 304.
- 48     O’Hare (1979) 204, Wiswall (1970) ch 6 charts the switch. A useful balance to his championing of the personification theory is to be found in G Gilmore & CL Black, *The Law of Admiralty*, 2nd edn, Foundation Press, Mineola NY, 1975, 613-6.
- 49     Administration of Justice Act 1956 (UK) s 3(4). This followed the adoption of sister ship arrest in the Brussels Convention of 1952, art 3(1) & (4).
- 50     See eg the comments of Brandon J in *The Conoco Britannia* [1972] 2 QB 543, 555.

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- 51 DR Thomas, *Maritime Liens*, Stevens, London, 1980, para 8a. It should be said that the courts have also been inconsistent in their  
classification of maritime liens as ‘substantive’ or ‘procedural’: see especially *The Halcyon Isle* [1981] AC 221.
- 52 See JM Bennett, *A History of the Supreme Court of New South Wales*, Law Book Co, Sydney, 1974, 152.
- 53 id, 238-9.
- 54 Historical Records of Australia, series IV, vol 1, 13, 17.
- 55 Bennett (1974) 155. See further NSW Archives Authority, *Vice Admiralty Court of New South Wales 1787-1911*, NSW State Archives Guide No 22, Sydney, 1980.
- 56 O’Hare (1979) 111.
- 57 AC Castles, *An Australian Legal History*, Law Book Co, Sydney 1982, 363-4.
- 58 s 10, 11. Jurisdiction in those matters had previously been conferred by the *Vice Admiralty Courts Act 1821* (2 Geo IV, c 51) (UK).
- 59 s 10.
- 60 s 22, 23.
- 61 See *McIlwraith McEacharn Limited v The Shell Company of Australia Limited* (1945) 70 CLR 175, 189 (Latham CJ).
- 62 s 2, 16, 17.
- 63 Bennett (1974) 163. The reasons for local opposition remain obscure. That given in the text was a surmise of Lord Knutsford, Secretary of State for the Colonies.
- 64 See para 31-3.
- 65 s 2(2).
- 66 The *Yuri Maru*, *The Woron* [1927] AC 906, 915. See DJ Cremeen, *Jurisdiction in Admiralty in Australia*, Monash Uni, Ph D Thesis, 1980, 64-6.
- 67 s 6, 7.
- 68 s 3(b). Purportedly in exercise of this power the *Broome Local Court Admiralty Jurisdiction Act 1917* (WA) was passed.
- 69 See RW Kerr, ‘Constitutional Limitations on the Admiralty Jurisdiction of the Federal Court’ (1979) 5 Dalhousie LJ 568, 571.
- 70 Courts (Admiralty Jurisdiction) Ordinance 1961 (Singapore); Supreme Court (Admiralty Jurisdiction) Act 1962 (Bermuda); Courts of Judicature Act 1964 (Malaysia); Admiralty Act 1973 (NZ). The position in Papua New Guinea is as anomalous as it is remarkable. The effect of the legislation accompanying independence in 1975 was accidentally to repeal the 1890 Act for the former territory of Papua, without replacing it. The Act continued to apply to New Guinea. In *The Ship ‘Federal Huron’ v OK Tedi Mining Ltd*, unreported, PNG Supreme Court, 30 Jan 1986, the Supreme Court filled the gap by reinserting the 1890 Act in the exercise of its power to develop the ‘underlying law’ (Constitution, Sch 2.3).
- 71 Admiralty Jurisdiction Regulation Act 1972 (SAf) s 1, 4.
- 72 See para 5.

## Chapter 3

- 1 See *McIlwraith McEacharn Ltd v Shell Company of Australia Ltd* (1945) 70 CLR 175,189 (Latham CJ).
- 2 See the note to cl 2 of the Colonial Courts of Admiralty Bill contained in the memorandum set out in DP O’Connell & A Riordan, *Opinions on Imperial Constitutional Law*, Law Book Co, Melbourne, 1971, 234, 235.
- 3 (1925) 34 CLR 420.
- 4 id, 425-6.
- 5 See para 21.
- 6 In re *McKelvey* [1906] VLR 304, 310 (Holroyd ACJ). See also *McArthur v Williams* (1936) 55 CLR 324, 346-7 (Starke J).
- 7 (1924) 34 CLR 420.
- 8 *McIlwraith McEacharn Ltd v Shell Company of Australia Ltd* (1945) 70 CLR 175; *Lewmarine Pty Ltd v The Ship ‘Kaptayanni’* [1974] VR 465.
- 9 But cf JG Latham, *Australia and The British Commonwealth*, Macmillan, London, 1929, 108.
- 10 (1936) 55 CLR 324.
- 11 *McIlwraith McEacharn Ltd v Shell Company of Australia Ltd* (1945) 70 CLR 175,192.
- 12 *McArthur v Williams* (1936) 55 CLR 324,360-1.
- 13 It has been argued that the effect of s 2(1) of the Act was that the Supreme Courts of these two States qualified under the Act in 1901, since they then became courts of original ‘unlimited civil jurisdiction’ in ‘the British possession’, the Commonwealth: see CA Ying, ‘Colonial and Federal Admiralty Jurisdiction’ (1981) 12 Fed LR 234, 252. The argument flies in the face of the express terms of s 16 of the Act: *generalia specialibus non derogant*.
- 14 See *McIlwraith McEacharn Ltd v Shell Company of Australia Ltd* (1945) 70 CLR 175, 192. See also *Dalgety and Co Ltd v Aitchison: ‘The Rose Pearl’* (1957) 2 FLR 219.
- 15 ACTLRC, *Report on Imperial Acts in Force in the Australian Capital Territory*, Canberra, 1973, 27, 55 is probably incorrect in saying that the ACT Supreme Court possesses admiralty jurisdiction by virtue of the Australian Capital Territory Supreme Court Act 1933 (Cth) s 11 independently of the Colonial Courts of Admiralty Act 1890 (UK). Whatever jurisdiction was possessed by the NSW Supreme Court on 1 January 1911 is picked up by s 11 But on that date the NSW Supreme Court had no admiralty jurisdiction: Bennett (1974) 153, 164. Admiralty jurisdiction was exercised in NSW exclusively by Vice Admiralty courts until 1 July 1911.
- 16 See generally BH McPherson ‘Admiralty Jurisdiction and the Federal Court’ (1981) 55 ALJ 71; J Crawford, ‘Admiralty Jurisdiction in Australia: The Australian Law Reform Commission’s Reference’ (1983) 1(2) MLAANZJ 4, 11.
- 17 McPherson (1981) 76.
- 18 DJ Cremeen, *Jurisdiction in Admiralty in Australia*, Monash Uni, Ph D thesis, 1980, 55 n 33.

19 eg District Court of Western Australia Act 1969 (WA) s 50(2).  
20 The Court is declared to be a superior court of record. Its judges have the same status and tenure as Supreme Court judges: Land and Environment Court Act 1979 (NSW) s 5, 9. cf Ying (1981) 255.  
21 (1936) 55 CLR 324.  
22 (1937) 56 CLR 277.  
23 Isaacs J considered it was not valid (*John Sharp & Sons Ltd v The Ship ‘Katherine Mackall’* (1924) 34 CLR 420, 429) because the Act purporting to insert it was ‘strictly speaking’ a reserved Bill under s 4 of the Colonial Courts of Admiralty Act 1890 (UK) which did not satisfy the requirements of s 60 of the Constitution in that the Royal Assent had been notified outside the two year period mentioned in s 60.  
24 Judiciary Act 1939 (Cth) s 3.  
25 At least so far as Australia was concerned. The point arose in the PNG Supreme Court in *The Ship ‘Federal Huron’ v OK Tedi Mining Ltd*, unreported, 20 January 1986. The Court agreed with Isaacs J (n 23) on the point: transcript of judgment, 32. cf also *Lewmarine Pty Ltd v The Ship ‘Kaptayanni’* [1974] VR 465, 467-8.  
26 [1963] Qd R 547, 577. s 17 was repealed by the Supreme Court Act Amendment Act 1971 (WA) s 3.  
27 Statute of Westminster Adoption Act 1942 (Cth) s 3.  
28 *Swift & Co Ltd v The Ship ‘Heranger’* (1965) 82 WN (Pt 1) (NSW) 540, 543; *Lewmarine Pty Ltd v The Ship ‘Kaptayanni’* [1974] VR 465, 467; *RW Miller & Co Ltd v The Ship ‘Patris’* [1975] 1 NSWLR 704,719-20.  
29 See Ying (1981) 245-6 for a brief discussion.  
30 s 3(2). Proceedings may be in rem or in personam: s 4. An appeal from the Local Court to the Supreme Court of Western Australia is provided: s 9.  
31 Ying (1981) 252-3, canvasses the point, arguing that s 107 does not have this effect.  
32 See para 53-6 on these provisions. The Local Court at Broome may qualify both under s 328 (as a court in a State having admiralty jurisdiction) and s 318(1) (as a local court of a State within the meaning of s 318(3)).  
33 See the note to cl 3 of the Colonial Courts of Admiralty Bill contained in the Memorandum set out in O’Connell & Riordan (1971) 239.  
34 (1945) 70 CLR 175, 192, 206.  
35 Though it would not necessarily be an appeal ‘as of right’: cf Judiciary Act 1903 (Cth) s 35. If not ‘as of right’, s 6 of the 1890 Act apparently conferred a right of appeal direct to the Privy Council from the State or Territory Supreme Court.  
36 (1945) 70 CLR 175, 206.  
37 cf *Commonwealth v Limerick Steamship Company Ltd* (1924) 35 CLR 69, 95-6.  
38 cf *Richelieu and Ontario Navigation Company (Owners of SS Canada) v Owners of SS Cape Breton* [1907] AC 112. See Ying (1981) 257-8.  
39 See Z Cowen & L Zines, *Federal Jurisdiction in Australia*, 2nd edn, OUP, Melbourne, 1978, 231-2; *McIlwraith McEacharn Ltd v Shell Co of Australia Ltd* (1945) 70 CLR 175, 210 (Dixon J).  
40 Whether this is the case is discussed in para 31-3.  
41 See KA Aickin, Note (1967) 41 ALJ 244, and especially Cowen and Zines (1978) 63-72, 228-33.  
42 (1945) 70 CLR 175.  
43 id, 210.  
44 (1979) 145 CLR 172.  
45 id, 197, 200 (Gibbs J); 214, 223 (Stephen J); 240 (Aickin J). Barwick CJ held that the State was bound by those provisions of their own force: id, 191.  
46 id, 223 (Stephen J); 244 (Aickin J). s 64 of the Judiciary Act 1903 (Cth) provides that in ‘any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject’.  
47 id, 230 (Stephen J); 244 (Aickin J).  
48 id, 227.  
49 id, 229-30.  
50 id, 244.  
51 id, 204.  
52 ibid.  
53 id, 233.  
54 *Felton v Mulligan* (1971) 124 CLR 367, affirmed and applied in *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 31 ALR 161, 166 (Gibbs J), 174 (Stephen, Mason, Aickin, Wilson JJ). See also *Frost v Stevenson* (1937) 58 CLR 528, 543. The reasoning in cases such as *Lorenzo v Carey* (1921) 29 CLR 243, 252 can now be seen to have been wrong.  
55 *China Ocean Shipping Co v State of South Australia* (1979) 145 CLR 172, 242.  
56 (1925) 36 CLR 130. cf (1979) 145 CLR 172, 244 (Aickin J).  
57 (1924) 35 CLR 69.  
58 (1926) 37 CLR 393.  
59 *China Ocean Shipping Co v State of South Australia* (1979) 145 CLR 172, 235.  
60 (1945) 70 CLR 175, 210.  
61 See para 70.  
62 On Stephen J’s view (para 32) this could be the situation in any event, since he regarded ‘federal’ admiralty jurisdiction as coexisting with jurisdiction under the 1890 Act. On any view, the High Court and Territory Supreme Courts remain Colonial Courts of Admiralty under the 1890 Act.

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## Chapter 4

- 1 [1927] AC 906. It had earlier been decided in *Bow, McLachlan & Co Ltd v The Ship 'Camosun'* [1909] AC 597 that, where the general powers of a court are limited, the conferral of jurisdiction under the 1890 Act does not enlarge those powers. If eg the court ordinarily lacks the power to issue orders for specific performance, nothing in the 1890 Act allows it to issue such orders when exercising its admiralty jurisdiction.
- 2 [1927] AC 906, 915.
- 3 [1974] VR 465, 468. cf *Nagrint v The Ship 'Regis'* (1939) 61 CLR 688; *McIlwraith McEacharn Ltd v Shell Company of Australia Ltd* (1945) 70 CLR 175; *The Lorena* [1973] 1 NZLR 507, 509; *China Ocean Shipping Co v State of South Australia* (1980) 27 ALR 1, 41-2. See too *Tharros Shipping Corporation SA v The Owner of the Ship 'Golden Ocean'* 1972 (4) SAf LR 316; BJ McGrath, 'Admiralty Jurisdiction and the Statute of Westminster' (1932) 6 ALJ 160, 215.
- 4 *The Yuri Maru, The Woron* [1927] AC 906, 915.
- 5 See para 9.
- 6 See eg *The Mecca* [1895] P 95, 107 (Lindley LJ).
- 7 *R v Keyn* (1876) 2 Ex D 63, 162 (Cockburn CJ).
- 8 The Admiralty Court Act 1840 (UK) and the Admiralty Court Act 1861 (UK) would by virtue of the operation given to them by the Colonial Courts of Admiralty Act 1890 (UK), seem to cover the field and render any laws of the States enacted before 1986, which cover the same field, void to that extent: see Colonial Laws Validity Act 1865 (UK) s 2. The Colonial Courts of Admiralty Act 1890 (UK) s 2(4) uses the expression 'outside the body of a county'. In Australia a matter arising upon the 'high seas' arises outside the body of a county: see *R v Keyn* (1876) 2 Ex D 63, 162-3; *Union Steamship Company of New Zealand Ltd v Ferguson* (1969) 119 CLR 191, 200, 208. The Australia Act 1986 (Cth) and the Australia Act 1986 (UK) freed the States from the fetters of the Colonial Laws Validity Act 1865 (UK). But laws invalid on grounds of repugnancy before 1986 were not validated by those Acts, although the States now have power to validate them by new legislation.
- 9 Criminal admiralty jurisdiction is not dealt with in this Report: see para 7.
- 10 But not a mortgagor: *Bow, McLachlan & Co Ltd v The Ship 'Camosun'* [1909] AC 597, 609.
- 11 Admiralty Court Act 1840 (UK) s 3.
- 12 Admiralty Court Act 1861 (UK) s 11. At the time when s 3 of the Admiralty Court Act 1840 (UK) was enacted, the system of registered mortgages had not been introduced; it was introduced by the Merchant Shipping Act 1854 (UK). The Admiralty Court Act 1861 (UK) s 11 was passed to take into account the changes made by the 1854 Act.
- 13 *The Two Ellens* (1871) LR 3 A & E 345; *The Tagus* [1903] P 44.
- 14 Merchant Shipping Act 1894 (UK) s 31 read with s 2.
- 15 It was possible to read s 11 of the 1861 Act as applying to the Merchant Shipping Act 1894 because of the provisions of the Interpretation Act 1889 (UK) s 38(1). But it is doubtful whether s 38(1) applies to Commonwealth Acts. See MJ Calder, 'Note' (1983) 1(1) *MLAANZ Journal* 12.
- 16 s 38(1) read with s 12, 34. It is true that s 94A uses the term 'included', but given the 1981 Act's repeal of Part I of the 1894 Act for Australia, a mortgage registered under the 1894 Act after 1981 can hardly be said to be 'duly registered' as a matter of Australian law.
- 17 Admiralty Court Act 1861 (UK) s 4.
- 18 cf Admiralty Court Act 1861 (UK) s 5.
- 19 *Lewmarine Pty Ltd v The Ship 'Kaptayanni'* [1974] VR 465, 471.
- 20 Admiralty Court Act 1840 (UK) s 6.
- 21 Admiralty Court Act 1861 (UK) s 5: Colonial Courts of Admiralty Act 1890 (UK) s 2(3) proviso (a).  
(1821) 4 B & Aid 352, 354; 106 ER 966, 967.
- 22 *The Sophie* (1842) 1 W Rob 368, 166 ER 610.
- 23 *The William F Safford* (1860) Lush 69; 167 ER 37.
- 24 *The Feronia* (1868) LR 2 A & E 65.
- 25 *The Onni* (1860) Lush 154; 167 ER 75.
- 26 *The Marianne* [1891] P 180.
- 27 *Stokes v The Conference* (1887) 8 LR (NSW) Adm 10. See also *The Andre Theodore* (1904) 93 LT (NS) 184. Whether this can be said to represent the modern law may be open to doubt.
- 28 *The Norway* (1864) Br & L 226; 167 ER 347.
- 29 *The Pieve Superiore* (1874) LR 5 PC 482.
- 30 *The Bahia* (1863) Br & L 61; 167 ER 298.
- 31 *The Pieve Superiore* (1874) LR 5 PC 482. See also *The Cap Blanco* [1913] P 130.
- 32 *The Ironsides* (1862) Lush 458; 177 ER 205.
- 33 *The Yuri Maru, The Woron* [1927] AC 906.
- 34 *Larsen v The Ship 'Nieuw Holland'* [1957] St R Qd 605.
- 35 Admiralty Court Act 1840 (UK) s 6.
- 36 Admiralty Court Act 1861 (UK) s 7.
- 37 *The Industrie* (1871) LR 3 A & E 303 (breach of duty which results in damage to ship).
- 38 *Nagrint v The Ship 'Regis'* (1939) 61 CLR 688, 693.
- 39 id, 698.
- 40 id, 700 (Dixon J).
- 41 ibid. See also *Union Steamship Company of New Zealand Ltd v Ferguson* (1969) 119 CLR 191.
- 42 *Nagrint v The Ship 'Regis'* (1939) 61 CLR 688, 696.

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- 44 *The Clara Killam* (1870) LR 3 A & E 161. See also Submarine Telegraph Act 1885 (UK) s 6(5); *Parker v Commonwealth* (1965) 112 CLR 295, 298.
- 45 *Nagrint v The Ship 'Regis'* (1939) 61 CLR 688, 696. Note that apart from the situations governed by s 59A of the Navigation Act 1912 (Cth) the doctrine of common employment would still seem to be available as a defence in admiralty: see *Union Steamship Company of New Zealand Ltd v Ferguson* (1969) 119 CLR 191, 198-9. See also *Groves v Commonwealth* (1982) 56 ALJR 570.
- 46 See *Smith v Brown* (1871) 6 QB 729; *The Vera Cruz* (1884) 10 App Cas 59; *Nagrint v The Ship 'Regis'* (1939) 61 CLR 688. cf *The Guldfaxe* (1868) LR 2 A & E 325; *Le Vae, Ilott & Crooks v Steamship Giovanni Amendola* [1956] Ex CR 55. The Navigation Act 1912 (Cth) s 262 provides that any 'enactment which confers on any Court Admiralty jurisdiction in respect of damage shall have effect as though references to such damage included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *in personam*'. cf s 5 of the Maritime Conventions Act 1911 (UK) which corresponds to s 262 of the Navigation Act 1912 (Cth); s 5 of that Act is (by virtue of s 9) not in force in Australia: see *Nagrint v The Ship 'Regis'* (1939) 61 CLR 688. In that case Dixon J suggested that s 262 may be invalid for inconsistency with the proviso to s 3 of the 1890 Act: id, 696.
- 47 *The Courier* (1862) Lush 541; 167 ER 244. See also *The Tolten* [1946] P 135.
- 48 *Outhouse and Himmelman v The Thorshavn* [1935] 4 DLR 628; *The Eschersheim* [1976] 1 All ER 920 (HL). See the general discussion on when oil pollution can be said to be done by a ship in DW Abecassis, *The Law and Practice Relating to Oil Pollution from Ships*, Butterworths, London, 1978, 160-3.
- 49 Admiralty Court Act 1861 (UK) s 10. cf Navigation Act 1912 (Cth) s 91(1)(a)-(b).
- 50 *The Bengal* (1859) Swab 468; 166 ER 1220. For the definition of a maritime lien see para 16.
- 51 *The Chieftain* (1863) Br & L 212; 167 ER 340.
- 52 ES Roscoe, *Admiralty Jurisdiction and Practice*, 5th edn, G Hutchinson ed, Stevens, London, 1931, 245; *The Milford* (1858) Swab 362; 166 ER 1167. See now New South Wales Admiralty Rules 1952, r 26(b); Queensland Rules of the Supreme Court, O 7 r 11(b); South Australian Supreme Court Rules, O 39 r 7(2)(b); Tasmanian Rules of the Supreme Court 1965, r 5(c); Victorian Admiralty Rules 1975, r 20(b); Western Australian Rules of the Supreme Court 1971, O 74 r 3(3)(f); and High Court Rules O 5 r 8(f), all of which require the local consul of the foreign state in which the ship is registered to be notified of the action. See further para 298.
- 53 *The Halcyon Skies* [1977] QB 14, 22, 31 (Brandon J). See eg *The Arosa Star* [1959] 2 Lloyd's Rep 396 where sick leave and holiday pay were treated as 'earned on board the ship' as required by s 10 of the 1861 Act.
- 54 Navigation Act 1912 (Cth) s 118(1).
- 55 *The Feronia* (1868) LR 2 A & E 65, 75, interpreting Admiralty Court Act 1861 (UK) s 10.
- 56 Roscoe (1931) 251.
- 57 (1866) LR 1 A & E 62.
- 58 *Bristow v Whitmore* (1861) 9 HL Cas 391; 11 ER 781; *The Feronia* (1868) LR 2 A & E 65. See also the Navigation Act 1912 (Cth) s 94(2) which refers to 'disbursements or liabilities'.
- 59 (1833) 3 Hagg 14, 48; 166 ER 312, 315. The reference to a 'lien' is a reference to the maritime lien for salvage: see para 16.
- 60 DR Thomas, *Maritime Liens*, Stevens, London, 1980, para 257-9.
- 61 cf FL Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800*, CUP, Cambridge, 1970, 43-4. See *The Fusilier* (1865) Br & Lush 341, 344 (Dr Lushington).
- 62 Thus s 317 of the 1912 Act substantially follows s 546 of the UK Act, but makes no reference to salvage of 'cargo or apparel'. For general issues of the validity of Navigation Act provisions enacted before 1939 see para 56.
- 63 Merchant Shipping Act 1854 (UK) s 458 (provision for salvage), 460 (jurisdiction over salvage disputes). Awards for life salvage were given priority over other salvage awards, but if no property was salved life salvors were only eligible for an *ex gratia* payment: s; 459. s 476.
- 64 Merchant Shipping Act 1894 (UK) s 544-6, 565.
- 65 *SG White Pty Ltd v The Ship 'Mediterranean'* [1966] Qd R 211, 216 (Wanstall J).
- 66 Thus s 317 of the 1912 Act substantially follows s 546 of the UK Act, but makes no reference to salvage of 'cargo or apparel'. For general issues of the validity of Navigation Act provisions enacted before 1939 see para 56.
- 67 Navigation Act 1912 (Cth) s 315 (life salvage), 317 (salvage 'on or near the coasts of Australia or any tidal water within Australia'), 328 (courts having salvage jurisdiction). There is no equivalent to s, 565 of the 1894 Act.
- 68 s 328 refers to 'the Supreme Court of every State, every Court in a State having Admiralty jurisdiction terminology that does not advance matters.
- 69 Thomas (1980) para 265. The current version of the UK provisions referred to is Supreme Court Act 1981 (UK) s 20(6), which provides that The reference in sub-section (2)(j) to claims in the nature of salvage includes a reference to such claims for services rendered in saving life from a ship or an aircraft or in preserving cargo, apparel or wreck as, under sections 544 to 546 of the Merchant Shipping Act 1894, or any Order in Council made under section 51 of the Civil Aviation Act 1949, are authorised to be made in connection with a ship or an aircraft.
- 70 Thomas (1980) para 265. The current version of the UK provisions referred to is Supreme Court Act 1981 (UK) s 20(6), which provides that The reference in sub-section (2)(j) to claims in the nature of salvage includes a reference to such claims for services rendered in saving life from a ship or an aircraft or in preserving cargo, apparel or wreck as, under sections 544 to 546 of the Merchant Shipping Act 1894, or any Order in Council made under section 51 of the Civil Aviation Act 1949, are authorised to be made in connection with a ship or an aircraft.
- 71 cf *Burns Philp & Co Ltd v Nelson & Robertson Pty Ltd* (1958) 98 CLR 495, 502-3 (Taylor J; the point was not argued on appeal); *The Loretta v Bubb* [1971] WAR 91, 93 (Nevile J); *SG White Ply Ltd v The Ship 'Mediterranean'* [1966] Qd R 211, 216-17 (Wanstall J). cf *United Geographical Corporation v The Ship 'Tully Falls'* [1975] Qd R 85; *Burley v The Ship 'Texaco Southampton'* [1981] 2 NSWLR 238, 249 (Yeldham J) (reversed on other grounds, [1982] 2 NSWLR 336) where, without discussion, cases are heard in admiralty but based on the statutory salvage jurisdiction.
- 72 Navigation Act 1912 (Cth) s 329A-B. For the definition of 'Government ship' (which includes ships 'demised or sub-demised to or in the exclusive possession or a government) see s 6.
- 73 Thomas (1980) para 16-7 and cases there cited.
- 74 But in *The Ambatielos; The Cephalonia* [1923] P 68, Hill J was prepared to treat pilotage as equivalent, under s 10 of the 1861 Act, to 'seaman's wages' (as to which see para 44). This overcomes the possible anomaly of lack of jurisdiction over pilotage within the body of a county, but at the expense of introducing another, since it is clear that seamen's wages do give rise to a maritime lien. On the possible classification of pilotage as a 'necessary' of *The Queen of the South* [1968] P 449 (Brandon J).
- 75 *The Princess Alice* (1849) 3 W Rob 138; 166 ER 914.
- 76 *Fisher v The Ship 'Oceanic Grandeur'* (1972) 127 CLR 312, 331; cf *Burley v The Ship 'Texaco Southampton'* [1982] 2 NSWLR 336. See also *The Medora* (1853) 1 Sp Ecc & Ad 17, 18; 164 ER 10, 11.

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- 77 Admiralty Court Act 1840 (UK) s 4.
- 78 Admiralty Court Act 1861 (UK) s 8; Colonial Courts of Admiralty Act 1890 (UK) s 2(3) proviso (a).
- 79 See Roscoe (1931) 54-7. The reference to co-owners is a reference to co-owners of shares in the ship, not of shares in any company that owns the ship.
- 80 id, 46-8.
- 81 *Baxter v Blanshard* (1823) 3 Dow & Ry KB 177; 107 ER 374; *The Pitt* (1824) 1 Hagg 240; 166 ER 86; *The Beatrice (otherwise The Rappahannock)* (1866) 36 LJ Adm 9; *The Annette; The Dora* [1919] P 105.
- 82 cf *Brond v Broomhall* [1906] 1 KB 571.
- 83 A Browne, *Compendious View of the Civil Law and the Law of Admiralty*, 2nd edn, London, 1802, vol 2, 72.
- 84 Note the dismissive way in which Lord Esher MR commented on the claim in *R v Judge of the City of London Court* [1892] 1 QB 273, 293. See also the dicta of Lord Herschell in *The Zeta* [1893] AC 468, 482. The 1st edition of *Halsbury's Laws of England*, vol 1, Admiralty, London, 1907, does not refer to contracts in setting out the heads of admiralty jurisdiction.
- 85 Browne (1802) 110-11.
- 86 *R v Judge of the City of London Court* [1892] 1 QB 273, 292-3 (Lord Esher MR). cf *The Zeta* [1893] AC 468, 478-85 (Lord Herschell); Wiswall (1970) 125.
- 87 eg interference with salvage rights: *The Tubantia* [1924] P 78.
- 88 eg *Stainbank v Shepard* (1853) 13 CB 418; 138 ER 1262.
- 89 Wiswall (1970) 9-10; Roscoe (1931) 69.
- 90 ibid. See also *The Cargo ex Sultan* (1859) Swab 504; 166 ER 1235.
- 91 *The Panama* (1870) LR 3 PC 199.
- 92 Roscoe (1931) 13-4.
- 93 cf *The Royal Arch* (1857) Swab 269, 276; 166 ER 1131, 1135.
- 94 Roscoe (1931) 75.
- 95 cf *The Prince of Saxe Cobourg* (1838) 3 Moo PCC 1; 13 ER 1.
- 96 id, 76.
- 97 *Jonson v Shepney* (1705) Holt KB 48; 87 ER 836; *The Ripon City* [1897] P 226, 245-6.
- 98 cf Wiswall (1970) 211; Thomas (1980) para 371-2.
- 99 *The Conet* [1965] 1 Lloyd's Rep 195; *Paschalis v The Ship Tona Maria* [1975] 1 Cyprus LR 162. See DC Jackson, *Enforcement of Maritime Claims*, Lloyd's of London Press, London, 1985, 28-9.
- 100 See RG Marsden, 'Admiralty Droits and Salvage — Gas Float Whitton, No II' (1899) 15 LQR 353.
- 101 *Lord Warden of Cinque Ports v The King in his Office of Admiralty* (1831) 2 Hagg 438; 166 ER 304. But not all derelicts are droits: see *HMS Thetis* (1833) 3 Hagg 228, 236; 166 ER 390, 393.
- 102 Wiswall (1970) 8.
- 103 *R v Two Casks of Tallow* (1837) 3 Hagg 294, 297-8; 166 ER 414, 416.
- 104 *Australia and New Zealand Commentary on Halsbury's Laws of England*, Admiralty, Butterworths, Sydney, 1976, para C350.
- 105 Note also the Historic Shipwrecks Act 1976 (Cth). The wreck provisions of the Merchant Shipping Act 1894 (UK) do not generally extend beyond the waters of the United Kingdom: see *Robinson v Western Australian Museum* (1977) 138 CLR 283, 308 (Gibbs J) 332 (Mason J).
- 106 Navigation Act 1912 (Cth) s 305.
- 107 id, s 31 1.
- 108 id, s 328.
- 109 See eg Queensland Marine Act 1958 (Qld) s 212; Marine Act 1958 (Vic) s 13; West Australian Marine Act 1982 (WA) s 71. See *Victoria v Commonwealth* (1937) 58 CLR 618 for the relationship between these types of provisions and the Navigation Act 1912 (Cth).
- 110 There does not appear to be any definitive statement of what types of fish are 'Royal' fish. One grant by the Crown of its droits refers to 'all royal fishes, such as sturgeons, grampus, whales, porpoises, dolphins, riggs, and generally all other fishes of very large bulk or fatness': *Lord Warden of the Cinque Ports V The King in his Office of Admiralty* (1831) 2 Hagg 438, 439-40; 166 ER 304, 304.
- 111 eg Whale Protection Act 1980 (Cth) s 36 (whales killed or taken in waters to which Act applies vest in Commonwealth); Local Government Act 1962 (Tas) s 536A ('whales, porpoises, seals and other large sea creatures' which are stranded below low-water mark to be removed by local authority; provision for recovery of costs via Justices Act 1959 (Tas)).
- 112 Browne (1802) 82.
- 113 In addition to the Acts listed here, the Prize Courts Act 1894 (UK) s 2(3) allows jurisdiction to be conferred on Colonial Courts of Admiralty for the purposes of the Naval Prize Act 1864 (UK): see para. 7.
- 114 Before 1981 jurisdiction was also conferred by s 76 of the Merchant Shipping Act 1894 (UK) (certain forfeitures under Part I). That section, together with the rest of Part I of that Act, was repealed by the Shipping Registration Act 1981 (Cth) s 3, 4.
- 115 See para 177.
- 116 'Dangerous goods' are goods of a dangerous nature, including explosives and various types of flammable liquids (s 446(3)).
- 117 See generally *The Royalist* (1863) Br & L 46; 167 ER 29 1. s 472, which corresponds to what was s 240 of the Merchant Shipping Act 1854 (UK), only applies to the extent that it is not superseded by s 385 of the Navigation Act 1912 (Cth). The ambit of the Navigation Act 1912 (Cth) is discussed in para 56.
- 118 See para 45.
- 119 The Navigation Amendment Act 1980 (Cth) s 53 (not yet in force) adds claims by or on behalf of a person for wages earned by the person under a contract of sea service: in effect this applies to service on offshore industry vessels and off-shore industry mobile units.
- 120 See further para 276.
- 121 These are defined in s 2.
- 122 (1925) 36 CLR 130; cf *Hume v Palmer* (1926) 38 CLR 441, 449 (Knox CJ), 452 (Isaacs J).

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- 123 KH Bailey, 'The Statute of Westminster' (1932) 5 ALJ 362, 365; cf HE Zelling, 'Constitutional Problems of Admiralty Jurisdiction' (1984) 58 ALJ 8, 8-9.
- 124 But the Navigation Act 1965 (Cth) did prospectively validate all subsisting *regulations* under the Act.
- 125 *Hume v Palmer* (1926) 38 CLR 441, 460 (Higgins J). For the possible invalidity of Navigation Act 1912 (Cth) s 262, see para 43, n 46.
- 126 On the complex relations between the Merchant Shipping Acts 1894 and 1906 (UK) and the Navigation Act 1912 (Cth), see also *The WD Atlas* (1967) 12 FLR 320 (Ct of Marine Inquiry); *Bice v Cunningham* [1961] SASR 207, 211-14; *Cotter v Huddart Parker Ltd* (1942) 42 SR (NSW) 33, 39-42 (Jordan CJ); *Burns Philp & Co Ltd v Nelson & Robertson Ply Ltd* (1958) 98 CLR 495, 501-3 (Taylor J). cf *Victoria v Commonwealth* (1937) 58 CLR 618.
- 127 These provisions are discussed in para 163.
- 128 eg Seamen's Act 1898 (NSW) s 3, 4, 57; Marine Act 1958 (Vic) s 3, 234, 262-3; Merchant Seaman Act 1935 (Tas) s 3, 4; Marine Act 1948 (WA) s 4, 110, 8, 94, 143-4.
- 129 Navigation Act 1912 (Cth) s 304, 305. See para 5 1.
- 130 It seems that at common law, courts will not award salvage in the absence of contract: see *Kennedy's Civil Salvage*, 4th edn, KC McGuffie ed, Stevens, London, 1958, 372-5. For maritime and statutory liens see para 15-7. For bottomry and respondentia see para 50.
- 131 s 2(2). See CA Ying, 'Colonial and Federal Admiralty Jurisdiction' (1981) 12 FLR 234, 249.
- 132 *Compania Naviera Vascongado v Steamship Cristina* [1938] AC 485; *Owners of the Ship Philippine Admiral v Wallem Shipping (Hong Kong) Ltd* [1977] AC 373; *I Congreso del Partido* (1983) 1 AC 244.
- 133 cf *The Evangelistria* (1876) 2 PD 241; *The Annette; The Dora* [1919] P 105. But see *The Jupiter* (No 2) [1925] P 69. See also para 44 n 52.
- 134 And now codified for Australia in the Foreign States Immunities Act 1985 (Cth) s 18, based on this Commission's Report No 24, *Foreign State Immunity*, AGPS, Canberra, 1984.
- 135 cf *Bankers Trust International Ltd v Todd Shipyards Corp; The Halcyon Isle* [1981] AC 221, 232 (Lord Diplock).
- 136 cf id, 239-41 (Lord Diplock) 244, 247, 250 (Lords Salmon, Scarman, diss).
- 137 Commission of inquiry into the Maritime Industry, *Fourth Report, Australian Maritime Legislation*, AGPS, Canberra, 1977, 1-2 (Summers Report).
- 138 One important aspect of this program of renovation is the Shipping Registration Act 1981 (Cth), replacing Part I of the Merchant Shipping Act 1894 (UK): see para 65. Other recommendations of the Summers Report were implemented by the Navigation Amendment Act 1979, in particular the enactment of new limitation of liability provisions in Part VIII of the Act (involving the repeal of Part VIII of the Merchant Shipping Act 1894 (UK)).
- 139 114 *Parl Debs (H of Reps)* (22 May 1979) 2179-80. The point is made, even more forcefully, by Zelling (1984) 17 (the Act 'desperately needs a proper codification for use in 1983').
- 140 See Seamen's Compensation Act 1911 (Cth) s 4.
- 141 The owner need not have been made a defendant through service *in personam* before detention of the ship: of s 13(3).
- 142 See para 265-6.
- 143 See para 176.
- 144 See para 275.
- 145 See 121 *Parl Debs (H of Reps)* (5 March 1981) 485-7 for the Minister for Transport's second reading speeches on the 'Protection of the Sea' legislation.
- 146 See also Part IV (recovery of expenses incurred by the Commonwealth under the Protection of the Sea (Powers of Intervention) Act 1981 s 21 (expenses charge on ship) and s 22 (detention of ships). See further para 175.
- 147 See para 175.
- 148 See para 39, 60.

## Chapter 5

- 1 See generally GJ Lindell, 'Admiralty and Maritime Jurisdiction: Necessity for Retaining Section 76(iii) of the Commonwealth Constitution'. This Paper was prepared at the request of the Judicature Committee of the Australian Constitutional Convention. For background to the request see *Proceedings of the Australian Constitutional Convention, Adelaide 1983*, Government Printer, Melbourne, 1983, vol 2, 25. The Paper is Appendix C in the same volume. The Australian Constitutional Convention at its 1983 session approved the Committee's recommendations that s 76(iii) be retained: id, vol 1, xxviii, and for the debate see id, 59-62.
- 2 (1924) 34 CLR 420, 428.
- 3 See *McIlwraith McEacharn Ltd v Shell Co of Australia Ltd* (1945) 70 CLR 175, 208 (Dixon J); *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 228 (Stephen J).
- 4 Z Cowen & L Zines, *Federal Jurisdiction in Australia*, 2nd edn, Oxford University Press, Melbourne, 1978, 64, citing *The Constitution of the United States of America: Analysis and Interpretation*, ed Small and Jayson, 1964, 646.
- 5 See para 9.
- 6 G Gilmore & CL Black, *The Law of Admiralty*, 2nd edn, Foundation Press, Mineola, 1975, 31-3.
- 7 CL Black, 'Admiralty Jurisdiction: Critique and Suggestions' (1950) 50 Col LR 259, 262 citing *De Lovio v Boit* 2 Gall 398; 7 Fed Cas 418 (1815) (Story J). For divergent accounts see H Putnam, 'How the Federal Courts were given Admiralty Jurisdiction' (1925) 10 Cornell LQ 460; DW Robertson, *Admiralty and Federalism*, Foundation Press, Mineola, 1970, 6-17.
- 8 7 Fed Cas 418, 444 (1815).
- 9 See para 173.
- 10 Gilmore & Black (1975) 32.
- 11 Black (1950) 262.
- 12 *The Lottawanna* 88 US 558 (1874); *Panama Railroad Co v Johnson* 264 US 375 (1924); Gilmore & Black (1975) 47; Note, 'From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century' (1954) 67 Harv LR 1214.

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- 13      *Owners of the SS Kalibia v Wilson* (1920) 11 CLR 689.
- 14      Constitution s 51(39); see para 73.
- 15      HE Zelling, ‘Constitutional Problems of Admiralty Jurisdiction’ (1984) 58 ALJ 8, 11.
- 16      See L Zines, *The High Court and the Constitution*, Sydney, Butterworths, 1981, 13-14. See *Commonwealth v Tasmania* (1983) 46 ALR 625 for a strong example of the application of these principles — but there are many other examples: eg *R v Coldham, ex parte Australian Social Welfare Union* (1983) 47 ALR 225.
- 17      All matters of Admiralty jurisdiction under the 1890 Act could be described as ‘maritime’ in the ordinary sense.
- 18      See para 75-6.
- 19      J Quick & RR Garran, *The Annotated Constitution of the Australian Commonwealth*, Sydney, 1901, 800. It is true that they went on to describe it as ‘probably ... inexpedient to go outside the limits defined by [the 1890] Act, which may be taken as a guide to the reasonable limits of the jurisdiction’. But this was an explicitly prudential argument, the force of which is long spent. See also FL Stow, ‘Maritime Law and Jurisdiction in Australia’ (1904) 2 Cth Law Rev 157, 161-3.
- 20      *John Sharp & Sons Ltd v The Ship ‘Katherine Mackall’* (1924) 34 C LR 420, 428.
- 21      (1945) 70 CLR 175, 208.
- 22      (1979) 145 CLR 172, 204. And cf Cowen & Zines (1978) 69.
- 23      cf Zelling (1984) 22.
- 24      Constitution, s 77(iii).
- 25      Constitution, s 76 (High Court); 77(i) (other federal courts).
- 26      Constitution, s 122.
- 27      *Le Mesurier v Connor* (1929) 42 CLR 481; *Russell v Russell* (1976) 9 ALR 103; Cowen & Zines (1978) 196-9.
- 28      Especially s 71 (only Ch III courts can exercise federal judicial power); 72 (judges’ appointment, tenure and remuneration); 73 (position of High Court as ultimate Australian court of appeal), 80 (trial by jury in certain cases).
- 29      *R v Bernasconi* (1915) 19 CLR 629; *Porter v R* (1926) 37 CLR 432; *Spratt v Hermes* (1965) 114 CLR 226.
- 30      *Capital TV & Appliances Pty Ltd v Falconer* (1971) 125 CLR 591. See J Crawford, *Australian Courts of Law*, Oxford University Press, Melbourne, 1982, 38-42.
- 31      *Spratt v Hermes* (1965) 114 CLR 226.
- 32      Constitution, s 77.
- 33      s 73.
- 34      See generally Cowen & Zines (1978) 72-5; Crawford (1982) 132-7.
- 35      *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 33 ALR 465; *Fencott v Muller* (1983) 46 ALR 41; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 49 ALR 193.
- 36      *Kotsis v Kotsis* (1970) 122 CLR 69; *Knight v Knight* (1971) 122 CLR 114.
- 37      *Commonwealth v Hospital Contribution Fund of Australia* (1982) 40 ALR 673.
- 38      See para 287.
- 39      *Burton v Honan* (1952) 86 CLR 169, 178 (Dixon J).
- 40      It would also be a valid procedural matter to provide for assessors to advise the judge, eg in collision cases, although they could not be given decisional power. Whether provision for assessors is in fact desirable is discussed in ch 14.
- 41      See para 80.
- 42      In Canada where there is no equivalent to s 76(iii), the federal power over ‘navigation and shipping’ (Constitution Act 1867, s 91 (10)) has been held to justify the enactment of legislation conferring admiralty jurisdiction in broad terms, eg over marine insurance: *Zavarovalna Skupnost Triglav v Terrasses Jewellers Inc* [1983] 1 SCR 283. But see Lindell (1983) 14, commenting that too much reliance should not be placed on the Canadian cases in view of the constitutional differences between Canadian and Australian admiralty jurisdiction.
- 43      *Owners of the SS Kalibia v Wilson* (1910) 11 CLR 689.
- 44      See eg Zines (1981) 42-58; PH Lane, *The Australian Federal System*, 2nd edn, Law Book Co, Sydney, 1977, 55-92.
- 45      *W & A Macarthur Ltd v Queensland* (1920) 28 CLR 530, 547.
- 46      See *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54. The decision in *R v Turner, ex parte Marine Board of Hobart* (1927) 39 CLR 411 would probably now be overruled or confined to its special facts: see PD Phillips, ‘The Trade and Commerce Power’ in R Else-Mitchell (ed) *Essays on the Australian Constitution*, 2nd edn, Law Book Co, Sydney, 1961, 129, 153-5.
- 47      *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46,54 (Dixon CJ).
- 48      (1914) 19 CLR 298, 335.
- 49      (1982) 39 ALR 417.
- 50      (1983) 46 ALR 625.
- 51      See para 94.
- 52      See eg *Commonwealth v Tasmania* (1983) 46 ALR 625, 693-5 (Mason J); 728-30 (Murphy J); 772-4 (Brennan J); 805-6 (Deane J).
- 53      (1975) 135 CLR 337.
- 54      See para 37.
- 55      Coastal Waters (State Title) Act 1980 (Cth) s 4(1). The term ‘coastal waters’ is defined in s 3(1) to mean the 3-mile territorial sea.
- 56      (1975) 135 CLR 337, 497.
- 57      See para 80.
- 58      *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.
- 59      ibid; *R v Australian Industrial Court, ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235.
- 60      (1983) 46 ALR 625, 710-13 (Mason J); 736 (Murphy J); 813-16 (Deane J). Gibbs CJ (dissenting) disagreed (id, 684), as (probably) would have Wilson J (id, 756) and Dawson J (id, 853). Brennan J did not decide the point: id, 789-90.

61 Disputes between ship-owning corporations and their employees or agents would, at least as far as they related to the general activities of the corporation, be within the power: *R v Australian Industrial Court, ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235.

62 Some local commercial fishing craft are also not owned or operated by corporations.

63 These questions will be dealt with in a separate Report.

64 cf para 68.

65 cf Marine Insurance Act 1909 (Cth) s 6(1). For the meaning of 'limits of the State' see para 77.

66 On the scope of s 51(17) see ALRC 6, *Insolvency: The Regular Payment of Debts*, AGPS, Canberra, 1977, 74-9.

67 See further para 256-62, This might in any event be valid as incidental to the investment of admiralty jurisdiction: see para 73.

68 See Cowen & Zines (1978) 124-5 for a brief account.

69 id, 128.

70 id, 125-8, citing *R v Commonwealth Court of Conciliation and Arbitration, ex parte Barrett* (1945) 70 CLR 141; *Hooper v Hooper* (1955) 91 CLR 529; *Suehle v Commonwealth* (1967) 116 CLR 353; *Carter Bros v Renouf* (1962) 111 CLR 140 (where the argument failed, but only as to an aspect of the case which was held to be beyond federal power altogether).

71 id, 128-9.

72 See para 14-17.

73 eg time limits for bringing such claims (presently covered by the doctrine of laches): see para 249-55. Although it has been argued that the doctrine of laches, so far as it affects maritime liens, is substantive and not procedural (Australian Mining Industry Council, *Submission 86*, 13 May 1986, 4) this is very doubtful. The doctrine of laches (like other time bars) needs to be specifically relied on and can be waived. Functionally laches operates as a discretionary time bar: there is no reason to treat laches as somehow immune from the constitutional power in s 76(iii) and 51(39) to regulate admiralty jurisdiction and matters incidental thereto. See further Jackson (1985) 96-7; Thomas (1980) 281-3 ('Where there exists a statutory time limitation, there can be no successful challenge for delay within the specified period'). One unsettled aspect, which may or may not be 'substantive' but which is undoubtedly within federal power under s 51(29), is the extent to which foreign maritime liens will be enforced: see para 123.

74 As in the United States: see para 68.

75 See para 127 for discussion of the 19th century position.

76 *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 58 ALR 29. For earlier, more restrictive, views see KH Bailey, 'The Statute of Westminster' (1932) 5 ALJ 362, 364; KC Wheare, *The Statute of Westminster and Dominion Status*, 4th edn, London, 1949, 205-6; WA Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th edn, Law Book Co, Sydney, 1976, 77. cf (on slightly different grounds) O Dixon, 'The Statute of Westminster 1931' (1936) 10 ALJ 96, 101.

77 (1985) 58 ALR 29.

78 On the Australia Act 1986 (Cth) and its UK equivalent, the Australia Act 1986 (UK), see [1985] *Reform* 152.

79 *Felton v Mulligan* (1971) 124 CLR 367; *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 31 ALR 161.

80 The need for certainty in any reform of admiralty jurisdiction was stressed by one of the Commission's consultants: Mr PA Cornford, Crown Counsel, New Zealand, *Submission 10* (15 March 1984) 2. He suggested that, if there was significant constitutional uncertainty in the proposals, admiralty legislation should be enacted in the form of request and consent legislation to be passed by the United Kingdom Parliament. For the reasons given here the Commonwealth does certainly possess power to bring about secure reforms in this field.

81 See Law Council of Australia and Maritime Law Association of Australia and New Zealand, Joint Carnotite (Chairman: Justice HE Zelling), *Admiralty Jurisdiction in Australia*, 1982, para 12.9: 'we conclude that the Commonwealth Parliament does have power to enact an Admiralty Act operative in and for the whole of Australia'. Reference has sometimes been made to s 108 of the Constitution as a barrier to the Commonwealth's repealing relevant Imperial legislation: eg Zelling (1984) 10. But s 108 is no barrier to action under other powers conferred by the Constitution. It is merely a saving clause.

## Chapter 6

1 Law Council of Australia and Maritime Law Association of Australia and New Zealand, Joint Committee (Chairman: Justice HE Zelling) *Admiralty Jurisdiction in Australia*, 1982 (Zelling Report), para 10.2; HE Zelling, 'Of Admiralty and Maritime Jurisdiction' (1982) 56 ALJ 101; RAN Chesterman, 'Arrest of Ships' (1979) 5 *Qld Lawyer* 61, 66; CA Ying 'Colonial and Federal Admiralty Jurisdiction' (1981) 12 *FLR* 234, 269-70; NH Pratt, 'Queensland Admiralty Jurisdiction: How much do we have?' (1975) 4 *Qld Lawyer* 127, 139; CW O'Hare 'Admiralty Jurisdiction' (1979) 6 *MULR* 195, 224; PG Foss & RJM Anderson, 'Admiralty Jurisdiction in Western Australia', *mimeo*, Perth, 1976, on behalf of the Western Australian MLAANZ, 36-7.

2 Zelling Report, para 10.2.

3 *Commonwealth of Australia*, 114 Parl Debs (H of R) (22 May 1979) 2179-80 (Minister of Transport); Zelling (1984) 17. See also para 56, 60.

4 For Mareva injunctions and their relationship to arrest see para 245-7.

5 cf the comment of Goff J in *Marazura Navegacion SA v Oceanus* [1977] 1 Lloyd's Rep 283, 287:

It is a commonplace that English procedure is less well equipped than many of its Continental counterparts to provide security for pending claims. The most important exception to this general proposition is the power to arrest ships in Admiralty proceedings.

6 See also ch 9 where other boundary problems are noted, such as limitation of liability actions.

7 KD Kerarneus, 'Admiralty Jurisdiction in Continental Countries' (1983) 8 *Maritime Lawyer* 329, 334-1; JC Sweeney, 'Compromise Provisions Regarding *In rem* Procedures' (1979) 27 *Am J Comp Law* 407, 409. See para 94, n 42 on *saisie Conservatoire*.

8 Note particularly the potential impact of the Civil Jurisdiction and Judgments Act 1982 (UK) s 25, 26. See para 187-9 for a discussion of s 26. The fact that the United Kingdom is altering its position in line with its European treaty obligations is not itself a reason for Australia to consider a similar alteration in the absence of any treaty obligations.

9 See para 1.

10 DR Thomas, *Maritime Liens*, London, Stevens, 1980, para 67; *Aichhorn & Co KG v The Ship MV 'Talabot'* (1974) 48 AUR 403.

11 See eg *I Congreso del Partido* [1978] QB 500, 534 (Goff J) and [1983] 1 AC 244, 272 (Lord Wilberforce). cf Foreign Judgments Act 1962 (Vic) s 7(3)(b) and similar legislation in all other Australian jurisdictions except South Australia.

12 See eg art 7(1) of the 1952 Arrest Convention. See also Sweeney (1979) 414-17 on the debate over the drafting of the jurisdictional provisions in the 1978 Hamburg Rules on the Carriage of Goods by Sea. But cf *Comite Maritime International*, Draft Convention on Salvage, Montreal, 1981, art 4-5(1) which gives jurisdiction to, amongst others, ‘the place where the property salved has been arrested’.

13 *The Atlantic Star* [1974] AC 436; *The Abidin Daver* [1984] 1 All ER 470 (HL); *The Courageous Colocotronis* [1979] WAR 19. For discussion of the position in Canada see *Kuhr v The Ship ‘Friedrick Busse’* (1982) 134 DLR (3d) 261, 268-71 (Fed Ct, Addy J). See generally GW Paulsen & RS Burrick, ‘Forum Non Conveniens in Admiralty’ (1982) 13 *JMLC* 343.

14 *The Abidin Daver* [1984] 1 All ER 470, 480 (Lord Brandon).

15 See para 245-6.

16 See para 256 for an outline of Admiralty priorities.

17 Commonwealth of Australia, Department of Transport, ‘Economic Policy Developments in International Shipping — Australia’s Approach’ (1981) 52 *Aust Foreign Aff Rev* 395, 396.

18 See JG Crawford, *Revitalisation of Australian Shipping: An Overview* (Crawford Report) AGPS, Canberra, 1982, 42 where the following figures are given for the percentage of revenue tonnes of overseas cargo carried by Australian flag vessels:

Year	Imports(%)	Exports(%)	Total(%)
1975-76	3.6	0.25	1.0
1976-77	3.7	1.3	1.5
1977-78	3.5	2.1	2.6
1978-79	3.9	2.4	2.7
1979-80	7.0	3.4	3.5

In 1980-81 the total percentage was 3.87%: Year Book Australia 1983, AGPS, Canberra, 1983, 526.

19 id. 1. For a critical look at the possibilities of revitalisation see P Stubbs (1983) *Australia and the Maritime Industries*, AIDA research Centre, Melbourne, 1983, 162-78.

20 International Convention on a Code of Conduct for Liner Conferences, Geneva, 1974 ((1974) 13 ILM 917), entered into force 6 October 1983. Art 2 provides for a split of liner cargoes in the ratio of 40% each to ships of the exporting and importing states with only the remaining 20% available to ships registered in third countries. Australia is not a party to the Convention and is unlikely to become one in the foreseeable future: Dept of Transport (1981) 397-8; Stubbs (1983) 30-1.

21 cf Norway where about 90% of the Norwegian merchant fleet is engaged in trade solely between non-Norwegian ports: S Brackhus, ‘Choice of Law Problems in International Shipping (Recent Developments)’ (1979) 164 *ADI* 251, 261.

22 See OECD, *Maritime Transport* 1982, OECD, Paris, 1983, 73: open registry flags accounted for 26.8% of Australian imports and 30.7% of Australian exports in 1981. See id, 68-71 for a definition of ‘open registry’: such ships make up about 25% of the world merchant fleet.

23 For a sample of the criticism see National Union of Seamen, *Flags of Convenience*, NUS, London, 1981, reprinted in Crawford Report, Attachment B, 81-96.

24 See eg E Ellen & D Campbell, *Maritime Fraud*, Sweet & Maxwell, London, 1981, 2, 6 1.

25 R Humphrey, ‘The Outlook for Western Shipping: Changes in Political Structure’ (1982) 116 *OECD Observer* 47, 49. The United Nations Convention on Conditions for Registration of Ships, Geneva, 7 February 1986 (UN Doc DAFFE/MTC/86.6 (Add)) seeks to strengthen the ‘genuine link’ principle between a State and ships flying its flag, and to ensure more effective control by the flag State over its ships.

26 See para 85, para 94 n 42.

27 cf South African Law Commission, *Report on the Review of the Law of Admiralty*, Project 32, 1982, para 6.4.

28 *The Tojo Maru* [1970] P 21, 62 (Lord Denning MR). See also *The Tolten* [1946] P 135 where Scott LJ used the phrase ‘general law of the sea’ throughout his judgment.

29 *Bankers Trust International Ltd v Todd Shipyards Corp; The Halcyon Isle* [1981] AC 221, 238 (Lord Diplock), 244 (Lords Salmon and Scarman, dissenting).

30 O’Hare (1979) 199 observes that historically it is more accurate to see the existence of a maritime lien as the result of the ability to arrest rather than as creating the right to arrest.

31 *Bankers Trust International Ltd v Todd Shipyards Corp; The Halcyon Isle* [1981] AC 221, 244. For the text of the Convention done at Brussels, 10 April 1926, see 120 *LNTS* 187; for that done at Brussels, 27 May 1967, see Benedict on Admiralty, 7th edn, MM Cohen ed, Matthew Bender, New York, 1983, vol 6A, Doc 8-3. Australia is not a party to either Convention.

32 [1981] AC 221, 232, 240 (Lord Diplock).

33 See para 14, 15, and see further para 119, 127.

34 *Bankers Trust International Ltd v Todd Shipyards Corp; The Halcyon Isle* [1981] AC 221, 241.

35 The fact of non-membership does not indicate that a state is strongly opposed to the Convention regime. Conversely, the United Kingdom, though a party, has in several respects failed to implement the Convention. On the failure fully to implement art 3 see para 13 1. On the failure to implement art 7 see *The Golden Trader* [1975] QB 348, 360 (Brandon J).

36 According to the official list of parties issued by the Belgian Government, the depositary for the Convention. The most recent state to accede was Cuba in November 1983.

37 Figures on ship ownership as measured in deadweight tonnes taken from OECD, *Maritime Transport* 1982, OECD, Paris, 1983, 147.

38 In 1971 a Parliamentary Question asked if Australia could be in a position to ratify the 1952 Arrest Convention after the then current amendments to the Navigation Act. The answer was that it was not possible to say but the question of ratification would ‘be kept in mind’: Commonwealth of Australia, 72 *Parl Debs (H of R)* (7 May 1971) 2853.

39 *The Eschersheim* [1976] 1 All ER 920, 923 (Lord Diplock).

40 Donaldson LJ complained in *The Span Terza* [1982] 1 Lloyd’s Rep 225, 23 1, that art 3(4) ‘is not only eccentrically drafted, but eccentrically laid out on paper’. Penlington J in *The Sextum* [1982] 2 Lloyd’s Rep 532, 534 (Hong Kong S Ct) confessed ‘to some difficulty in understanding the wording of that article’. It can be argued that at least some of the difficulty experienced by English and Commonwealth judges in interpreting the 1952 Arrest Convention occurs because the 1956 Act (and legislation in other countries based on that Act) is unclear in its wording and does not clearly follow the Convention despite the stated intent: see Poh Chiu Chai, ‘Arrest of Ships: A Comparative Study of English and Singapore Cases’ [1982] 1 *MLJ* xvi, xviii.

- 41 See eg *Bankers Trust International Ltd v Todd Shipyards Corp; The Halcyon Isle* [1981] AC 221, 241 (Lord Diplock). In its reply to the Comite Maritime International questionnaire on the possible revision of the 1952 Arrest Convention, the Italian Maritime Law Association noted several discrepancies between the English and French texts of art 1(1)(p) and art 9 (CMI Doc Arrest-4/I-84, 5, 12, 13 (2 Jan 1984)).
- 42 The title and the preamble of the French text of the Convention refer to uniform rules ‘sur [a saisie conservatoire de navires de mer]’. The French and English texts are equally authentic but *saisie conservatoire* would have been more appropriately translated by ‘pre-judgment attachment’ or even by a reference to Mareva injunctions (had they existed in 1952) than by arrest. The drafting of art 1 and 3 does not seem to make any allowance for the fact that in English admiralty law arrest not only confers a security interest in the *res* but also gives the arresting court jurisdiction to decide the underlying merits. On the widespread distinction in civil law countries between jurisdiction to order *saisie conservatoire* and jurisdiction to decide the merits see the discussions by Lord Diplock in *The Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210, 258-60 and *Bankers Trust International Ltd v Todd Shipyards Corp; The Halcyon Isle* [1981] AC 221, 239. See also DC Jackson, *Enforcement of Maritime Claims*, Lloyd’s of London Press, London, 1985, 240-1. For *saisie conservatoire* in French law see P Herzog, *Civil Procedure in France*, Nijhoff, The Hague, 1967, 198-202, 235-8. Civil law jurisdiction to order *saisie conservatoire* must be distinguished from another type of jurisdiction, found in far fewer civil law countries, under which jurisdiction to determine the merits is acquired simply by the arrest of any of the defendant’s property within the territory of the forum court. In countries (such as Scotland and South Africa) where this arrestment *ad fundandam jurisdictionem* is part of the law it can be used to arrest ships. For both an illustration and discussion see *Alexander Ward & Co Ltd v Samyang Navigation Co Ltd* [1975] 2 All ER 424, 431 (Lord Kilbrandon). Note his comment that this type of jurisdiction ‘has long been recognised as being of an “exorbitant” character’.
- 43 F Berlingieri, ‘The 1952 Brussels Convention on Arrest of Ships’ (CMI Doc Arrest — 2/XI-83, December 1982) 9 lists the items, referencing the 1926 Liens Convention art 2(1) (‘law costs due to the State’, ‘expenses incurred in the common interest of creditors’, ‘costs of watching and preservation’) and to some extent art 2(5).
- 44 Italian MLA questionnaire response, 2-4.
- 45 eg, stevedoring charges which give rise to a maritime lien in the United States.
- 46 See para 208 n 47 on the ‘sister ship’ arrest provision. Note also that the jurisdictional provisions of the Convention Relating to the Carriage of Passengers and their Luggage by Sea, Athens, 13 December 1974 (text: Benedict (1983) vol 6, Doc 2-2) art 17 makes no provision for jurisdiction over claims bought under the Convention to be based on the arrest of the wrongdoing ship. Australia has signed but not ratified this Convention.
- 47 The Lisbon meeting of the Comite Maritime International (CMI) in 1985 produced a Draft Revision of the Brussels Convention (see para 5). The Draft Revision differs from the Brussels Convention itself in many respects, including especially the following:
- the definition of ‘maritime claim’ is now indicative and inclusive rather than a specific, exhaustive list (art 1(1));
  - ‘maritime claims’ specifically included in art 1(1) include all forms of damage done or threatened by a ship (including costs of preventative action and pollution clean-up costs), a broader definition of wages, and marine insurance premiums and calls (art 1(1)(d), (o) & (q));
  - arrest is broadly defined, so as to include Mareva injunctions (art 1(2));
  - there is more explicit provision for maritime liens (5 listed classes) (art 3(1)(a));
  - unless local law provides to the contrary, a ship may only be arrested on a statutory right of action *in rem* in respect of liabilities of the owner or bareboat (ie demise) charterer, and the relevant time is the time of arrest, not of institution of the proceedings (art 3(1)(d), (3));
  - specific provision is made for rearrest and multiple arrest, with multiple arrest permitted to the full value of the claim (art 5(2));
  - there is more extensive provision for plaintiffs to be required to furnish security for costs, damages etc (art 6);
  - arrest confers local jurisdiction over the merits of the claim unless the local law provides to the contrary, irrespective of any nexus of the claim to the forum (art 7).
- The CMI Draft has no special status, except as a working text to be submitted to a diplomatic conference of States called to revise the 1952 Convention.
- 48 See for example, *The Alletta* [1974] 1 Lloyd’s Rep 40, 49 (Mocatta J) where it is noted that the then relevant English legislation, the Administration of Justice Act 1956 (UK), makes no mention of arrest except in the peripheral context of Crown property. The particular point at issue, when, if at all, it was possible to arrest or rearrest a ship for which bail or security had been posted, had to be resolved by reference to earlier decisions. The point is similarly not dealt with by the 1981 Act. See para 213, where it is recommended that the rule in *The Alletta* not be followed in Australian legislation.
- 49 For Australian insistence in other contexts on this general principle see eg Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth).
- 50 A number of submissions to the Commission emphasised the different arguments outlined in this para, though without any agreement as to their outcome. Submissions favouring what might be described as ‘plaintiff’ interests included: P Foss, *Submission 3* (4 May 1983) 3; MR Blair, Australian Shippers’ Council, *Submission 28* (19 February 1985); S Westgarth, Westgarth Baldick, *Submission 42* (12 April 1985) 1-2; WM Ross, Executive Secretary, National Bulk Commodities Group, *Submission 85* (9 May 1986). Submissions to the contrary included, for example: PG Willis, Deputy Corporate Solicitor, BHP, *Submission 23* (12 February 1985) 3-5; Ebsworth & Ebsworth (S Hetherington), *Submission 31* (1 March 1985) 3-5; AB Willings, Chairman, Universal Shipbrokers (Australia) Pty Ltd, *Submission 32* (6 March 1985). See also para 135-6, 139-40.

## Chapter 7

- 1 See generally DR Thomas, *Maritime Liens*, Stevens, London, 1980, para 180, 279, 329; KC McGuffie, PA Fugeman & PV Gray, *Admiralty Practice*, Stevens, London, 1964 & Supp, 1975, para 69. See, among many other examples, *The Gas Float Whilton No 2* [1896] P 42 (floating gas-light not a ship for salvage purposes); *National Harbours Board v Saint John Shipbuilding & Dry Dock Co Ltd* (1981) 43 NRI 5 (Full FCT) (floating crane and barge, neither self-propelled, both ‘ships’) and the cases cited in the following paras.
- 2 See para 108.
- 3 This phrase is to be preferred to that in the Shipping Registration Act 1981 (Cth) s 3(1) (‘capable of navigating the high seas’). ‘Incapable’ ships should also be within admiralty jurisdiction. Under this definition there is no requirement that the ‘ship’ be in the water at the time of service or arrest. In *Tozer Marine Ltd v Ulf Soderberg Marine; The Magnifik Midget No 15* a 23 ft sloop was arrested in an artificial pool inside the hall of the Earls Court Boat Show. After the show finished the Admiralty Marshal had the yacht put into storage. See *The Times*, 13 January 1966, 10; 18 January 1966, 4; 10 February 1966, 5.
- 4 See the cases referred to in M Thomas and D Steel, *Temperley’s Merchant Shipping Acts*, 7th ed, Stevens, London, 1976, para 684. In *The Pelion SS Co v North of England P & I Assoc* (1925) 22 Lloyd’s Rep 510, 513, it was said that a wreck remains a ‘ship’ as long as ‘any

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reasonably-minded owner could continue salvage operations in the hope of completely recovering the vessel by those operations and subsequent repair'.

5     *In re Glider Standard Austria SH 1964* [1965] P 463, 466 (Hewson J). See also HE Zelling, 'Constitutional Problems of Admiralty Jurisdiction' (1984) 58 ALJ 8, 13.

6     Civil Aviation Act 1949 (UK) s 62(2) and its successor Civil Aviation Act 1982 (UK) s 91 allow regulations to be made conferring jurisdiction on any court exercising admiralty jurisdiction over, and applying admiralty rules of practice and procedure to, 'any claim in respect of aircraft'. No such regulation has been made.

7     *Australian and New Zealand Commentary on Halsbury's Laws of England*, Butterworths, Sydney, 1976, Aviation, Pt 1, C 1282. The Prize Act 1939 (UK) s 1(1) assimilates aircraft and their cargoes to ships and ship's cargoes. This Act will be discussed in the separate Report dealing with Criminal Jurisdiction and Prize (see para 7).

8     Navigation Act 1912 (Cth) s 265(1).

9     *Weston v RCA Victor Co, Inc* (1934) 50 Lloyd's Rep 77 (Aberdeen Sheriff's Court) relying on *The Gas Float Whitton No 2* [1896] P 42. See also *Polpen Shipping Co Ltd v Commercial Union Assurance Co Ltd* [1943] 1 All ER 162 (a marine insurance case). In the United States dicta in *Lambros Seaplane Base v The Batory* 215 F 2d 228 (1954) suggest the opposite conclusion. See generally G Gilmore & CL Black, *The Law of Admiralty*, 2nd edn, Foundation Press, Mineola, 1975, 539-41. See also *Smith v Smith* (1979) 101 DLR (3d) 189 (no maritime jurisdiction over 'salvage' of aircraft on inland lake).

10    Civil Aviation Act 1982 (UK) s 87. See previously Civil Aviation Act 1949 (UK) s 51 and in a more restricted form Air Navigation Act 1920 (UK) s 11. Note also the Aircraft (Wreck and Salvage) Order 1938 (UK) (SR & O 1938 No 36) which alters the Merchant Shipping Act 1894 (UK) so that in a number of its sections 'vessel' and 'ship' include 'aircraft'.

11    Supreme Court Act 1981 (UK) s 20(2)(j). Jurisdiction is also conferred on the County Court: County Courts Act 1984 (UK) s 28.

12    Gilmore & Black (1975) 541. Although modern techniques of retrieving objects on the sea-bed may change this position, it is desirable that these be carried out by agreement with the owners of the wrecked craft. No need for an involuntary salvage regime appears to exist.

13    If reform were thought necessary, the United Kingdom approach of assimilating aircraft on or over the sea to vessels for salvage purposes would be appropriate, and there is a range of international treaty and other material to support such a solution. See for references *Lambros Seaplane Base v The Batory* 215 F 2d 228 (1954). However, the main international instrument on the point, the Convention for the Unification of Certain Rules Relating to Assistance and Salvage of Aircraft or by Aircraft at Sea, Brussels, September 1938, is not yet in force due to insufficient ratifications: see *Shawcross and Beaumont on Air Law*, P Martin ed, Butterworths, London, 1983 (looseleaf), appendix A, 79 for text.

14    Supreme Court Act 1981 (UK) s 20(2)(k)-(l); Admiralty Act 1973 (NZ) s 4(1)(j)-(k); Federal Court Act 1970 (Can) s 22(2)(k)-(l).

15    *Dicey and Morris on the Conflict of Laws*, 10th edn, J HC Morris ed, Stevens, London, 1980, 231. There seem to be no reported cases apart from the totally ill-founded case involving a glider referred to in n 5.

16    International Regulations for Preventing Collisions at Sea, 1972, r 3(a): 'the word "vessel" includes ... seaplanes'. The text of the Regulations and the associated Convention forms Sch 3 to the Navigation Act 1912 (Cth).

17    One difficulty is in determining when a seaplane ceases to be a 'ship' and becomes an 'aircraft': eg at which point is its take-off. Demarcation difficulties of this kind reinforce the conclusion that seaplanes should be excluded.

18    While hovercraft are generally treated as *sui generis* under English law (Hovercraft Act 1968 (UK) s 4(3)), they are treated as ships for the purposes of maritime liens (s 2(2)) and for the purposes of the admiralty jurisdiction set out in the Supreme Court Act 1981 (UK) s 20-4 (s 2(t)). of Admiralty Jurisdiction Regulation Act 1983 (S Af) s 1(1)(v) ('ship includes any ... hovercraft'). As might be expected from its date, the 1952 Arrest Convention does not refer to hovercraft. The Convention does not contain any definition of ship. The definition in Federal Court Act 1970 (Can) s 2 of 'ship' makes no direct reference to hovercraft: 'ship' includes 'any description of vessel or boat used or designed for use in navigation without regard to method or lack of propulsion'.

19    Other Commonwealth legislation in which hovercraft are treated as 'ships' or 'vessels' include the Antarctic Marine Living Resources Conservation Act 1981 (Cth), Crimes at Sea Act 1979 (Cth), Great Barrier Reef Marine Park Act 1975 (Cth), Historic Shipwrecks Act 1976 (Cth), s 14, 16, 23, 25, 28, Shipping Registration Act 1981 (Cth), Whale Protection Act 1980 (Cth). Commonwealth legislation which excludes hovercraft from the definition of 'vessel' includes the Antarctic Treaty (Environment Protection) Act 1980 (Cth) and Bounty (Ships) Act 1980 (Cth).

20    See para 115.

21    The text is reprinted as Appendix D to WW Spicer, 'Some Admiralty Law Issues in Offshore Oil and Gas Development' (1982) 20 Alberta L Rev 153.

22    M Summerskill, *Oil Rigs: Law and Insurance*, Stevens, London, 1979, 84-5. In the absence of decisions precisely in point this work relies on exhaustive analysis of the general English case law on the definition of 'ship'. Australian courts would presumably be guided by the same cases, there being no Australian cases of direct relevance.

23    id, 84. In its submission to the Senate Select Committee on Off-Shore Petroleum Resources, the Commonwealth Department of Shipping and Transport stated: 'Oil drilling rigs of the semi-submersible or jack-up type are not regarded as ships under British law, and therefore we consider the Navigation Act does not apply to them'. See the Committee's Report, AGPS, Canberra, 1971, para 19.77. Note the dictum of Thurlow CJ in *Re Seafarers' International Union of Canada and Crosbie Offshore Services Ltd* (1982) 135 DLR (3d) 485, 495 that the rigs in question, self-propelled rigs capable of operating in either submersible or semi-submersible mode, were ships.

24    Summerskill (1979) 85. Spicer (1982) 153, on the basis of a survey of English and Canadian cases, concludes 'with the possible exception of jack-ups, that offshore rigs are ships'. He also however observes: 'Oil rigs are a relatively new phenomenon in Admiralty Law. There are very few questions to which there are certain, or any, answers': ibid. See also WW Spicer, 'Canadian Maritime Law and the Offshore: A Primer' (1984) 15 JMLC 489, 502-4.

25    See para 99.

26    The mode of propulsion is independent of the type of rig: while all drill ships are self-propelled (cf drill barges), some semi-submersibles and jack-ups are self-propelled, others are not.

27    Navigation Act 1912 (Cth) s 383, 399.

28    The Beattie Report recommended this option for New Zealand (Special Law Reform Committee (Chairman: Beattie J), *Admiralty Jurisdiction*, Wellington, 1972, para 9), and it was in fact adopted: Admiralty Act 1973 (NZ) s 2 ('ship' includes any description of vessel used in navigation').

29    Provided, of course, that they can be duly served and arrested. See para 111-5 on the geographical ambit of admiralty jurisdiction, in particular whether it would allow service and arrest in Australia's exclusive economic zone.

- 30 cf Spicer (1982) 163-4. For the scope of the various heads of jurisdiction for damage done in the operation etc of ships see para 165-7, 172, 179-84.
- 31 Navigation Act 1912 (Cth) s 6(1) ('ship') with reference to Pt VIII. This is presumably because the view was taken that only self-propelled rigs were 'sea-going ships' for the purposes of the 1957 Limitation of Liability Convention, the text of which is reproduced in Sch 6 to the Act and upon which Pt VIII relies. The limitation provisions of the Protection of the Sea (Civil Liability) Act 1981 (Cth) would seldom be relevant because they apply only to 'any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo': Sch 1, art 1(1).
- 32 cf the CMI Draft International Convention on Off-Shore Mobile Craft, 1977, art 9 which attempted to deal with this difficulty by providing that 'for the purposes of calculating the limit of liability ... craft which are platforms shall be deemed to be not of less than X tons'. No value was assigned to X.
- 33 See eg *Offshore Company v Robison* 266 F 2d 769 (1959) on the question whether a labourer on a jack-up rig is a seaman. The Navigation Amendment Act 1980 (Cth) s 18 (not yet in force) provides that those who work on off-shore industry mobile units are eligible to sign a 'contract of sea-service' and to recover under the Navigation Act provisions dealing with seamen's wages. The Navigation Amendment Act 1981 (Cth) s 7 alters the definition of 'ship' for the purposes of wages in the principal Act so that it 'does not include a barge, lighter or other floating vessel that is not self-propelled'. The effect, if any, of these provisions on the admiralty definition of seaman is unclear.
- 34 Summerskill (1979) 85.
- 35 See para 103 n 3 1. Not all ships within admiralty jurisdiction at present are entitled to limit liability: *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 58 ALR 29.
- 36 In ALRC Admiralty Research Paper 1 (S Curran & D Cremeen). *An Australian Admiralty Act: The Ambit of Admiralty Jurisdiction*, 1984, 115 the tentative view was taken that mobile rigs should be neither specifically included nor specifically excluded. However the predominant view expressed to the Commission since then has supported the conclusion in the text. See eg PG Willis, Deputy Corporate Solicitor, BHP, *Submission* 68 (15 November 1985) 1. The same view was taken in the Zelling Report: Law Council of Australia and Maritime Law Association of Australia and New Zealand, Joint Committee, (Chairman: Justice HE Zelling) *Admiralty Jurisdiction in Australia*, 1982, 56.
- 37 See eg P Stolz, 'Pleasure Boating and Admiralty: Erie at Sea' (1963) 51 *Cal L Rev* 661; PD Carmilla and MP Drzal, 'Foremost Insurance Co v Richardson : If This is Water it must be Admiralty' (1983) 59 *Wash L Rev* 1.
- 38 *Foremost Insurance Co v Richardson* 457 US 668 (1982). For comment see eg NJ Healy, 'United States Admiralty and Shipping Law - Recent Developments' [1984] *LMCLQ* 607, 607-10.
- 39 Stolz (1963) 662-63 gives as examples of differences between admiralty and ordinary courts the rules as to contributory negligence, contribution between tortfeasors, standards of care owed to visitors on board, and limitations of actions. The absence of any jury in admiralty and differing rules as to interspousal immunity are other factors. The most contentious point is that because the power to legislate is congruent with admiralty jurisdiction (see para 68), the extension of admiralty jurisdiction into what are argued to be local matters (ie small boats in non-commercial use) entails the intrusion of federal legislative power into the subject: see Stolz (1963) 664-65.
- 40 cf *Edwards v Quickenden and Forester* [1939] P 261, a case arising out of a collision between a racing eight and another rowing boat in which the rules at the time as to contributory negligence were different in admiralty compared to the common law. The court held (on dubious grounds) that neither rowing craft was a 'vessel' and hence that admiralty rules did not apply. For criticism see Thomas and Steel (1976) para 68 1. Note also the forum shopping in *Union Steamship Co of New Zealand v The Ship 'Caradale'* (1937) 56 CLR 277.
- 41 In *Foremost Insurance Co v Richardson* 457 US 668 (1982) the majority regarded such a distinction as difficult, referring to pleasure boats used on hire or used occasionally for business purposes. The minority however, felt that the distinction 'rarely would present a difficult problem for any court' (id, 683, n 7). *Contrast Mayor of Southport v Morris* [1893] 1 QB 359 and *Weeks v Ross* [1913] 2 KB 229.
- 42 There is a long-standing common law objection to the exercise of admiralty jurisdiction over 'internal' matters: see para 10. The Acts of Richard 11 may not delimit the scope of s 76(iii) of the Constitution (see para 67, 70) but extending admiralty to local matters arising on internal waters might be held to go too far.
- 43 See para 115 for proposed restrictions on the exercise of admiralty jurisdiction where the claim arises on inland waters.
- 44 McGuffe (1964,1975) para 69.
- 45 [1991] 2 Lloyd's Rep 534.
- 46 id, 537. Justice Sheen noted that in English admiralty practice the sale of bunkers is kept distinct for accounting purposes from the sale of the vessel but commented that no ultimate significance should be attached to the Court's internal bookkeeping procedures. This judgment contains a useful statement of Registry practice on the sale of a ship with respect to food, stores, fuel, barometers and instruments etc.
- 47 ibid.
- 48 See eg *The Span Terza* (No 2) [1983] 1 Lloyd's Rep 441 (CA), [1984] 1 WLR 27 (H L); *Frossio Shipping Corporation v Richmond Maritime Corporation* 1985 (2) SAfLR 476 (not an admiralty case).
- 49 Of relevant overseas legislation, the only Act to do so is Admiralty Jurisdiction Regulation Act 1983 (SAf) s 3(5)(a) (action *in rem* instituted by arrest of 'the ship, with or without its equipment, furniture, stores or bunkers'). cf the definition in the Navigation Act 1912 (Cth) s 6 of 'equipment' for the purposes of the Act (including salvage) as including 'every thing or article belonging to or to be used in connection with, or necessary for the navigation and safety of, the ship and, in particular includes There follows a list of some 28 items.
- 50 See *Benedict on Admiralty*, 7th edn, MM Cohen ed, Matthew Bender, NY, 1983, para 163 for reference to United States and some 19th century English authorities.
- 51 See Thomas and Steel (1976) para 684 for references to cases involving the Merchant Shipping Acts and other legislation.
- 52 *Lovett Bay Holdings Pty Ltd v The Cognac*, unreported, NSW Supreme Court, 18 November 1981 (Fisher J) noted in (1981) 4(1) *MLAANZ Newsletter* 10-11 from which the account in the text is taken. Before fitting out was complete a dispute arose between the owner and the boatyard, the owner removed the yacht from the yard and the boatyard then had the yacht arrested for the balance of the monies outstanding.
- 53 cf *The Andalusian* (1878) 3 PD 182. A hull launched into the Mersey river collided with a passing ship. The engines, masts and sails had not yet been installed in the hull. Sir Robert Phillimore was 'disposed to consider that a ship of this character, in the imperfect state of a launch, might be included' in the definition of 'ship' in the Merchant Shipping Act 1854 (UK) s 2 (which is identical to the definition in the Admiralty Court Act 1861 (UK) s 2).
- 54 Shipping Registration Act 1981 (Cth) s 16.
- 55 Limitation operates on a formula which involves the tonnage of the ship. In *The Andalusian* (1878) 3 PD 182 (see n 53) Sir Robert Phillimore held that, as the unfinished hull was incapable of being registered, its owner could not limit liability, which at that time could only be done in respect of registered ships.
- 56 For claims with respect to ship construction see para 170.

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- 57 Supreme Court Act 1981 (UK) s 21(2), 21(3), 21(6).
- 58 RSC (UK) O 75, r 8(1); O 75, r 11.
- 59 Admiralty Jurisdiction Regulation Act 1983 (S Af) s 3(5).
- 60 See eg *National Dock Labour Board v John Bland & Co Ltd* [1970] 2 QB 333 concerning (again not for admiralty purposes) when a ‘cargo’ ceases to be identifiable as such.
- 61 *Carver’s Carriage by Sea*, 13th edn, R Colinvaux ed, Stevens, London, 1982, para 1661. See *The Zigurds* [1932] P 113 for an example of an admiralty action concerning freight in which the freight was worth considerably more than the ship itself.
- 62 *Arnould’s Law of Marine Insurance and Average*, 16th edn, MJ Mustill & JCB Gilman eds, Stevens, London, 1981, para 31 1 ; cf *Marine Insurance Act* 1909 (Cth) s 3.
- 63 See *The Andalina* (1886) 12 PD 1 where a ship belonging to A had been chartered by B for a round voyage. B had later sub-chartered the ship to C for the homeward leg of the voyage. In an action by the crew for wages it was held that they had a lien on all the freight outstanding on the voyage, including that payable by C to B. C’s cargo could be arrested to enforce the lien.
- 64 McGuffie (1964, 1975) para 69 (footnotes and references to aircraft and hovercraft have been omitted)\* Thomas adds to this list the possibility of arresting freight on the maritime liens for master’s and seaman’s wages and master’s disbursements: Thomas (1980) para 37.
- 65 Administration of Justice Act 1956 (UK) s 1(1)(q).
- 66 See *Carver’s Carriage by Sea* (1982) para 1991-2039 on the shipowner’s liens at common law and under contract.
- 67 The problem of the elusive dividing line between substance and procedure has already been referred to: see para 80. On the complex history of the master’s lien on cargo for payment of freight, see Wiswall (1970) 10; Gilmore & Black (1975) 187.
- 68 In *The Eschersheim* [1976] 1 All ER 920 no question of arresting other than a ship was at issue. But Lord Diplock’s analysis (*id*, 927-9) of the Administration of Justice Act 1956 (UK) s 3(4) and s 1(1)(d)-(r) can be read as suggesting that only a ship may be arrested under heads (d)-(r). Similarly it is possible to read the Supreme Court Act 1981 (UK) s 21(3) as allowing the arrest of ‘other property’ in respect of maritime liens, but only ships under s 21(4) (which operates by reference to s 20(2)(e)-(s)). But s 21(4) can also be read (and it is perhaps the better reading) as dealing only with the question of when a ship may be arrested and as not addressing the question of arrest of ‘other property’ at all.
- 69 See eg *Carver’s Carriage by Sea* (1982) para 1747 for the rules on maritime liens on freight. See also Thomas (1980) para 226, 281-2, 318, 359. For one situation that may require reform see *The Castlegate* [1893] AC 38, 55 (Lord Watson). This involved arrest of cargo or freight in respect of a charterer’s liabilities, an issue discussed in general terms in chapter 8.
- 70 See eg *The Gina* [1980] 1 Lloyd’s Rep 398 for an illustration of the way in which a shipowner with a claim against cargo can simply hold on to the cargo and thereby force the cargo owner to sue as plaintiff (in this case by arresting the ship).
- 71 There does not appear to be any clear judicial statement on why freight should be arrested. In *The Orpheus* (1871) LR 3 A & E 308, 312, Sir Robert Phillimore justified admiralty jurisdiction to arrest freight as stemming ‘from the reason of the thing’ and from long usage.
- 72 It is not clear whether freight can only be arrested where the value of the arrested ship is inadequate to meet the outstanding claim. In *The Mary Ann* (1845) 9 Jur 94, dicta of Dr Lushington suggest that freight can be arrested even where the claim is not greater than the value of the ship alone. See also *The Andalina* (1886) 12 PD 1. In practice the point often becomes overlaid by doctrines of marshalling. The commercial reality seems to be that the extra costs of arresting freight are not incurred unless the arrest of the ship alone will prove inadequate.
- 73 Where freight has already been collected and paid into a bank it ceases to be a *res*: *The Kaleden* (1914) 30 TLR 572.
- 74 *The Flora* (1866) LR 1 A & E 45.
- 75 *The Kaleden* (1914) 30 TLR 572: ‘But if a portion of the cargo could be reached then the whole of the freight could be arrested’, citing *The Roecliff* (1869) LR 2 A & E 363. In the latter case the entire cargo belonged to a single owner. It would not appear that cargo belonging to one owner can be arrested to secure payment of freight by another.
- 76 See McGuffie (1964, 1975) para 211, 217, 25 1.
- 77 Jackson (1985) 83, 85.
- 78 See *Borjesson and Wright v Carlberg* (1878) 3 App Cas 1316, 1320 for the observations of Lord Cairns (with whom Lord Hatherley agreed) on the practice of Scottish courts in allowing arrestment *ad fundam jurisdictionem*. He noted that some of the judges in the court below doubted whether the ship could be even served with arrestment after she had ... commenced her voyage and was in motion; but, be that as it may, it appears to me that the very utmost that could be done would be that those who thus got on board of her might affect the master, whatever might be the consequence of it, with the knowledge that an arrestment was there and was served there on board the ship. But I can find no authority whatever which would justify them in turning the ship about and bringing her back into port.
- See also *Dunbar v The Milwaukee* (1907) 11 Ex CR 179 (admiralty arrest effective where sheriff allowed on board moving ship and master agreed to follow sheriffs instructions and proceed to anchorage); *The Rhenania*, *The Times*, 12 November 1909 (ship in transit through English Channel after leaving English port, hailed by admiralty officer from tug, stopped, allowed officer to board, warrant of arrest read and fixed to the mast. Master asserted that he could not be properly arrested in that position, nearly 2 miles off English coast, and sailed off. On subsequent return to England, fined 100 pounds for contempt of court for ‘breaking arrest’). cf *The Largo Law* (1920) 15 Asp MLC 104, 105, where Hill J questioned whether an effective arrest could be made even of a ship anchored in an open roadstead, though he was prepared to assume that it could.
- 79 In ALRC Admiralty research Paper 3 (V Thompson & S Curran), *Draft Legislation: Admiralty Procedure and Rules*, 1985, a provision was proposed in draft rules defining when it is contempt of court to move a ship so as to prevent arrest. After discussion it was agreed that the matter is best left to the general law: cf *The Seraglio* (1885) 10 PD 120.
- 80 *Castrique v Imrie* (1870) LR 4 HL 414, 429 (Blackburn J) cited with approval in *Aichhorn & Co KG v The Ship MV ‘Talabot’* (1974) 48 ALJR 403, 404 (Menzies, Gibbs and Mason JJ).
- 81 Contrast the position in the United States where admiralty courts lack the power to order arrests in the territorial sea as a matter of municipal law: *The Hungaria* (1889) 41 F 109. Hence as a matter of municipal law an oil drilling rig off-shore is outside admiralty jurisdiction and cannot be arrested *in rem*: *ITT Industrial Credit Co v Phoenix Sea Drill ‘Big Foot II’* [1984] AMC 503 (DC WD La).
- 82 Convention on the Territorial Sea and Contiguous Zone, Geneva, 29 April 1958, 516 UNTS 205 (see also for text, Sch 1 of the Seas and Submerged Lands Act 1973 (Cth)). Art 28(2)-(3) of the Law of the Sea Convention, Montego Bay, 10 December 1982, UN Doc NoA/Conf.62/122, is to identical effect. Although the wording of the 1952 Arrest Convention is capable of being read as allowing arrest of foreign ships transiting the territorial sea on any ‘maritime claim’ as defined in that Convention, the better view is that the 1952 Arrest Convention was not intended to address the issue and that the 1958 Convention represents the international, law rule: see the summary of the extensive discussions within the International Law Commission in *YBILC* 1956/II, 275-6.

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- 83 In 1958 Sir Gerald Fitzmaurice of the United Kingdom said that there had never been such an arrest: UN Conference on the Law of the Sea (Geneva, 27 Feb- 27 April 1958) *Official Records*, vol 3, 124 (UN Doc No A/Conf.13/69). But for an example see *The Ship 'DC Whitney' v St Clair Navigation Co* (1907) 38 SCR 303 in which the Canadian Supreme Court held that there was no right to arrest in admiralty a foreign ship on innocent passage through Canadian waters on a claim which had no connection with Canada beyond the presence of the *res*. It was assumed but never proven that the ship was in motion at the time of arrest (*id.* 324). But note that s 383(1) of the Navigation Act 1912 (Cth), when read with the definition of 'Australia' in s 15B of the Acts Interpretation Act 1901 (Cth), allows ships on innocent passage to be detained by an Australian court on civil claims which need not have any connection with Australia. Such a detention would seem to be a clear breach of Australia's obligations as a party to the 1958 Territorial Sea Convention, art 20(2).
- 84 1982 Law of the Sea Convention, art 73, 81.
- 85 There are no reported cases on s 380.
- 86 See para 105-6.
- 87 The Admiralty Act 1973 (NZ) s 2 defines 'New Zealand territorial waters' to include all waters within New Zealand ('and includes the waters of any river, lake or stream'). s 4(b) provides that the jurisdiction extends to all waters wheresoever arising'. s 6 limits certain admiralty claims to cases arising *inter alia* 'within New Zealand territorial waters'. s 14 repeals the Acts of Richard II which excluded admiralty jurisdiction from matters arising within the body of a country (see para 9-10).
- 88 See para 105.
- 89 [1986] 2 WLR 219.
- 90 *id.* 223.
- 91 Navigation Act 1912 (Cth) s 315, 317; see also s 2. 'Tidal water' is defined in s 294 as 'a part of the sea, or a part of a river within the ebb and flow of the tide at ordinary spring tides, but does not include a harbour'.
- 92 See para 67, 70.

## Chapter 8

- 1 For the subject matter of a reformed admiralty jurisdiction see ch 9.
- 2 See para 80.
- 3 See eg *The Dictator* [1892] P 304. See further para 143.
- 4 A 'demise charterer' (often called a 'bareboat charterer') is a person to whom the whole operation and management of the ship has been delegated, who appoints the master and employs the crew: see L Gorton and others, *Shipbroking and Chartering Practice*, Lloyd's of London Press, London, 1980, 44.
- 5 In addition to demise charters and sub-charters by demise, the two categories commonly used are time and voyage charters. A time charter is the charter of the carrying capacity of the ship for a specified period, with the owner remaining responsible for the technical and navigational operation of the ship: *ibid*. A voyage charter is a charter of the carrying capacity of a ship for a specified voyage, and is thus usually of a relatively short duration. A ship may be sub-let on time or voyage charter by its demise charterer. In this sense the categories are not mutually exclusive.
- 6 On 'flags of convenience' see para 93.
- 7 See eg *The Father Thames* [1979] 2 Lloyd's Rep 364, 368 (Sheen J). An alternative description is the 'offending' ship: see eg *The Banco* [1971] P 137, 151 (Lord Denning MR). It is the 'ship' referred to in the Supreme Court Act 1981 (UK) in each of s 20(2)(a)-(s) either explicitly (in (a)-(h), (k)-(p) and (s)) or by necessary implication (in (j), (q) and (r)).
- 8 To simplify matters, this chapter and ch 9 will deal only with the action *in rem* in respect of the wrongdoing ship itself. The question of actions *in rem* against surrogate ships is dealt with in ch 10.
- 9 Supreme Court Act 1981 (UK) s 21(4)(b).
- 10 *Rosenfeld Hillas & Co Pty Ltd v The Ship Fort Laramie* (1922) 31 CLR 56, 63 (Knox CJ); *Shell Oil Co v The Ship Lastrigoni* (1974) 131 CLR 1, 5 (Menzies J).
- 11 eg *The Father Thames* [1979] 2 Lloyd's Rep 264 (demise charterer personally liable on damage claim); *The Castlegale* [1893] AC 38, 52 (Lord Watson) (seamen's wages, wide range of persons potentially liable); *The Ripon City* [1897] P 266 (master's wages and disbursements, non-owner in possession of ship personally liable: but see DR Thomas, *Maritime Liens*, London, Stevens and Sons, 1980, para 357 where this category is explained on the ground of estoppel of owners); *Five Steel Barges* (1890) 15 PD 142 (salvage, everyone who has an interest in the salved property liable).
- 12 A demise charterer, having possession and full control of the ship, might be potentially liable on just about any maritime claim except one involving a dispute about mortgage, ownership or between co-owners.
- 13 The sort of claims within Supreme Court Act 1981 (UK) s 20(2)(a)-(s) for which a time charterer might incur personal liability include towage, pilotage, harbour dues, supply of bunkers, personal injury, and lost or damaged goods carried under contract with the time charterer.
- 14 Of the items listed in n 13 the voyage charterer might incur liability with respect to the last two where passengers or goods are carried under contract with the voyage charterer. The other items are normally the owner's responsibility.
- 15 See generally Thomas (1980) esp chs 1, 4-8; W Tetley, *Maritime Liens and Claims*, Business Law Communications, London, 1985, Part III; DC Jackson, *Enforcement of Maritime Claims*, Lloyd's of London Press, London, 1985, esp ch 11-12.
- 16 *Shell Oil Co v The Ship 'Lastrigoni'* (1974) 131 CLR 1 followed English authorities and denied the existence of a maritime lien for necessities.
- 17 It is accepted that the category of bottomry includes *respondentia*: Thomas (1980) para 371. Some writers regard additional maritime liens as arising by implication under statutory provisions creating charges on ships, or otherwise providing for recovery from the ship of expenses or costs incurred by third parties in respect of the ship or its cargo: eg G Price, *Law of Maritime Liens*, Stevens, London, 1940, 2, citing Merchant Shipping Act 1894 (UK) s 513(2) and 567(2); Diseases of Animals Act 1894 (UK) s 46. See para 122 for references to similar provisions in Australian legislation.
- 18 *Shell Oil Co v The Ship 'Lastrigoni'* (1974) 131 CLR 1; *Bankers Trust International Ltd v Todd Shipyards Corp: The Halcyon Isle* [1981] AC 221, 232 (Lord Diplock). cf *The Acrux* [1965] P 391, 403 (Hewson J) (categories of maritime liens cannot be extended except by legislation). For the recognition of foreign maritime liens, see para 123.

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- 19 Merchant Shipping Act 1854 (UK) s 109, restricting the ambit of s 191; Merchant Shipping Act 1894 (UK) s 260, restricting the ambit of s 167.
- 20 (1858) *Swab* 362; 166 ER 1167.
- 21 *The Tagus* [1902] P 44. See also the dicta in *Poll v Dambe* [1901] 2 KB 579, 687.
- 22 See now Merchant Shipping Act 1970 (UK) s 18; Supreme Court Act 1981 (UK) s 7(a); Thomas (1980) para 322. But the proposition in the text still to some extent rests upon inferences from provisions concerning jurisdiction rather than any explicit statement in a substantive provision.
- 23 (1858) *Swab* 362; 166 ER 1167.
- 24 As defined in s 10 of the Act.
- 25 *The Louise Roth* [1905] SALR 107.
- 26 See eg Merchant Seamen Act 1935 (Tas) s 4(1), Merchant Shipping Act Application Act 1903 (WA) s 2(1), which simply extend the relevant provisions of the Merchant Shipping Act 1894 (UK) to fill the gap. Since the extension in the Tasmanian Act is in ambulatory terms the relevant legislation is presumably now the Merchant Shipping Act 1970 (UK) s 18. The Seamen's Act 1898 (NSW) s 57(1) creates a lien for wages of masters of local vessels but not for disbursements. The Queensland Marine Act 1958 (Qld) s 44(1) gives jurisdiction over both types of lien to various courts but does not itself purport to establish any categories of lien. The Marine Act (NT) s 49 creates a master's lien for disbursements but not for wages.
- 27 cf *The Royal Wells* [1984] 3 All ER 193 (Sheen J) where master's and seamen's wages claims were assimilated for priorities purposes.
- 28 For a comparative review see I Pives-Filho, 'Priority of Maritime Liens in the Western Hemisphere: How Secure is Your Claim?' (1985) 16 *Inter-American LR* 505. See further ch 12.
- 29 See generally O'Hare (1979) 200-7; Gilmore & Black (1975) 589-90; Wiswall (1970) ch 6; Thomas (1980) para 8-9.
- 30 *Bankers Trust International Ltd v Todd Shipyards Corp; The Halcyon Isle* [1981] AC 221, 250 (Lords Salmon and Scarman, dissenting). Although most of the discussion in the literature discusses the issues in terms of two competing theories, other theories are sometimes advanced: see eg Thomas (1980) para 9 for a third, 'conflict', theory.
- 31 *The Halcyon Isle* [1981] AC 221, 234 (Lord Diplock, speaking for the majority).
- 32 Thomas (1980) para 46. On the substantive character of maritime liens see *The Heinrich Bjorn* (1885) 10 PD 44, 53-6 (CA) aff'd (as *The Henrich Bjorn*) (1886) 11 App Cas 270, 277-8 (Lord Watson). cf also *Hamilton v Baker; The Sara* (1889) 14 App Cas 209, 214-5 (Lord Halsbury LC).
- 33 The question of the recognition of foreign maritime liens (ie maritime liens created under foreign law either as the *lex loci* or the proper law of the claim in question) is a separate issue, discussed in para 123.
- 34 cf para 80.
- 35 For the position in US admiralty law, see Gilmore & Black (1975) ch 9.
- 36 *The Lastrigoni* (1974) 131 CLR 1; *The Halcyon Isle* [1981] AC 221.
- 37 The 1926 & 1967 Maritime Liens and Mortgages Conventions (as to which see para 94 n 31) have not been widely accepted, but there is no indication that wider categories of liens than those allowed by the Conventions would be internationally acceptable.
- 38 cf Brussels Arrest Convention 1952, art 1. Expansion of admiralty jurisdiction in other common law countries has been by way of expanding categories of arrest rather than the creation of new maritime liens (eg South Africa, Canada, New Zealand, Singapore).
- 39 See para 126-37 for discussion of the problem and possible solutions to it.
- 40 cf Brussels Arrest Convention, art 9.
- 41 cf the comment in *The Father Thames* [1979] 2 Lloyd's Rep 364,368 (Sheen J): 'A maritime lien is not defined in the 1956 Act. That is not surprising because it is more easily recognised than defined'.
- 42 See para 119 where the statutory provisions are discussed.
- 43 As in Supreme Court Act 1981 (UK) s 21(3).
- 44 cf Admiralty Act 1973 (NZ) s 2: 'Maritime lien' without derogating from the generality of the term, includes a lien in respect of bottomry, *respondentia*, salvage of property, seamen's wages and damage'.
- 45 The exception is the virtually obsolete category of bottomry and *respondentia*. It is not proposed to confer jurisdiction (including jurisdiction *in personam*) over these other than as maritime liens: cf Wiswall (1970) 211.
- 46 See para 80.
- 47 For the definition of 'other property' see para 109-10.
- 48 See eg Lighthouses Act 1911 (Cth) s 19(3) (lighthouse dues); Navigation Act 1912 (Cth) s 38(1) (apprentice's indentures), s 128(2) (medical expenses of crew owed to Commonwealth), s 163A(d) (expenses of maintaining distressed seamen); Quarantine Act 1973 (Cth) s 65 (quarantine expenses); Protection of the Sea (Civil Liability) Act 1981 (Cth) s 21 (Commonwealth's expenses in pollution clean-up); Environment Protection (Sea Dumping) Act 1981 (Cth) s 17(3) (penalties for breach of Act); Merchant Shipping Act 1894 (UK) s 513(2) (damage caused to landowner by those attending a wreck); Queensland Marine Act 1958 (Qld) s 59(2) (medical expenses of crew owed to State).
- 49 An example of the latter is Navigation Act 1912 (Cth) s 128(2) under which the charge may be recovered 'in the same court and manner as wages due to seamen'. A seaman has a maritime lien for wages.
- 50 It follows from the conclusion in this para (and the point is made explicit in ch 13) that, under the proposed legislation, State and Territory Parliaments will retain their existing powers to create new maritime liens.
- 51 *Bankers Trust International Ltd v Todd Shipyards Corp; The Halcyon Isle* [1981] AC 221. Singapore law on the point was acknowledged to be identical to English law.
- 52 Lords Diplock, Elwyn-Jones & Lane; Lords Salmon & Scarman dissenting.
- 53 *The Strandhill v W Hodder Inc* [1926] SCR 680; *Todd Shipyards Corp v Altema Compania Maritima SA; The Ioannis Daskalelis* [1974] SCR 1248. The decision of the Privy Council in *The Halcyon Isle* has not altered the attitude of Canadian Courts: see eg *Marlex Petroleum Inc v The Ship Har Rai* [1984] 4 DLR (4th) 739, 744 (FC).
- 54 *Southern Steamship Agency Inc v MV 'Khalij Sky'* 1986 (1) S AfrLR 485.
- 55 See para 94 for the limited degree of consensus so far.
- 56 See para 94.

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- 57 The CMI Draft Revision of the Brussels Convention (Lisbon, 1985) adopts a broader and indicative, rather than exclusive, definition of 'maritime claim' but it also specifically limits the categories of maritime liens: art 3(1)(a). See para 94 n 47.
- 58 Professor DC Jackson, *Submission 25* (14 February 1985) 4; PA Cornford, *Submission 67* (14 November 1985) 2. cf Ebsworth & Ebsworth, *Submission 31* (1 March 1985) 6. Opinions expressed in the literature also tend to favour the minority view in *The Halcyon Isle*: eg Thomas (1980) para 578-9 (written before the decision); Jackson (1985) 221-2, 345-9; Tetley (1985) 545-50. A compromise was suggested by PG Willis, Deputy Corporate Solicitor, BHP, *Submission 68* (15 November 1985) 4-5 of recognising only those foreign maritime liens generally accorded recognition in international maritime law: in particular those falling within the categories defined in art 4 of the Lisbon CMI draft Liens and Mortgages Convention.
- 59 See para 118 for the meaning of 'relevant person'.
- 60 See para 17 for references to the literature on the rival theories.
- 61 For the effect of 'surrogate ship' arrest on this theory see para 125.
- 62 Gilmore & Black (1975) 589-90.
- 63 See para 94 n 42 on arrest *ad fundam jurisdictionem*.
- 64 See para 96.
- 65 [1976] 1 All ER 920, 928 (Lord Diplock, with whom the other four Lords agreed).
- 66 Although 'damage received by a ship' remains a head of jurisdiction (s 20(2)(d)), proceedings are only allowed *in personam* under it, not *in rem* (s 21(4)). For the argument that there should nonetheless be a right of arrest for 'damage done to a ship', see para 172.
- 67 Administration of Justice Act 1956 (UK) s 1(1)(h).
- 68 [1968] P 449.
- 69 [1972] 2 QB 543. In fact the writ named 'sister ships' of the ship to which the service had been rendered but nothing in the present argument turns on this.
- 70 See *The Eschersheim* [1976] 1 All ER 441, 459 (CA) (Sir Gordon Willmer).
- 71 [1976] 1 All ER 920, 927 (Lord Diplock).
- 72 Art 3(1).
- 73 Federal Court Act 1970 (Can) s 43(2); Admiralty Act 1973 (NZ) s 5(2); Admiralty Jurisdiction Regulation Act 1983 (S Af) s 3(5).
- 74 If surrogate ship arrest is permissible, some other ship may be served and arrested, but the first step in determining whether proceedings *in rem* can be brought would still be to identify the wrongdoing ship. For surrogate ship arrest see ch 10.
- 75 eg Supreme Court Act 1981 (UK) s 20(2)(p).
- 76 Which it probably is: see *Mortensen and Lange v Neptune International Shipping Ltd* [1981] 2 FC 232, 235 (Mahoney J) interpreting Federal Court Act 1970 (Can) s 22(2)(i).
- 77 See para 134 n 123 for an example of a shipowner/time charterer dispute in which the former is plaintiff.
- 78 cf O'Hare (1979) 206.
- 79 [1968] P 449.
- 80 [1972] 2 QB 543. See para 124.
- 81 In particular, both cases would be covered by a head of jurisdiction 'services supplied to a ship'. See para 171.
- 82 cf Price (1945) 22.
- 83 *The Henrich Bjorn* (1886) 11 App Cas 270, 278. The reasoning of Menzies J in *Shell Oil Co Ltd v The Ship Lastrigoni* (1974) 131 CLR 1 is suggestive of a similar attitude. For a suggestion that the Supreme Court Bill 1981 (UK) cl 21(3) was open to similar attack, see Jackson (1982) 241. Amendment in the House of Lords altered the whole scope of cl 21 and rendered the point moot. Lord Watson's reasoning has been followed by Canadian courts in interpreting the admiralty provisions of the Federal Court Act 1970 (Can) although the constitutional position there is somewhat different to that in Australia: *Westcan Stevedoring Ltd v The Ship 'Amar'* [1973] FC 1232; *McCain Produce Co Ltd v The Ship MV 'Rea'* [1978] 1 FC 686.
- 84 *The Druid* (1842) 1 W Rob 390, 399; 166 ER 619, 622 (Dr Lushington); *The M Moxham* (1876) 1 PD 107, 111 (James LJ); *The Tolla* [1921] P 22; *The Castlegate* [1893] AC 38, 52 (Lord Watson); *The Utopia* [1893] AC 492; *The Tervae* [1922] P 259; cf *The St Merriel* [1963] P 247, 256 (Hewson J). Australian authorities include: *Rosenfeld Hillas & Co Ltd v The Ship Fort Laramie* (1922) 31 CLR 56, 63 (Knox CJ); *Dalgety & Co Ltd v Aitchison*; *The Rose Pearl* (1957) 2 FLR 219, 227-9 (Kriewaldt J); *The Lastrigoni* (1974) 131 CLR 1, 5 (Menzies J). See the discussion by PM Hebert, 'The Origin and Nature of Maritime Liens' (1930) 4 *Tulane LR* 381, 388-91. The owner may in some circumstances be liable on a claim notwithstanding that the ship is chartered or requisitioned, either by operation of the general law or by virtue of special rules of maritime law: cf *The Meandros* [1925] P 61 (salvage); *Phillips v Highland Railway Co* (1883) 8 App Cas 329, 336-8 (wages and wrongful dismissal); *The Tolla* [1921] P 22 (disbursements on master's ostensible authority).
- 85 According to Hebert (1930) these cases fall into two classes. The first and most important involves possession with the owner's consent and authority: *The Ticonderoga* (1857) Swab 215, 217-8; 166 ER 1103, 1104 (Dr Lushington); *The Lemington* (1874) 2 Asp MLC (NS) 475, 478 (Sir R Phillimore); *The Tasmania* (1888) 13 PD 110, 115-118 (Hannen P); *The Ripon City* [1897] P 226, 242-5 (Barnes J); cf *Foong Tai & Co v Buchheister & Co* [1908] AC 458. These cases were criticised and distinguished by Hill J in *The Sylvan Arrow* [1923] P 220 (collision of requisitioned ships) (and cf *The St Merriel* [1963] P 247, 256 ('not prepared to enlarge the area of exceptions')). But see the explanation in *The Andrea Ursula* [1973] QB 265, 269-70 (Brandon J). The second class involves wrongful possession: eg *The Edwin* (1864) Br & L 281, 285; 166 ER 365, 367 (Dr Lushington).
- 86 cf Brandon J (in a slightly different, but analogous context):  
the jurisdiction which is invoked by an action in rem ... is the jurisdiction to hear and determine the questions and claims listed ... I see no reason why, once a plaintiff has properly invoked that jurisdiction by bringing an action in rem ... he should not, despite a subsequent change of ownership of the res, be able to prosecute it through all its stages, up to and including judgment against the res, and payment of the amount of the judgment out of the proceeds.
- The Monica S* [1968] P 741, 773.
- 87 cf Brandon J, id, 768-9, pointing out that *in rem* procedures on any view produce 'substantive' effects in many cases.
- 88 cf *The Henrich Bjorn* (1886) 11 App Cas 270, 278 (Lord Watson).
- 89 See para 74-80.
- 90 *John Sharp & Sons Ltd v The Ship 'Katherine Mackall'* (1924) 34 CLR 420, 428 (Isaacs J). See para 70.

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- 91 See further para 137.
- 92 Unreported, NSW S Ct, 22 November 1983, Rogers J. This was a cargo claim brought *in personam* in the Common Law Division.
- 93 Transcript of Judgment, 3.
- 94 On the sometimes difficult distinction between demise and time charters cf *Frossos Shipping Corporation v Richmond Maritime Corporation* 1985 (2) S AfrL 476, 479-81 (Berman AJ).
- 95 (1974) 131 CLR 1, 6.
- 96 Two situations need to be distinguished. The first is where a lien comes into existence despite the fact that the owner of the ship would not be liable *in personam* with respect to the events which gave rise to the lien. Bottomry is a classic example but see Thomas (1980) para 14 for other (admittedly rare) examples. The second situation is where the owner was personally liable at the time when the lien came into existence but the ship has since been sold. The lien survives despite the new owner's lack of *in personam* liability. This situation is far more common.
- 97 Supreme Court Act 1981 (UK) s 21.
- 98 See para 94.
- 99 See the historical introduction in para 9-17.
- 100 See para 91-6.
- 101 Strictly it is service on the *res*, not arrest, that confers jurisdiction, although they frequently occur at the same time. The Convention, however, is concerned with 'arrest' in the English text, '*saisie conservatoire*' in the French text.
- 102 Administration of Justice Act 1956 (UK) s 3(4).
- 103 The better view was that it could not: *I Congreso del Partido* [1978] QB 500, 537-42 (Goff J); *The Father Thames* [1979] 2 Lloyd's Rep 364, 368 (Sheen J); *The Pangakalan Susu*; *The Permina 3001* [1977] 2 MLJ 129 (Singapore CA); *The Union Darwin* [1983] HKLR 248. For the opposing view, which had the advantage of bringing English law into accord with at least the first paragraph of art 3(4) of the 1952 Arrest Convention, see *The Andrea Ursula* [1973] QB 265 (Brandon J).
- 104 Great Britain, 418 *Parl Debs (HL)* (5th Series) (26 March 1981) 1307-9. For critical comment, see Jackson (1982) 241-2.
- 105 This is the position under the Supreme Court Act 1981 (UK) s 21(4)(i) and the Admiralty Act 1973 (NZ) s 5(2)(b).
- 106 *I Congreso del Partido* [1978] QB 500, 541-2 (Goff J). See also the Zelling Report, Supp, para 2.4.
- 107 *Sir John Jackson Ltd v The Owners of the SS Blanche* [1908] AC 126. Even before the final appeal was decided the Merchant Shipping Act 1906 (UK) s 71 had provided that s 502-9 of the principal Act were 'to be read so that the word "owner" shall be deemed to include any charterer to whom the ship is demised.'
- 108 See the cases referred to in para 130, n 103.
- 109 On these differences see Gilmore & Black (1975) 239. In civil law systems the demise charter is in a different legal form to time or voyage charters. But cf para 127, n 94.
- 110 See the International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships, Brussels, 10 October 1957, art 6(2) (owner includes charterer, manager or operator), given effect in Australia by the Navigation Act 1912 (Cth), s 333. See also the International Convention on Limitation of Liability for Maritime Claims, London, 19 November 1976 (IMCO Doc No 77.04.E) art 2 ('The term "shipowner" shall mean the owner, charterer, manager and operator of a seagoing ship'). But cf the position in the United States (under 46 USC 186) where still only the owner or demise charterer is allowed to limit: *In re Barracuda Tanker Corp* 281 F Supp 228 (1968), remanded on other grounds 409 F 2d 1013 (1969).
- 111 The Navigation Act 1912 (Cth) at present refers directly to demise charterers only in s 6 (definitions of 'Commonwealth ship', 'Government ship') and s 265A (liability of 'charterers or other persons' for collisions, loss and damage). On the other hand s 6(4) provides that: Unless the contrary intention appears, a reference in this Act (except in Division 3 or 4 of Part VII) to the owner of a ship shall, in the case of a ship that is operated by a person other than the owner, be read as including a reference to the operator.
- Pt VII Div 3 & 4 are concerned with salvage claims and procedure, where the extension is (because of the salvage lien) probably not necessary anyway.
- 112 Federal Court Act 1970 (Can), s 22(2)(a)-(c).
- 113 id, s 22(2)(1) and (s).
- 114 id, s 22(2)(q).
- 115 Owners often go to great lengths to ensure that those dealing with a ship know that it is on charter and the charterer is not authorised to deal on the credit of the ship. See eg *The Loon Chong* [1982] 1 MLJ 212, 214, where the charterparty required the charterer to exhibit on board the ship in a conspicuous place a prominent notice to the effect that the ship was the property of the lessor and that neither the lessee nor the master had any right, power or authority to create, incur or permit to be imposed upon the ship any liens whatsoever except for crew's wages and salvage.
- 116 See Gilmore & Black (1975) 668-88 for details.
- 117 This option could be combined with either of the two previous options, ie, it could apply only to demise charters (option c) or only to certain heads of jurisdiction (option d). Other combinations are also possible.
- 118 The Canada Shipping Act 1934 (Can) s 702(7) makes similar provision, and is still in force. The Shipping and Seamen Act 1952 (NZ) s 486 allowed stevedoring claims against a ship in respect of any sum due 'from the owners or other persons responsible for the navigation and management of a ship' to be pursued 'as if the claim were a claim for necessaries supplied to the ship'. This provision was repeated by the Admiralty Act 1973 (NZ) s 14(3).
- 119 Zelling Report, Supp, para 27; *The Father Thames* [1979] 2 Lloyd's Rep 364, 368, (Sheen J).
- 120 Great Britain, 418 *Parl Debs (HL)* (5th Series) (26 March 1981) 1309.
- 121 On the distinction in English admiralty law between maritime liens and 'statutory liens' see Thomas (1980) para 44-51. But other solutions are possible. Under Greek maritime law, for example, 'in cases when the vessel is the only asset of the shipowning company and is transferred to a new owner who knows that the ship was the only asset of the previous owner, the vessel may be arrested in the hands of the new owner for claims against his predecessor even though such claims are not covered by a maritime lien, which in any event follows the ship under certain conditions': GJ Timagenis, 'Arrest of Ships in Greece' [1984] LMCLQ 90, 92. See also the comparative surveys in Jackson (1985) App 5; Tetley (1985) Part IX.
- 122 *The Father Thames* [1979] 2 Lloyd's Rep 364, 368 (Sheen J). See also *The Monica S* [1968] P 741, 769 (Brandon J) discussing the argument that a new owner is unfairly burdened by the maritime liens on the ship which came into existence prior to the date of purchase:

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A purchaser always has to reckon with the possibility of maritime liens, and under many foreign laws all or most of the claims which in England only give a right of action *in rem* give rise to such liens ...

In practice a purchaser takes an indemnity from his seller against claims which attached prior to the sale, and, unless the seller becomes insolvent, this affords adequate protection.

For a case involving the interpretation of the indemnity clause in a common form agreement for the sale of a ship see *Athens Cape Naviera SA v Deutsche Dampfschiffarts Gesellschaft 'Hansa' AG. The Barenbels* [1985] 1 Lloyd's Rep 528 (CA).

123 See eg *The Vestland* [1980] 2 Lloyd's Rep 171. This involved a simple owner-time charterer relationship. The owner had great difficulty in recovering from the time charterer the cost of posting security to obtain the release of its vessel which had been arrested on claims for which the charterer was the relevant person.

124 cf *Shell Oil Co Ltd v The Ship Lastrigoni* (1974) 131 CLR 1.

125 Australian Law Reform Commission, Discussion Paper 21, *Admiralty Jurisdiction*, 1984, para 16; Australian Law Reform Commission, Admiralty research Paper 1, S Curran & D Cremeen, *An Australian Admiralty Act: The Ambit of Admiralty Jurisdiction*, (1984) 140.

126 MR Blair, President, Australian Shippers' Council, *Submission 28* (19 February 1985) 2-3.

127 S Westgarth, Westgarth Baldick, *Submission 55* (1 November 1985) 2. Other submissions supporting a broader right of arrest included P Foss, *Submission 3* (4 May 1983) 3; Professor DC Jackson, *Submission 25* (14 February 1985) 3; WM Ross, National Bulk Commodities Group, *Submission 82* (18 April 1986). Similar views were expressed at the Commission's public meetings on the Reference held in Brisbane and Perth (see para 4) and by the Commonwealth Department of Trade.

128 AB Willings, Chairman, Universal Shipbrokers (Aust) Pty Ltd, *Submission 32* (6 March 1985) 2.

129 PG Willis, Deputy Corporate Solicitor, BHP Co, *Submission 23* (12 February 1985) 3-5. Other submissions opposing a right of action *in rem* extending beyond owners' and demise charterers' liabilities included: S Hetherington, Ebsworth & Ebsworth, *Submission 31* (1 March 1985) 3-5; Justice B Sheen, *Submission 38* (21 March/2 May 1985); B Davenport QC, Law Commission for England and Wales, *Submission 37* (19 March 1985); Australian Mining Industry Council, *Submission 86* (13 May 1986). This view also had a considerable measure of support at the public meetings held in Sydney and Melbourne (see para 4).

130 See para 88-9, 94, 96.

131 The French text refers to '*saisie Conservatoire*' rather than arrest. This is a quite separate concept. See para 130.

132 CMI Draft Convention, 1985, art 3(1)(d), (3). The text of art 3(1)(d) was adopted by 23-6 (with 5 abstentions): PG Willis, *Submission 80* (15 April 1986).

133 According to the principal architect of the South African Act, it may be possible to bring proceedings *in rem* under it in respect of a demise charterer's liability, on the old common law basis that a demise charterer is owner *pro hoc vice*: D Shaw QC, *Submission 39* (25 March 1985) 2. Alternatively it may be possible under South African law to attach the demise charterer's right to possession by attaching the ship *ad fundam jurisdictionem*: ibid.

134 Apparently there is no proposal at present to extend the right of action *in rem* under Canadian law to demise charterers' liabilities generally: PM Troop, Canadian Department of Justice, *Submission 40* (26 March 1985).

135 Justice B Sheen, *Submission 38* (21 March/2 May 1985).

136 For these 'proprietary' claims, where an interest in the ship itself is at stake, see para 149-52. It is accepted that no nexus requirement needs to be spelt out in these cases. The owner may, eg, be arresting the ship after wrongful dispossession. See also para 192, 208.

137 It was proposed as a compromise by P Willis (Australia) and was defeated only by 15-11 (5 abstentions): PG Willis, Deputy Corporate Solicitor, BHP Ltd, *Submission 80* (15 April 1986).

138 See para 131 n 110.

139 cf P Foss, *Submission 3* (4 May 1983) 3; S Westgarth, *Submission 55* (1 November 1985) 2.

140 On the question whether surrogate ship arrest should be introduced in Australia see ch 10.

141 South African Law Commission, *Report on the Review of the Law of Admiralty*, 1982, para 73. See now Admiralty Jurisdiction Regulation Act 1983 (S Af) s 317.

142 Robinson SK, 'Arresting the Misconception' [1982] *LMCLQ* 261, 262.

143 *The Aventicum* [1978] 1 Lloyd's Rep 184; *The Helene Roth* [1980] 2 WLR 549, 554; *The Enfield* [1982] 2 MLJ 106. The facts in *The Aventicum* provide a good example of how complex the chain of interlocking companies involved in the ownership of a commercial vessel can be. See para 139 n 158.

144 *The Maritime Trader* [1981] 2 Lloyd's Rep 153.

145 s 3(4)(a)-(b).

146 s 21(4)(i)-(ii) ('beneficial owner').

147 *The Andrea Ursula* [1973] QB 265, 269, See also *The Pangakalan Susu*; *The Permina 3001* [1977] 2 MLJ 129 (Singapore CA) (attempt by plaintiff to argue that a constructive trust had arisen out of a ship financing arrangement failed). Under the Shipping Registration Act 1981 (Cth) s 46, notice of trusts shall not be entered in the Register. Under s 47 however, equities may be enforced. See also Navigation Act 1912 (Cth) s 391 (beneficial owners of ships subject to penalties imposed by Act on registered owners).

148 As Robinson (1982) 263 points out, if the expression 'beneficial owner' in the Supreme Court Act 1981 (UK) s 21(4) was interpreted strictly, 'the present information which is in practice laid before the court in order to obtain a warrant for arrest is not in compliance with the requirements laid down by the 1981 Act'.

149 *The Aventicum* [1978] 1 Lloyd's Rep 184; *The Maritime Trader* [1981] 2 Lloyd's Rep 153; *The Saudi Prince* [1982] 2 Lloyd's Rep 255. The decision in *The Asean Promoter* [1982] 2 MLJ 108 (Singapore S Ct) illustrates the limits of the courts' willingness to lift the corporate veil under the general law. Plaintiffs claim arose in connection with ship AP. The relevant person was its registered owner M & G Ltd which had a paid up capital of 2 \$1 shares, both of which were owned by HPI Ltd. All directors of M & G were directors of HPI. The ship it was sought to arrest, APS, was owned by SML Ltd who acted as managers of the the wrongdoing ship, AP. The Court 'had no hesitation in lifting the veil of incorporation' between M & G Ltd and HPI Ltd on the basis of the former's undercapitalisation and the common directorships. However it refused to do likewise with the veil between HPI Ltd and SML Ltd and thus would not allow the arrest of APS.

150 *The Maritime Trader* [1981] 2 Lloyd's Rep 153, 159.

151 ibid. But cf his remarks in *The Helene Roth* [1980] 2 WLR 549, 554. For examples of lifting the veil see *The Saudi Prince* [1982] 2 Lloyd's Rep 255, 260 (shares in ship-owning company put in the names of children, father treated as beneficial owner), *The Enfield* [1982] 2 MLJ 106 (Singapore CA) (purported sale of ship between two companies owned by same family disregarded). On the other side of the line see eg *The Loon Chong* [1982] 1 MLJ 212 (Malaysia, Fed Ct, Full Ct).

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- 152 Tettenborn AM 'The Time Charterer, the One-Ship Company and the Sister-Ship Action *in rem*' [1981] LMCLQ 507, 509. GW Keeton, 'Lessons of the Torrey Canyon: English Law Aspects' (1968) 21 *Current Legal Problems* 94, 110 asserts that one ship companies were a direct reaction to the introduction in 1956 of surrogate ship arrest.
- 153 HAJ Ford, *Principles of Company Law* 3rd edn, Butterworths, Sydney, 1982, para 711.
- 154 See eg the added difficulties created for the operation of the time bar in the Navigation Act 1912 (Cth) s 396(3): see para 254.
- 155 See para 259.
- 156 Admiralty Jurisdiction Regulation Act 1983 (S Af) s 3(7)(b)(ii).
- 157 On the other hand there have been difficulties both with the question of the retrospective effect of s 3(7) and with priorities as between associated claims. In *Transgroup Shipping SA v Owners of MV Kyoju Maru* 1984 (4) S AfLR 210, Leon J held that the associated ship provisions were merely procedural and therefore applied to claims arising before the Act came into force. But he held that the plaintiff had failed to prove that two ships, time chartered to the defendant company and operated as part of a single fleet, were 'associated' with a third ship owned by the company. The plaintiffs solicitor's affidavit in that case complained that lack of access to share registers of the various companies prevented it proving the 'control' required by s 3(7). The Court declined to allow discovery to assist the plaintiff in proving that the action was properly constituted. In *Euromarine International of Mauren v The Ship Berg* 1984 (4) S AfLR 647 the Natal Provincial Division held (2-1, Leon J dissenting) that the effect of the corporate veil provision was to convert associated ship arrest into a new right instead of merely a new procedure, on the basis that the action could be brought against a ship 'owned by an entirely different company from that which owned the ship in respect of which the claim arose' (*id*, 659 (Milne JP)). The rights created by s 3(6) & (7) were therefore strictly prospective in effect only. The *Kyoju Maru* case was, on this point at least, disapproved. But cf *Banque Paribas v Fund of Sale of the MV Emerald Transporter* 1985 (2) S AfLR 452, on appeal on another point 1985 (4) S AfLR 133. In *EE Sharp & Sons Ltd v MV Nefeli* (1984) (3) S AfLR 325, King AJ held that common management of two ships did not establish 'control', but the fact that the same person was 'president/director' of the two companies in question did. In *Zygos Corporation v Salen Rederierna AB* 1984 (4) S AfLR 444, Friedman J, surprisingly, held that a ship could be arrested as an associated ship notwithstanding that it had ceased to be 'associated' after the claim arose and before proceedings were commenced. *Gulf Oil Trading Co v Fund of Sale of MV Emerald Transporter* 1985 (4) S AfLR 133 concerned the respective priorities of claims against 'associated ships', some of which were owned by the same company and some of which were owned by different companies in the same group. The court rejected the literal interpretation of s 11(8) as leading to an absurdity and held that it applied to all associated ship claims carried into effect by an action *in rem*. Its effect was to give priority to claims pursued directly against the ship in question as the wrongdoing ship over all such associated ship claims, which were then ranked inter se without reference to the identity of the relevant person or the question whether they were 'sister ship' or 'group ship' claims. For priorities and surrogate ship arrest see further para 259-61.
- 158 In *The Aventicum* [1978] 1 Lloyd's Rep 184, the companies involved were set up under the laws of Panama, Liberia, the Bahamas, Singapore, Switzerland and West Germany and at the time of the action the linkages had still not been unscrambled in a manner that made it clear to the court who was ultimately in control.
- 159 id, 190.
- 160 Submissions supporting a 'corporate veil' provision included MA Hill, *Submission 19* (16 January 1985) 3; Justice B Sheen, *Submission 22* (29 January 1985) 1 (while expressing concern about conflict with general company law principles); MR Blair, President, Australian Shippers' Council, *Submission 28* (19 February 1985) 3. Submissions opposing such a provision included PG Willis, Deputy Corporate Solicitor, BHP, *Submission 23* (12 February 1985) 6; WE Paterson QC, *Submission 41* (1 April 1985) 3; Australian Mining Industry Council, *Submission 86* (13 May 1986). cf AT Scotford, *Submission 61* (18 November 1985) 1, drawing attention to reported concern at the South African provision and its possible deterrent effect.
- 161 The same conclusion was reached in the context of a proposal for a 'group insolvency' regime, and for the same reason, by the Cork Committee: GB, Report of the Review Committee, *Insolvency Law and Practice*, HMSO, London, 1982, para 1950-2.
- 162 As the South African cases referred to in n 157 suggest, such a provision might require the support of a substantive legislative power, presumably s 51(20).
- 163 Wiswall (1970) 16, 179. On the fall into disuse of arrest *in personam* in admiralty in the 18th century see *The Clara* (1855) Swab 1; 166 ER 980.
- 164 See now Supreme Court Act 1981 (UK) s 21(1)-(4); Federal Court Act 1970 (Can) s 43(1)-(2); Admiralty Act 1973 (NZ) s 3(1); Admiralty Jurisdiction Regulation Act 1983 (S AD) s 3(1)-(4).
- 165 See Wiswall (1970) 62-4 on the transition, the precise nature and details of which appear to have been confusing to contemporaries and remain obscure for historians.
- 166 Thomas (1980) para 66.
- 167 Wiswall (1970) 197.
- 168 See para 295-7 for discussion of preliminary acts.
- 169 See para 176, 299.
- 170 Kennedy's *Civil Salvage*, 4th edn, KC McGuffie (ed), Stevens, London, 1958, 372-4 canvasses the issue. Because the salvage does not constitute a debt, recovery at common law would only be available if there was a contract, express or implied. If recovery were based on *quantum meruit* it is not clear that the amount recovered would reflect the admiralty practice of encouraging salvors by making liberal and generous awards. Navigation Act 1912 (Cth) s 318-28 covers most, but not all cases: cf para 45.
- 171 Navigation Act 1912 (Cth) s 405A. See para 199.
- 172 See ch 11 for discussion of federal jurisdictional issues.
- 173 [1892] P 304. See also *The Gemma* [1899] P 285.
- 174 See Wiswall (1970) 158-62, 174-8, 180-4, 198-201 for an advocate's account of the old admiralty rule and its displacement in *The Dictator* [1892] P 304.
- 175 The Privy Council in *The August 8* [1983] AC 450, 456 described it as 'this important principle'.
- 176 Appearance is a submission to jurisdiction, not to liability: *ibid*. cf Jackson (1985) 84. The point is implicit in *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstad'* (1976) 11 ALR 227, 231-3 (Gibbs J).
- 177 The rule should refer only to liability for the payment of money, leaving open the question of the effect of equitable orders (eg injunctions). See further para 245-8.
- 178 Specifically, in the proposed uniform Admiralty Rules. See ch 14 on the need for and content of such rules.

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179 See now Rules of the Supreme Court (UK) O 75 r 3(1) & (2). The earlier UK practice of issuing ‘combined’ writs was disapproved by a Practice Direction in 1979: [1979] 2 All ER 155; Rules of the Supreme Court (UK) Admiralty Practice Direction 2A.

## Chapter 9

- 1 See para 121-3.  
2 International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships, Brussels, 10 May 1952, art 1(1)(a)-(q).  
3 Supreme Court Act 1981 (UK) s 20(2)(a)-(s).  
4 Federal Court Act 1970 (Can) s 22(2)(a)-(s); Admiralty Act 1973 (NZ) s 4(1)(a)-(s).  
5 Admiralty Jurisdiction Regulation Act 1983 (S Af) s 1(1)(ii)(a)-(z).  
6 *The Eschersheim* [1976] 1 All ER 920, 926 (Lord Diplock). See also *The Saint Anna* [1983] 1 Lloyd’s Rep 637, 639 (Sheen J); *The Antonis P Lemos* [1985] AC 711.  
7 See para 39 (foreign mortgages), 40 (construction, repair, equipping of ship).  
8 See para 300 (caveats against arrest), 301-4 (damages for vexatious arrest).  
9 See para 11.  
10 See para 48, 49. See also para 42.  
11 This involves, among other things, the repeal of 13 Ric 11 St 1, c 5 and 15 Ric 11 c 3. See para 9 on these Acts, and see further para 271.  
12 See para 115.  
13 See para 106.  
14 The Canadian Supreme Court has rejected the view expressed by the Federal Court based on decisions of admiralty courts in the United States that the equivalent language in the Federal Court Act 1970 (Can) s 22(2)(a) should be construed as covering only petitory and possessory actions. It looked instead to English decisions and treated the Federal Court’s admiralty jurisdiction under s 22(2)(a) as extending to awards of damages and orders of specific performance in actions for breach of contract to sell a ship: *Antares Shipping Corp v The Ship ‘Capricorn’* (1980) III DLR (3d) 289. But note that the 1952 Arrest Convention art 1(1)(o) refers only to title and ownership, not possession. Hence Greek courts, for example, have interpreted this as not covering (and hence not allowing arrest on) a vendor’s claim arising out of the sale of a ship: KD Kerameus, ‘Admiralty Jurisdiction in Continental Countries’ (1983) 8 ML 329, 336.  
15 cf Supreme Court Act 1981 (UK) s 20(7)(a). See also para 298.  
16 For the admiralty jurisdiction under the Administration of Justice Act 1956 (UK) s 1(1)(a) to make declarations as to ownership and as to entitlement to registration see *The Bineta* [1966] 3 All ER 1007. For the inherent jurisdiction of admiralty and other superior courts to order rectification of registers see *The Rose* (1873) LR 4 A & E 6; *Brond v Broomhall* [1907] 1 KB 571.  
17 In ch 11 it is recommended that the Federal Court be given concurrent original admiralty jurisdiction. The power to order rectification would also be vested in inferior courts, under the provision recommended in para 195, in the rare case where the exercise of that power is an ‘associated matter’.  
18 See para 47.  
19 Administration of Justice Act 1956 (UK) s 1(1)(b), 1(4)(a). cf Supreme Court of Judicature (Consolidation) Act 1925 (UK) s 22(1)(a)(ii).  
20 Supreme Court Act 1981 (UK) s 20(4). See similarly Admiralty Act 1973 (NZ) s 4(3).  
21 Administration of Justice Act 1956 (UK) s 1(4)(c); Supreme Court Act 1981 (UK) s 20(7)(c); Federal Court Act 1970 (Can) s 22(3)(d); Admiralty Act 1973 (NZ) s 4(4)(c).  
22 See para 39.  
23 *The Acerux* [1965] P 391, 403 (Hewson J). See also *The St Merriel* [1963] P 247; *The Monica S* [1968] P 741, 747.  
24 See *The Colorado* [1923] P 102.  
25 *Bow, McLachlan & Co Ltd v The Ship Camosun* [1909] AC 599, 609.  
26 Supreme Court Act 1981 (UK) s 20(2)(c).  
27 [1976] 1 All ER 920, 927 (Lord Diplock).  
28 See para 125-6.  
29 For cases involving mortgages of freight see *Keith v Burrows* (1876) 1 CPD 722; *The Zigurds* [1934] AC 209. *Respondentia* is a specialised example of such a mortgage.  
30 See para 39 for the background to s 94A.  
31 See further para. 195.  
32 See para 258.  
33 eg Supreme Court Act 1981 (UK) s 20(2)(k).  
34 *The Leoborg* [1962] 2 Lloyd’s Rep 146.  
35 [1972] 2 QB 543, 552. It was unnecessary to resolve the point. Counsel for the defendant had argued that, because the claim was neither for remuneration nor for an incident which occurred while the tug was actually towing, it fell outside the towage head of jurisdiction.  
36 [1976] 1 All ER 920, 927 (Lord Diplock); see para 124-5.  
37 See para 169. See also para 171 (services supplied to a ship).  
38 GK Green, *The Law of Pilotage*, Lloyd’s of London Press, London, 1977, 80-1 provides a convenient State-by-State summary.  
39 eg Pilotage Act 1971 (NSW) s 34; Queensland Marine Act 1958 (Qld) s 178; Harbours Act 1936 (SA) s 133.  
40 eg Queensland Marine Act 1958 (Qld) s 245. See para 263-6 for the relationship between admiralty arrest and statutory rights of detention.  
41 See para 45.  
42 Supreme Court Act 1981 (UK) s 20(2)(j).  
43 See the cases cited in para 45 n 71.  
44 ie s 318-320, 322, 326, 328.

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- 45 The Summers Report, 168 recommended that the uniform limits in s 318 and 320 be abolished and that the ordinary money limits of the courts in question be applied.
- 46 Navigation Act 1912 (Cth) s 327.
- 47 id, s 323, 325.
- 48 cf para 62.
- 49 Thomas (1980) para 252. See also G Brice, *The Maritime Law of Salvage*, Stevens, London, 1983, para 493. In *The Tesaba* [1982] 1 Lloyd's Rep 397, the owners of a salved ship were sued *in rem* by the salvors alleging that the owners' release of the cargo aboard without first obtaining security from the cargo owners for the salvage claim was a breach of the salvage agreement. Sheen J stated (id, 400):  
To my mind it is clear beyond doubt that the plaintiffs' claim is not a claim in the nature of salvage for two main reasons. Firstly, the plaintiffs' claim is for damages and is not for a salvage reward. Secondly, the claim endorsed on the writ is a claim for damages for breach of one of the obligations of the salvage agreement, which breach did not occur until after the termination of the salvage services.
- On the requirement for a temporal relationship between the facts giving rise to the cause of action and the salvage, see also *McAllister Towing & Salvage Ltd v General Security Insurance Co of Canada* [1982] 2 FC 34 in which the Federal Court held that a dispute between a salvor and an insurance company which undertook to pay salvage in the amount to be determined by arbitration in exchange for the salvor immediately releasing the salved cargo was not a salvage dispute within the meaning of the Federal Court Act 1970 (Can) s 22(2)(j) because it arose from facts which took place a long time after the salvage.
- 50 See para 193.
- 51 A narrower definition of salvage is required in the context of implementing the limitation of action provision of the 1910 Brussels Salvage Convention: see para 254.
- 52 See Navigation Act 1912 (Cth) s 315 (salvage for saving life).
- 53 [1976] 1 All ER 920, 927 (Lord Diplock) discussed above para 124-5. The particular application of this general reasoning to the salvage head of jurisdiction was not discussed in the House of Lords. For discussion in that case in the courts below see [1974] 3 All ER 307, 319 (Brandon J); [1976] 1 All ER 441, 446 (Cairns LJ) 456, 458 (Sir Gordon Willmer).
- 54 As was permitted in *The Eschersheim* [1976] 1 All ER 920.
- 55 This appears to be the way in which the action was brought in *The St Blane* [1974] 1 Lloyd's Rep 557, but the report does not make clear either the head of jurisdiction under which the claim was brought or even whether it was brought *in rem* or *in personam*.
- 56 See eg the facts in *The Tojo Maru* [1972] AC 242 in which it was held (for the purpose of limitation of liability, not admiralty jurisdiction) that the negligent act was not done either in the management of the salvage tug or on board that tug.
- 57 Admiralty Jurisdiction Regulation Act 1983 (S Af) s 1.
- 58 See para 125-6.
- 59 See especially para 165 (damage done by a ship), 166, 181-4 (damage or loss in the operation of a ship for which the owner &c is liable).
- 60 Similar reasoning applies to the tort of interference with salvage rights, which does not fall within the UK salvage head of jurisdiction: *The Tubantia* [1924] P 78. See para 181.
- 61 For a survey of the concept and the controversy which surrounds it see B Sheen, 'Conventions on Salvage' (1983) 57 *Tulane LR* 1387, 1404-9.
- 62 See para 178.
- 63 See generally *Lowndes & Rudolf on the Law of General Average and the York-Antwerp Rules*, 10th edn, J Donaldson and others (eds), Stevens, London, 1975, para 463-4.
- 64 *La Constancia* (1846) 2 W Rob 487; 166 ER 839; *The North Star* (1860) Lush 45; 167 ER 24.
- 65 *Cargo ex 'Galam'* (1863) Br & L 167; 167 ER 327.
- 66 *La Constancia* (1846) 2 W Rob 487; 166 ER 839, 841 (Dr Lushington).
- 67 Admiralty Court Act 1861 (UK) s 14, 15.
- 68 Administration of Justice Act 1956 (UK) s 1(1)(q).
- 69 McGuffie (1964, 1975) para 44 notes that a plaintiff seeking to recover a general average contribution may well choose to proceed in the commercial list rather than admiralty. In the United States 'general average claims may be asserted in ordinary civil actions, where the process of shoregoing courts is adequate to deal with them, but today what little litigation there is on this subject is mostly carried on in the admiralty court': Gilmore & Black (1975) 270.
- 70 eg Supreme Court Act 1981 (UK) s 20(2)(h) (agreement relating to carriage of goods in a ship); see also *Union of India v EB Aaby's Rederi A/S* [1975] AC 797.
- 71 eg Supreme Court Act 1981 (UK) s 20(2)(g) (any claim for loss or damage to goods carried on a ship).
- 72 In this situation the shipowner would normally refuse to release the cargo until security had been given for the claim. Because the shipowner will have custody of the cargo anyway there would usually be no advantage in proceeding *in rem*.
- 73 "Master" means a person having command or charge of a ship'. cf Supreme Court Act 1981 (UK) s 24(1) which applies, for the purposes of admiralty jurisdiction, the definition of master in the Merchant Shipping Act 1894 (UK).
- 74 cf the definition in the Merchant Shipping Act 1894 (UK) s 742: "'seaman'" includes every person (except masters, pilots and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship'. In *R v Judge of the City of London Court* (1890) 25 QBD 339, it was said that this definition would undoubtedly include a person such as a stevedore. The question whether stevedores should be able to bring claims *in rem* is discussed in para 171.
- 75 *The Albert Crosby* (1860) Lush 44; 167 ER 23.
- 76 *The Jane and Matilda* (1823) 1 Hagg 187; 166 ER 67. For a dictum that the NSW Vice Admiralty Court had 'jurisdiction to entertain the claim for wages of a person who is in charge of a vessel while laid up in harbour', see *The Collaroy* (1887) 3 WN (NSW) 97, 97.
- 77 *The Jane and Matilda* (1823) 1 Hagg 187; 166 ER 67.
- 78 *The Prince George* (1837) 3 Hagg 376; 166 ER 445.
- 79 *The Bulmer* (1823) 1 Hagg 163; 166 ER 59.
- 80 The question who is a 'seaman' for admiralty jurisdiction purposes does not seem to have received significant discussion in any modern case.
- 81 s 1(1)(o). See similarly Supreme Court Act 1981 (UK) s 20(2)(o).
- 82 Admiralty Court Act 1861 (UK) s 10; Supreme Court of Judicature (Consolidation) Act 1925 (UK) s 22(1)(viii).

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- 83 Thomas (1980) para 327.
- 84 Navigation Act 1912 (Cth) s 154(1). Seamen's Act 1898 (NSW) s 68(a) is to the same effect.
- 85 Navigation Act 1912 (Cth) s 71 referring to 'a County Court, District Court, or Local Court of any State, or in a court of summary jurisdiction'; Seamen's Act 1898 (NSW) s 54(2) referring to the District Court or (for small claims) summary courts. cf Merchant Seamen Act 1935 (Tas) s 4(1), Merchant Shipping Application Act 1903 (WA) s 2(1), both incorporating the Merchant Shipping Act 1894 (UK) Pt 11, s 143(1) of which allows the allottee to recover 'in the same court and manner in which the wages of seamen not exceeding fifty pounds may be recovered under this Act'. This refers to s 165 which bars proceedings for recovery of wages not exceeding 50 pounds 'in any superior court of record ... [or] in any court having Admiralty jurisdiction' unless the owner is bankrupt, the ship is already under arrest, the claim is referred to such a court by a lower court, or 'where neither the owner nor the master of the ship is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore'.
- 86 Administration of Justice Act 1956 (UK) s 1(1)(o): '... any claim by or in respect of a master or member of the crew ...'. See also Admiralty Act 1973 (NZ) s 4(1)(o); 1952 Arrest Convention art 1 (1)(m).
- 87 Supreme Court Act 1981 (UK) s 20(2)(o): 'any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages'. The Federal Court Act 1970 (Can) s 22(2)(o) and the Admiralty Jurisdiction Regulation Act 1983 (S Af) s 1(1)(ii)(n) likewise only permit actions by masters and crew for wages, not actions in respect of their wages.
- 88 The Summers Report, 65 recommends that the range of people to whom allotments may be made should be extended to include banks and insurance companies.
- 89 See para 44, n 53.
- 90 cf Thomas (1980) para 308.
- 91 id, para 321 (footnotes omitted).
- 92 See eg *The Ferret* (1883) 8 App Cas 329 (PC) upholding (on this point) the Vice Admiralty Court of Victoria (1882) 8 VLR (Vice Ad) 1.
- 93 *The Justitia* (1887) 12 PD 145; *Karamanlis v The Norsland* [1971] FC 487. See also the discussion in *The Halcyon Skies* [1977] QB 14.
- 94 See para 103, n 33 on these amendments.
- 95 See s 10 for a precise definition. The definition applies 'except so far as the contrary intention appears' but there is little basis for arguing that such an intention was shown in s 91.
- 96 See eg Seamen's Act 1898 (NSW) s 55-7 (which allocates business between magistrates and admiralty courts depending on several factors: the size of the claim, whether the ship is already under arrest, whether the owner or master is locally resident); Queensland Marine Act 1958 (Qld) s 44 (which allocates jurisdiction concurrently to the Supreme Court, courts having admiralty jurisdiction, and courts having civil jurisdiction in respect of the amount of the claim with provision to ensure that small claims are brought in Magistrates or District Courts); Merchant Seamen Act 1935 (Tas) s 4(1); Merchant Shipping Application Act 1903 (WA) s 2(1) (which incorporate the relevant provisions of the Merchant Shipping Act 1894 (UK) Pt II).
- 97 But see para 276 where it is recommended that the phrase 'courts having admiralty jurisdiction' be repealed as unnecessary.
- 98 Navigation Act 1912 (Cth) s 152(3) (recovery of effects of deceased seaman). Merchant Shipping Act 1894 (UK) s 171 (same subject) as extended by Merchant Seamen Act 1935 (Tas) s 4(1) and Merchant Shipping Act Application Act 1903 (WA) s 2(1).
- 99 See eg Navigation Act 1912 (Cth) s 77(4) (compensation for late payment of wages), s 88(1) (compensation for premature discharge), s 118(1) (compensation for supplying bad provisions), s 131(2) (recovery from ship by Commonwealth of its costs in caring for sick seamen). On the last point, see also Merchant Shipping Act 1906 (UK) s 35. Further illustrations can be found in other Acts: eg Queensland Marine Act 1958 (Qld) s 74(1), 91, 97; Seamen's Act 1898 (NSW) s 36(2), 60(3), 72.
- 100 See further para 274.
- 101 See para 119, 122.
- 102 Administration of Justice Act 1956 (UK) s 1(1)(p); Supreme Court Act 1981 (UK) s 20(2)(p); Admiralty Act 1973 (NZ) s 4(1)(p); Federal Court Act 1970 (Can) s 22(2)(p).
- 103 Thomas (1980) para 341. This presumably explains the virtual absence of modern reported decisions on master's disbursements.
- 104 See eg *The Zafiro* [1960] P 1, 14.
- 105 eg *The Westport* (No 3) [1966] 1 Lloyd's Rep 342.
- 106 Navigation Act 1912 (Cth) s 94(2) referring to master's disbursements.
- 107 *The Eschersheim* [1976] 1 All ER 920, 926 (Lord Diplock). Thomas (1980) para 176 itemises the types of damage which fall within the phrase.
- 108 See para 43.
- 109 *Nagrint v The Ship 'Regis'* (1939) 61 CLR 688, 698. But see the comment in *Union Steamship Co of New Zealand v Ferguson* (1969) 119 CLR 191, 202 (Windeyer J) that the distinction between injury done by a ship and injury occurring on or in the ship 'is not an easy one'. To the same effect, id, 209 (Barwick CJ).
- 110 PG Foss & RJM Anderson, 'Admiralty Jurisdiction in Western Australia', mimeo, Perth, 1976, 37, stated:  
We do not generally favour jurisdiction over personal injury caused on or by a ship, except possibly in the case of a foreign ship. A maritime lien or even a statutory lien for such things seem to be too powerful a remedy.
- 111 See para 55. s 262 can therefore be repealed. Recovery would also be allowed under the Law Reform (Miscellaneous Provisions) Act 1944 (NSW) and similar survival of actions legislation in other States and Territories.
- 112 1952 Arrest Convention art 1(1)(b); Admiralty Jurisdiction Regulation Act 1983 (S Af) s 1(1)(ii)(f).
- 113 Administration of Justice Act 1956 (UK) s 1(1)(f) Supreme Court Act 1981 (UK) s 20(2)(f) Admiralty Act 1973 (NZ) s 4(1)(f) Federal Court Act 1970 (Can) s 22(2)(g) (and note also s 22(2)(d)).
- 114 Supreme Court Act 1981 (UK) s 20(2)(f).
- 115 See para 43. In the United Kingdom, claims under the Occupier's Liability Act 1957 (UK) which relate to ships would now, it seems, be able to be brought in admiralty jurisdiction: *Hollingworth v Southern Ferries Ltd; The Eagle* [1977] 2 Lloyd's Rep 70.
- 116 The phrase 'wrongful act, neglect or default' is taken from Lord Campbell's Act of 1846 and is used in equivalent Australian legislation: see eg Compensation to Relatives Act 1897 (NSW) s 3(1).
- 117 Here and throughout the part of the Act dealing with admiralty jurisdiction 'goods' includes baggage: Supreme Court Act 1981 (UK) s 24(1).

- 118 ‘Persons’ is intended to include visitors. It would also include trespassers and stowaways, although the extent to which a duty of care is owed to such persons is of course a separate matter.
- 119 Thomas (1980) para 182. The comment is made in relation to the virtually identical text of the Administration of Justice Act 1956 (UK) s 1(1)(f). As an illustration, it would now be possible to bring in admiralty the type of claim rejected in *Hamilton v SS Monterey* [1940] NZLR 30 (claim by passenger arising out of alleged assault by her cabin steward) and in *Loupides v The Schooner ‘Calimeris’* (1921) 69 DLR 138 (assault by master on crewman) where the tortious acts arose in the course of employment.
- 120 See further para 179-84 for the expansion of this formula to cover other tortious claims arising from the operation of a ship.
- 121 *The Victoria* (1887) 12 PD 105.
- 122 Thomas (1980) para 183 citing *The Widgans*, an unreported English decision, folio 947 of 1976.
- 123 1952 Arrest Convention art 1(1)(f); Federal Court Act 1970 (Can) s 22(2)(h); Admiralty Act 1973 (NZ) s 2; Administration of Justice Act 1956 (UK) s 8(1); Supreme Court Act 1981 (UK) s 24. See *The Eschersheim* [1974] 3 All ER 307, 316 (Brandon J) on how ‘goods’ would be interpreted so as to exclude ‘baggage’ in the absence of special provision. See also *Larsen v The Ship ‘Nieuw Holland’* [1957] St R Qd 605 (F Ct).
- 124 *The Eschersheim* [1974] 3 All ER 307, 316 (Brandon J).
- 125 *ibid.*
- 126 eg *Larsen v The Ship ‘Nieuw Holland’* [1957] St R Qd 605 (stock, plant and equipment in ship’s hairdresser’s, barber’s and merchandise shops).
- 127 eg the instruments of the ship’s band on a passenger ship or tools of a contractor working on the ship.
- 128 Thomas (1980) para 185 (footnotes omitted), referring to Administration of Justice Act 1956 (UK) s 1 (1)(h).
- 129 *The St Elefterio* [1957] P 179, 183 (Willmer J). See eg *The Gina* [1980] 1 Lloyd’s Rep 398, where the ship operator detained cargo claiming a possessory lien for freight. The cargo owner was held entitled to arrest the ship under this head claiming damages for wrongful detention of goods.
- 130 *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] AC 255, overruling *The Sonia S* [1983] 2 Lloyd’s Rep 63 (container leasing). But see the position taken by United States courts: *CTI Container Leasing v Oceanic Operations* 682 F 2d 377 (1982); *Integrated Container Service Inc v Starliner Container Shipping Ltd* 476 F Supp 119 (1979).
- 131 *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] AC 255. For insurance claims see further para 173. The proposed head of jurisdiction extends to the enforcement of awards arising from an arbitration agreement relating to the carriage of goods in a ship: *The St Anna* [1983] 2 All ER 691. The question of enforcement of arbitration awards is dealt with separately: see para 185-9.
- 132 Thus the Supreme Court Act 1981 (UK) s 20(2)(h) reads: ‘any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship’.
- 133 *The Eschersheim* [1976] 1 All ER 920, 926 (Lord Diplock), refusing to follow a 19th century decision favouring a narrow *eiusdem generis* interpretation of similar statutory language in s 2 of the County Courts Admiralty Jurisdiction Act 1869 (UK).
- 134 *ibid.*
- 135 *The Conoco Britannia* [1972] 2 QB 543.
- 136 *The Queen of the South* [1968] P 449.
- 137 cf *Kuhr v The Ship ‘Friedrich Busse’* (1982) 134 DLR (3d) 261, 264-5 (Addy J) (contract for supply of fish to a fish processing vessel not a contract relating to use of a ship within the Federal Court Act 1970 (Can) s 22(2)(i)); *Dome Petroleum Lid v Hunt International Petroleum Co* [1978] 1 FC 11 (contract to drill for oil not for use or hire of ship even though it involves use of drilling ships and supply vessels); *Sumitomo Shoji Canada Ltd v The Juzan Maru* [1974] 2 FC 488 (contract between cargo owner and warehouseman not for hire of ship even though warehouseman always used a barge to unload cargo owners goods; warehousing activities central, use of barge only incidental).
- 138 *Mortensen and Lange v Neptune International Shipping Ltd* [1981] 2 FC 232, 235 (Mahoney J) interpreting Federal Court Act 1970 (Can) s 22(2)(i).
- 139 *The St Elefterio* [1957] P 179.
- 140 *The Antonis P Lemos* [1985] AC 711. The facts were unusual and the chain of charterparties involved was complex. P was a sub-charterer of the vessel under a time charter. P entered into a voyage charter with TP under which P guaranteed the maximum draught of the vessel at port of arrival. On arrival the draught was exceeded, P incurring extra expense thereby. P arrested the ship under the Supreme Court Act 1981 (UK) s 20(2)(h), on the basis of an ‘agreement relating to ... the use or hire of a ship’. The cause of action was based on the negligence of the master and other servants of the owners in loading the ship beyond the specified draught, with knowledge of the specification in the charterparty between P and TP. The House of Lords held that this nexus with the agreement and the (assumed) provisions in the chain of charterparties between P and the owner, under which the master and crew were to act under the charterer’s orders with respect to loading, rendered the negligence claim sufficiently bound up with agreements for the hire of a ship to validate the arrest of the ship.
- 141 See para 40.
- 142 See also para 108 for the recommendation that claims for construction before launch be able to be commenced after the launch of the ship.
- 143 *R v Canadian Vickers Ltd* [1976] 1 FC 77, 83 (emphasis in original), affirmed [1979] 2 FC 410. The issue arose in the context of an attempt to join the engine makers as third party in a suit against the shipbuilder.
- 144 See para 124-5.
- 145 Supreme Court Act 1981 (UK) s 20(2)(m).
- 146 See eg *Lewmarine Pty Ltd v The Ship ‘Kaptayanni’* [1974] VR 465, 471-72 (Pape J); *Argosy Marine Co v The Jeannot D* [1970] Ex CR 351 (radar equipment supplied to a ship held to be a necessary).
- 147 Admiralty Court Act 1861 (UK) s 5. See para 41.
- 148 Under pre-1956 law payments made by way of advances to enable necessities to be purchased were themselves ‘necessaries’, and thus within the head of jurisdiction relating to the supply ‘of goods or materials’ under Administration of Justice Act 1956 (UK) s 1(1)(m): *The Fairport* (No 5) [1967] 2 Lloyd’s Rep 162, *Kuhr v The Ship ‘Friedrich Busse’* (1982) 134 DLR (3d) 261, 266 (Addy J). The latter decision arguably represents an extension of the definition of necessities in holding that the supply of fish to a ship designed to process fish at sea is within the definition.
- 149 See *The Queen of the South* [1968] P 449, 457 (Brandon J) where the point was discussed but did not have to be decided.
- 150 Administration of Justice Act 1956 (UK) s 7(1).

- 151 But see W Tetley, 'Stevedores and Maritime Liens' (1983) 8 *Maritime Lawyer* 269, 285 where it is argued that stevedoring services were capable of being necessaries under the Admiralty Court Acts of 1840 and 1861; cf D Ipp, 'Admiralty Jurisdiction and the Claims of Stevedores' (1982) 4(3) *MLAANZ Newsletter* 22, 25 (at present 'Australian Courts do not have Admiralty jurisdiction over the claims of stevedores'). Tetley relies on *The Equator* (1921) 9 *Lloyd's Rep* 1, in which it was said that the passage of the Merchant Shipping (Stevedores and Trimmers) Act 1911 (UK) was unnecessary to give stevedores a statutory right of action *in rem*. Hill J remarked that the services of stevedores had time after time been held to be necessaries but cited no authority (*id.*, 1). See also *Aldershot Contractors Equipment Rental Ltd v The Ship 'Protostatis'* (1967) 67 *DLR* 2d 174 (hire of mobile crane to unload a stranded ship held to be a necessary). If this view is correct, English admiralty courts continue to have jurisdiction by virtue of the Supreme Court Act 1981 (UK) s 20(1)(c) over those claims of stevedores for services necessary to enable the ship to continue its voyage.
- 152 Shipping and Seamen Act 1952 (NZ) s 486(2).
- 153 Admiralty Act 1973 (NZ) s 14(3), s 4(1)(n). The Beattie Committee Report (1972) 12 note 4 stated that the Committee could envisage circumstances arising in New Zealand where it would be desirable to have available the power to arrest ships on stevedores' claims and the Committee's Draft Bill provided accordingly. An amendment reducing the right of action to one exercisable *in personam* only was made during passage of the Bill through Parliament.
- 154 Federal Court Act 1970 (Can) s 22(2)(m). See also Canada Shipping Act 1934 (Can) s 702, as revised by the Federal Court Act 1970 (Can) Schedule 11(5), which also gives the admiralty court jurisdiction to order arrest on such claims.
- 155 cf *Wolfe v SS Clearpool* (1922) 67 *DLR* 538 (claim for damages for owner's refusal to permit stevedores to load ship in accordance with contract not within admiralty jurisdiction even where claim for services rendered would be within jurisdiction as a claim under statute for necessaries).
- 156 Admiralty Jurisdiction Regulation Act 1983 (S Af) s 1(1)(ii)(l) (emphasis added).
- 157 Under United States law stevedoring claims are treated on the same basis, giving rise to a maritime lien: Gilmore & Black (1975) 630. In France stevedoring services do not give rise to a maritime claim sufficient to arrest the vessel (except in circumstances which would very rarely arise in practice): Tetley (1983) 294.
- 158 As proposed, this head would cover the line handling services rendered in *The Queen of the South* [1968] P 449. Art 1(1)(1) of the CMI draft revision of the Brussels Convention also expressly includes 'services supplied to the ship'.
- 159 See para 124.
- 160 Professor DC Jackson has suggested that in some circumstances the shipowner may wish to proceed *in rem* for damage done to the shipowner's own ship, eg damage to the ship through the negligence of a demise charterer during the currency of the charter: *Submission 54* (28 October 1985), and see Jackson (1985) 12-13, 72-3. If the conclusion in para 124-5 is accepted, the only cases where the action *in rem* should lie are those where the ship belongs to or is demise chartered by the relevant person. Conceptually there is no reason why the plaintiff should not be the owner of the wrongdoing ship, eg where the relevant person is the demise charterer. Damage to the ship can be done by it, in the sense required. Accordingly, in the example given the owner could proceed *in rem* for damage done by the ship, either against the wrongdoing ship (if this was worthwhile) or against a surrogate ship belonging to the demise charterer of the wrongdoing ship. There is accordingly no need for a specific head of jurisdiction *in rem* for damage done to a ship.
- 161 For the possible extension of preliminary acts in such cases see para 297. It is also desirable that courts of limited jurisdiction have power to deal with claims for damage done to a ship: cf *The Eschersheim* [1976] 1 All ER 920, 927 (Lord Diplock).
- 162 Federal Court Act 1970 (Can) s 22(2)(r); Admiralty Jurisdiction Regulation Act 1983 (S Af) s 1(1)(ii)(r).
- 163 CMI Bulletin No 105, 79.
- 164 *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] AC 255.
- 165 In *The Aifanourios* [1980] 2 *Lloyd's Rep* 403, where a P & I club sought to arrest a ship in respect of a release call, it was held that there was no right to proceed *in rem* in Scotland on such a claim. The decision was applied by the House of Lords in the *Gatoil* case: [1985] AC 255.
- 166 The issue is restricted to the collection of unpaid premiums and calls of various kinds. The conclusion in para 124-5 means that there can be no question of arresting a ship which an insurance company or P & I club happens to own.
- 167 See eg MA Hill, *Submission 27* (14 February 1985); S Westgarth, *Submission 42* (12 April 1985). Cases in recent years involving claims by insurance companies or clubs include: *Empress Lineas Maritimas Argentinas v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 2 *Lloyd's Rep* 517; *Banque Paribas v Fund of Sale of the MV Emerald Transporter* 1985 (2) SAFLR 452, and the *Gatoil* case, [1985] AC 255.
- 168 See para 94. Such a provision would not cover cases where the ship's owners have allowed the insurance on the ship to lapse and those claiming against the ship have insured it to protect their interest in the security pending the judicial sale. In *The Fairport* it was recognised that insurance by a claimant in these circumstances was proper and yet the premium could not form part of the claim against the *res* as it would not fall within any head of English admiralty jurisdiction. However the cost of insurance was allowed by the Court to be included as part of the costs of the action. As such it could be recovered from the *res*: [1965] 2 *Lloyd's Rep* 183. (The insurance point is found on an addendum slip intended to be inserted at *id.*, 186). This solution seems adequate for present purposes.
- 169 Consistently with the principles discussed in para 70, there is no constitutional objection to this recommendation. Reliance could be placed on s 51(14) of the constitution, which however excludes State insurance. But it seems clear that maritime insurance contracts would fall within the ambit of 'admiralty and maritime jurisdiction' in s 76(iii) of the Constitution. Such contracts were within the inherent admiralty jurisdiction in Scotland (but not in England): *Sailing Ship 'Blairmore' Co Ltd v Macredie* [1898] AC 593, 606 (Lord Watson). They have always been within admiralty jurisdiction in the United States: *De Lovio v Boit* 7 Fed Cas 418 (1815) They are treated as an admiralty and maritime matter in Canada: *Intermunicipal Realty & Development Corp v Gore Mutual Insurance Co* (1977) 108 *DLR*(3d) 494, 496-499, 505 (Gibson J); *Zavarovalna Skupnost Triglav v Terrasses Jewellers Inc* [1983] 1 SCR 283.
- 170 The *Gatoil* case [1985] AC 255 involved the arrest of a ship, allegedly owned by the defendant cargo owners, which had no connection to the cargo in question or to the contract of carriage. Such an arrest is possible in Scotland as a form of attachment under s 47 of the 1956 Act, but consistently with *The Eschersheim* (see para 124-5) would not be possible in England even if marine insurance claims were within admiralty.
- 171 See para 107, 109-10.
- 172 Brussels Arrest Convention, art 1(1)(1); Federal Court Act 1970 (Can) s 22(2)(s); Administration of Justice Act 1956 (UK) s 1(1)(n); Supreme Court Act 1981 (UK) s 20(2)(n); Admiralty Act 1973 (NZ) s 4(1)(m); Admiralty Jurisdiction Regulation Act 1983 (S Af) s 1(1)(ii)(m).
- 173 eg Port of Geelong Authority Act 1958 (Vic) s 82; Fremantle Port Authority Act 1902 (WA) s 52.
- 174 See para 265-6.

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- 175 See *The Charger* [1966] 3 All ER 117 for an English illustration of a harbour authority electing not to use its statutory authority to arrest and detain but instead to proceed *in rem*.
- 176 Lighthouses Act 1911 (Cth) s 17.
- 177 Art 1(1)(a). The 1985 CMI draft revision of the Convention expressly includes preventive and clean-up costs (art 1(1)(d)) and through the generality of its introductory language also probably includes pollution damage claims.
- 178 DW Abecassis, *The Law and Practice Relating to Oil Pollution from Ships*, Butterworths, London, 1978, 160 See also para 165.
- 179 Admiralty Jurisdiction Regulation Act 1983 (S Af) s 1(1)(ii)(w).
- 180 Brussels, 29 November 1969.
- 181 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Brussels, 18 December 1971.
- 182 The Liability and Fund Conventions were amended in important respects by two Protocols concluded in 1984, which have not yet entered into force. See AHE Popp, 'Liability and Compensation for Pollution Damage caused by Ships Revisited' [1985] *Lloyd's MCLQ* 118.
- 183 All the significant operative parts of the Convention are given the force of Commonwealth law by s 8(1). Sch 1 of the Act contains the text of the Convention.
- 184 The other Acts were the Protection of the Sea (Discharge of Oil from Ships) Act 1981 (Cth), the Protection of the Sea (Powers of Intervention) Act 1981 (Cth), the Protection of the Sea (Shipping Levy) Act 1981 (Cth), the Protection of the Sea (Shipping Levy Collection) Act 1981 (Cth) and the Navigation (Protection of the Sea) Amendment Act 1981 (Cth). The Protection of the Sea (Discharge of Oil from Ships) Act 1981 (Cth) was repealed and replaced by the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth).
- 185 Art III, V.
- 186 Art IX.
- 187 Art III(4).
- 188 Protection of the Sea (Civil Liability) Act 1981 (Cth) s 9, 10.
- 189 A possible but perhaps unlikely reading of the Protection of the Sea (Civil Liability) Act 1981 (Cth) is that it is intended to provide the exclusive means of recourse, thereby eliminating admiralty jurisdiction entirely.
- 190 See para 275 for discussion of s 383, which provides what is in effect a statutory right of arrest in respect of damage, including in some situations damage occurring outside Australia.
- 191 As defined in art 1(6) of the Convention.
- 192 There is a body of State legislation dealing with oil pollution of navigable waters. Some of the Acts allow a limited right to detain ships though none explicitly purport to confer admiralty jurisdiction: eg Pollution of Waters by Oil Act 1973 (Qld) s 23(3)(b), 24(3)(b); Navigable Waters (Oil Pollution) Act 1960 (Vic) s 26(3)(b), 27(3)(b); Western Australian Marine (Sea Dumping) Act 1981 (WA) s 12(3). The Environment Protection Act 1973 (Tas) s 50(2) allows in some circumstances the seizure and forfeiture of 'a ship, barge, tank, or other vessel' which has been used to pollute the sea. To the extent that any of the State legislation conflicts with the Pollution Convention as made part of Commonwealth law the latter clearly prevails under s 109 of the Constitution. There is therefore no need to be concerned with how this State legislation interrelates with the proposed legislation.
- 193 International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, Brussels, 10 October 1957; the text forms Schedule 6 to Navigation Act 1912 (Cth).
- 194 Protection of the Sea (Civil Liability) Act 1981 (Cth) s 10. The regime applicable is that set out in the 1969 Pollution Convention discussed in para 175.
- 195 id, s 11; Navigation Act 1912 (Cth) s 335(2).
- 196 1957 Limitation Convention art 1(1); 1969 Pollution Convention art V(1).
- 197 Navigation Act 1912 (Cth) s 335(1); Protection of the Sea (Civil Liability) Act 1981 (Cth) s 10(1). This is the usual procedure.
- 198 Both the Acts referred to in n 197 allow for State and Territory legislation governing applications to limit in respect of intrastate ships: see s 334 read with s 2(1), and s 7, respectively. For an example of recent State legislation in this area see Western Australian Marine Act 1982 (WA) s 86 which confers jurisdiction on the Supreme Court with provision for transfer to the Supreme Court of another State or Territory.
- 199 See ch 11 for discussion of which superior courts should exercise admiralty jurisdiction. For procedure in limitation actions see para 299.
- 200 Supreme Court Act 1981 (UK) s 20(2)(s).
- 201 eg Fisheries Act 1957 (Qld) s 94(1); Fisheries Act 1958 (Vic) s 64; Antarctic Marine Living resources Conservation Act 1981 (Cth) s 17.
- 202 *Challenger v Rae* (1929) 24 Tas LR 53, 60.
- 203 id, 62-3 (Nicholls CJ). For an example of the forfeiture legislation referred to, see eg Customs Act 1901 (Cth) s 228-9. Jurisdiction is given by s 245 to State and Territory Supreme Courts.
- 204 In *The Skylark* [1965] P 476 the Court accepted without question that an action *in rem* for forfeiture under the Customs and Excise Act 1952 (UK) fell within the forfeiture head of jurisdiction in the Administration of Justice Act 1956 (UK) s 1(1)(s).
- 205 The situations giving rise to forfeiture (s 32, 33) relate to a ship improperly assuming or concealing Australian nationality. The situations are fewer in number than those under the Merchant Shipping Act 1894 (UK) s 16, 28(4), 67(2), 69, 70, 71 and the Merchant Shipping Act 1906 (UK) s 51(2) (both now repealed for Australia). Other Commonwealth legislation also gives State and Territory Supreme Courts jurisdiction over forfeiture of ships: see eg Historic Shipwrecks Act 1976 (Cth) s 25; Minerals (Submerged Lands) Act 1981 (Cth) s 93(1)(c).
- 206 eg, Commercial Vessels Act 1979 (NSW) s 51B (use of vessel in prescribed waters without permit).
- 207 eg, Marine Act 1936 (SA) s 91; Western Australia Marine Act 1982 (WA) s 94.
- 208 eg, Queensland Marine Act 1958 (Qld) s 149(3); Marine Act 1958 (Vic) s 164. The Marine Act (NT) s 107 provides for forfeiture of dangerous goods but makes no provision as to jurisdiction.
- 209 These provisions will be discussed in the separate Report on criminal admiralty jurisdiction and prize: see para 7.
- 210 See para 51.
- 211 The Merchant Shipping Act 1894 (UK) s 529 subordinates admiralty jurisdiction over wreck to the wreck regime set out in the Act; of *Pierce v Bemis* [1986] 2 WLR 501, 504 (Sheen J) (statutory provisions treated as in effect a code). The Navigation Act 1912 (Cth) has no equivalent provision.
- 212 See para. 155. It would in any event be unnecessary to transfer any jurisdictional provisions from the Historic Shipwrecks Act 1976 (Cth), because the provisions refer only to criminal matters (s 27) and to compensation actions under s 51(31) of the Constitution (s 21).

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- 213 See s 296-8, 302-3, 312-4.
- 214 *The Sydney Cove* (1815) 2 Dods 13, 13; 165 ER 1399, 1400 ('a seaman's claim for his wages was sacred as long as a single plank of the ship remained'); *The Neptune* (1824) 1 Hagg 227; 166 ER 81. See para 99 where a statutory clarification to this effect is recommended.
- 215 See eg *The Cargo ex Schiller* (1877) 2 PD 145 (CA) where possible difficulties, including the ranking in priority of the receiver of wreck's expenses vis-a-vis a salvor's claim, are referred to. See also *Robinson v Western Australian Museum* (1977) 138 CLR 283, 316-23 (Stephen J) where salvage claims in respect of wrecks are discussed.
- 216 s 303 provides that only the receiver of wreck or the owner may keep possession of the wreck. This might be interpreted as excluding arrest and custody by the admiralty Marshal. s 307(c) states that any dispute in regard to the expenses of a receiver of wreck 'shall be determined by the Minister, whose decision shall be final'. Again a possible conflict with admiralty jurisdiction exists. There must also be doubt about the constitutional validity of s 307(c), as a conferral of judicial power on the Minister.
- 217 See para 238.
- 218 The wreck provisions of the Navigation Act 1912 (Cth), like many other aspects of that Act, should be reviewed: see para 62. This matter is outside the scope of this Report.
- 219 See para 42-3.
- 220 See para 166-7.
- 221 Supreme Court Act 1981 (UK) s 20(1)(c).
- 222 See para 193.
- 223 [1892] 1 QB 273, 298.
- 224 [1893] AC 468, 481, 485.
- 225 [1924] P 78, 86.
- 226 *Commonwealth Pacific Cable Co v The 'Prince Albert'* (1926) 3 WWR 309, 310-311 (Martin J), citing without disapproval the reasoning in *The Ship 'DC Whitney' v St Clair Navigation Co* (1905) 10 EX CR 1.
- 227 See eg *Union Steamship Co of New Zealand Ltd v Ferguson* (1969) 119 CLR 191, 207 (Barwick J), 211 (Owen J).
- 228 [1924] P 78.
- 229 *The Agincourt* (1824) 1 Hagg 271; 166 ER 96; *The Lowther Castle* (1825) 1 Hagg 384; 166 ER 137; *The Enchantress* (1801) 1 Hagg 395; 166 ER 140.
- 230 *The Ruckers* (1801) 4 C Rob 73; 165 ER 539.
- 231 These decisions were referred to with approval in *The 'Zeta'* [1893] AC 468, 483 (Lord Herschell).
- 232 *Loupides v The Schooner 'Calimeris'* (1921) 69 DLR 138; *Hamilton v SS 'Monterey'* [1940] NZLR 31, 35-6 (Myers CJ).
- 233 *The Terukawa Maru* (1972) 126 CLR 170, 176 (Menzies J).
- 234 See para 166 n 119.
- 235 See para 167.
- 236 See para 156.
- 237 Jurisdiction may exist in some cases already, eg where the defendant's vessel injures a wreck: *The Zelo* [1922] P 9. Similarly, if a tortfeasor were to actually take possession of a wreck in contravention of a salvor's established right of possession, the salvor may have an action *in rem* as a 'claim relating to possession of a ship'.
- 238 See the cases cited in n 229-31.
- 239 See para 180 n 232.
- 240 *Boyce v Bayliffe* (1807) 1 Camp 58; 170 ER 875; *King v Franklin* (1858) 1 F & F 360; 175 ER 764.
- 241 *Hook v Cunard Steamship Co Ltd* [1953] 1 All ER 1021.
- 242 *The Whisper* 268 F 464 (1920).
- 243 *The State of Missouri* 76 F 376 (1896).
- 244 Gilmore and Black (1975) 628-9.
- 245 See para 166 n 119.
- 246 Administration of Justice Act 1956 (UK) s 1(1)(f); Supreme Court of Judicature Consolidation Act 1925 (UK) s 22(1) & (2).
- 247 Federal Court Act 1970 (Can) s 22(2)(g); Admiralty Act 1973 (NZ) s 4(f).
- 248 *Yates v South Kirby Collieries* [1901] 2 KB 538 (worker's compensation statute).
- 249 See eg the common law meaning: *R v Yea* [1901] 1 All ER 864.
- 250 Another objection might be that these claims will sometimes be for relatively minor amounts, but that is no more an objection here than in relation to any head of jurisdiction. See para 147.
- 251 See eg *Chargeurs Reunis Campagnie Francaise de Navigacion a Vapeur v English and American Shipping Co. The Merida* (1921) 9 Lloyd's Rep 464; *Elliott Steam Tug Co Ltd v Shipping Controller* [1922] 1 KB 127; *Konstantinidis v World Tankers Corp Inc. The World Harmony* [1965] 2 All ER 139; *Candlewood Navigation v Mitsui OSK Lines. The Mineral Transporter* [1985] 2 All ER 935 (PC).
- 252 The authorities cited in n 251 establish that such claims will not succeed as a matter of substantive law. On the other hand the High Court in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529 upheld a claim for economic loss caused by the defendant negligently severing a pipeline. The *Caltex* case was distinguished by the Privy Council in *The Mineral Transporter* [1985] 2 All ER 935, and cf *Leigh & Sullivan v Aliakmon Shipping Co Ltd* [1986] 2 WLR 902 (HL). The divergence between English and Australian authority remains unresolved.
- 253 *The Eschersheim* [1976] 1 All ER 920, 926 (Lord Diplock).
- 254 ibid. Even in excluding the need for a collision, Lord Diplock in *The Eschersheim* talked in terms of contact with 'whatever object sustains the damage' not being essential. The example given was that of a ship's wash causing physical damage.
- 255 In *The Maindy Manor* (1933) 45 Lloyd's Rep 231, 238 Bateson J implied that no action for economic loss for negligent blocking could succeed. See also *Anglo-Algerian SS v Houlder* [1908] 1 KB 659 (although of Walton J, id 665); *Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd* 1982 (4) SAF LR 891, affirming on this point 1980 (3) SAF LR 653. A recent decision in which such a claim did succeed is *Intercean Shipping Co v M/V Atlantic Splendour* [1984] AMC 1332, though the authorities do not appear to have been

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- thoroughly canvassed and the decision is not easy to reconcile even with some of the decisions cited in support. For a discussion of these and other cases, see NJJ Gaskell, 'Economic Loss in the Maritime Context' [1985] *LMCLQ* 81, 102-8. For an early decision in which a claim for damages in negligence for blocking succeeded, see *S & R Steamships Ltd v London County Council* (1938) 82 Sol J 353.
- 256 Either in nuisance (*Rose v Miles* 4 M & S 99 (1815); 105 ER 773) or perhaps in one of the innominate torts: see generally JG Fleming, *The Law of Torts*, 6th edn, Law Book Co, Sydney, 1983, 649-62; JD Heydon, 'The Future of the Economic Torts' (1975) 12 *UWAL Rev* 1; JC Scowcroft, 'Economic Loss in Admiralty: A re-examination of Foundations' (1985) 16 *JMLC* 167.
- 257 eg the examples given in para 180-1.
- 258 FMB Reynolds, *Submission* 57 (6 November 1985); WE Paterson QC, *Submission* 62 (18 November 1985); P Willis, Deputy Corporate Solicitor, BHP Co Ltd, *Submission* 68 (15 November 1985); Australian Mining Industry Council, *Submission* 86 (13 May 1986). On the other hand provision for economic loss claims was supported by Professor DC Jackson, *Submission* 54 (28 October 1985); Dr J Wong, *Submission* 59 (10 November 1985). R Cooper QC, *Submission* 70 (6 December 1985) argued for a general provision covering 'torts at sea', at least allowing actions *in personam*.
- 259 See further para 194.
- 260 *The Rena K* [1979] QB 377, 405 (Brandon J). It may well be possible that the award may be invoked as an issue estoppel in any subsequent action *in rem*: *ibid*; and see also *The Tuyuti* [1984] 2 All ER 545, 553 (Goff LJ).
- 261 See *The St Anna* [1983] 2 All ER 691 (Sheen J), holding that an action to enforce an arbitration award made pursuant to an arbitration agreement in a charterparty was an action which arose out of the charterparty, not merely out of the award. As a result the action fell within admiralty jurisdiction as 'a claim arising out of any agreement relating to the carriage of goods in a ship' within the Supreme Court Act 1981 (UK) s 20(2)(h).
- 262 cf BJD, 'Arrest and Arbitration' [1984] *LMCLQ* 370,372-3.
- 263 In particular if the proposal (para 252-3) to apply ordinary limitation periods to admiralty actions is accepted.
- 264 Or a surrogate ship, under the circumstances outlined in ch 10.
- 265 For enforcement of foreign admiralty judgments see para 190-2.
- 266 eg Arbitration Act 1902 (NSW) s 6; Arbitration Act 1895 (WA) s 6; Arbitration (Foreign Awards and Agreements) Act 1974 (Cth) s 7(2). s 11 of the 1974 Act preserves the effect of the Sea-Carriage of Goods Act 1924 (Cth) referred to in n 268.
- 267 See eg *Huddart Parker Ltd v The Ship 'Mill Hill'* (1950) 81 CLR 502 in which the interaction between arbitration and admiralty jurisdiction and the question of granting a stay of court proceedings is canvassed.
- 268 Note that foreign jurisdiction clauses are void in contracts covered by legislation dealing with the carriage of goods by sea: eg Sea-Carriage of Goods Act 1924 (Cth); Sea-Carriage of Goods (State) Act 1921 (NSW) s 6. This will presumably change if Australia adopts the Hamburg Rules (United Nations Convention on the Carriage of Goods by Sea, Hamburg, 31 March 1978) art 21 of which gives some scope to jurisdiction clauses.
- 269 [1975] QB 348, 352. See also *The Rena K* [1979] QB 377, 397-98 (Brandon J).
- 270 *The Golden Trader* [1975] QB 348, 353. See also *The Maritime Trader* [1981] 2 Lloyd's Rep 153, 158 (Sheen J).
- 271 See now Arbitration Act 1975 (UK) s 1. Both *The Golden Trader* [1975] QB 348 and *The Rena K* [1979] QB 377 involved such arbitrations. But cf *Mike Trading and Transport Ltd v R Pagnan & Fratelli* [1980] 2 Lloyd's Rep 546,549-50 (Lord Denning MR).
- 272 Arbitration (Foreign Awards and Agreements) Act 1974 (Cth) s 7(2). s 7(3) also provides that the court may make 'such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter' to which the staying order given under s 7(2) relates. There is no question that the 1958 Convention itself prevents interim relief being ordered in relation to stayed proceedings: art 11(3) merely requires the court to refer the parties to arbitration in certain circumstances. cf *Filia Compania Naviera SA v Petroship SA* [1982] AMC 1217 (SDNY); CN Brower & WM Tupman, 'Court-Ordered Provisional Measures under the New York Convention' (1986) 80 *AJIL* 24.
- 273 *The Golden Trader* [1975] QB 348; *The Rena K* [1979] QB 377. In *The Andria* [1984] 1 All ER 1126, 1134 the Court of Appeal observed that, though it was not necessary to consider the point and argument was not offered on it, 'we proceed on the basis that the principle is sound'. See also *The Atlantic Star* [1974] AC 436 (willingness of party seeking a stay on *forum non conveniens* grounds to provide alternative security if stay granted is a relevant fact in deciding whether to exercise discretion to grant stay); *The Abidin Daver* [1984] 1 All ER 470, 478 (Lord Diplock), 487 (Lord Brandon) (*lis alibi pendens*, offer by defendant in English action to transfer security obtained by plaintiff by arrest in England to other forum, undertaking to this effect could be made part of order staying English action). In the converse situation, where an English-based plaintiff has arrested a ship in another jurisdiction in order to provide security for an arbitration to take place in England, the English courts will not generally grant the defendant an injunction preventing the plaintiff from maintaining the foreign arrest: *Marazura Navegacion SA v Oceanus* [1977] 1 Lloyd's Rep 283. See further DR Thomas, 'Admiralty Security and the Arbitral Process' [1983] *LMCLQ* 495.
- 274 *The Andria* [1984] 1 All ER 1126, reversing the decision of Sheen J and not following *The Cap Bon* [1967] 1 Lloyd's Rep 543; *The Golden Trader* [1975] QB 348; *The Rena K* [1979] QB 377, and *The Maritime Trader* [1981] 2 Lloyd's Rep 153.
- 275 *The Andria* [1984] 1 All ER 1126, 1134. The source of both discretions was found in the Admiralty Rules: RSC (UK) O 75 r 5(1),13(4).
- 276 *The Tuyuti* [1984] 2 All ER 545, 554 (Goff LJ).
- 277 *The Rena K* [1979] QB 377; *The Tuyuti* [1984] 2 All ER 545.
- 278 In *The Tuyuti* [1984] 2 All ER 545, 553 Goff LJ refused to accept counsel's argument that in reality admiralty court process was being used to provide security for other proceedings, something which he accepted that admiralty courts have no power to do.
- 279 s 26 provides:
- (1) Where in England and Wales or Northern Ireland a court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of courts of another part of the United Kingdom or of an overseas country, the court may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest —
    - (a) order that the property arrested be retained as security for the satisfaction of any award or judgment which —
      - (i) is given in respect of the dispute in the arbitration or legal proceedings in favour of which those proceedings are stayed or dismissed; and
      - (ii) is enforceable in England and Wales or, as the case may be, in Northern Ireland; or
    - (b) order that the stay or dismissal of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award or judgment.

(2) Where a court makes an order under subsection (1), it may attach such conditions to the order as it thinks fit, in particular conditions with respect to the institution or prosecution of the relevant arbitration or legal proceedings.

(3) Subject to any provision made by rules of court and to any necessary modifications, the same law and practice shall apply in relation to property retained in pursuance of an order made by a court under subsection (1) as would apply if it were held for the purposes of proceedings in that court.

280 s 5(3) provides:

(3) (a) A Court may in the exercise of its admiralty jurisdiction order the arrest of any property if —

(i) the person seeking the arrest has a claim enforceable by an action *in rem* against the property concerned or which would be so enforceable but for arbitration or proceedings contemplated in subparagraph (ii);

(ii) the claim is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding either in the Republic or elsewhere and whether or not it is subject to the law of the Republic.

(b) Unless the Court orders otherwise any property so arrested shall be deemed to be property arrested in an action in terms of this Act.

(c) A court may order that any security for or the proceeds of any such property shall be held as security for any such claim or pending the outcome of the arbitration or proceedings.

Cases where s 5(3) has been applied include *Katagum Wholesale Commodities Co Ltd v The MV Paz* 1984 (3) SAf LR 261; *Euromarine International of Mauren v The Ship Berg* 1984 (4) SAf LR 647.

281 The principal difference is that the South African provision does not require an action *in rem* actually to be commenced, but merely requires an application for arrest, to which certain consequences flowing from arrest in an action *in rem* are attached. The UK provision assumes an invocation of admiralty jurisdiction by the commencement of proceedings. s 5(3) is thus closer to a form of *saisie conservatoire*. s 26 also expressly allows an order for alternative security rather than maintaining the arrest. To ensure that the court has sufficient power to deal with the matter fairly, and to avoid time limit problems for a plaintiff pending arbitration, the UK model is to be preferred on both points.

282 cf of the decisions of Canadian courts: *Ship MV Sea Pearl v Seven Seas Shipping Corp* (1982) 139 DLR (3d) 669; *The Didymi*, unreported, FCt, 11 May 1984, (Reed J).

283 eg application for sale of the *res pendente lite* or intervention by port authority seeking an order that the ship be moved to a different berth.

284 In *The Tuyuti* [1984] 2 All ER 545, 553 (Goff LJ) the possibility of such difficulties was not regarded as fatal: cf Civil Jurisdiction and Judgments Act 1982 (UK) s 26(3); Admiralty Jurisdiction Regulation Act 1983 (S Af) s 5(3)(b) for similar legislative solutions to such potential difficulties.

285 See para 84-5.

286 Both English and South African courts require the plaintiff to demonstrate why the assistance of the court is required in retaining the security, although there are shades of difference in the decided cases on the courts' readiness to assist in respect of claims otherwise unconnected with the forum: *The Tuyuti* [1984] 2 All ER 545, 554 (Goff LJ); *Katagum Wholesale Commodities v The MV Paz* 1984 (3) SM LR 261, 268 (Friedman J), 270 (Didcott J).

287 See para 143.

288 *The Dictator* [1892] P 304; *The Gemma* [1899] P 285; *The Dupleix* [1912] P 8; *The Banco* [1971] P 137.

289 eg *The Gemma* [1899] P 285.

290 [1974] 1 Lloyd's Rep 40, 48 (Mocatta J), referred to, without disapproval, in *The Despina GK* [1982] 2 Lloyd's Rep 555, 558.

291 The only other exception to the rule against arrest to enforce a judgment is in the case of a failure to honour an undertaking to give bail: in such cases arrest to enforce the resulting default judgment is expressly permitted under the English (and most other) rules of court. See RSC (UK) O 75 r 21(2); NSW Ad Rules 1952, r 37; Vic Ad Rules 1975, r 84; Qld RSC, O 27A r 16; Tas RSC 1965 Part IV, r 51; SA SCR, O 39 r 33; WARSC 1971, O 74 r 19(3).

292 On the relationship between *in rem* and *in personam* liability see para 143.

293 A jurisdiction expressly preserved in England and New Zealand: Supreme Court Act 1981 (UK) s 20(c); Admiralty Act 1973 (NZ) s 4(2). See para 193.

294 A judgment creditor who has obtained a final judgment against a shipowner by proceeding *in rem* in a foreign admiralty court can bring an action *in rem* in this court against that ship to enforce the decree of the foreign court if that is necessary to complete the execution of that judgment, provided that the ship is the property of the judgment debtor at the time when she is arrested.

*The Despina GK* [1982] 2 Lloyd's Rep 555, 559 (Sheen J), applying *The City of Mecca* (1879) 5 PD 28. See also *Eurobulk Ltd v Wood Preservation Industries* (1979) 106 DLR (3d) 571. It is not always clear when the foreign judgment arose from a proceeding *in rem*. The foreign law may contain no direct equivalent to the action *in rem* and it becomes a question of what degree of resemblance is sufficient in order that the foreign action qualify as an action *in rem*. See further JK Bentil, 'Enforcement of Judgments of Foreign Admiralty Courts' (1984) 128 Sol J 375.

295 *The City of Mecca* (1879) 5 PD 28, 32 (Sir Robert Phillimore).

296 [1985] 2 MLJ 90.

297 See further para 213 where it is recommended that the rule in *The Alletta* preventing arrest after judgment not be followed in Australia.

298 See para 193.

299 DC Jackson, *Enforcement of Maritime Claims*, Lloyds, London, 1985, 166-7, 256.

300 *The Alletta* [1974] 1 Lloyd's Rep 40, 46-50; *The Daien Maru No 18* [1985] 2 MLJ 90, 93-5.

301 Once an action *in rem* to enforce a statutory lien has been commenced (through the issue of the writ) the burden of that action runs with the ship notwithstanding any subsequent transfer of ownership, even if that transfer is to a *bona fide* purchaser: see *The Monica S* [1968] P 741. Sale of the *res* to a *bona fide* purchaser after the issue of a writ of execution will, however, prevent execution upon that *res*: see *Ritchie's Supreme Court Procedure (NSW)*, Butterworths, Sydney, 1984, Vol 1, para 44.7.4 and authorities cited.

302 *The James W Elwell* [1921] P 351 ; Thomas (1980) para 454; Jackson (1985) 314.

303 *Orwell Steel Erection and Fabrication Ltd v Asphalt and Tarmac (UK) Ltd* [1984] 1 WLR 1097. See also *Devlin v Collins* (1984) 37 SASR 98, 99 (King CJ), 105 (Zelling J), 116 (White J). Whether this approach will be adopted in all Australian jurisdictions remains to be seen. For discussion of the relationship between the action *in rem* and Mareva injunctions, see para 245.

304 *The Alletta* [1974] 1 Lloyd's Rep 40, 50.

305 As was pointed out in *The Alletta*: ibid.

306 To similar effect Admiralty Jurisdiction Regulation Act 1983 (SAf) s 1(1)(ii)(x). The judgment in question must be properly classified as an *in rem* judgment in admiralty: cf *The City of Mecca* (1881) 6 PD 106 (CA) reversing (1879) 5 PD 28 (Sir Robert Phillimore) on this point.

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- 307 [1982] 2 Lloyd's Rep 555.  
308 id, 559.
- 309 *The Monica S* [1968] P 741; *Re Aro Co Ltd* [1980] 1 All ER 1067. See Thomas (1980) para 78; Jackson (1985) 256.
- 310 See para 143.
- 311 To similar effect Thomas (1980) para 591. The point did not have to be decided in *The Despina GK* [1982] 2 Lloyd's Rep 555 since the requirements mentioned by Sheen J were in fact met.
- 312 For the distinction between proprietary and general maritime claims see para 132, 149-51. For the exclusion of surrogate ship arrest under this head of jurisdiction (in common with other proprietary maritime claims) see para 208.
- 313 See the cases cited by Brandon J in *The Rena K* [1979] QB 377, 405-6.
- 314 Administration of Justice Act 1956 (UK) s 1(1). See also Admiralty Act 1973 (NZ) s 4(2); Admiralty Jurisdiction Regulation Act 1983 (S AF) s 1(1)(ii)(z).
- 315 *The Queen of the South* [1968] P 449, 455 (Brandon J). See para 156, 171 n 148 for the use in England of the sweeping-up provision with respect to salvage and necessaries.
- 316 See *The Aifanourios* [1980] 2 Lloyd's Rep 403 for an example of how, before it could deny admiralty jurisdiction under the Administration of Justice Act 1956 (UK) s 1, a court had first to be certain that the subject matter in question would not have fallen within the jurisdiction of the pre-1875 Court of Admiralty.
- 317 cf the comment of 2 Western Australian practitioners:  
When we wish to rely upon matters that only fall within the inherent jurisdiction of the High Court of Admiralty, we have to research great lines of contradictory cases which have, from time to time, been summarized by Judges but never so as to resolve the conflict. No sooner does one eminent Judge summarize the cases so as to prefer one line of authority, than another summarizes them, finely distinguishing with great respect the findings of the other Judge.  
Foss and Anderson (1976) 37. See also Zelling Report, para 5(6).
- 318 The 1952 Brussels Convention, art 1 lists the various 'maritime claims' exhaustively, without a residual clause. For the 1985 CMI Draft Revision see para 194.
- 319 See para 275 for discussion of how other non-federal legislation may add to admiralty jurisdiction.
- 320 eg a collision action in which the vessel at fault sought to argue that it drifted off its mooring due to a defective anchor and sought to join the anchor's manufacturer: see *Mitsui OSK Lines Ltd v The Ship 'Mineral Transporter'* [1983] 2 NSWLR 564 (Yeldham J), [1985] 2 All ER 935 (PC).
- 321 But cf Administration of Justice Act 1956 (UK) s 3(7).
- 322 See para 227-8.
- 323 See para 228 for a discussion of this provision and the way in which it incorporates admiralty and maritime jurisdiction under s 76(iii) of the Constitution.
- 324 See para 111.
- 325 See para 39 (mortgages), para 41 (necessaries).
- 326 Supreme Court Act 1981 (UK) s 20(7). See similarly Federal Court Act 1970 (Can) s 22(3); Admiralty Act 1973 (NZ) s 4(4); Admiralty Jurisdiction Regulation Act 1983 (S Af) s 2(1).
- 327 See para 84.
- 328 See para 105. The distinction (discussed in para 115) between navigable waters to which the proposed legislation will apply and inland waters to which it will not apply will reduce the opportunity to litigate claims in admiralty arising in connection with pleasure boats. So will the exclusion of 'inland waterways vessels': para 106.
- 329 Mareva injunctions, which started out as a remedy against foreign defendants, have been similarly generalised to cover local defendants also: see para 245.
- 330 International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, Brussels, 10 May 1952, 439 UNTS 217.
- 331 There are some 20 parties to the Convention in their own right and about 30 former colonies whose position as parties depends upon the operation of rules or practices of state succession to treaties.
- 332 Supreme Court Act 1981 (UK) s 22.
- 333 Federal Court Act 1970 (Can) s 43(4); Admiralty Act 1973 (NZ) s 6. Admiralty Jurisdiction Regulation Act 1983 (S Af) s 3(2) only partially meets the Convention's requirements.
- 334 Although the territorial sea is not part of a State or Territory a tort occurring offshore would 'occur' in the State or Territory for the purpose of the rules governing service out: Navigation Act 1912 (Cth) s 380. See also para 113-4.
- 335 Under s 51(29): see para 77. Since this would be a restriction, not a conferral, of jurisdiction no problem of 'protective jurisdiction' arises: cf para 80.
- 336 See *South Coast Road Metal Quarries v Whitfield* (1914) 14 SR (NSW) 300 (F Ct) for extensive discussion of suits *in personam* against the Crown under the Colonial Courts of Admiralty Act 1890 (UK) and an overruling of a first instance decision refusing to allow such a suit.
- 337 *The Prins Frederick* (1820) 2 Dods 451, 464; 165 ER 1543, 1548 referring to *The Comus* (1816); see also *The Scotia* [1903] AC 501; *The Broadmayne* [1916] P 64. There is no bar to the Crown as plaintiff proceeding *in rem*.
- 338 s 405A(2) will be redundant when the proposed legislation comes into force, and can be repealed. s 405A(1) needs to be retained because it deals with the effect of the 1912 Act itself.
- 339 The need to exempt all separate statutory bodies, whether Commonwealth or not, which operate ships commercially was stressed by RS Kneebone, Australian National Line, *Submission 65* (14 November 1985).
- 340 ALRC 24, *Foreign State Immunity*, AGPS, Canberra, 1984, para 139-44.
- 341 Foreign States Immunities Act 1985 (Cth) s 18.

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## Chapter 10

- 1 Perhaps the most famous illustration of ‘sister ship’ arrest arose out of the stranding of the *Torrey Canyon* off south-west England in 1967 and the subsequent pollution damage to British and French coasts. Prospects for recovering for the damage from the owners of the *Torrey Canyon*, an American owned Bermuda-based corporation created under Liberian law, appeared minimal even if their liability could be established. But the owners had two other ships and the British government tracked their movements. Four months later they succeeded in arresting one, the *Lake Palourde*, during a brief unscheduled transit stop in Singapore. A bond of 3 million pounds was put up to secure its release. The French government was slower off the mark. Though the newly released *Lake Palourde* was pursued out of Singapore agents of the French government in a motor launch they failed to serve the writ before it left territorial waters. It was not until 9 months later that they managed to obtain the arrest of the same ‘sister ship’, time in Rotterdam, where a 3.2 million pound bond had to be put up to secure its release. See *The Times* 18 July 1967, 8, 21 July 1967, 1, 4 April 1968, 19.
- 2 G Gilmore & CL Black, *The Law of Admiralty*, 2nd edn, Foundation Press, Mineola, 1975, 242 (discussing demise charterers, time charterers) and for exceptions to the basic rule, *id*, 594-622.
- 3 Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims r B. Arrest *in rem* is provided for: r C. Note that r B, and to a lesser extent r C, have come under attack the last decade or so as infringing the constitutional right to due process: see CJ Duzon, ‘The Constitutionality of Supplemental Admiralty Rule C’ (1983) 14 *JMLC* 28 1; DG Culp, ‘Chartering a New Co Proposed Amendments to the Supplemental Rules for Admiralty Arrest and Attachment’ (1984) 15 *JLMC* 353.
- 4 Federal Court Act 1970 (Can), s 43(2).
- 5 See para 245 n 5. In some of the Canadian provinces a system of general pre-judgment attachment operates as a matter of ordinary civil procedure. This can be used to detain ships in actions brought in provincial courts but not in admiralty actions brought in the Federal Court even when sitting in the province in question: *Maple Leaf Mills Ltd v The Baffin Bay* [1973] FC 1097.
- 6 This was not authoritatively stated until as late as 1936: *The Beldis* [1936] P 51 (CA). The correctness of the decision (or strictly speaking the obiter dictum) in *The Beldis* does not appear to have come up formally for decision in Australia. But it is safe to assume that it would be followed.
- 7 DR Thomas, *Maritime Liens*, Stevens, London, 1980, para 8.
- 8 *ibid*; CW O’Hare ‘Admiralty Jurisdiction’ (1979) 6 *MULR* 195, 204-6.
- 9 Thomas (1980) para 8 n 40 gives examples.
- 10 *The Banco* [1971] P 137, 151 (Lord Denning MR).
- 11 [1936] P 51. The property in question was in fact a ‘sister ship’ but the argument was cast in broad terms attempting to rely on historical works and dicta from the 19th century cases.
- 12 [1892] 1 QB 273, 299.
- 13 *The Beldis* [1936] P 51, 76.
- 14 O’Hare (1979) 207.
- 15 For the term ‘surrogate ship’ and possible alternatives see para 118, 205.
- 16 Administration of Justice Act 1956 (UK) s 3(4)(b).
- 17 Although the Court of Appeal in *The Span Terza* [1982] 1 Lloyd’s Rep 225 decided by a majority in favour of the broadest view, Stephenson LJ observed that because the matter was heard *ex parte* as a matter of urgency ‘the authority of the decision of the majority in this case will be of little, if any, more authority than the dissenting opinion of Lord Justice Donaldson’ (*id*, 231). The same result had earlier been reached in *The Permina 108* [1978] 1 Lloyd’s Rep 308 (Singapore, CA) and *The Span Terza* was followed in *The Djatianam* [1982] HKLR 427 and *The Sextum* [1982] 2 Lloyd’s Rep 532 (Hong Kong S Ct), where Penlington J observed that the sort of situation in which it is necessary to choose between the views would only rarely arise (*id*, 535). In *The Maritime Trader* [1981] 2 Lloyd’s Rep 153, Sheen J felt compelled to follow what were very much dicta in *The Eschersheim* [1976] 1 All ER 441, 456-7 (Sir Gordon Willmer LJ) and [1976] 1 All ER 920, 925 (Lord Diplock) and reject the broadest view. See similarly *The Ledesco Uno* [1978] 2 Lloyd’s Rep 99 (Hong Kong S Ct). For discussion see DR Thomas, ‘The Sister Ship Action *in rem*’ [1979] *LMCLQ* 158, 165-67; SJ Tabbush, ‘Arrest of Ships Owned by Charterers’ [1982] *LMCLQ* 585, 588-89; AM Tettenborn, ‘The Time Charterer, the One-Ship Company and the Sister-Ship Action *in rem*’ [1981] *LMCLQ* 507; SJ Hazelwood, ‘Gaps in the Action *in rem* — Plugged?’ [1982] *LMCLQ* 422. During the passage of the 1956 Act through Parliament s 3(4) was amended. The substitution of ‘beneficially owned’ for ‘in possession of’ was intended to ensure that only ships in the same ownership could be arrested: United Kingdom, 194 *Parl Debs* (HL, 5th Series) (8 December 1955) 1239.
- 18 Supreme Court Act 1981 (UK) s 21(4)(ii).
- 19 But the jurisdictional provision in the Hamburg Rules (United Nations Convention on the Carriage of Goods by Sea, Hamburg, 31 March 1978), art 21(2)(a), allows jurisdiction founded on the arrest of ‘the carrying vessel or any other vessel of the same ownership’. This does not seem to allow arrest of any other vessel where the relevant person is merely a charterer of the wrongdoing vessel.
- 20 *The Maritime Trader* [1981] 2 Lloyd’s Rep, 153, 15 56 (Sheen J).
- 21 See para 124-5 for the requirement of a ‘wrongdoing ship’.
- 22 For the question whether more than one ship can be arrested on a particular claim see para 210. For the question of piercing the corporate veil to determine ownership for this and other purposes see para 138-41.
- 23 See eg the factual situation in *The Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210. But the wrongdoing vessel which sank after the cause of the action arose but before it could be arrested belonged to a ‘one ship’ company and hence its owners had no other ship which could be arrested.
- 24 See para 84-6, 94, 96.
- 25 Admiralty Act 1973 (NZ) s 5(2)(b)(ii); Supreme Court Act 1981 (UK) s 21(4)(ii); Admiralty Jurisdiction Regulation Act (S Af) s 3(7)(a)(i).
- 26 See a suggestion to this effect in the Italian Maritime Law Association response to question 5 of the CMI’s 1983 questionnaire (CMI Doc No Arrest-4/1-84). The German Democratic Republic agreed (CMI Doc No Arrest-5/1-84), while the Belgian Association’s response favoured allowing no arrest without complete congruence of ownership (CMI Doc No Arrest-3/XII-83).
- 27 See n 25.
- 28 Art 3(1) & (2). But note the interpretation suggested by the Italian Maritime Association: ‘if for example the ship in respect of which the maritime claim arose is owned by A, B, and C, and each of the co-owners fully owns another ship, the claimant may arrest any of those three

other ships' (1983 response). Unless intended to be read *de lege ferenda* this interpretation is incorrect. Art 3(1) refers to 'any other ship which is owned by the person who was ... the owner of the particular ship'.

29 cf SK Robinson, 'Arresting the Misconception'[1982] *LMCLQ* 261, 264.

30 Other persons who are not owners of the ship may also be liable on the claim: this is irrelevant to the question whether the ship can be sued in respect of the liability of persons who are its owners.

31 Admiralty Act 1973 (NZ) s 5(2)(b)(ii).

32 [1973] QB 265. The case was decided in 1970 and is cited in the explanatory note to the relevant section of the Draft Admiralty Bill proposed by the Report of the Special Law Reform Committee on *Admiralty Jurisdiction* (Chairman: Justice Beattie), Wellington, Government Printer, 1972, 15-6.

33 [1973] QB 265, 272, interpreting the Administration of Justice Act 1956 (UK) s 3(4).

34 id, 271 (emphasis added), referring to the 1952 Arrest Convention, art 3(4).

35 See para 131-7.

36 Other persons interested in ship B (eg as purchasers) would have to inquire not merely as to the liabilities of the owner of ship B, with whom they are dealing, but with respect to the liabilities of other persons, who were or had been demise charterers of ship B, with respect to other ships.

37 Administration of Justice Act 1956 (UK) s 3(4); Supreme Court Act 1981 (UK) s 21(4); Admiralty Act 1973 (NZ) s 5(2)(b); Admiralty Jurisdiction Regulation Act 1983 (S Af) s 3(6); 1952 Arrest Convention art 3(1).

38 See Shipping Registration Act 1981 (Cth) s 14.

39 The general question of the relationship between competing claims when a surrogate ship rather than the wrongdoing ship is arrested will be considered in chapter 12 in the context of priorities: see para 259-62.

40 See para 190-2.

41 Assuming that only one ship may be arrested with respect to a particular cause of action: see para 210. The position of maritime liens may perhaps be different: see para 212 and n 75.

42 See para 119-20.

43 See para 118 for the cases where this is not so.

44 See para 210 for the question whether multiple arrest should be possible in this situation.

45 See para 177.

46 See para 132, 149-52.

47 In contrast to the 1952 Arrest Convention, the CMI Draft Convention on Salvage (Montreal, 1981) does not cater for surrogate ship arrest. Art 4-5(1) allocates jurisdiction over salvage disputes on a number of grounds including to the Courts of 'the place where the property salved has been arrested'. This is the only ground upon which arrest is possible.

48 Extension of rights *in rem* against property other than 'maritime' property would contravene the underlying theory of admiralty jurisdiction outlined in para 94, 96.

49 See para 109-10 on the present position with respect to arrest of cargo.

50 *The Castlegate* [1893] AC 38. See para 109-10 where 'freight' is defined and its arrest discussed.

51 Clearly for the purposes of such rule it is critical precisely how 'claim' or 'cause of action' is defined. eg in *The Permina Samudra XIV* [1977] 1 MLJ 47 (Singapore, CA) a series of monthly payments were outstanding under charterparty. The Court of Appeal held that the plaintiff was entitled to treat each payment as giving rise to a different cause of action even though only one substantial issue, for breach of the charterparty, was involved. The plaintiff was therefore entitled to arrest the wrongdoing ship in respect of one payment and a surrogate ship in respect of a second payment. For a case on the other side of the line see *The Brunei 602* [1984] 1 MU 227.

52 Thomas (1980) para 91. See also *The Conoco Britannia* [1972] 2 QB 543, 555 (Brandon J) to the effect that the limitation to the value of the *res* when the defendant does not appear is perhaps 'not justified'. Insofar as this dictum was directed at the authority underpinning the rule it has been convincingly criticised by Thomas (1980) para 91.

53 In most situations the value of the ship is greater than the limitation value.

54 In England and Wales in 1980, 1016 writs and summonses were issued in admiralty and 15 ships were sold by the court. In 1981 the corresponding figures were 954 and 10: Great Britain (Lord Chancellor's Office), *Judicial Statistics* 1981, HMSO, London, 1982, Table C7a.

55 *The Rena K* [1979] QB 337,410. See the discussion in para 245-7.

56 CMI Doc LIS/Arrest 30 (1985). Art 5(2)(b) allows arrest of another ship where security or other undertakings given in relation to the first ship prove unreliable.

57 id, art 1(2) (definition of 'arrest'), art 3(1)(d), (2) (conditions for arrest). The latter provisions do not exclude statutory liens entirely, since art 3(3) allows arrest of a ship not owned by the relevant person if under local law the ship can be sold by the court to meet the liability.

58 As DJL Watkins, Secretary, British Maritime Law Association, pointed out: *Submission 49* (12 June 1985).

59 DC Jackson, *Enforcement of Maritime Claims*, Lloyd's, London, 1985, 166-7.

60 Together with costs: Thomas (1980) para 513.

61 See *ibid* and the authorities cited, in particular *The Kalamazoo* (1851) 15 Jur 885, 886; *The Wild Ranger* (1863) Br & L 84; 167 ER 3 10; *The Point Breeze* [1928] P 135, 139-141. These decisions were approved in both *The Alletta* [1974] 1 Lloyd's Rep 40, 46-50 (Mocatta J) and *The Daien Maru No 18* [1985] 2 MLJ 90 (Thean J).

62 Thomas (1980) para 516.

63 id, para 513. In addition to the authorities cited by Thomas, see *The Arctic Star* [1985] TLR 70.

64 (1865) B & L 447, 167 ER 436. In that case an application seems to have been made for leave to arrest the ship: *ibid*. There appears to be no rule requiring leave prior to arrest, however: see *The Arctic Star* [1985] TLR 70; cf *The Point Breeze* [1928] P 135, 141.

65 No arrest to increase bail can take place after judgment but prior to the amount of the claim being ascertained: *The Point Breeze* [1928] P 135. It also seems unlikely that rearrest simply to 'top up' bail will be permitted: id, 142.

66 cf Admiralty Jurisdiction Regulation Act 1983 (S Af) s 3(8), which expressly forbids the arrest of property (or giving of security) more than once in respect of the same maritime claim.

67 See *The Banco* [1971] P 137, 150-1 (Lord Denning MR).

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- 68 id, 532-4 (Lord Denning MR); 536-7 (Megaw LJ); 540 (Cairns LJ).
- 69 Sub-s(8) forbids not only the arrest of, but also the service of a writ *in rem* upon, a second ship:  
where, as regards [general maritime claims], a ship has been served with a writ or arrested in an action *in rem* brought to enforce that claim, no other ship may be served with a writ or arrested in that or any other action *in rem* brought to enforce that claim.
- In *The Stephan J* [1985] 2 Lloyd's Rep 344, Sheen J held that s 21(8) should be read as excluding service upon or arrest of a second ship only where the ship previously served or arrested was a ship against which that action *in rem* could be brought. Thus where, as in *The Stephan J*, a ship that could not be sued on the relevant claim was mistakenly arrested, s 21(8) did not prevent later service on and arrest of a second, correct, ship.
- 70 The reasoning of Sheen J in *The Stephan J* [1985] 2 Lloyd's Rep 344 is not relevant since, unlike the situation in that case, the initial arrest in a typical 'rearrest' action will have been proper, but the bail or other security will have failed for one of the reasons outlined in para 211. Sheen J did not refer to the possibility of any other exception to s 21(8), and this may tend to support the argument that s 21(8) forbids rearrest of a different ship.
- 71 CMI Draft Revision, art 5(2).
- 72 [1971] 1 All ER 524. There, seven ships were arrested on the same day.
- 73 There are other consequential problems to be resolved: eg, would the statutory lien against ship A be extinguished by the 'rearrest' of ship B?
- 74 *The Stephan J* [1985] 2 Lloyd's Rep 344.
- 75 Text discussions of the extinction of maritime liens do not list unsatisfied judgments against surrogate ships as a ground of extinction: eg Thomas (1980) ch 11. The emphasis with maritime liens has always been upon requiring actual satisfaction of the liability before the lien is extinguished (apart from laches etc): id, para 548.
- 76 See para 119-23.
- 77 [1974] 1 Lloyd's Rep 40. cf *The Despina GK* [1982] 2 Lloyd's Rep 555 (Sheen J) (which, however, refers to *The Alletta* without disapproval).
- 78 *The Dainen Maru No 18* [1985] 2 MLJ 90. For comment see DCJ, 'Arrest after Judgment' [1985] LMCLQ 186.
- 79 The strongest argument in favour of the rule against post-judgment arrest is that thereafter other parties with an interest in the ship have no opportunity to appear or intervene: see *The Alletta* [1974] 1 Lloyd's Rep 40, 50 (Mocatta J). Apart from the possibility that service on the ship will have put them on notice, the court's powers, including powers to order that other interested parties be given notice of the claim, and to set aside a default judgment, are sufficient to resolve most difficulties.
- 80 This view was expressed eg by Justice B Sheen, *Submission 74* (6 January 1986) 1-2. See also Jackson (1985) 166.
- 81 KC McGuffie, DA Fugeman & PV Gray, *Admiralty Practice*, Stevens, London, 1964 and supp 1975, para 157, 262. See n 83.
- 82 *The Monica S* [1968] P 741; *Re Aro Co Ltd* [1980] 1 All ER 1067.
- 83 For the substantive effect of s 21(8) see para 212. The practice of naming several ships had earlier been approved in *The Banco* [1971] P 137; *The Berny* [1979] QB 80.
- 84 For admiralty registers see para 292.
- 85 See para 143.
- 86 [1985] 1 MLJ 343.
- 87 id, 346.
- 88 It is unclear whether amendments adding a new party are retrospective in effect or not. The English Court of Appeal has recently refused to follow dicta in *Liff v Peasley* [1980] 1 All ER 623, 643 (Brandon LJ) to the effect that they are not: *Ketteman v Hansel Properties Ltd* [1985] 1 All ER 352. See also *Liptons Cash Registers and Business Equipment Ltd v Hugin (GB) Ltd* [1982] 1 All ER 595, 605 (Hawser QC); *Leadbitter v Hodge Finance Ltd* [1982] 2 All ER 167, 173 (Bush J). The Australian authorities are confused. Some clearly assume the retrospective effect of adding a party: *Archie v Archie* [1980] Qd R 546 (Full Ct); *Perrett v Robinson* [1985] 1 Qd R 83, 86-7 (Connolly J). There are, however, statements in a number of cases that tend the other way: *J Robertson & Co Ltd (In Liquidation) v Ferguson Transformers Pty Ltd* (1970) 44 ALJR 441, 444 (Walsh 3); *John Robertson & Co Ltd (In Liquidation) v Phillips Industries Pty Ltd* (1973) 1 ALR 21, 30 (Menzies J); *Perrett v Robinson* [1985] 1 Qd R 83, 92-3 (McPherson J); *Booth v Peko Mines (NL)* (1978) 22 ALR 94 (Toohey J); *Neilson v Peters Ship Repair Pty Ltd* [1983] 2 Qd R 419 (Full Ct). Some decisions appear to rely upon both lines of authority: *Stout v RA Wenham Builders Pty Ltd* [1980] 1 NSWLR 426 (Sharpe, M). *Liff v Peasley* has been reversed in England by statute: Limitation Act 1980 (UK) s 35.
- 89 In particular it avoids different courts acquiring jurisdiction by service over the same cause of action.

## Chapter 11

- 1 For examples of conflict due to one party wishing to proceed in admiralty, the other in the ordinary jurisdiction, see *Union Steamship Co of New Zealand Ltd v The Ship 'Caradale'* (1937) 56 CLR 277; *Avis Rent-A-Car System Pty Ltd v Bill* unreported, NSW Supreme Court, 9 June 1972 (MacFarlan J).
- 2 No statistics are available for the Supreme Court of the Northern Territory, nor for the Broome Local Court, though apparently the latter has, in recent years at least, had no cases in its admiralty jurisdiction.
- 3 The overwhelming majority of these actions (317) were commenced in the Melbourne Registry. No matters were commenced in the High Court in the Canberra, Hobart, Adelaide or Darwin Registries. The High Court will usually remit admiralty matters to the appropriate State Supreme Court. Two matters went to the High Court on appeal.
- 4 No actions were commenced in the District Registries of Newcastle and Wollongong. Of 18 matters commenced in 1982, 7 involved local craft. In the view of Registry staff the marked decline in the number of actions commenced in the Supreme Court over the course of the decade was due to the fact that most cargo claims were pursued in the Commercial Causes List and fewer *in personam* actions were commenced in Admiralty. Improved communication systems in Sydney Harbour greatly reduced the number of collisions.
- 5 Cases have on occasion been adjourned to the Supreme Court sitting at Sale. Approximately 25% of the actions commenced in admiralty were within the limits of the jurisdiction of the Victorian County Court.
- 6 Of these actions, some 83 were commenced in the District Registries of Rockhampton and Townsville, and three-quarters of those actions involved local vessels.

- 7 Three were commenced in District Registries.
- 8 None of these actions were heard on circuit.
- 9 All admiralty matters are dealt with by the Supreme Court in Perth. Approximately 20% of the actions commenced in admiralty were within the limits of the jurisdiction of the District Court.
- 10 Most courts reported no admiralty appellate work, and those that did (Qld & NSW) reported only one or two instances during the decade surveyed. *China Ocean Shipping Co v State of South Australia* (1979) 145 CLR 172 went to the High Court on a case stated, not on appeal.
- 11 As the Queensland Branch of the Maritime Law Association pointed out: *Submission 6* (5 October 1983), reprinted in (1983) 1(3) *MLAANZ Journal* 23, 25. During the decade 57% of admiralty actions commenced in the Brisbane Registry.
- 12 Note, 'Ship May Come Home for Maritime Lawyers' (1983) 57 *Law Inst J* 128, 129.
- 13 MH Byers & PB Toose, 'The Necessity of a New Federal Court' (1963) 36 *Aust LJ* 308, 309. See also R Else-Mitchell, 'The Judicial System — The Myth of Perfection and the Need for Unity' (1970) 44 *Aust LJ* 516, 521-3.
- 14 See eg R Else-Mitchell, 'Burying the Autochthonous Expedient?' (1969) 3 *Fed L Rev* 187; G Barwick, 'The State of the Australian Judicature' (1977) 51 *Aust LJ* 480; MM Helsham, 'Difficulties Caused by a Dual System of State and Federal Courts' (1978) 52 *Aust LJ* 466, L Street, 'The Consequences of a Dual System of State and Federal Courts' (1978) 52 *Aust LJ* 434; L Street, 'Towards an Australian Judicial System' (1982) 56 *Aust LJ* 515; N Bowen, 'Federal and State Court Relationships' (1979) 53 *Aust LJ* 806; W Campbell, 'The Relationship between the Federal Court and the Supreme Courts of the States' (1979) 11 *U Qld LJ* 1; H Gibbs, 'The State of the Australian Judicature' (1981) 55 *Aust LJ* 677; A Rogers, 'State/Federal Court Relations' (1981) 55 *Aust LJ* 630; F Burt, 'An Australian Judicature' (1982) 56 *Aust LJ* 509; FM Neasey, 'Comment Upon Proposals for an Australian Judicial System' (1983) 57 *Aust LJ* 335; AR Moffit, 'A Comment on the Proposal for Creating an Australian Court of Appeal' (1983) 57 *Aust LJ* 167.
- 15 Gibbs (1981) 679. See also Rogers (1981) 648.
- 16 Campbell (1979) 18.
- 17 EG Whitlam, Comment in Discussion, (1963) 36 *Aust LJ* 327.
- 18 Gibbs (1981) 677-8.
- 19 Burt (1982) 509.
- 20 Byers & Toose (1963) 313.
- 21 P Durack, 'The Special Role of the Federal Court of Australia' (1981) 55 *Aust LJ* 778, 781; Byers and Toose (1963) 314; Bowen (1979) 809; Commonwealth of Australia, 58 *Part Debs (Sen)* (12 December 1973) 2725 (Sen L Murphy, 2nd reading, Superior Court of Australia Bill 1973).
- 22 Durack (1981) 781.
- 23 Campbell (1979) 16.
- 24 Byers & Toose (1963) 314.
- 25 Bowen (1979) 813.
- 26 Burt (1963) 323. See also Campbell (1979) 11.
- 27 Gibbs (1981) 678; Campbell (1979) 10-11.
- 28 Campbell (1979) 11. See also Neasey (1983) 340.
- 29 Byers & Toose (1963) 314; Bowen (1979) 809.
- 30 For the Commission's work in its Reference on the Service and Execution of Process Act see Australian Law Reform Commission Issues Paper 5, *Service and Execution of Process*, Sydney, 1984.
- 31 Campbell (1979) 14.
- 32 Street (1978) 434.
- 33 Rogers (1981) 631. See also Else-Mitchell (1970) 519; Campbell (1979) 6-8; Gibbs (1981) 677; *Noble v Noble* (1983) 48 ALR 157, 161 (McPherson J).
- 34 Durack (1981) 781. See also Bowen (1979) 812.
- 35 Durack (1981) 781 citing *Ward v R* (1980) 54 ALJR 271 as an example. See also Bowen (1979) 811-12.
- 36 Street (1982) 515.
- 37 cf Burt (1982) 509-10.
- 38 Neasey (1983) 341.
- 39 *Stack v Coast Securities (No 9) Pty Ltd* (1983) 49 ALR 193, 222 (Wilson & Dawson JJ, dissenting) where the test for pendent jurisdiction is described as 'imprecise and unsatisfactory'. See also the criticism by Rogers (1981) 639, of earlier High Court guidelines.
- 40 In the United States the problem of demarcation between State and federal courts persists despite much longer judicial experience of the problem. See on the US experience generally WMC Gurnmow, 'Pendent Jurisdiction in Australia — s 32 of the Federal Court of Australia Act 1976' (1979) 10 *Fed L Rev* 211, 215-28.
- 41 Bowen (1979) 812.
- 42 Rogers (1981) 646-8. But cf *Stack v Coast Securities (No 9) Pty Ltd* (1983) 46 ALR 451, 489 (Fitzgerald J).
- 43 eg Gibbs (1981) 679; Rogers (1981) 648; G de Q Walker, 'Competition between Courts: Bane or Bounty?' (1981) 55 *Aust LJ* 312-13; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 49 ALR 193, 207 (Gibbs CJ).
- 44 Durack (1981) 782. See also Bowen (1979) 812; Campbell (1979) 18.
- 45 eg Walker (1981) 313.
- 46 Durack (1981) 782; Bowen (1979) 816.
- 47 Durack (1981) 782.
- 48 ibid; Bowen (1979) 816.
- 49 F Burt, Comment in Discussion, (1963) 36 *Aust LJ* 323. See also Campbell (1979) 17.
- 50 Bowen (1979) 813.
- 51 Campbell (1979) 17; Neasey (1983) 339-40; Moffitt (1983) 171.
- 52 Bowen (1979) 813.

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- 53 But for reservations on this solution see eg Campbell (1979) 16; Neasey (1983) 341.
- 54 See Street (1978) 434; Durack (1981) 782; Rogers (1981) 646; Burt (1982) 510; Moffitt (1983) 167-8.
- 55 It is also assumed that any cross-vesting legislation which may be enacted will not eliminate the basic distinctions between courts or their primary jurisdictions.
- 56 Supreme Court Act 1981 (UK) s 51(1), 6(1).
- 57 id, s 6(2).
- 58 FL Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800*, CUP, Cambridge, 1970, 122-26, 136-37, 140, 144, 153.
- 59 In the 5 years from 1977-81 about 1000 admiralty actions were commenced each year, with about 170 warrants of arrest issued annually. Judicial sales of ships during this period totalled 54. About 99% of actions are settled before trial. Source: *Judicial Statistics*, England and Wales, prepared annually by the Lord Chancellor's Department, HMSO, London.
- 60 County Court Jurisdiction Act 1868 (UK); County Court Admiralty Jurisdiction Amendment Act 1869 (UK). Because s 2(1) of the latter Act conferred broader jurisdiction than that enjoyed by the Admiralty Court at the time, the curious position was created that the inferior court enjoyed greater jurisdiction in some admiralty matters than the superior court. The position was remedied by altering the High Court's jurisdiction in the Administration of Justice Act 1920 (UK). Such is the present state of admiralty jurisdiction in Australia that it was necessary to explore this historical curiosity in order to decide a modern Australian case: *The Ship 'Terukawa Maru' v Co-Operated Dried Fruit Sales Pty Ltd* (1976) 126 CLR 170, 173-4. See Wiswall (1970) 98 for the miscellany of local courts (such as the Liverpool Court of Passage) which exercised admiralty jurisdiction in the 19th century.
- 61 County Courts Act 1984 (UK), s 26(1); Civil Courts Order 1983 (UK), SI 1983 No 713 as amended.
- 62 Non-monetary restrictions on the ability to arrest were removed by the Supreme Court Act 1981 (UK) Sch 7. Previously s 83 of the County Courts Act 1959 (UK) allowed pre-judgment arrest only where it could be shown 'that it is probable that the vessel, aircraft or property to which the proceedings relate will be removed out of the jurisdiction of the court before the plaintiffs claim is satisfied'.
- 63 County Courts Act 1984 (UK) s 27(2).
- 64 id, s 27(b).
- 65 Information supplied by Justice B Sheen, the Admiralty Court Judge, 21 Sept 1983.
- 66 County Courts Act 1984 (UK) s 40-2.
- 67 id, s 29.
- 68 County Court Rules 1981 (UK) O 40 r 9(3).
- 69 id, O 13 r 11.
- 70 id, O 40 r 14-15.
- 71 County Courts Act 1984 (UK) s 77, 78, 28(12).
- 72 Admiralty Act 1973 (NZ) s 3(1)(a); Judicature Amendment Act 1979 (NZ) s 12.
- 73 Admiralty Act 1973 (NZ) s 3(1)(b); District Courts Amendment Act 1979 (NZ) s 2.
- 74 District Courts Amendment Act 1975 (NZ) s 2; District Courts Act 1947 (NZ) s 37. The arrest limit is \$12 000: District Courts Amendment Act 1979 (NZ) s 9(1)(a).
- 75 Admiralty Act 1973 (NZ) s 13(1).
- 76 District Court Rules 1948 (NZ) r 6, 11, 17.
- 77 28 USC 1333(1).
- 78 See eg the statistics cited by Brennan J in *Romero v International Terminal Operating Co* 358 US 354, 409 (1959) (about 150 cases in State courts in the years 1953-57).
- 79 See DW Robertson, 'Admiralty Procedure and Jurisdiction after the 1966 Unification' (1976) 74 *Mich L Rev* 1627, 1631.
- 80 cf Wiswall (1970) 134.
- 81 Robertson (1976) 1631. One area of difficulty involves jury trial: see BB Woodhouse, '*Powell v Offshore Navigation Inc* : Jurisdiction over Maritime Claims and the Right to Trial by Jury' (1982) 82 *Col L Rev* 784.
- 82 The distinction between the meaning of the terms 'ancillary' and 'pendent' is becoming blurred: see Robertson (1976) 1646. See also JM Landers, 'Sleight of Rule: Admiralty Unification and Ancillary and Pendent Jurisdiction' (1972) 51 *Texas L Rev* 50, 57.
- 83 BR Bentley, 'Third-Party Practice in Admiralty: Ancillary Jurisdiction' (1974) 28 *Southwestern LJ* 1021, 1027-8; Landers (1972) 58-60.
- 84 Landers (1972) 59-60.
- 85 The articles by Landers, Bentley and Robinson cite only a handful of cases as examples. See also JH Lederer, 'Pendent Jurisdiction in Admiralty' [1973] *Wis L Rev* 594.
- 86 Federal Court Act 1970 (Can) s 22(1). The admiralty jurisdiction of the Newfoundland Supreme Court was surrendered to the Federal Courts under the Terms of Union by which the Province joined Canada in 1949: see *Cull v Rose* (1982) 139 DLR(3d) 599.
- 87 *Balfour Guthrie (Canada) Ltd v Far Eastern Steamship Co* (1977) 82 DLR (3d) 414. cf *Heath v Kane* (1975) 10 OR (2d) 716 in which the Ontario Court of Appeal held that Ontario County Courts lacked any admiralty jurisdiction.
- 88 Information supplied to the Commission by Mr PM Troop QC, Dept of Justice, Ottawa, September 1983. But time limits within which claims may be brought are in some respects longer in provincial courts: see eg *The Ship 'CF Todd' v The Ship 'Taru Warrior'* (1982) 133 DLR (3d) 70.
- 89 Canadian Bar Association, *Federal Court Report*, Ottawa, 1983, 29.
- 90 ibid.
- 91 id, 29.
- 92 id, 30.
- 93 id, 3 1. See also M MacGuigan (Minister of Justice and AG of Canada), *Proposals to Amend the Federal Court Act*, Dept of Justice, Ottawa, 1983, 3, 15-16.
- 94 RT Hughes, *Federal Court of Canada Service*, Butterworths, Toronto, 1983, 805.
- 95 WR Jackett, 'The Federal Court of Appeal' (1973) 11 *Osgoode Hall LJ* 253, 271-3 describes the registry system.
- 96 Federal Court Act 1970 (Can) s 13. See also *International Marine Banking Co Ltd v MIT Dora* [1977] 1 FC 282.

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- 97 JL Jessiman, *On the Heritage of the Admiralty Court in British Columbia*, Fac of Law, UBC, mimeo, 1983, 38.
- 98 The volume of business is small. In 1976, 825 admiralty actions were filed but only 22 came to trial: Canadian Bar Association, 28. Spread among even three judges, this volume of work would not necessarily lead to a rapid growth of expertise.
- 99 Their *Federal Court Report*, 30-1, comments that ‘the interests of claimants and of the legal profession are well served by the Federal Court of Canada’.
- 100 Federal Court Act 1970 (Can) s 27(1), 31.
- 101 Canadian Bar Association, 29-30.
- 102 id, 30. The Report makes no positive recommendation on the issue, suggesting that perhaps the profession is content to live with the problem. For examples of cases involving ancillary jurisdiction see *Quebec & Ontario Transportation Co Ltd v The Ship 'Incan St Laurent'* (1980) 121 DLR (3d) 510 affirming (1979) 104 DLR (3d) 139; *Transports Insurance Co Inc v Ship 'Ondine'* (1982) 138 DLR (3d) 745.
- 103 See JB Laskin & RJ Sharpe, ‘Constricting Federal Court Jurisdiction: A Comment on *Fuller Construction*’ (1980) 30 *U of Toronto LJ* 283, 304, for a list of the cases.
- 104 eg *Zavarovalna Skupnost Triglav v Terrasses Jewellers Inc* [1983] 1 SCR 283 (insurance a provincial matter, navigation and shipping a federal matter; held, Federal Court validly given jurisdiction over marine insurance).
- 105 Jessiman (1983) 42. No evidence is given to support the assertion.
- 106 ibid. Apparently attempts to do this for salvage claims have been only partially successful. Jessiman notes that the advent of Mareva injunctions has reduced the need to have recourse to admiralty, particularly because in Canada sister ship arrest is not available in admiralty. See eg *Irving Oil Ltd v Bjornstad, Bjorn & Co* (1981) 35 NBR (2d) 265; W Tetley, ‘Canadian Maritime Law Judgments in 1982’ [1983] *LMCLQ* 603, 609. On the co-existence of Mareva injunctions with arrest *in rem* see *Pamar Fisheries Ltd v Parceria Maritime Esperanca LDA* (1982) 53 NSR (2d) 338.
- 107 Constitution, s 77(iii).
- 108 id, s 76 (High Court), 77(i) (other federal courts).
- 109 id, s 122.
- 110 *Le Mesurier v Connor* (1929) 42 CLR 481; *Russell v Russell* (1976) 9 ALR 103; Z Cowen & L Zines, *Federal Jurisdiction in Australia*, 2nd edn, OUP, Melbourne, 1978, 196-9.
- 111 *R v Bernasconi* (1915) 19 CLR 629; *Porter v R* (1926) 37 CLR 432; *Spratt v Hermes* (1965) 114 CLR 226.
- 112 *Capital TV & Appliances Pty Lid v Falconer* (1971) 125 CLR 59 1. See J Crawford, *Australian Courts of Law*, OUP, Melbourne, 1982, 38-42.
- 113 *Spratt v Hermes* (1965) 114 CLR 226.
- 114 The provision of Admiralty assessors, provided at least that their role was an advisory one, would not do so. In fact the Commission makes no recommendation for admiralty assessors, for other reasons. See para 288-91. The question whether the Admiralty Registrar can be given ancillary judicial powers is discussed in para 287.
- 115 Constitution, s 77.
- 116 id, s 73.
- 117 See generally Cowen & Zines (1978) 72-5; Crawford (1982) 132-7.
- 118 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 33 ALR 465; *Fencott v Muller* (1983) 46 ALR 41; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 49 ALR 193.
- 119 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 33 ALR 465, 504.
- 120 *Fencott v Muller* (1983) 46 ALR 41, 67, 68, 69 (Mason, Murphy, Brennan & Deane JJ). This test was approved and followed in *Stack v Coast Securities (No 9) Pty Ltd* (1983) 49 ALR 193.
- 121 (1983) 46 ALR 41.
- 122 See eg *Stohl Aviation v Electrum Finance Pty Ltd* (1984) 56 ALR 716; *Hilton v Wells* (1985) 59 ALR 281.
- 123 cf *United States Surgical Corporation v Hospital Products International Pty Ltd* (1981) 33 ALR 465.
- 124 (1981) 33 ALR 465.
- 125 In the *Hospital Products* case five justices, declined to determine whether a copyright claim was ‘associated’ with a trade practices claim on the facts. Barwick CJ and Murphy J held that it was.
- 126 A brief summary of Justice Zelling’s proposals can be found in ‘Admiralty Jurisdiction in Australia’ (1969) 4 *Law Council Newsletter* 11.
- 127 Law Council of Australia and Maritime Law Association of Australia and New Zealand (Chairman: Justice HE Zelling), Joint Committee, Report, *Admiralty Jurisdiction in Australia*, 1982, para 11.5.
- 128 id, para 13-1.
- 129 cf *The Eschersheim* [1976] 1 All ER 920, 924-5 (Lord Diplock).
- 130 County Courts Act 1984 (UK), s 28. See para 222.
- 131 eg see *The Ship 'Texaco Southampton' v Burley* [1982] 2 NSWLR 336, 339 where Glass JA declined to be bound by *Fisher v The Ship 'Oceanic Grandeur'* (1972) 127 CLR 312, a decision of a single judge exercising the admiralty jurisdiction of the High Court, despite the fact that ‘it was an express ruling of law on the point in issue before us’. The High Court decision was not given ‘in the framework of the appellate hierarchy to which this Court belongs ...’.
- 132 See eg *Delrosa v Clippers Anchorage Pty Ltd*, unreported, 6 November 1978, NSW Supreme Court (Sheppard J) in which a definite effort is made to discover an Australian standard against which to measure the appropriateness of a salvage award in a particular case.
- 133 See para 222.
- 134 Submission 6 (5 October 1983), in (1983) 1(3) *MLAANZ Journal* 23, 26. However there are now two Federal Court judges based in Perth.
- 135 id, 25. See also para 219, n 6, 11.
- 136 See para 219, n 7.
- 137 MLAANZ Submission (1983) 28. cf para 225 on the loss of judicial expertise in admiralty following the establishment of the Federal Court of Canada in 1970. The need to avoid loss of expertise was noted in a number of submissions: HG Fryberg, *Submission 4* (19 May 1983) 4; Hon T Sheahan MLA, New South Wales Attorney General, *Submission 48* (23 May 1985).
- 138 Zelling Report, para 13.3.

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- 139 MLAANZ Submission (1983) 28. Compare the different views taken by the majority and minority of the US Supreme Court on the degree of federal interest in asserting admiralty jurisdiction over a local collision between locally-owned pleasure craft in *Foremost Insurance Co v Richardson* 457 US 668 (1982). By a 5:4 majority the Court upheld the exercise of federal admiralty jurisdiction.
- 140 On caveats against arrest para 300; on caveat registers see para 293.
- 141 Zelling Report, para 13.3(e).
- 142 As is acknowledged in the MLAANZ Submission (1983) 29.
- 143 Barwick (1977) 488; Gibbs (1981) 677; Durack (1981) 779.
- 144 The Chief Justice of the High Court was consulted on the question of the withdrawal of its present jurisdiction. He stated that: the repeal of the Colonial Courts of Admiralty Act 1890 (Imp) and the conferral of concurrent jurisdiction in admiralty and maritime matters upon the Supreme Courts of the States and Territories and the Federal Court of Australia, with the consequence that the High Court will no longer exercise original jurisdiction in admiralty, would be an appropriate and desirable reform.  
Sir Harry Gibbs CJ, *Submission* 47 (16 May 1985).
- 145 See para 142.
- 146 Non-contractual salvage is the most obvious example. But cf Navigation Act 1912 (Cth) s 318, which allows salvage disputes where the amount claimed is less than \$5 000, or where the value of the property salved is less than \$20 000, or where the parties assent, to be heard by a County Court, District Court, or Local Court of a State of Territory.
- 147 cf New Zealand, Special Law Reform Committee on Admiralty Jurisdiction, *Report* (1972) (Beattie Committee) para 6(c): it is desirable that as many cases as possible, particularly involving pleasure craft and small marine cargo claims, within the monetary limits of the Magistrates' Courts, should be heard in those Courts. ... our experience is that the Magistrates' Courts have in the past dealt with many maritime matters, particularly those involving claims for damage to or loss of cargo, and we are strongly of the view that this should be encouraged.
- See also IM Mackay, 'The Admiralty Act 1973 — Part II' [1976] NZLJ 387, 391-2.
- 148 For a discussion of the need to retain preliminary acts, see para 295-7.
- 149 See para 299 for a discussion of existing limitation procedures and those recommended for use under the proposed uniform rules.
- 150 In discussion with the Commission both Lord Brandon and Justice Sheen, the former and present English Admiralty Judges respectively, stressed the need for expertise. See also Great Britain, Committee on the Business of the Courts, *Second Interim Report* Cmd 4471, 1933, [1933-34] 11 Brit Session Papers (HC 1 (Hanworth Committee) 10-15: and Anon, 'Why Abolish the Admiralty Court? (1934) 177 Law Times 54.
- 151 See para 293, 300.
- 152 See para 242-3.
- 153 eg BH McPherson, 'Admiralty Jurisdiction and the Federal Court' (1981) 55 Aust LJ 71, 78; Zelling Report, 72; MLAANZ Submission (1983) 30.
- 154 It has been suggested that a ship may even divert to another State to avoid arrest: P Foss, *Submission* 78 (6 February 1986).
- 155 Garnock Engineering Co Pty Ltd, *Submission* 15 (21 September 1984); Justice BH McPherson, *Submission* 17 (3 December 1984).
- 156 See para 300.
- 157 The Act defines 'suit' to include proceedings *in rem* and a 'writ of summons' to include any process by which a suit is commenced. s 4(1) provides:  
A writ of summons issued out of or requiring the defendant to appear at any Court of Record of a State or part of the Commonwealth may be served on the defendant in any other State or part of the Commonwealth.
- Service under the Act requires a closer nexus before leave to proceed against a non-appearing defendant will be given. Thus the Act could not be used where the cause of action arose entirely in ports outside the territorial jurisdiction of the issuing court. In any event the argument that the Service and Execution of Process Act 1901 (Cth) allows service *ex juris* in actions *in rem* presents many difficulties. s 3 in using the term '*in rem*' is probably not referring to admiralty actions at all. The term '*in rem*' seems to be referring to actions in which there is only one party (such as some kinds of probate actions or winding up actions). The connection is with the common law judgment in rein rather than admiralty actions *in rem*. Moreover the Act makes no provision for the arrest of the *res*. The High Court has refused to allow service of its process *in rem* outside the Commonwealth on the ground that, while it might be possible to effect service of the writ, there is no possibility of serving the warrant of arrest because it is directed to the Court's Marshal or his deputy and the authority of the Marshal is territorially restricted. 'Only if it [the *res*] be within the jurisdiction can there be an arrest and the ability to arrest is, I think, inherent in the action *in rem*': *Aichhorn & Co KG v The Ship MV 'Talabor'* (1974) 48 ALJR 317, 318 (Stephen J), aff'd (1974) 48 ALJR 403. This reasoning supports the view that the Service and Execution of Process Act 1901 (Cth) does not authorise *ex juris* service of State or Territory Supreme Court admiralty process *in rem*.
- 158 On the other hand it is at least doubtful whether the jurisdiction of Territory Supreme Courts could be extended in this way: see para 71-2.
- 159 See para 88, 93-4, 96.
- 160 Which of several courts of service would have jurisdiction to sell a ship, for example? No doubt the problems could be resolved by legislative provision or judicial discretion, but it seems desirable not to multiply the possibility of them occurring.
- 161 See para 195, where it was recommended that associated jurisdiction over all matters of admiralty and maritime jurisdiction be conferred on courts exercising jurisdiction under the proposed legislation.
- 162 eg Sir Harry Gibbs, Chief Justice of the High Court, *Submission* 29 (21 February 1985) (see n 144); NJ Harper MP, Queensland Minister for Justice and Attorney-General, *Submission* 9 (27 January 1984); Sir Nigel Bowen, Chief Judge, Federal Court of Australia, *Submission* 12 (25 July 1984); Garnock Engineering Co Pty Ltd, *Submission* 15 (21 September 1984). The submissions listed in n 180 which strenuously opposed exclusive Federal Court appellate jurisdiction tacitly or expressly accepted concurrent original jurisdiction as appropriate. Concurrent jurisdiction (though of the High Court, not the Federal Court) was proposed by the Zelling Committee: see para 232 n 141.
- 163 eg NJ Harper MP, Queensland Minister for Justice and Attorney-General, *Submission* 75 (7 January 1986); P Foss, *Submission* 78 (6 February 1986).
- 164 The need for service *ex juris* in such cases was affirmed by P Foss, *Submission* 83 (22 April 1986); Australian Mining Industry Council, *Submission* 86 (13 May 1986).
- 165 cf Family Law Act 1975 (Cth) s 47; Bankruptcy Act 1966 (Cth) s 29. See also para 190-2 (enforcement of *in rem* judgments).
- 166 Beattie Report, para 6(c).
- 167 See para 222.

- 168 The Hanworth Report, (1933) 8-9 endorsed the views of a Committee Appointed by the Lord Chancellor to Consider Relations between the High Court and County Court (Lord Gorell, Chairman), *Report*, London, 1908. The Gorell Report gave three reasons against further extensions. First, the admiralty court is an international court in that it gives judgments against foreign ships and their owners: 'it is not satisfactory to subject them to any but the superior court except in trifling cases'. Secondly, admiralty required judicial expertise which was only to be found in London. Thirdly, the Elder Brethren of Trinity House were available to sit as assessors in London but there was no similar source of qualified and experienced assessors in the provinces. The Hanworth Committee added that 'the high standard which has been maintained must not be imperilled by devolution' (id, 9).
- 169 Zelling Report, para 13(3)(g).
- 170 See para 218.
- 171 See MLAANZ Submission (1983) 25 (in relation to Queensland) 29 (more generally). See also para 219.
- 172 Already there have been suggestions that *in rem* admiralty jurisdiction should be conferred in Tasmania, to deal with disputes involving fishing and pleasure craft and yachts.
- 173 Views expressed to the Commission were generally opposed to lower court *in rem* jurisdiction. A number of submissions suggested that the possible economic consequences involved rule out the right to arrest in lower courts: PG Willis, Deputy Corporate Solicitor, BHP Co Ltd, *Submission 23* (12 February 1985) 7; or at least require the right to be restricted (eg by reference to the value of the *res* rather than the value of the claim): JJ Hockley, Hon Sec Law Reform Committee, Victorian Bar, *Submission 46* (23 April 1985).
- 174 The formula adopted in the text avoids any difficulty arising from the doubts as to whether federal jurisdiction can, under the Constitution, be vested by subordinate legislation or proclamation: see Cowen & Zines (1978) 181-4.
- 175 See para 30.
- 176 In the case of Territories appeals are heard by the Federal Court: Federal Court of Australia Act 1976 (Cth) s 24(1)(b). It is proposed to discontinue this practice in the case of the Northern Territory.
- 177 The importance of maintaining existing lines of appeal was emphasised in a number of submissions to the Commission: South Australian Crown Solicitor, *Submission 36* (18 March 1985) 12; Hon T Sheahan MLA, New South Wales Attorney-General, *Submission 48* (23 May 1985); Hon Justice D Yeldham, *Submission 51* (10 October 1985).
- 178 See para 219.
- 179 See para 230. This point was stressed by the Chief Justice of the NSW Supreme Court: Sir Laurence Street, *Submission 63* (20 November 1985).
- 180 Submissions to the Commission on this subject argued that exclusive Federal Court appeals would place State Supreme Courts in an inferior position: Hon LJ King, Chief Justice Supreme Court of South Australia, *Submission 71* (10 December 1985); might encourage litigants to begin in the Federal Court: Queensland Attorney General, Hon NJ Harper, *Submission 75* (7 January 1986), or would run against a general trend towards freeing up areas of exclusivity: Hon T Sheehan MLA, New South Wales Attorney General, (*Submission 48*) (23 May 1985). Strong opposition to any exclusive vesting of appellate jurisdiction was expressed by State Attorney General and Chief Justices. In addition to the submissions already cited see: Hon John Young, Chief Justice, Supreme Court of Victoria, *Submission 56* (45 November 1985); Hon DG Andrews, Chief Justice Supreme Court of Queensland, *Submission 66* (14 November 1985); Justice KJ Carruthers, *Submission 69* (27 November 1985).

## Chapter 12

- 1 *Hiero Pty Ltd v Somers* (1983) 47 ALR 605, 611 (Ellicott J); *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264, 276 (CA). 'Mareva' injunctions were first granted in 1975 by the Court of Appeal in England: see *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282; *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509 (CA).
- 2 *Hiero Pty Ltd v Somers* (1983) 47 ALR 605 (FC); *Wheeler v Selbon Pty Ltd trading as Parklands Nursery & Ors* [1984] 1 NSWLR 555 (NSW Industrial Court). The South Australian Full Court only recently overruled its original denial of any power to grant a Mareva injunction: *Devlin v Collins* (1984) 37 SASR 98. Dicta in the Supreme Courts of Queensland and Victoria indicate that there are still doubts about the power to issue these injunctions in those States: *Bank of New Zealand v Jones* [1982] Qd R 466, 469 (Campbell J); *Deputy Commissioner of Taxation (Vic) v Rosenthal* (1984) 16 ATR 159, 165 (Ormiston J).
- 3 *The Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210; *Sanko Steamship Co Ltd v DC Commodities (A'Asia) Pty Ltd* [1980] WAR 5 1. In the UK the decision in *The Siskina* has been reversed by the Civil Jurisdiction and Judgments Act 1982 (UK) s 25(1)(a), 26(1) (s 25 not yet proclaimed). This allows security obtained by arrest or Mareva injunction to be retained where proceedings have been or are about to be commenced in another European Economic Community jurisdiction, but it does not confer jurisdiction over the underlying dispute.
- 4 G Jones, 'The Infiltration of Equity into English Commercial Law' in BS Markesenis and JHH Wilems (ed) *The Cambridge-Tilberg Law Lectures 1979*, Kluwer, Deventer, 1980, 49, 71; FD Rose, 'The Mareva Injunction — Attachment in Personam' [1981] LMCLQ 177, 182; DE Charity, 'Mareva Injunctions: A Lesson in Judicial Acrobatics' (1981) 12 JMLC 349, 360; T O'Neill, 'Mareva Injunctions' in 'Mareva' Injunctions, Lloyd's of London Press, London, 1982, 8; W Hodgekiss, 'Mareva Injunctions and their Remedial Alternatives' in M Hetherington (ed) *Mareva Injunctions*, Law Book Co, Sydney, 1983, 96, 114. cf J Maskell, 'The Cargo Owner's Remedies — Theory and Practice' in *Maritime Law in Bills of Lading*, Lloyd's of London Press, London, 1982, 7; DA Perry, "Mareva" or Arrest — The Choice' in *Charter Parties Conference*, Lloyd's of London Press, London, 1982, 21.
- 5 The most extended judicial discussion is in *The Rena K* [1979] QB 377, 407-10 (Brandon J). Other reported cases include *Elesguro Inc v Ssangyong Shipping Co Ltd* (1980) 117 DLR (3d) 105 (Fed Ct); *Irving Oil Ltd v Bjornstad, Bjorn & Co* (1981) 35 NBR (2d) 265; *Pamar Fisheries Ltd v Parceria Maritima Esperanca LDA* (1982) 53 NSR (2d) 338; *Sanko Steamship Co Ltd v DC Commodities (A'Asia) Pty Ltd* [1980] WAR 5 1; *Clipper Maritime Co Ltd v Mineralimportexport. The Marie Leonhardt* [1981] 3 All ER 664; *Galaxia Maritime SA v Mineralimportexport. The Eleftherios* [1982] 1 All ER 796 (CA). There are in addition numerous unreported cases: eg *The Stolt Filia*, High Court, England, 1980, noted in MA Grant, 'The Mareva Injunction Four Years On' (1980) 130 NLJ 985, 986; *Re The Vessel Shereen*, High Court, Auckland, Sinclair J, 1981, discussed in DN Rogers, 'The Action *in rem* and the "Mareva" Injunction: the Need for a Coherent Whole' (1983) 14 JMLC 513, 528-9; *Glebe Island Terminals Pty Ltd v Malaysian International Shipping Corp*, NSW SCt, Rogers J, 22 June 1983, noted in (1983) 105 Lloyd's Marit L Newsletter 4. See also S Robertson, 'Obtaining Security in the Far East — A Comparative Analysis' in *Ocean Carriers' Rights and Liabilities*, Lloyds of London Press, London, 1982; W Tetley, 'Canadian Maritime Law Judgments in 1982' [1983] LMCLQ 603, 609; JL Jessiman, 'The Mareva Injunction in British Columbia' (1984) 18 UBC L Rev 143, 144; Charity

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- (1981) 360. In Papua New Guinea there was doubt over the existence of any admiralty jurisdiction, and the Mareva injunction was proposed as a means of filling the gap: *New Guinea Cocoa Export Co Pty Ltd v Basis Vedbaek* [1980] PNGLR 205, 214.
- 6 There are some differences in practice between the States. On these requirements generally, see J Farmer, 'Procedures and Enforcement' in M Hetherington (ed) *Mareva Injunctions*, Law Book Co, Sydney, 1983, 35; M Tedeschi, 'The Mareva Injunction — An Update' (1985) 13 *ABLR* 236, 241-2, 246-9.
- 7 *Glebe Island Terminals Pty Ltd v Malaysian International Shipping Corp*, unreported, NSW SCt, Rogers J, 22 June 1983, noted in (1983) 105 *Lloyd's Marit L Newsletter* 4. For the converse situation, seeking a Mareva injunction to detain cargo aboard a vessel owned by a third party, see *Galaxia Maritime SA v Mineralimportexport: The Eleftherios* [1982] 1 All ER 796 (CA) where it was held, despite an offer by the plaintiff to indemnify the third party, that a Mareva injunction would not be granted if it seriously affected a third party.
- 8 See *The Jogo* [1981] 3 All ER 634. Whether this is satisfactory is discussed in para 302.
- 9 *Glebe Island Terminals Pty Ltd v Malaysian International Shipping Corp*, unreported, NSW SCt, Rogers J, 22 June 1983, noted in (1983) 105 *Lloyd's Marit L Newsletter* 4; *Montecchi v Shimco UK Ltd* [1979] 1 WLR 1180.
- 10 See para 107, 109-10, 204, for the definition of *res* for this purpose.
- 11 *The Banco* [1971] P 137 (CA). See para 210.
- 12 See eg *Iraqi Ministry of Defence v Arceppey Shipping Co SA: The Angel Bell* [1981] QB 65.
- 13 In *Irving Oil Ltd v Bjornstad, Bjorn & Co* (1981) 35 NBR 265, an attempt to obtain an injunction to prevent the removal of a sister ship following the arrest of the wrongdoing vessel was denied on the facts, but apparently not objected to in principle. See also *The Rena K* [1979] QB 377, 410 (Brandon J).
- 14 W Tetley, 'Maritime Liens for Cargo Damage' in *Ocean Carrier's Rights and Liabilities*, Lloyd's of London Press, London, 1981, 19; Perry (1982) 15.
- 15 *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502, 505 (Lord Denning MR).
- 16 *Z Ltd v A* [1982] 1 All ER 556 (CA). Maskell (1982) 8, suggests that a plaintiff's concern at the potential expense is often the significant practical consideration favouring arrest over Mareva injunction.
- 17 Tetley (1981) 19-20.
- 18 Only where the plaintiff acted maliciously or with gross negligence will damages be awarded: *The Strathnaver* (1875) 1 App Cas 58 (PC); Maskell (1982) 8; Perry (1982) 2. But see the Vice Admiralty Vexatious Arrests Act 1901 (NSW) s 5 and the Arrest of Ships Act 1848 (NSW) s 2, in force in Queensland by virtue of its Constitution Act 1867, s 33. There is no equivalent legislation in force in other parts of Australia. Whether the present position should be changed is discussed in para 301-2.
- 19 *Iraqi Ministry of Defence v Arceppey Shipping Co SA: The Angel Bell* [1981] QB 65.
- 20 ibid; *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 (CA).
- 21 *PCW (Underwriting) Agencies Ltd v Dixon* [1983] 2 All ER 158.
- 22 In *The Ship 'Federal Huron' v OK Tedi Mining Ltd*, unreported, PNG Supreme Court, 20 January 1986, the Full Supreme Court of PNG unequivocally rejected an argument that the Mareva injunction could provide an adequate substitute for admiralty jurisdiction in Papua New Guinea: reasons for judgment 48.
- 23 It is in this sense (and only in this sense) that Lord Denning MR was correct to say that a Mareva injunction 'operates *in rem* just as the arrest of a ship does': *Z Ltd v A* [1982] 1 All ER 556, 562. See also *The Span Terza* [1982] 1 Lloyd's Rep 225, 229 (Donaldson LJ); Maskell (1982) 7.
- 24 Perry (1982) 2. See also Thomas (1980) para 113.
- 25 It is not entirely clear whether the general availability of Mareva injunctions in England to detain vessels puts that country in breach of the 1952 Brussels Arrest Convention. The Convention defines a series of matters as constituting a maritime claim (art 1(1)). It then provides that a ship, but only one ship, of a contracting state may be arrested in the jurisdiction of any other contracting state 'in respect of any maritime claim, *but in respect of no other claim*' (art 2, emphasis added). The Convention defines 'arrest' as the 'detention of a ship by judicial process ...' (art 1(2)). Whether this is broad enough to cover detention of a ship by means of a Mareva injunction which operates *in personam* does not appear to have received any discussion. If it is, a breach of the Convention would seem to occur if a Mareva injunction is used to detain a ship on a non-maritime claim, or to detain more than one ship on a maritime claim. Whatever the position with the Convention, the CMI draft revision of the Convention (Lisbon, 1985) art 1(2) is explicit: 'arrest' is defined to include 'restriction on removal' and 'other conservatory measures'. In the view of the BMLA, the inclusion of Mareva injunctions in the definition of 'arrest' is unacceptable: DJL Watkins, Secretary, British Maritime Law Association, *Submission 49* (12 June 1985).
- 26 of the Mareva injunction cases *Clipper Maritime Co Lid v Mineralimportexport: The Marie Leonhardt* [1981] 3 All ER 664 (detained ship causing port congestion); *Galaxia Maritime SA v Mineratimportexport: The Eleftherios* [1982] 1 All ER 796 (position of crew of detained ship). The British Maritime Law Association has recently expressed the view that the Mareva injunction, when used to detain a ship does not emphasise sufficiently the concern felt on the central issue of custody and control. Under the procedure which has developed with the action *in rem* the Admiralty Marshal assumes practical responsibility for custody and, perhaps more important from the point of view of third parties, acts as a focal point so that all matters in relation to the vessel can be properly regulated by the court. It may be questioned whether it is appropriate to permit Mareva injunctions in respect of vessels when arrest procedure is generally available.
- Letter to the Commission from BMLA, 13 June 1984, summarising the responses of members to a BMLA questionnaire on, among other matters, Mareva injunctions as they relate to ships.
- 27 1952 Arrest Convention, art 3; *The Banco* [1971] P 137. See para 142.
- 28 This conclusion also makes it unnecessary to explore the relevance to admiralty (if any) of the provisions relating to foreign attachment in the Supreme Court Act 1958 (Vic) s 152-9 and the Common Law Process Act 1869 (Qld) s 27-46.
- 29 See para 245 n 2 & 6.
- 30 [1972] 2 QB 543.
- 31 id, 554.
- 32 *The Volant* (1842) 1 Wm Rob 383; 166 ER 616. See Wiswall (1970) 171-3 on the evolution of this rule. On the effect of appearance in an action *in rem* see para 143.
- 33 The clearest statement of this position is to be found in *The Key City* 81 US (14 Wall) 653, 660 (1871) cited with approval by Mocatta J (after referring to the relevant English authorities) in *The Alletta* [1974] 1 Lloyd's Rep 40, 45:
1. That while the Courts of Admiralty are not governed in such cases by any statute of limitation, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under the proper circumstances, constitute a valid defence.

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2. That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case,  
3. That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defence will be held valid under shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued.

The origins of the doctrine of laches in admiralty are obscure; it seems to have been borrowed from equity about the middle of the 17th century, See J Hanenan, 'Admiralty: The Doctrine of Laches' (1963) 37 *Tul L Rev* 811, 811-2.

- 34 In *The Alletta* [1974] 1 Lloyd's Rep 40, 44 it was said that the last reported English case was *The Kong Magnus* [1891] P 223 (in which the defence failed despite a delay of eleven years in prosecuting the claim). cf the position in the United States: during the period from 1940-77, of the personal injury and death cases reported in American Maritime Cases, some 35 were dismissed for laches where a suit was commenced within 3 years, while 29 were allowed to proceed where suit was brought more than 3 years later. 41 cases within 3 years were allowed to proceed and 48 cases were dismissed after 3 years. US Congress, House Report No 96-737, 'Statute of Limitations-Maritime Torts' [1980] *US Code Cong of Admin News* 3303-4. Since 1980 a uniform 3 year period has been applied in the United States for bringing actions for personal injury or death arising out of a maritime tort: 46 USC 763a.
- 35 *The Bold Buccleugh* (1851) 7 Moo PC 267; 13 ER 884; *The Europa* (1863) 2 Moo PC (NS) 1; 15 ER 803 and the two cases cited in n 34.
- 36 In *The Alletta* [1974] 1 Lloyd's Rep 40, 44 the plaintiff argued that laches applied to both maritime liens and statutory rights *in rem* in the same way but the court did not need to decide the point. In *The Helene Roth* [1980] 2 WLR 549, the point was accepted as axiomatic.
- 37 For another example (the admiralty action of restraint) see para 47.
- 38 cf Great Britain, Law Reform Committee, *21st Report. Final Report on Limitation of Actions*, 1977, Cmnd 6923 (Orr Committee) Para 4(4) where it is noted that perhaps the original reason why admiralty actions were excluded from the general rules of limitation of actions was simply 'that the Statutes of Limitation were originally drafted in terms of the common law forms of action'.
- 39 Limitation Act 1939 (UK) s 2(6), repealed by Limitation Amendment Act 1980 (UK) s 9.
- 40 There are no reported decisions on the provision: Orr Committee, para 4(2)-(3).
- 41 Limitation Act 1969 (NSW) s 22(1); Limitation Act (NT) s 20(2).
- 42 Note also that s 26 which imposes limitation periods in actions in respect of mortgages and charges 'does not apply to a mortgage or charge on a ship': s 26(6).
- 43 Limitation of Actions Act 1936 (SA) s 3(1) ('action' includes legal proceedings of all kinds); Limitation of Actions Act 1958 (Vic) s 3(1) ('action' includes any proceeding in a court of law).
- 44 Limitation of Actions Act 1936 (SA) s 35(g). The six year limit on such actions has prevailed in admiralty at least since the enactment of 4 & 5 Anne c 3, s 17 (1705). It is not clear whether s 17 of the 1705 Act (or s 35(g) of the 1936 Act) applies also where statutory provisions have allowed for recovery of master's wages and of other debts in the same manner as seamen's wages may be recovered: see *The Chieftain* (1863) Br & L 212; 167 ER 340 where the point was considered but not decided. Section 17 of the 1705 Act was repealed in England by the Limitation Act 1939 (UK). But it would appear to have formed part of the admiralty jurisdiction conferred by the Colonial Courts of Admiralty Act 1890 (UK). It may follow that the local repeals of 4 & 5 Anne c 3, s 17 are ineffective (eg the repeal by the Limitation Act 1969 (NSW) Sch 1; Limitation Act 1974 (Tas) Sch 1) insofar as they purport to affect admiralty actions because they have not been enacted in any of the ways required by s 4 of the 1890 Act. This problem is not referred to in New South Wales Law Reform Commission, *First Report on the Limitation of Actions* (LRC 3) Sydney, Government Printer, 1967, Para 8, 129 where the repeal of 4 & 5 Anne c 3 is recommended.
- 45 eg Seamen's Compensation Act 1911 (Cth) s 6(1) (generally 6 month period for claims brought under Act); Annual Holidays Act 1944 (NSW) s 13 (18 month period for recovery of holiday pay due under the Act); Long Service Leave Act 1955 (NSW) s 12(1) (2 year period for recovery of leave due under the Act). See para 255 for the related question of special limitation periods in respect of certain defendants.
- 46 See *The Caliph* [1912] P 213, 215 (Bargrave Deane J).
- 47 But the Navigation Act 1912 (Cth) s 262 (assuming it is validly enacted) allows actions under the local equivalents to Lord Campbell's Act 1846 (UK) for wrongful death to be brought *in rem*. These local equivalents all attach a time limit varying from one to six years for the bringing of an action (eg Fatal Accidents Act 1959 (WA) s 7 (12 months)). To complicate the picture still further some of the limitation Acts expressly exempt actions *in rem* from the Lord Campbell's Act time limit (eg Limitation Act 1969 (NSW) s 19 read with s 22(1)).
- 48 eg *The Alnwick* (1965) P 357 (two year limitation period in the Maritime Conventions Act 1911 (UK) s 8 governing admiralty actions in collision prevails over the three year period governing actions for loss of life provided in the Law Reform (Limitation of Actions) Act 1954 (UK) s 3).
- 49 The provision derives from the Maritime Conventions Act 1911 (UK) s 8, an Act which did not extend to Australia. See also Limitation Act 1969 (NSW) s 22(2)-(5), Limitation Act 1974 (Tas) s 8(2)-(6) and the Limitation Act (NT) s 20(3)-(5), which all in broad terms also follow the 1911 Act. Other State legislation may also be relevant: see eg Supreme Court Civil Procedure Act 1932 (Tas) s 11(11)(e). For other examples of special time limits in Commonwealth legislation see Protection of the Sea (Civil Liability) Act 1981 (Cth) s 8(1) (applying art VIII of the 1969 Pollution Convention: this provides broadly for a 3 year limitation period for claims brought under the Convention); Sea-Carriage of Goods Act 1924 (Cth) s 6 (which incorporates in any contract within the ambit of the Act the one year limitation on bringing suits for loss or damage stipulated by the Hague Rules of 1924).
- 50 'Collision' is a convenient shorthand. As Brandon J observed in *The Narwhale* (1975) 2 All ER 501, 507 the Maritime Conventions Act 1911 (UK) s 8, although intended to implement the Brussels Collision Convention of 1910, did so in terms covering a considerably wider class of cases than the Collision Convention itself.
- 51 For extensive discussion of s 396, particularly as it relates to salvage claims, see *Burns Philp & Co Ltd v Nelson & Robertson Pty Ltd* (1958) 98 CLR 495, Neither before Taylor J nor on appeal was the point raised that s 262 might be invalid, since it 'affects the jurisdiction of or practice or procedure in' a court operating under the Colonial Courts of Admiralty Act 1890 (UK). See para 27, 56.
- 52 For a summary of the principles upon which the equivalent provision in the Maritime Conventions Act 1911 (UK) s 8 is exercised see *The Albany and The Marie Josaine* [1983] 2 Lloyd's Rep 195. Both the 1910 Collision and the 1910 Salvage Conventions permit this discretion in very similar terms. Art 10 of the latter is set out in para 254.
- 53 See Thomas & Steel (1976), para 845-6 for references and discussion. There do not appear to be any reported English decisions on the operation of the alternative locus of arrest (foreign territorial waters etc); but see *The Atlantic Faith* [1978] 2 MLJ 187. There has to be a 'reasonable' opportunity to arrest: see *The Largo Law* (1920) 15 Asp MLC 104 (10 days anchored in roadstead, never entered port, not a reasonable opportunity). In *The Salviscount* [1984] 1 Lloyd's Rep 164, 168, Sheen J commented that the reasons for granting extensions in the Conventions upon which the Maritime Conventions Act 1911 (UK) s 8 is based 'may have less validity now that it is permissible to arrest a sister ship of the offending ship'.

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- 54 International Conventions for the Unification of Certain Rules of the Law with respect to Collision between Vessels, and Relating to Assistance and Salvage at Sea, Brussels, 23 September 1910 (UKTS (1913) No 4) art 7 and art 10 respectively. Australia is a party to both treaties. cf CMI Draft Convention on Salvage, Montreal, 29 May 1981 (Benedict (1983) vol 6, Doc 4-2A) which gives no right or discretion to extend beyond two years under any circumstances.
- 55 Convention Relating to the Carriage of Passengers and their Luggage by Sea, Athens, 13 December 1974 (Benedict (1983) vol 6, Doc 2-2) art 16. Australia has signed but not yet ratified this treaty.
- 56 See para 175, n 180. Australia is a party.
- 57 See para 94. Australia is not a party either to the 1926 or the 1967 Convention.
- 58 Orr Committee, para 4(1).
- 59 id, para 4(4)-(5).
- 60 id, para 4(7).
- 61 Great Britain 418 *Parl Debs (HL 5th Series)* (26 March 1981) 1309.
- 62 See para 250.
- 63 The Limitation Amendment Act 1980 (UK) s 9 removed from the principal Act, the Limitation Act 1939 (UK), the special provision which exempted admiralty actions *in rem* from the operation of that Act: the principal Act 'shall apply to any cause of action within the Admiralty jurisdiction of the High Court as it applied to any other cause of action'. The principal Act itself was consolidated later in the same year: see now Limitation Act 1980 (UK).
- 64 But cf Admiralty Jurisdiction Regulation Act 1983 (S Af) s 11(1)(c) (claims of specified types to enjoy high priority in any ranking of claims only if brought within one year of the cause of action arising: otherwise relegated to lower priority).
- 65 Although the focus here is on the period of limitation, the limitation legislation also contains provisions dealing with such matters as when the running of time may be suspended or interrupted, the exercise of discretion by a court to extend the statutory period and the time limits on bringing counterclaims. These would also be included.
- 66 The Orr Committee, para 1(7) stated the rationale as follows:
- (a) first, to protect defendants from stale claims;
  - (b) secondly, to encourage plaintiffs to institute proceedings without unreasonable delay and thus enable actions to be tried at a time when the recollection of witnesses was still clear, and
  - (c) thirdly, to enable a person to feel confident, after the lapse of a given period of time, that an incident which might have led to a claim against him is finally closed.
- 67 In *The Kong Magnus* [1891] P 223, 230 Sir James Hannan P attempted to meet this criticism. In disallowing a defence of laches despite a lapse of 11 years, he said that at the eventual trial 'the defendants will certainly have the benefit of every presumption which can fairly be made in their favour by reason of the absence of any witness'.
- 68 cf *The Charles Amelia* (1868) LR 2 A & E 330; *The Kong Magnus* [1891] P 223.
- 69 See para 94 on the limited acceptance of the Maritime Liens and Mortgages Conventions. These Conventions are currently under study by the CMI with a view to possible revision, although it appears that the 1 year period is unlikely to be altered: F Berlingieri, 'Maritime Liens and Mortgages — A Progress Report', *CMI News Letter* (September 1983) 1, 2-3.
- 70 See para 250.
- 71 eg the action of restraint (para 47).
- 72 In addition the Limitation Act 1969 (NSW) operates not merely to bar the remedy but to extinguish the right: see NSWLR 3, para 14. Although the point is rarely important in practice, it does have significant implications in conflict of laws (cf Law Commission of England and Wales, Report No 114, *Classification of Limitation in Private International Law*, HMSO, London, 1982). Conflicts of law are more common in admiralty than in many other areas of the law.
- 73 This problem is not limited to admiralty jurisdiction. For examples of forum shopping in the High Court's diversity jurisdiction to avoid local time limits see *Robinson v Shirley* (1982) 39 ALR 252; *Foxe v Brown* (1984) 58 ALR 542; *Fielding v Doran* (1984) 60 ALR 342. A uniform federal Limitation Act appears desirable.
- 74 Limitation Act (NT) s 12, 27.
- 75 Limitation problems can arise in general average cases because the cause of action accrues when the general average act is done, not when the average adjustment is published. The latter may be some years after the former and hence outside the limitation period but it is only when the adjustment is published that it may become clear than an action will lie: see eg *Castle Insurance Co Ltd v Hong Kong Islands Shipping Co Ltd* [1983] 3 All ER 706 (PC). The problem however is one of the law of general average, not admiralty or limitation of actions.
- 76 IH Wildboer, *The Brussels Salvage Convention*, Sijthoff Leyden, 1965, 261, commenting on the equivalent provision in the Maritime Convention Act 1911 (UK) s 8.
- 77 This is true both of s 396 and its overseas equivalents, eg Maritime Conventions Act 1911 (UK) s 8.
- 78 See *The Alnwick* [1965] P 357, 364 (Hewson J); *The Preveze* [1973] 1 Lloyd's Rep 202, 204-6 (Mocatta J); *The Salviscount* [1984] 1 Lloyd's Rep 164, 168-9. cf Orr Committee, para 4(6), commenting that the matter requires further consideration. Requiring a plaintiff to pursue a surrogate ship may be unfair in view of priorities and other considerations. It can also be expensive: eg *The Salviscount* [1984] 1 Lloyd's Rep 164, 166, where the plaintiff was attempting to track the movements of 46 sister ships. On the other hand in some cases it may not matter to the plaintiff which ship is arrested: eg *The Preveze* [1973] 1 Lloyds Rep 202, 207.
- 79 Either by transferring the case to the Federal Court or through the facility for interstate arrest recommended in para 236, 239. Problems could arise over the scope of s 396: Wildboer (1965) 259 argues that the Convention should not be interpreted as covering actions for apportionment of a salvage award precisely in order to avoid this result. Decisions of Spanish and Italian courts are cited in support. On the same reasoning Wildboer argues that an action for contribution by one who has paid the total amount of the salvage claim is outside the scope of the Convention provision on limitation of actions: *ibid*.
- 80 [1907] P 137.
- 81 Public Authorities Protection Act 1893 (UK) s 1(a).
- 82 eg, actions against a state-owned vessel implead the state: *The Parlement Beige* (1880) 5 PD 197; *The Broadmayne* [1916] P 64, *The Cristina* [1938] AC 485. Actions against a ship owned by a debtor are caught by insolvency provisions dealing with actions against debtors: see para 258. For an analysis of *The Burns* in terms of the competition between the personification and procedural theories see Wiswall (1970) 199-202.

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- 83 On this trend see New South Wales Law Reform Commission, Report No 21, *Third Report on the Limitations of Actions — Special Protections*, Sydney, Government Printer, 1974, para 58-71. Such special periods have been generally abolished in New South Wales: Notice of Action and Other Privileges Abolition Act 1977 (NSW).
- 84 eg Harbours Act 1936 (SA) s 172, a provision which allows 6 months for bringing actions ‘against the Minister or any other officer or person for anything done under this Part (of the Act)’.
- 85 See para 199.
- 86 Thomas (1980) para 411.
- 87 id, para 418 (footnotes omitted).
- 88 Navigation Act 1912 (Cth) s 83(2) (‘lien for seamen’s and apprentice’s wages shall have priority of [sic] all other liens’), s 315(2) (life salvage payable in priority to all other claims for salvage); Shipping Registration Act 1981 (Cth) s 39 (registered mortgages *inter se*). Some State and Territory legislation also contains provisions which affect priorities in admiralty: see eg Queensland Marine Act 1958 (Qld) s 70(2) (seamen’s wages); Marine Act (NT) s 49(1) (seamen’s wages). Other statutory provisions may also have a limited impact on priorities in that they allow for the payment of certain types of expenses as a priority over satisfaction of outstanding claims against the *res*: see eg the Navigation Act 1912 (Cth) s 323(2) (wreck).
- 89 Compare s 11 with McGuffie (1964 & 1975) para 1574, which attempts to summarise the rules developed by the English courts.
- 90 South African Law Commission, *Report on the Review of the Law of Admiralty*, 1982, para 7.6. But the ranking of maritime claims under the existing law in the United States differs widely from the Convention scheme: Berlingieri (1983) 2.
- 91 See para 94.
- 92 Thomas (1980) para 412. For an Australian example of possible conflict between courts, consider how a State or Territory Supreme Court would exercise its jurisdiction under s 66(6)(b) of the Shipping Registration Act 1981 (Cth) (court may make such orders as it thinks fit for distribution of proceeds of mortgagee’s sale of ship). Would admiralty rules as to priorities be applied? Could the holder of a maritime lien go to the same court in its admiralty jurisdiction and enforce his priority over the mortgagee according to admiralty priorities?
- 93 eg the rule that the maritime lien for salvage has priority over all other liens which attached before the salvage services were rendered. Had the *res* not been salved the earlier lien-holders would have had no *res* against which to claim: see *The Lyрма* (No 2) [1978] 2 Lloyd’s Rep 30, 33 (Brandon J).
- 94 The same can be said of the Companies Act 1981 (Cth) s 441 and its State and Territory counterparts.
- 95 See para 86.
- 96 cf McGuffie (1964 & 1975) para 1574 where the restatement of the current law in something akin to legislative form occupies nearly 4 pages; Admiralty Jurisdiction Regulation Act 1983 (S Af) s 11 which contains 10 sections and 19 subsections. For difficulties which have arisen with these provisions see para 259 n 116.
- 97 cf *The Royal Wells* [1984] 3 All ER 193 where it was held that the ancient rule that the wages claims of the crew had priority over the wages claim of a master of a vessel was no longer just. Under present conditions the master, officers and crew were all employees of the shipowner and a claim for wages by a master of a ship ranked *pari passu* with claims for wages by the members of the crew.
- 98 eg AGL Stewart-Richardson, ‘Liens on Ships and their Priorities’ [1960] *J of Bus Law* 44, 50.
- 99 Thomas (1980) para 99. But in Australia the importance of bankruptcy may be rather greater because of the significant volume of admiralty litigation here which involves small fishing and pleasure craft. The only provision in the Companies Act 1981 (Cth) which explicitly refers to ships is s 200(1)(d) which exempts charges on locally registered ships from the general requirement to register charges on company property.
- 100 But cf s 21(6) which gives to the High Court, sitting in admiralty, jurisdiction to determine questions of title to the proceeds of sale of a *res* which has been sold by order of the court exercising admiralty jurisdiction.
- 101 Bankruptcy Act 1966 (Cth) s 58(3); Companies Act 1981 (Cth) s 371(2). See also id, s 402 (voluntary winding up).
- 102 Supreme Court Act 1981 (UK) s 21(4). See para 136.
- 103 *The Constitution* [1965] 2 Lloyd’s Rep 538, 539 (argument of counsel).
- 104 *In re Australian Direct Steam Navigation Co* (1875) LR 20 Eq 325 (relying on the then English equivalent to Companies Act 1981 (Cth) s 368(3) rather than s 371(3)). This was followed in *The Constitution* [1965] 2 Lloyd’s Rep 538. Counsel for the holder of the lien conceded the point in *In re Aro Co Ltd* [1979] Ch 613.
- 105 Bankruptcy Act 1966 (Cth) s 58(3); Companies Act 1981 (Cth) s 371(2).
- 106 *In re Aro Co Ltd* [1980] Ch 196, 205 (Brightman LJ).
- 107 ibid. The need for seeking leave is avoided in bankruptcy by the Bankruptcy Act 1966 (Cth) s 58(5) which allows secured creditors to proceed as of right to realise their security.
- 108 Alternatives suggested are the time when the writ is issued (*The Monica S* [1968] P 741, 772-3 (Brandon J); *The Banco* [1971] P 137, 161 (Cairns LJ); *The Helene Roth* [1980] 2 WLR 549, 553-4 (Sheen J)), or the time when the writ is served (*The Banco* [1971] P 137, 153 (Lord Denning MR who refers to service and arrest), 158-9 (Megaw LJ); *The Berry* [1979] QB 80, 98 (Brandon J following the majority in *The Banco* and without reference to his earlier decision in *The Monica S*)). See the discussion in the context of when a plaintiff proceeding *in rem* acquires the status of secured creditor with respect to the *res* in *Re Aro Co Ltd* [1979] Ch 613, on appeal [1980] Ch 196. For the view that the textual changes made in the Supreme Court Act 1981 (UK), s 21 have resolved the point in favour of the time when the writ is issued see Jackson (1982) 239. This is the right view in principle (subject to later amendments of the writ: see para 215). cf *The Zafiro* [1960] P 1 where the precise time at which the winding up proceeding could be said to be commenced was also in issue.
- 109 *The Zafiro* [1960] P 1; *In re Aro Co Ltd* [1980] Ch 196.
- 110 *Benson Bros Shipbuilding Co* (1960) *Ltd v The Ship ‘Miss Donna’* [1978] 1 FC 379, 387 (Addy J), following earlier decisions including an unreported Supreme Court decision of 1971.
- 111 *In re Aro Co Ltd* [1980] Ch 196 (CA) reversing [1979] Ch 613. The facts of this case are slightly unusual in that, as the ship was already under arrest, the creditor took out a caveat against release rather than undertake a second arrest. As a matter of comity between the Chancery and Admiralty courts and to avoid a multiplicity of arrests of the same ship the Court of Appeal was prepared to exercise its discretion and allow the creditor to continue in admiralty and so perfect the security.
- 112 *The Constitution* [1965] 2 Lloyd’s Rep 538, 542 (Hewson J).
- 113 [1964] 1 Lloyd’s Rep 380.
- 114 id, 384.
- 115 ibid.

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- 116 Admiralty Jurisdiction Regulation Act 1983 (S Af) s 11(8). There are additional complications in that some ‘transferred’ claims are pursued against different parties, because of the ‘corporate veil’ provision in the legislation: see *Euromarine International of Mauren v The Ship Berg* 1984 (4) SAfLR 647; *Banque Paribas v Fund of Sale MV Emerald Transporter* 1985 (2) SAfLR 452. See para 140 n 157.
- 117 *Bankers Trust International Ltd v Todd Shipyards Corp; The Halcyon Isle* [1981] AC 221, 230-1 (Lord Diplock).
- 118 See para 151, 208.
- 119 [1964] 1 Lloyd’s Rep 380.
- 120 See para 120, 126.
- 121 ie, apart from any special factors relevant in the particular case.
- 122 [1964] 1 Lloyd’s Rep 380.
- 123 See para 259 n 116.
- 124 This problem can arise in other contexts than ‘group ships’, eg statutory liens. But these cases are exceptional and need not be specifically provided for. Another relevant factor is the equitable doctrine of marshalling. On the use of this doctrine in admiralty in the 19th century see Thomas (1980) para 462. There appear to be no 20th century cases involving marshalling in admiralty.
- 125 See para 93. This conclusion was strongly supported during the Commission’s consultations.
- 126 Thomas (1980) para 453 (footnotes omitted).
- 127 [1968] P 449, 462. For an example of the inconvenience caused if the court lacks this power to deal with statutory rights of detention see *The Spermnia* (1923) 17 Lloyd’s Rep 17, 52, 76, 109 which went before Hill J on 4 separate occasions before the competing canal authority and mortgagee were persuaded to agree that the latter should pay off the former so as to enable the Marshal to sell the vessel free of the canal authority claim.
- 128 *The Emilie Millon* [1905] 2 KB 817 (CA); *The Charger* [1966] 3 All ER 117; McGuffie (1964 & 1975) para 1573; cf *The Spermnia* (1923) 17 Lloyd’s Rep 17.
- 129 [1968] P 449, 464 referring to *The Parita* [1964] 1 Lloyd’s Rep 199; *The Westport (No 2)* [1965] 2 All ER 447.
- 130 [1968] P 449, 464.
- 131 Although it has been held that the Commonwealth may not interfere with fiscal or governmental rights of the States under the incidental power (*Victoria v Commonwealth* (1956) 99 CLR 575), that case involved a very different situation. It is doubtful whether statutory rights of detention would fall within the protected class of ‘fiscal or governmental rights’: even if they do, the incidental power in aid of federal judicial power in respect of a matter itself within federal jurisdiction is very strong, and is sufficient to validate the proposed provision.
- 132 It is accepted that there is no power to award compound interest in admiralty: *The Garden City (No 2)* [1984] 2 Lloyd’s Rep 37.
- 133 *London, Chatham and Dover Railway Co v South Eastern Railway Co* [1893] AC 429.
- 134 Law Reform (Miscellaneous Provisions) Act 1934 (UK) s 3; Administration of Justice Act 1982 (UK) s 15.
- 135 Supreme Court Act 1970 (NSW) s 94; Common Law Practice Act 1867 (Qld) s 72; Supreme Court Act 1935 (SA) s 30c; Supreme Court Act 1958 (Vic) s 79A; Supreme Court Act 1935 (WA) s 32; Australian Capital Territory Supreme Court Act 1933 (Cth) s 53A; Supreme Court Act 1979 (NT) s 84. Many lower courts possess similar powers: see eg District Court Act 1973 (NSW) s 83A; Local and District Criminal Courts Act 1926 (SA) s 35g; County Court Act 1958 (Vic) s 50.
- 136 There has been a more limited reform in Tasmania. Under the Supreme Court Civil Procedure Act 1932 (Tas) s 34 pre-judgment interest may be recovered in actions on debt or for sums certain in some restricted circumstances.
- 137 Judiciary Act 1903 (Cth) s 77MA; Federal Court of Australia Act 1976 (Cth) s 51A (both inserted in 1984). For the previous position see *Australian National Airlines Commission v Commonwealth* (1975) 6 ALR 433, 435-6 (Mason J); *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1984) 53 ALR 625 (Gibbs CJ).
- 138 See generally H Luntz, *Assessment of Damages*, 2nd edn, Butterworths, Sydney 1983, 493-5; B Cairns, *Australian Civil Procedure*, Law Book Co, Sydney, 1981, 460-3; Law Reform Commission of Western Australia, Project No 70, Part 1, *Report on Pre-Judgment Interest*, Perth, 1981, para 4.1-16.
- 139 It may be possible in South Australia to use the general discretion and award interest in respect of the period prior to commencement: Luntz (1983) 493.
- 140 Luntz (1983) 494; Cairns (1981) 462; WALRC 70, para 4.2-16.
- 141 *The Aldora* [1975] QB 748. See also *The Norseman* [1957] P 224, 230 (Lord Merriman P).
- 142 Law Commission of England and Wales, Report No 88, *Law of Contract: Report on Interest*, London, HMSO, 1978, para 135 implicitly accepts this.
- 143 The issue was referred to elliptically by Yeldham J in *Burley v The Ship ‘Texaco Southampton’* [1981] 2 NSWLR 238, 249.
- 144 *Tehno-Impex v Gebr Van Weelde Scheepvaartkantoor BV* [1981] QB 648, 674 (Oliver LJ).
- 145 *The Aldora* [1975] QB 748.
- 146 *The Medina Princess* [1962] 2 Lloyd’s Rep 17, 21, 23 (Hewson J). Full argument on the point had not been heard and it is unclear whether any general statement of the law was intended.
- 147 *Tehno-Impex v Gebr Van Weelde Scheepvaartkantoor BV* [1981] QB 648, 665 (Lord Denning MR), 675-6 (Oliver LJ), 681 (Watkins LJ).
- 148 In *Tehno-Impex*, Oliver LJ, whose view this was, failed to convince his brethren. In *President of India v La Pintada Compania Navegacion SA* [1985] AC 104, 121 Lord Brandon stated that the view of Oliver LJ ‘is the wrong one’.
- 149 [1981] QB 648, 665 (Lord Denning MR) (a judge exercising a admiralty jurisdiction was ‘entitled to award interest whenever it was equitable to do so’), 682 (Watkins LJ).
- 150 Law Commission 88, para 122. See eg *Shaw Savill and Albion Co Ltd v Commonwealth* (1953) 88 CLR 164, 166-7 (Dixon CJ) where this is assumed.
- 151 Law Commission 88, para 124.
- 152 id, para 125, citing *The Berwickshire* [1950] P 202, 208 and *Jefford v Gee* [1970] 2 QB 130. See also n 149.
- 153 *The Norseman* [1957] P 224.
- 154 See now Rules of the Supreme Court (UK) O 22 r 1(8), introduced in 1980.
- 155 *Murphy v Murphy* [1963] VR 610, 613 (Herring CJ); contrast *Jefford v Gee* [1970] 2 QB 130. The position has been put beyond doubt in some jurisdictions by amendments to the relevant rules of the Supreme Court: NSW RSC 1970, Pt 22 r 2(3); Vic RSC 1985, O 22 r 6A.

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- 156 Law Commission of England and Wales, Working Paper No 66, *Interest*, London, 1976, Para 29 (footnotes omitted): it has been held, for example, that on the sinking of an unladen vessel the plaintiff is entitled to interest from the date of sinking; on the damaging of a vessel from the date of payment for the repairs; and on death or personal injury at sea from the date of the registrar's report to the trial judge.
- 157 *The Theems* [1938] P 197, followed reluctantly in *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397.
- 158 See eg *The Funabashi* [1972] 1 WLR 666; *Gaggin v Moss* [1983] 2 Qd R 486.
- 159 The WALRC Report (above n 138) is silent on this point. The assumption appears to have been that the admiralty rules would survive their proposed general reform (which has now been implemented: Supreme Court Act 1935 (WA) s 32).
- 160 Law Commission, WP 66, para 98-100, 107. The admiralty rules would have continued to be available as a guide to the exercise of discretion in selecting the date from which the interest should be awarded.
- 161 Law Commission 88, para 123, 234.
- 162 id, para 13 1.
- 163 id, para 132.
- 164 id, para 134.
- 165 In this area as in many others it is London arbitrators rather than the Admiralty Court who apparently have developed the rules: see eg *The Aldora* [1975] QB 748, 750 (Brandon J). [1962] 2 Lloyd's Rep 17.
- 166 *President of India v La Pintada Compania Navegacion SA* [1985] AC 104, 121. The other members of the House of Lords agreed with Lord Brandon's speech.
- 167 Law Reform (Miscellaneous Provisions) Act (UK) 1934. The corresponding legislation in NSW, Qld, SA and WA uses the same formula (see para 267 n 135). See n 169 on the 1982 amendment to the English legislation.
- 168 *President of India v La Pintada Compania Navegacion SA* [1985] AC 104, 120-1 (Lord Brandon). This case was decided on the pre-1982 law. See now s 35A(1)(a) inserted in the Supreme Court Act 1981 (UK) in 1982. This allows the court in admiralty actions or otherwise to award simple interest for all or any part of the period between the date when the cause of action arose and the date of payment of the claim.
- 169 cf Admiralty Jurisdiction Regulation Act 1983 (S Af) s 1(1)(ii)(y). Separate provision should be made for interest claims in respect of proprietary and general maritime claims, to avoid surrogate ship arrest with respect to the former: cf para 208. [1962] 2 Lloyd's Rep 17. cf *Berry v Stinson* (1973) 5 SASR 225, 228 (Bray CJ).

## Chapter 13

- 1 See para 9, 148.  
2 See para 9.  
3 See para 54, 155, 163, 177.  
4 See New South Wales Law Reform Commission Report 4, *Application of Imperial Acts*, (NSWLRC 4) Sydney, Government Printer, 1967, 74-5 for a brief description of this statute and a recommendation that it be repealed as being spent.  
5 id, 100.  
6 For the Act 4 & 5 Anne c 3 s 17-19 providing time limits for the recovery of seamen's wages see para 249, cf South Australian Law Reform Committee, Report No 55, *Inherited Imperial Statute Law on Practice and Procedure*. (SALRC 55) Adelaide, Government Printer, 1980, 21. Since the proposed legislation does not make comprehensive provision for time limits, it is not proposed to repeal these provisions.  
7 See para 17, 80, 116-7.  
8 See para 27.  
9 cf *University of Wollongong v Metwally* (1984) 56 ALR 1.  
10 See para 122.  
11 This result might be thought anomalous: the States will retain the capacity to affect admiralty jurisdiction through the creation of new liens, but not through the creation of statutory rights of action *in rem*, although the latter are, from an admiralty point of view, less powerful than the former. The distinction is however the result of the distinction between substance and procedure probably required by the Constitution s 76(iii), and of the lack of any general international agreement on the proper scope of maritime liens. The States have in fact shown no disposition to expand admiralty jurisdiction by the creation of new liens, and if they did do so in ways which affected the balance of the proposed legislation or cut across any future international consensus as to the proper scope of maritime liens, the Commonwealth possesses sufficient power to deal with the problem.  
12 See para 155-7.  
13 See F Berlingieri, 'The 1952 Brussels Convention on the Arrest of Ships', CMI Doc Arrest -2/XI-83, December 1982, 2-3 for discussion.  
14 See the discussion of forfeiture in para 177. The Navigation Act 1912 (Cth) s 399 gives any court a general power in addition to its ordinary powers to order distress and sale of the ship to meet sums ordered by the court to be paid by the master or owner of the ship.  
15 See para 263-6 on the relationship between this power of detention and admiralty.  
16 See eg Western Australian Marine Act 1982 (WA) s 57(1) (search power), 61(1) (unsafe ships), 63(1) (order ship to return to port).  
17 This is what was done in New Zealand. The Shipping and Seamen Act 1952 (NZ) s 488 continues unaffected by the Admiralty Act 1973 (NZ) and gives jurisdiction to the High Court. See para 175 for the implied amendment of s 383 by the Protection of the Sea (Civil Liability) Act 1981 (Cth).  
18 cf Canada where the provision equivalent to s 383, Canada Shipping Act 1934 (Can) s 685 as revised by the Federal Court Act 1970 (Can) Sch II(5), gives exclusive jurisdiction to the Admiralty Court which is part of the Federal Court.  
19 This was done in England by the Administration of Justice Act 1956 (UK) s 7(1), repealing Merchant Shipping Act 1894 (UK) s 686.  
20 cf Commission of Inquiry into the Maritime Industry (Chairman, MM Summers), *Fourth Report. Australian Maritime Legislation*, AGPS, Canberra, 1977, 192 where, without commenting on the larger issue of whether s 383 should be repealed, it is suggested 'that Australia should not now take action to detain a foreign ship which has caused injury to property belonging to a Commonwealth country other than Australia or belonging to a person other than an Australian citizen'.  
21 ibid.  
22 s 472 was repealed in the United Kingdom by the Merchant Shipping Act 1970 (UK) Sch 5 and not replaced by any similar provision.  
23 Navigation Act 1912 (Cth) s 10. This section applies 'except so far as the contrary intention appears'. There is nothing in s 59A to indicate any such intention.  
24 cf s 262, applying to all admiralty actions the survival of actions legislation.

25 *Cotter v Huddart Parker Ltd* (1942) 42 SR (NSW) 33; *Huddart Parker Ltd v Cotter* (1943) 66 CLR 624. Under provisions such as the Acts Interpretation Act 1958 (Vic) s 40 and the Application of Laws (Coastal Sea) Act 1980 (NSW) s 4, State legislation abolishing common employment would now appear to apply to causes of action arising within the coastal sea (ie within the 3-mile limit): EI Sykes & MC Pyles, *Australian Private International Law*, Law Book Co, Sydney, 1979, 341-2.

26 id, 341.

27 *ibid*.

28 See para. 56.

29 The Navigation Act 1965 (Cth) s 57 provides a model. This validated regulations made under the principal Act.

30 Shipping Registration Act 1981 (Cth) s 12-14.

31 eg Seamen's Compensation Act 1911 (Cth) s 5AA (injuries caused while travelling to or from employment).

32 *The Tojo Maru* [1972] AC 242, 290 (Lord Diplock); *Bankers Trust International Ltd v Todd Shipyard Corp: The Halcyon Isle* [1981] AC 221, 232, 238 (Lords Diplock, Elwyn-Jones and Lane): but cf id, 243 (Lords Salmon and Scarman, dissenting) who, at least on the point at issue, recognition of foreign maritime liens, were more receptive to 'the concept of a universal law of the sea' as a guide to resolving uncertainties and to judicial development of the law. However even Lords Salmon and Scarman did not suggest that there was any precise body of rules which could be picked up by a phrase such as 'law maritime'.

33 cf *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 on the common law rules.

34 See eg para 62, 200 (actions *in rem* against foreign state-owned ships). The need to notify the consul of the flag state when certain types of actions *in rem* are brought against foreign ships is discussed in para 298.

## Chapter 14

1 The Commission has been much assisted in the preparation of the draft Rules by a 'Rules Sub-committee' consisting of Mr A Scotford (Ebsworth & Ebsworth), Ms Morella Calder (Dawson, Waldron) and Mr Bruce Brown, Secretary, NSW Supreme Court Rules Committee.

2 Though on a different point, the decision of the High Court in *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 58 ALR 29 as to the meaning of s 2(2) of the Statute of Westminster 1931 (UK) supports this assumption.

3 See High Court Rules O 5 r 8-9, O 50 r 10-12, O 53, O 62 r 10-12; Queensland Admiralty Rules 1894 (printed in *Queensland Supreme Court Practice*, KW Ryan, HA Weld & WC Lee (ed), Butterworths, Sydney, 1984, vol 2, 20,023); New South Wales Admiralty Rules 1952; Victorian Admiralty Rules 1975; Tasmanian Rules of the Supreme Court 1965, Part IV; South Australian Supreme Court Rules O 39; Western Australian Supreme Court Rules 1971, O 74.

4 As is the case in NSW, Qld, SA and WA: NSW Ad Rules 1952, r 3; Qld RSC, O 1 r 1, O 60 r 1A; SASCR, O 39 r 1(2); WA RSC 1971, O 74 r 1(2).

5 As with the Territories.

6 Vic Ad Rules 1975, r 2(1); Tas RSC 1965, Pt IV r 1(1), 2(1).

7 Joint Committee of the Law Council of Australia and the Maritime Law Association of Australia and New Zealand, *Admiralty Jurisdiction in Australia*, 1982, 46-7, although that Committee did not discuss the content of such Rules or attempt to formulate them.

8 See, among many other expressions of support for this conclusion, WE Paterson QC, *Submission 62* (18 November 1985) 13; Australian Mining Industry Council, *Submission 86* (13 May 1986) 5-6. Only one contrary view was expressed: SA Crown Solicitor, *Submission 77* (5 February 1986) 2.

9 See Bankruptcy Act 1966 (Cth) s 315. This was also the case with the rules made under the Matrimonial Causes Act 1959 (Cth) s 127, and is now the case with the regulations made under the Family Law Act 1975 (Cth) s 123.

10 The Bankruptcy Act 1966 (Cth) does not make any special provision for a formal body to advise on the amendment of the Bankruptcy Rules. The rule making powers of the Supreme Courts, Federal Court and High Court on the other hand are all vested either in the judges themselves or in rules committees.

11 PA Cornford, *Submission 67* (14 November 1985) 1. It was pointed out by Justice IF Sheppard, *Submission 79* (24 February 1986) that 'the task of persuading governments to alter Rules of Court has never been an easy one'.

12 Opinions expressed to the Commission by consultants and others were strongly in favour of a formal rules committee. Submissions making this point, in addition to those cited in n 11, included: Justice D Yeldham, *Submission 51* (10 October 1985) 1; Chief Justice Sir Laurence Street, *Submission 63* (20 November 1985), NSW Attorney General, *Submission 73* (16 December 1985).

13 For preliminary acts see para 295-7. For limitation actions see para 299.

14 This approach has been generally supported in discussions on the Reference. See eg B Davenport, QC, Law Commission for England and Wales, *Submission 37* (19 March 1985) 2. There has been only limited support for a more comprehensive approach, but see PA Cornford, *Submission 67* (14 November 1985) 1.

15 See para 280.

16 *ibid*.

17 Revision of the High Court's rules to deal with the removal of any original jurisdiction in admiralty is a matter for the High Court itself, under the Judiciary Act 1903 (Cth) s 86: Sir Harry Gibbs, *Submission 47* (16 May 1985).

18 See para 295-7.

19 See para 106, 115.

20 The Act will, on the other hand, be the sole source of jurisdiction *in rem* in relation to matters of admiralty and maritime jurisdiction. See para 194, 274.

21 The preliminary act requirements in New South Wales and in the Territories form part of their admiralty rules and will cease to apply when the Colonial Courts of Admiralty Act 1890 (UK) is repealed: NSW Ad Rules 1952, r 3, 62; Vice Admiralty Rules 1883 (UK) r 54. The preliminary act requirements in Victoria also form part of their admiralty rules; those rules will continue to apply to any exercise of the 'Admiralty jurisdiction' of the Supreme Court after the 1890 Act is repealed (so far as not overridden by the new Act and Rules): Vic Ad Rules 1975, r 2(1), 15(a); but this will be of little significance as regards internal waters since actions arising there would probably fall outside the Court's 'Admiralty jurisdiction'. The preliminary act requirements in Queensland, South Australia and Western Australia form part of the general rules of their Supreme Courts and will survive the loss of their admiralty rules upon the repeal of the 1890 Act: Qld RSC, O 60 r 1A, O 23 r 4; SASCR, O 39 r 1(2), O 19 r 26(1); WARSC 1971, O 74 r 1(2), O 20 r 23. Their preliminary act requirements apply to collisions generally, not just collisions within the court's admiralty jurisdiction. Tasmania's preliminary act provisions also apply to collisions generally: Tas RSC 1965, O 21 r 32.

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- 22 See NSW Ad Rules 1952, r 104; Vic Ad Rules 1975, r 53; Qld RSC, O 53A r 2; Tas RSC 1965, Pt IV r 61, 62; SASCR, O 39 r 51; WARSC 1971, O 74 r 34. See also para 287.
- 23 See NSW Ad Rules 1952, r 120; Vic Ad Rules 1975, r 77; Tas RSC 1965, Pt IV r 86; SASCR, O 39 r 66; WARSC 1971, O 74 r 47(2). The Registrar has also usually enjoyed limited authority to release property from arrest, to determine the sufficiency of bail and to assess the adequacy of agreements filed as orders of court: see, eg NSW Ad Rules 1952, r 40 (release), r 58 (sufficiency of bail); SASCR, O 39 r 49, WARSC 1971, O 74 r 33 (agreements).
- 24 See para 287.
- 25 See eg the range of directions sought by the Marshal in *C Clausen Damskibs-Rederi AIS and Clausen Steamship Company (Australia) Pty Lid v The Ship Om Algora (No 2)* (1985) 38 SASR 494 (SA Sup Ct).
- 26 This was strongly urged by the South Australian Crown Solicitor in light of the difficulties experienced in *The Om Algora (No 2)* : SA Crown Solicitor, *Submission 50* (20 October 1985) 2.
- 27 cf the UK practice of using customs officers to serve warrants in appropriate circumstances: see KC McGuffie, PA Fugeman & PV Gray, *Admiralty Practice*, Stevens, London, 1964 and Supp 1975, para 266.
- 28 *Moore's Federal Practice*, M Bender, NY, looseleaf vol 7A (Admiralty) para 61[3] discussing Fed R Civ P, r 53(b).
- 29 *ibid*.
- 30 See *The Marlborough Hill* [1921] 1 AC 444, 456-7 on representative actions in admiralty.
- 31 This view was supported by the English Admiralty Judge, Justice B Sheen, *Submission 22* (29 January 1984) 2:  
I would retain the power to refer the amount of the damages to a Registrar for assessment. It shortens the trial which can be confined to the question of liability. Thereafter the parties frequently agree the damages. If there is an important issue they can apply to have that issue determined by the Judge.
- 32 *Kotsis v Kotsis* (1970) 122 CLR 69; *Knight v Knight* (1971) 122 CLR 114.
- 33 *Commonwealth v Hospital Contribution Fund of Australia* (1982) 40 ALR 673.
- 34 (1954) 90 C LR 353.
- 35 Under the Bankruptcy Act 1924 (Cth) Deputy Registrars were executive officers attached to the Court but not part of its structure. See *id*, 362, 365 (Dixon CJ, McTiernan J), 375 (Fullagar J), 380 (Kitto J).
- 36 *id*, 365.
- 37 (1970) 122 CLR 69, esp 76-7 (Barwick CJ), 91-3 (Windeyer J).
- 38 (1971) 122 CLR 114, esp 118-9 (Barwick CJ), 123 (Menzies J), 124 (Windeyer J).
- 39 (1982) 40 ALR 673.
- 40 *id*, 684-5.
- 41 *id*, 686.
- 42 See HCR O 36 r 38 (ascertainment by Registrar of damages which are 'substantially a matter of calculation'), O 37 r 3 (depositions), O 45 r 11 (examination of judgment debtor), O 52 r 19 (taking of accounts etc before Registrar), O 52 r 21 (computation of interest by Registrar), O 71 r 70 (taxation of costs), O 72 r 11 (Registrar's power to decide on disputed facts). cf Federal Court Rules O 30 r 1, O 40 r 9, O 62 r 8.
- 43 HCR O 53 r 2. The Registrar's report is taken to be confirmed unless objected to within 14 days: O 53, r 14.
- 44 A Dickey, 'The Province and Function of Assessors in English Courts' (1970) 33 *Mod L Rev* 494, 499.
- 45 The judge may in all cases direct that a nautical assessor be used even in the absence of any application by the parties: McGuffie (1964 & 1975) para 1214 n 90.
- 46 *Marsden's Law of Collision at Sea*, KC McGuffie (ed), Stevens, London, 1961 and Supp 1973, para 382.
- 47 Practice Direction (CA) [1965] 2 All ER 504; SCR (UK) O 50 r 10 n 3. See *The Savina* [1976] 2 Lloyd's Rep 123, 131 (Lord Simon) on the proper role of assessors on appeal. Nautical assessors are also used in admiralty appeals in the House of Lords and the Privy Council. For an example of a collision case heard in Australia in admiralty without assessors and heard on appeal by the Privy Council with assessors see *United States Shipping Board v The Ship 'St Albans'* (1928) 28 SR (NSW) 429; (1929) 29 SR (NSW) 162 (FCt); (1931) 31 SR (NSW) 333 (PC).
- 48 *The Queen Mary* (1949) 80 Lloyd's Rep 609, 612 (Scott LJ).
- 49 The trial judge is not bound to put in writing the points on which advice is sought: *The Queen Mary* (1949) 82 Lloyd's Rep 303, 321 (Lord Merriman).
- 50 *The Clan Lamont* (1946) 79 Lloyd's Rep 521, 524 (Scott LJ).
- 51 *Owners of SS Australia v Owners of Cargo of SS Nautilus* [1927] AC 145, 152-3 (Lord Sumner). See *ibid* on the not uncommon position where conflicting advice is received from assessors.
- 52 *The Ann and Mary* (1843) 2 Wm Rob 189, 196-7; 166 ER 725, 728 (Dr Lushington); *The Fritz Thyssen* [1967] 1 Lloyd's Rep 104, aff'd [1967] 2 Lloyd's Rep 199 (CA).
- 53 In *The St Chad* [1965] 1 Lloyd's Rep 107 expert evidence was allowed where the fishing practice at issue was of such recent origin that it might be outside the practical experience of a fishery assessor. On appeal Willmer LJ doubted the propriety of this but did not treat the expert evidence as inadmissible: [1965] 2 Lloyd's Rep 1, 4. In *The Neptun (Owners) v Humber Conservancy Board* (1937) 59 Lloyd's Rep 158 expert hydrographic evidence was allowed by agreement with the nautical assessors, who thought it would add to their own knowledge of the subject.
- 54 *The City of Washington* 92 US 31, 38-9 (1875) where the Court indicated some regret that the rules prevented its having the assistance of nautical assessors. cf *The Jay Gould* 19 F 765 (1884) where assessors were used without comment; FL Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800*, CUP, Cambridge, 1970,18.
- 55 See New Zealand, Special Law Reform Committee on Admiralty Jurisdiction, *Report* (Chairman: Justice Beattie), Wellington, 1982, Appendix 1, para 12: 'The Committee have come to the conclusion that in New Zealand the appointment of assessors should be discontinued.
- 56 Admiralty Rules 1975 (NZ) r 33.
- 57 *Egmont Towing & Sorting Ltd v The Ship 'Telendos'* (1982) 43 NR 147, 165 (F Ct of A, Thurlow CJ). There does not appear to be any case in which the Supreme Court has heard an admiralty appeal assisted by assessors although, at its own request, it was given the power to do so in 1913: *The Ship 'Sun Diamond' v the Ship 'Erawan'* (1975) 55 DLR (3d) 138, 147 (Collier J).

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- 58 *Nord-Deutsche Versicherungs-Gesellschaft v The Queen* [1969] 1 Ex CR 117; *The Ship 'Sun Diamond v The Ship 'Erawan'* (1975) 55 DLR (3d) 138; *MacMillan Bloedel Ltd v Pan Ocean Bulk Carrier Ltd* (1981) 121 DLR (3d) 244.
- 59 *Egmont Towing & Sorting Ltd v The Ship 'Telendos'* (1982) 43 NR 147.
- 60 id, 165.
- 61 ibid.
- 62 eg *The Tyburnia* (1887) 8 LR (NSW) Adm 1.
- 63 In *Peters Slip Pty Ltd v Commonwealth of Australia* [1979] Qd R 123, 125 counsel, despite extensive research, were unable to discover any examples.
- 64 NSW Ad Rules 1952, r 100; Vic Ad Rules 1975, r 52; Tas RSC 1965, Pt IV r 59; Vice Ad Rules 1883 (UK) r 106.
- 65 Qld RSC, O 39 r 7; Supreme Court Act 1983 (SA) s 71; Supreme Court Civil Procedure Act 1932 (Tas) s 37; Supreme Court Act 1958 (Vic) s 110; Supreme Court Act 1935 (WA) s 56; ACT RSC, O 38 r 25; NT RSC, O 38 r 22. There is no provision in the Rules of the High Court or the Federal Court for either of those Courts to sit with assessors.
- 66 Navigation Act 1912 (Cth) s 359; Navigation Act 1901 (NSW) s 241(1); Marine Act 1936 (SA) s 107(1); Marine Act 1976 (Tas) s 177(2)(b); Marine Act 1958 (Vic) s 176(4); Western Australian Marine Act 1982 (WA) s 105.
- 67 Queensland Marine Act 1958 (Qld) s 195(3). Until its repeal in 1979 s 375B of the Navigation Act 1912 (Cth) required the Full Court of the Federal Court to sit with not less than 2 assessors when hearing appeals against cancellation or suspension of a certificate from Courts of Marine Inquiry. The use of an assessor always remains optional under the Marine Act (NT) s 119.
- 68 AG Ogilvie, 'Courts of Marine Inquiry in Australia' (1979) 53 ALJ 129, 137 referring to *SS Lake Illawarra* hearing, Hobart, 1975.
- 69 s 258(5).
- 70 s 319(2).
- 71 *Egmont Towing & Sorting Ltd v The Ship 'Telendos'* (1982) 43 NR 147, 165 (Thurlow CJ), leave to appeal dismissed by S Ct, id, 446. See similarly Law Reform Committee, England and Wales, 17th Report, *Evidence of Opinion and Expert Evidence*, London, 1970 (Cmnd 4489) para 9.
- 72 ibid.
- 73 eg *Peters Slip Pty Ltd v Commonwealth of Australia* [1979] Qd R 123, 129 (F Ct). See also *Owners of SS Australia v Owners of Cargo of SS Nautilus* [1927] AC 145, 150 where Viscount Dunedin commented:  
I cannot forget that when assessors were introduced, ships were sailing ships, and the navigation of a sailing ship is an art which the landsman cannot be expected to understand without much explanation. In these modern times it seems to me that it is much oftener a question of common sense in the application of the rules to avoid collision than a question of seamanship in the true sense of the word.  
On the other hand, not all judges would agree that assessors can add nothing to a common sense application of the rules: Justice IF Sheppard, *Submission 79* (24 February 1986).
- 74 *Egmont Towing & Sorting Ltd v The Ship 'Telendos'* (1982) 43 NR 147, 165 (Thurlow CJ).
- 75 In *Peters Slip Pty Ltd v Commonwealth of Australia* [1979] Qd R 123 the fees set by the trial judge for each of the assessors were \$1000 for the first day and \$250 for each additional day: the Full Court said that these figures 'seem rather high' (id, 129).
- 76 *Egmont Towing & Sorting Ltd v The Ship 'Telendos'* (1982) 43 NR 147, 165 (Thurlow CJ). See also Ogilvie (1979) 138 where a similar criticism is expressed with regard to Courts of Marine Inquiry.
- 77 GA Flick, *Natural Justice*, Butterworths, Sydney, 1979, 41-64.
- 78 *The Ship 'Sun Diamond' v The Ship 'Erawan'* (1975) 55 DLR (3d) 138, 144 (Collier J).
- 79 Ogilvie (1979) 137 and the Canadian decisions cited in n 58.
- 80 See *The Ship 'Sun Diamond' v The Ship 'Erawan'* (1975) 55 DLR (3d) 138, 144 (Collier J) where this was suggested as something of a second best solution.
- 81 Law R Cttee, 17th Rep, para 11. The Committee concluded that 'apart from recording this divergence of views, we ourselves do not feel justified in recommending any change in this respect'. They did however suggest that judges should exercise their discretion and adopt techniques by which parties could be better informed of what passes between assessors and judges. Justice B Sheen, the present English Admiralty judge, has commented that:  
In England the practice of having two Trinity Masters sitting with the Judge in collision and salvage cases is so long-established that I am reluctant to change it. But if I were starting again I would not encourage the court to sit with nautical assessors. In the days before the steamship seamanship was truly a matter on which the Judge needed advice. Insofar as any case nowadays depends upon the behaviour of a ship, I think it is better to let the parties call expert witnesses who are subjected to cross-examination.  
Justice B Sheen, *Submission 22* (29 January 1985) 2.
- 82 See n 76.
- 83 See however A Rogers, 'Dispute Resolution in Australia in the Year 2000' (1984) 58 ALJ 608, 616-8, for strong advocacy by a NSW judge of the use of assessors in certain cases (in and out of admiralty).
- 84 cf Beattie Report, App 1, para 12 where the lack of any New Zealand equivalent to Trinity House is given as one of the reasons for recommending that the use of nautical assessors be discontinued.
- 85 See eg *Peters Slip Pty Ltd v Commonwealth of Australia* [1979] Qd R 123.
- 86 But note the lack of enthusiasm in the Law R Cttee, 17th Rep, para 12 for the use of assessors in general litigation.
- 87 eg Justice IF Sheppard, *Submission 79* (24 February 1986) (based on experience with assessors in Courts of Marine Inquiry).
- 88 HCR O 61 r 11; Vic Ad Rules 1975, r 101; Qld RSC, O 58A r 7; Tas RSC 1965, Pt IV r 97; SASCR, O 39 r 68; WARSC 1971, O 74 r 49; Vice Ad Rules 1883 (UK) r 192. cf NSW Ad Rules 1952, r 142.
- 89 Compare eg Vic Ad Rules 1975, r 101 & SASCR, O 39 r 68.
- 90 McGuffie (1964 & 1975) para 235. See, eg HCR O 30 r 2, 5; Vic Ad Rules 1975, r 80, 81; SASCR, O 39 r 28, 29. See further para 300.
- 91 HCR O 30 r 18; NSW Ad Rules 1952, r 38; Vic Ad Rules 1975, r 85; Qld RSC, O 27A r 17; Tas RSC 1965, Pt IV r 52-, SASCR, O 39 r 34; WARSC 1971, O 74 r 20.
- 92 McGuffie (1964 & 1975) para 280. See eg HCR O 30 r 9; Vic Ad Rules 1975, r 86, 87; SASCR, O 39 r 26, 35.
- 93 HCR O 30 r 17. See para 303 n 224.
- 94 See para 300.

- 95      Indeed it would constitute an argument against retaining that procedure. See para 300.
- 96      At present the Federal Court does not maintain a central computerised filing system. Obviously it would be desirable that the Register of Caveats against Arrest be maintained in computerised form (as in Canada), so that access to it would be both uniform and swift. The recommendation in the text is not dependent upon such a development, but the Commission has been informed that such a facility is likely to be available in due course.
- 97      ie excluding courts to which proceedings *in rem* may be remitted under the proposal in para 241.
- 98      *Union Steamship Co of New Zealand Ltd v The Ship 'Caradale'* (1936) 56 CLR 277, 281-2 (Dixon J).
- 99      As to the use of assessors, see para. 288-91.
- 100     *The Seaham* (1878) 4 Asp MLC 58.
- 101     *The Temple Bar* (1885) 11 PD 6. If a jury was thought appropriate for any reason (eg if it was a mixed action) the matter could be transferred to another Division: *Ocean Steamship Co v Anderson, Tritton and Co* (1885) 1 TLR 413; or could even be split between Divisions: *Metropolitan Asylums Board v Sparrow* (1913) 29 TLR 450. Nevertheless, juries were ordered in the Division on at least two actions under Lord Campbell's Act 1846 (UK): *The Orwell* (1888) 13 PD 80, 81-2 and *The Kwasind* (1915) 84 UP 102, 103; and in one that did not concern either death or personal injury: *Marsden's Law of Collisions at Sea* (1961 & 1973), para 416 n 7a.
- 102     RSC (UK) O 75 r 25(3).
- 103     McGuffie (1964 & 1975) para 992 n 34. Their use is forbidden in admiralty actions in the County Court: County Courts Act 1984 (UK) s 66(1)(a).
- 104     NSW Ad Rules 1952, r 97; Vic Ad Rules 1975, r 46, 47; Qld RSC, O 35 r 513; Tas RSC 1965, Pt IV r 57.
- 105     See para 280.
- 106     J Crawford, *Australian Courts of Law*, OUP, Melbourne, 1982, 62-3, 68-9, n 79-83.
- 107     Jury trial was ordered in a collision action in Victoria in 1907: *Union Steamship Co of New Zealand Lid v Melbourne Harbour Trust Commissioners* [1907] VLR 204, but the collision took place within the body of a county and was proceeded with as a common law action for negligence: id, 205; cf *Union Steamship Company of New Zealand Ltd v The Ship 'Caradale'* (1937) 56 CLR 277, 280-1. There is a reference by counsel in *Peters Slip Pty Lid v Commonwealth of Australia* [1979] Qd R 123, 255 to cases involving matters of seamanship having been tried by judge and jury in Queensland or in the High Court, but no details were given.
- 108     eg in South Australia. See Crawford (1982) 62, 68 n 79; SASCR, O 36 r 3, 4.
- 109     Crawford (1982) 62-3, 69 n 80-3.
- 110     *Union Steamship Company of New Zealand Ltd v The Ship 'Caradale'* (1937) 56 CLR 277, 281-2.
- 111     See eg *Goldman v The Ferry 'Kameruka'* [1971] 1 NSWLR 393.
- 112     See Wiswall (1970) 54-5, 57 on the background and the earlier procedure which preliminary acts re. placed.
- 113     *The Vortigern* (1859) Swab 518, 518; 166 ER 1242, 1243 (Dr Lushington); *Gaggin v Moss* [1983] 2 Qd R 486, 496 (McPherson J).
- 114     RSC (UK) O 75 r 18(1). See also County Court Rules 1981 (UK), O 40 r 9 which requires either a preliminary act or, in small claims, the inclusion in the particulars of claim of the information normally contained in a preliminary act.
- 115     Federal Court Rules (Can) r 1013.
- 116     Ad Rules 1975 (NZ) r 24.
- 117     HCR O 20 r 30; Qld RSC, O 23 r 4; Tas RSC 1965, O 21 r 32; SASCR, O 19 r 26(1); WARSC 1971, O 20 r 23.
- 118     NSW Ad Rules 1952, r 62; Vic Ad Rules 1975, r 15.
- 119     Vice Ad Rules 1883 (UK) r 54. By omitting the words 'between vessels' it would appear that actions for collision with a landing-stage or a trawl cable are included: see *The Craighall* [1910] P 207; *Angell v The Ship 'Oceanic Peace'* [1972] FC 939.
- 120     *Webster v Manchester, Sheffield, and Lincolnshire Railway Co* (1884) 5 Asp MLC 256 n(a).
- 121     Vice Ad Rules 1883 (UK) r 54(14). See similarly NSW Ad Rules 1952, r 62(16); Qld RSC, O 21 r 32(1)(n).
- 122     eg RSC (UK) O 75, r 18; Vic Ad Rules 1975, r 15(a). cf NSW Ad Rules 1952, r 62 (time runs from appearance being entered).
- 123     McGuffie (1964 & 1975) para 677.
- 124     eg *The Rievaulx Abbey* (1910) 11 Asp MLC 437 (magnetic or true course required to be stated).
- 125     eg *The Godiva* (1886) 11 PD 20.
- 126     eg *The Radnorshire* (1880) 5 PD 172; *The Isle of Cyprus* (1890) 15 PD 134; *Broken Hill Proprietary Co Ltd v Compagnie des Messageries Maritimes* [1966] 2 NSW 344. cf Fed Court Rules (Can) r 1016 (ordinary rule allowing discovery before defence has been filed does not apply in vessel collision cases).
- 127     eg *The Beaverford* [1960] 2 Lloyd's Rep 215, 218 (Hewson J). In this case the court refused to confine the requirement for preliminary acts to parties having charge of vessels. The port authority whose official was alleged to be directing the movement of the vessels was also required to file. But cf *The John Boyne* (1877) 3 Asp NILC 341; *Armstrong v Gaselee* (1889) 22 QBD 250.
- 128     *Secretary of State for India v Hewitt & Co Ltd* (1888) 6 Asp MLC 384, 385-6 (in the absence of evidence that it lacked all relevant knowledge of collision, plaintiff cargo owner had to file preliminary act in a suit against owner of vessel which collided with barge upon which cargo was stored); *Webster v Manchester, Sheffield, and Lincolnshire Railway Co* (1884) 5 Asp MLC 256 n(a) (widow suing in respect of collision in which her husband, a seaman, was killed had to file a preliminary act).
- 129     See the editor's note to *Secretary of State for India v Hewitt & Co Ltd* (1888) 6 Asp MLC 384, 385.
- 130     *The El Oso* (1925) 21 Lloyd's Rep 340, 343.
- 131     Justice B Sheen, *Submission* 22 (29 January 1985) commented that the requirement that each party shall answer the questions in a Preliminary Act is a powerful weapon in the determination of the truth. Each party has to state his case 'blind'. I have frequently found them very revealing, and I would encourage you to retain them. I would prefer to discontinue the use of pleadings thereafter.
- 132     See also Justice DA Yeldham, *Submission* 51 (10 October 1985) 2.
- 133     This will mean that actions *in personam* arising out of collisions which are commenced in lower courts will also have to comply with the preliminary act requirement in the uniform rules. See para 234.

- 133 eg in the case of a ship striking a wharf. No preliminary act is currently required in such a situation: *The Craighall* [1910] P 207. Preliminary acts seem always to have been confined to cases of collision, despite the requirement in the Admiralty Court Rules 1859 (UK) that they be filed in ‘causes of damage’: id, 211 (Vaughan Williams LJ). See also Wiswall (1970) 54-5, 57.
- 134 RSC (UK) O 75, r 5(5). See similarly the County Court Rules 1981 (UK), O 40 r 4(3) referring to ‘a consulate within the district of the court’.
- 135 *The Octavie* (1863) Br & Lush 215, 217; 167 ER 341, 342.
- 136 Fed Court Rules (Can) r 1003(3) referring to ‘a consulate in the province where the ship is’. There was no equivalent provision in the pre-1970 Rules of the Exchequer Court of Canada in Admiralty. But see *Armanekis v SS Cnosaga* [1950] Ex CR 445 (court may decline to exercise discretion to hear action against foreign ship involving foreign seamen if accredited representative of flag state objects on reasonable grounds to the proceedings).
- 137 Ad Rules 1975 (NZ) r 15(2) (‘having a consulate in New Zealand’).
- 138 NSW Ad Rules 1952, r 26(b) (‘consular representative ... if there be one resident in Sydney’); Vic Ad Rules 1975, r 20(b) (‘... if there be one resident in Melbourne’); Qld RSC, O 7 r 11(b) dealing with actions for wages but not for possession and referring to ‘consular officer if there is one resident in Queensland’; Tas RSC 1965, Pt IV r 5(c) (‘consular representative or agent ... if there be one resident in the place of the registry in which the writ ... is issued’); SASCR, O 39 r 7(2)(b) (‘... if there be one resident in South Australia’); WARSC 1971, O 74 r 3(3)(f) (‘... resident in Western Australia’); Vice Ad Rules 1883 (UK), r 31(a) referring only to actions for wages, not possession, and to a consular officer ‘if there is one resident in the possession’ (defined in r 1 as ‘colony, ... territory’); HCR O 5 r 8(f) (‘consular officer ... if there be one within the Commonwealth’).
- 139 The 1952 Arrest Convention makes no reference to the point. But Wiswall (1970) 68, writing of 1859, notes that, *pace* Dr Lushington, the maritime law of other nations had historically considered the consent of the consul as virtually an absolute condition to the entertainment of a wages suit. In recent years the United Kingdom has made a number of Orders under the Consular Relations Act 1968 (UK) s 4 excluding or limiting the jurisdiction to entertain proceedings relating to the remuneration of masters and crew members of ships of specified states, except where a relevant consular officer has been notified of the proceedings and has not objected within 2 weeks. These Orders reflect specific treaty commitments. There are no Australian equivalents to these treaties.
- 140 cf C Parry (ed) *British Digest of International Law*, Stevens, London, 1965, vol 8, 390.
- 141 Note that it is sufficient to have posted the notice. No service or proof of service is required: McGuffie (1964 & 1975) para 257.
- 142 *The Golubchick* (1840) 1 Wm Rob 143; *The Nina* (1868) LR 2 PC 38; *The Leon XIII* (1883) 8 PD 121. Under Supreme Court Act 1981 (UK) s 24(2)(a) nothing in the admiralty provisions of the Act shall ‘be construed as limiting the jurisdiction of the High Court to refuse to entertain an action for wages by the master or a member of the crew of a ship, not being a British ship’.
- 143 See eg *Kandagasabapathy v MV Melina Tsiris* [1981] 3 SAfLR 950(N); *Magat v MV Houda Pearl* [1982] 2 SAfLR 37(N).
- 144 *The Annette; The Dora* [1919] P 105, 114-5, a view endorsed in *The Jupiter (No 2)* [1925] P 69, 75 (Bankes LJ).
- 145 cf Vienna Convention on Consular Relations, 24 April 1963, art 5(1) (in force in Australia by virtue of the Consular Privileges and Immunities Act 1972 (Cth) s 5(1): see Sch for text) which provides that for ships having the nationality of the state which the consul represents ‘consular functions consist in ... settling disputes of any kind between the master, the officers and the seamen insofar as this may be authorized by the laws and regulations of the sending State’.
- 146 cf 8 *Brit Digest IL* 402.
- 147 McGuffie (1964 & 1975) para 257.
- 148 para 176, 234.
- 149 RSC (UK) O 75, r 37-40; Ad Rules 1975 (NZ) r 31.
- 150 See eg *James Patrick and Co Ltd v Union SS Co of NZ Ltd* (1938) 60 CLR 633, 678-80; *Gates v Gaggin* (1983) 51 ALR 721, 723-5.
- 151 Under the draft South African rules, for example, the Courts simply have authority to give such directions as they see fit on the procedure to be adopted in these actions: SAf Draft Ad Proc Rules (5th draft 1984) r 21(2).
- 152 The English Supreme Court Rules and those in New Zealand are almost identical. The principal difference is that in England the Registrar plays a significant role in the proceedings, hearing the initial application (and issuing the decree where there is no dispute) and assessing the claims on reference, whereas in New Zealand the Court is primarily responsible for the conduct of the action. Compare RSC (UK) O 75 r 38(1), (5)-(9) and Ad Rules 1975 (NZ) r 31(8).
- 153 The right to limit can be asserted in a given action by way of ‘defence’ or ‘counterclaim’: *Gates v Gaggin* (1983) 51 ALR 721, 724-5; McGuffie (1964 & 1975) para 1223. Normally, however, separate proceedings are commenced.
- 154 And if the plaintiff admits liability (or partially does so): *Commonwealth v Asiatic Steam Navigation Co Ltd* [1955] 1 Lloyds Rep 503; *Marsden’s Law of Collisions of Sea* (1961 & 1973) para 221, 409. cf the position in the United States: G Gilmore & CL Black, *The Law of Admiralty*, 2nd ed, Foundation Press, New York, 1975, 937.
- 155 By the Registrar, initially, in the United Kingdom; by the Court in New Zealand. See n 152.
- 156 Alternatively, an order may be made for discovery if a defendant lacks the information necessary to decide whether to dispute the right to limit.
- 157 *Marsden’s Law of Collisions at Sea* (1961 & 1973) para 406; McGuffie (1964 & 1975) para 1218.
- 158 For an example of a decree, see *James Patrick & Co Ltd v Union SS Co of NZ Ltd* (1938) 60 CLR 633, 678-80.
- 159 id, 678-9; *Marsden’s Law of Collisions at Sea* (1961 & 1973) para 406.
- 160 Plus interest to the time of payment into court: McGuffie (1964 & 1975) para 1219.
- 161 Except for the purposes of taxation and payment of costs in those actions: ibid; *Marsden’s Law of Collisions at Sea* (1961 & 1973) para 406.
- 162 Three months is the usual period in practice in England, but longer periods can be allowed: id, para 410.
- 163 The claimants must establish their own cause of action against the plaintiff and can dispute each other’s claims: *The Disperser* [1920] P 228, 233.
- 164 RSC (UK) O 75, r 39(4); Ad Rules 1975 (NZ) r 38(9)(c).
- 165 *Marsden’s Law of Collisions at Sea* (1961 & 1973) para 410.
- 166 Applications to set aside are apparently almost unknown in practice: McGuffie (1964 & 1975) para 1225.
- 167 FRCP (US) Supp Rule F(1); Gilmore and Black (1975) 853-4.
- 168 FRCP (US) Supp Rule F(2).

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- 169 id, Rule F(3), (4).
- 170 Gilmore & Black (1975) 863. Even the plaintiffs liability on the claim can be disputed.
- 171 In fact the District Court initially has to decide a jurisdictional question on whether the claims can possibly exceed the limitation fund. if not, the Court cannot prevent other actions proceeding: Gilmore & Black (1975) 864.
- 172 FRCP (US) Supp Rule F(7).
- 173 Comments to the Commission have generally supported the present structure: eg Justice DA Yeldham, *Submission 51* (10 October 1985) 1.
- 174 Wiswall (1970) 185.
- 175 id, 185-7.
- 176 Vice Ad Rules 1883 (UK) r 159, 162, 163, 165-7.
- 177 See para 293.
- 178 See eg HCR O 30 r 2(1); NSW Ad Rules 1952, r 32; Vic Ad Rules 1975, r 81; SASCR, O 39 r 29.
- 179 HCR O 30 r 5; NSW Ad Rules 1952, r 35; Vic Ad Rules 1975, r 82; SASCR, O 39 r 31.
- 180 See eg HCR O 30 r 6,7; NSW Ad Rules 1952, r 36, 37; Vic Ad Rules 1975, r 83, 84; SASCR, O 39 r 32, 33. Under most rules the default action cannot be commenced until the caveat has failed to comply with the undertaking for 12-14 days after the service of the writ. Under the High Court and Queensland Supreme Court Rules, however, the action can be commenced after 3 days from the service of the writ provided that 12 or 14 days have elapsed since the caveat was entered: HCR O 30 r 6; Qld RSC, O 27A r 15. In Western Australia the plaintiff can proceed as upon default of appearance immediately upon the lapse of 3 days after notice of commencement of the action has been given to the caveat: WARSC 1971, O 74 r 19(2).
- 181 See eg HCR O 11 r 16; NSW Ad Rules 1952, r 22; Vic Ad Rules 1975, r 13; SASCR, O 39 r 9(2).
- 182 The State Supreme Court Rules only permit a 'party' to the action to enter a caveat against arrest: NSW Ad Rules 1952, r 32; Vic Ad Rules 1975, r 80; Qld RSC, O 27A r 11; Tas RSC 1965 Pt IV, r 145 -; SASCR, O 39 r 28; WARSC 1971, O 74 r 18(1). In the Supreme Courts of the Territories under the 1883 Vice Admiralty Rules and in the United Kingdom, New Zealand and Canada on the other hand, 'any person' can do so: Vice Ad Rules 1883 (UK) r 159; RSC (UK) O 75 r 6(1); Ad Rules 1975 (NZ) r 16(1); Fed Court Rules (Can) r 1009(1). It is clear that to limit the right to caveat against arrest to 'parties' in the narrow sense (ie to parties to proceedings before the court) is too restrictive. In most cases, litigation will not actually have been commenced and there will be no 'parties' in that sense. Presumably 'party' in this context means 'potential party'.
- 183 See eg HCR O 30, r 2(2); NSW Ad Rules 1952, r 33; Vic Ad Rules 1975, r 81; SASCR, O 39 r 29.
- 184 In Australia at present most rules expressly require the service of the writ upon the caveat, but only where there is a caveat in existence at the time the proceedings are commenced: HCR r 4; NSW Ad Rules 1952, r 34; SASCR, O 39 r 30. In Western Australia, as in the United Kingdom and New Zealand, service of the writ upon the caveat is required as soon as the plaintiff or the plaintiffs solicitor becomes aware of the existence of the caveat: WARSC 1971, O 74 r 18(3); RSC (UK) O 75 r 8(4); Ad Rules 1975 (NZ) r 10(2)), apparently whether the caveat was entered before or after the issue of the writ (though the entry of a caveat after the issue of the writ appears to be unknown in practice: McGuffie (1964 & 1975) para 243). The difference is not particularly significant, since a prudent plaintiff will search the warrant book before issuing the warrant (even though there is no special requirement to do so) to avoid the possibility of damages anyway. If there is a caveat in force the writ will be served upon the caveat and, if necessary, negotiations can take place on the question of bail or other security. If the caveat is for an amount not less than the amount claimed, the added incentive for serving the writ is that that service determines when default proceedings can commence: see n 180. Accordingly in all jurisdictions, the plaintiff will want to serve the writ upon anyone caveatting either before or after the issue of the writ, whether the rules require it or not.
- 185 The security that plaintiffs are entitled to claim is an amount representing their 'reasonably arguable best case, including interest, and their costs of the action': *The Gulf Venture* [1984] 2 Lloyd's Rep 445, 449 (Sheen J) applying *The Moschanthy* [1971] 1 Lloyd's Rep 37, 44 (Brandon J). Bail should not in any event exceed the value of the *res*: McGuffie (1964 & 1975) para 323. Where the defendant claims to be entitled to limit liability, the plaintiff can nevertheless insist upon bail exceeding that limitation figure, provided that the right to limit is not conceded: ibid. See also *The Norwalk Victory* (1949) 82 Lloyd's Rep 539, 547-50. For the liability of the plaintiff where security is claimed in excess of these amounts, see para 303.
- 186 See eg HCR O 30 r 18(1); NSW Ad Rules 1952, r 38; Vic Ad Rules 1975, r 85; SASCR, O 39 r 34.
- 187 See para 293 n 91. While none of the rules make it entirely clear, the plaintiff will apparently be liable whether the caveat was filed before or after the issue of the warrant; it is the arrest where a caveat has been entered that results in liability: HCR O 30 r 18(2); NSW Ad Rules 1952, r 38; Vic Ad Rules 1975, r 85; SASCR, O 39 r 34. With one exception the rules themselves do not expressly require a search of the caveat book before either the issue or service of the warrant, unlike in the United Kingdom and New Zealand where a search must be made before issue. See n 193.
- 188 *The Crimdon* [1900] P 171, 177.
- 189 eg the plaintiff might have reason to doubt that the caveat could ever raise the bail or sum promised and not want to wait to challenge under the usual rules any bail eventually tendered before the Registrar.
- 190 The plaintiff might claim more than the amount specified in the caveat because eg the caveat's asserted right to limit his liability is disputed: *The Charlotte* [1920] P 78: and if no agreement on increased bail can be achieved might arrest despite the caveat. Alternatively the plaintiff simply might not have time to check the adequacy or reliability of the bail and arrest rather than allow the ship to leave and risk discovering that the bail is inadequate: *The Crimdon* [1900] P 171, 177-8.
- 191 *The Crimdon* [1900] P 171, 177.
- 192 See para 301.
- 193 In England and New Zealand, the plaintiff and any district registrar are required by the rules to conduct a search of the caveat book before issuing a warrant and in New Zealand that search must be attested to in the affidavit to the warrant: RSC (UK) O 75 r 5(3); Ad Rules 1975 (NZ) r 15(3), (5); r 15(4)(a)(iv). Apart from a provision (O 30 r 3) in the High Court Rules requiring a District Registrar of the High Court to check with the Principal Registry, there is no such requirement in the various Australian rules.
- 194 It is always open to the plaintiff to apply to set aside the caveat before issuing the warrant, avoiding any risk of subsequent damages: see *The Charlotte* [1920] P 78. This is less objectionable from the caveat's point of view, however, for at least it permits the caveat to defend his caveat prior to arrest, rather than after the point of entering it has been lost.
- 195 McGuffie (1964 & 1975) para 233, 243.
- 196 See para 293.
- 197 McGuffie (1964 & 1975) para 232, 321; RSC (UK) O 75 r 16 n 1.

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- 198 See para 293.
- 199 A broader scheme is proposed under the current draft South African Admiralty Rules, forbidding the issue of a warrant (without leave of the Court) where any security or undertaking has been given to prevent arrest: S Af Draft Ad Proc Rules (5th Draft 1984) r 3(2)(c), 3(3)(c).
- 200 See n 194.
- 201 Submissions on the Reference have generally been in favour of this proposal. See eg Justice DA Yeldham, *Submission 51* (10 October 1985) 2.
- 202 The test of whether a plaintiffs case is so weak as to enable the commencement of an action to be treated as frivolous or vexatious is the same for actions *in rem* as for actions *in personam*. There is no requirement that in order to use the more plaintiff-oriented remedy of arrest the plaintiff must show a proportionately stronger case: *The Moschanthy* [1971] 1 Lloyd's Rep 37, 42 (Brandon J).
- 203 *Historical Records of Australia* series 1, Government Printer, Sydney, 1925, vol 26, 550, 552. See also NSW Archives Authority, *Vice Admiralty Court of New South Wales*, 1787-1911, Sydney, 1980, 13.
- 204 s 1 (emphasis added).
- 205 By virtue of Constitution Act 1867 (Qld) s 33. Minor modifications to the 1848 Act have been made by the Supreme Court Act 1867 (Qld) s 36 and the Statute Law Revision Act 1908 (Qld) s 2.
- 206 Vice Admiralty Vexatious Arrests Act 1901 (NSW). This Act is merely a consolidated version of the original 1848 Act.
- 207 *The Collingrove* (1885) 10 PD 158; *Ellerman's Wilson Line Ltd v Commissioners of Northern Lighthouses* [1921] SC 10.
- 208 The original change added RSC (UK) O 12 r 2 1 A to this effect. SR & O (UK) No 1958 (L13) of 1959 repealed O 12 r 21A but a Note to Items 97 and 98 of Appendix 2 to O 62 preserved the effect of the change. This Note was subsequently relocated within Appendix 2 and was eventually deleted altogether in an effort to simplify Appendix 2 of O 62: SR & O (UK) 35 (L1) of 1979. It is unclear whether this, deletion was intended to alter the substance but it would appear not.
- 209 *Antares Shipping Corp v the Ship 'Capricorn'* [1977] 17 NR 1 (FC of Appeal).
- 210 id, 5 (Le Dain J). Before the establishment of the Federal Court in 1970 the Canadian admiralty courts were empowered to follow English Rules of the Supreme Court as at 1 January 1928 in the absence of a local rule: Exchequer Court Amendment Act 1928 (Can) s 4.
- 211 HCR O 11 r 20.
- 212 SASCR, O 39 r 17; Tas RSC 1965, Pt IV r 19.
- 213 For an illustration of the delay in, and cost of, obtaining a bank guarantee to enable arrest to be lifted on a ship owned by a small company of limited resources see *Compania Financiera Soleada SA v Hamoor Tanker Corporation Inc* [1981] 1 WLR 274 (CA), a case involving arrest in breach of contract. The owners were a Liberian company, the ship was arrested in Cape Town, the local agents were held to be 'very dilatory' (id, 278) and it took 14 days before a Kuwait bank eventually provided the necessary guarantee. The cost of the guarantee together with the costs of crew wages, insurance and other overheads for the 14 days came to US\$30 000. In addition the possibility of bank charges for maintaining the guarantee until the action was heard, loss of profit due to the 14 day delay and other forms of consequential economic loss have to be borne in mind.
- 214 *The Evangelismos* (1858) Swab 378; 166 ER 1174 (PC); *The Volant* (1865) Br & L 321; 167 ER 385; *The Strathnaver* [1875] 1 App Cas 58 (PC); *The Collingrove* [1885] 10 PD 158. For cases in which damages were actually awarded see eg *The Victor* [1860] Lush 72; 167 ER 38; *The Cathcart* [1867] LR 1 A & E 314; *The Margaret Jane* (1869) LR 2 A & E 345 (failure to lift an initially proper arrest once it became clear the action could not be maintained); *The Walter D Wallet* [1893] P 202 (nominal damages only, although the case indicates that an action at common law may be available for malicious arrest in admiralty (query if punitive damages are available)).
- 215 *Astro Vencedor Compania Naviera SA v Mabanft GmbH* [1971] 2 QB 588, 595. Even where damages are in principle available the defendant may not be permitted to recover for elements of damage caused by failure to post bail or other acceptable security where the reason for the failure was improvidence: see *Owners of 'Chinook' v 'Dagmar Salem'* [1955] Ex CR 210; *Compania Financiera Soleada SA v Hamoor Tanker Corporation Inc* [1981] 1 WLR 274, both applying the general principle on remoteness of damages set out in *The Liesbosch* [1933] AC 449.
- 216 cf para 300. See also para 245 where it is noted that this minimal risk (compared to the very real possibility where a Mareva injunction is used to detain a ship or cargo) is a significant reason why admiralty arrest is preferred by plaintiffs to use of the Mareva injunction as a device to put pressure on defendants.
- 217 See para 300.
- 218 eg *Astro Vencedor Compania Naviera SA v Mabanft GmbH* [1971] 2 QB 588 (charterer/owner dispute); *Compania Financiera Soleada SA v Hamoor Tanker Corporation Inc* [1981] 1 WLR 274 (agent/owner dispute); *The Barenbels* [1984] 2 Lloyd's Rep 338 (vendor/purchaser dispute).
- 219 For damages and costs in respect of Mareva injunctions see D Bailey, 'Mareva Injunctions and Foreign Attachment' in M Hetherington, *Mareva Injunctions*, Law Book Co, Sydney, 1983, 77, 83-4, 87. See further para 245.
- 220 See para 300.
- 221 eg B Davenport QC, *Submission 37* (19 March 1985) 1-2. On the other hand, SD Westgarth, *Submission 42* (12 April 1985) 2, while agreeing that an express provision should be included, thought it should 'only apply to claimants who vexatiously or mala fide arrest vessels'.
- 222 On the other hand it has been suggested to the Commission that generally worded provisions for damages for lodging caveats under Real Property Acts 'without reasonable cause' have worked well: see eg Real Property Act 1861 (Qld) s 103.
- 223 Comments to the Commission on these proposals have generally indicated that they strike an appropriate balance between plaintiff and defendant: eg WE Patterson QC, *Submission 62* (18 November 1985) 10. cf however SD Westgarth, *Submission 55* (1 November 1985) 2-3, where the proposals are criticised as 'excessively defendant-orientated' and the suggestion is made that damages should only be for arrests that are vexatious or in bad faith.
- 224 The caveat is liable to be condemned in all 'costs and damages': NSW Ad Rules 1952, r 49; Vic Ad Rules 1975, r 89; Qld RSC, O 27A, r 10, 19; Tas RSC 1965, Pt IV r 44; SASCR, O 39 r 27, 36; or just 'damages': WARSC 1971, O 74 r 17(2); Vice Ad Rules 1883 (UK) r 164; Ad Rules 1975 (NZ) r 18(2).
- 225 As in *The Gulf Venture* [1984] 2 Lloyd's Rep 445 (Sheen J).
- 226 McGuffie (1964 & 1975) para 322.
- 227 ibid.

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228 *The Alletta* [1974] 1 Lloyd's Rep 40, 50 (Mocatta J); *Sadit Timber Sdn Bhd v The Ling Yung and Thai Yung* [1984] 2 MLJ 217, 219 (Chong Yik Liang J); cf *The Moschanthy* [1971] 1 Lloyd's Rep 37, 46 (Brandon J).

229 *The Gulf Venture* [1984] 2 Lloyd's Rep 445, 449 (Sheen J).

230 *The Moschanthy* [1971] 1 Lloyd's Rep 37, 46 suggests that damages are recoverable, despite the agreement between the parties.

231 See para. 300 n 185.

232 Most rules at present simply state that the person at whose instance the caveat was entered 'shall be condemned' in costs and damages: see, eg NSW Ad Rules 1952, r 49. cf WARSC 1971, O 74 r 17(2), where the cavaror is liable in damages to 'any person having an interest' in the property.