

**THE INTERACTION BETWEEN ADMIRALTY AND INSOLVENCY
LAW – a continuing conundrum**

**A COMMENTARY ON SOME RECENT ISSUES
CONCERNING THE ARREST OF SHIPS**

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THE ARREST OF SHIPS – SOME RECENT ISSUES¹

Introduction

1. The action *in rem* is the defining feature of admiralty jurisdiction.² Whilst admiralty jurisdiction is not confined to the pursuit of proceedings *in rem*, it is the action *in rem* and the ability thereby to arrest a ship or other property that is most associated with the exercise of admiralty jurisdiction and which distinguishes the exercise of that jurisdiction from the way in which claims are more conventionally pursued before Australian courts, namely by way of *in personam* proceedings against an individual defendant.
2. As the Full Court of the Federal Court of Australia said in *Tisand Pty Ltd v Owners of the Ship MV 'Cape Moreton' (Ex 'Freya')* (2004) 210 ALR 601 at 607:

The arrest of ships is a recognised feature of international maritime commerce and international maritime jurisdiction. Very often legitimate claims will go unsatisfied unless there is recourse to an effective and efficient system of maritime arrest. Ships, their owners and insurers are expected, in the ordinary course of their businesses, to be ready to deal with *in rem* claims arising in connection with the use or deployment of the ship or the business of the owner or charterer.
3. This paper addresses two aspects of the action *in rem* and the associated ability of a maritime claimant to arrest a ship or other property the subject of *in rem* proceedings, relevant to the theme of this part of the conference, namely the interaction between admiralty and insolvency law. These are:
 - a) the advantages associated with the exercise of *in rem* jurisdiction – in particular the ability to arrest a ship or other property in an *in rem* proceeding – in comparison to the interim relief to similar effect that might be obtained in an action *in personam*; and
 - b) recent issues concerning the scope of those claims that may be pursued *in rem* and for which a ship or other property may be arrested.³
4. The following comments are not confined to the enforcement of actions *in rem* in the context of insolvency, in particular the liquidation of the ship owner or operator liable for the plaintiff's claim. On the contrary, these comments apply

¹ This paper is based upon (but not identical to) the paper presented by the author at the Federal Court of Australia National Admiralty and Maritime Law Seminar on "SHIP ARRESTS AND INSOLVENCY" on 21 May 2009 and which was subsequently published in the [Australian and New Zealand Maritime Law Journal \(2009\) Vol.23 No. 1 at pp. 39-62](#)

² ["The nature of the modern action in rem"](#) by Dr Sarah Derrington (2007)

³ Given time limitations, I have not retained in this paper the comments on the challenge to the exercise of *in rem* jurisdiction and the arrest of ships that were included in my original paper from the Federal Court Seminar (and on which this paper is based). Those comments can however be found at [Australian and New Zealand Maritime Law Journal Vol. 23 No. 1 at pp. 59-62](#).

equally where there is no insolvency and where all that is sought to be achieved by the plaintiff is simply the enforcement and thereby recovery of its claim. But the scope and possible advantages of the action *in rem* are no less relevant and possibly more significant where the person liable for the plaintiff's claim is a ship owner and insolvent or in liquidation. This is because the availability of the action *in rem* may allow the maritime claimant to recover its claim against a ship that is liable to be arrested in an action *in rem* independently of both the ordinary winding up process and the claims of unsecured non-maritime claimants and of the need to share *pari passu* with such claimants.

THE BENEFITS OF *IN REM* JURISDICTION

The exercise of *in rem* jurisdiction

5. In general terms, an action *in rem* involves the pursuit of a maritime claim (or a claim in the nature of a maritime lien or other charge) in a proceeding that is brought directly against a ship or other property which is either the subject of that claim (or lien or charge) or belongs to the person who is alleged to be liable for that claim. Admiralty lawyers commonly refer to the ship or other property that is the subject of *in rem* proceedings as the *res*.
6. Although in Australia the action *in rem* is not confined to ships and may extend to “*other property*”, it is only certain limited types of property – generally cargo and freight – that might properly be the subject of *in rem* proceedings. The ability to commence *in rem* proceedings against the bunkers or fuel on board a ship independently of any proceeding against the ship itself has been significantly constrained (if not ruled out completely) by the judgment of the Full Court of the Federal Court in *Scandinavian Bunkering AS v the bunkers on board the fishing vessel “Taruman”* (2006) 151 FCR 126. Moreover, the types of claims that might be pursued as an action *in rem* against “*other property*” and the circumstances in which such claims might be pursued against such “*other property*” are also somewhat limited, much more so than *in rem* proceedings against a ship. For these reasons I have confined my comments in this paper to the arrest of ships.
7. An action *in rem* is only available in the exercise of admiralty jurisdiction. Since 1 January 1989 the exercise of admiralty jurisdiction in Australia has been pursuant to the *Admiralty Act 1988* (Cth) (*the Act*) and the *Admiralty Rules 1988* (Cth) (*the Rules*) which are made pursuant to section 41 of the Act. Both the Act and the Rules govern and apply to all admiralty proceedings in Australia, irrespective of both the court in which the proceeding is commenced and whether it is a State or federal court.
8. The Act distinguishes between actions *in personam* and actions *in rem*. In relation to the latter, section 14 of the Act provides :

14 Admiralty actions *in rem* to be commenced under this Act

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.

9. Accordingly, the Act is an exhaustive code as to the pursuit of *in rem* proceedings and the claims that may be pursued in an action *in rem*.
10. Section 10 of the Act confers jurisdiction to entertain *in rem* proceedings upon only the Federal Court of Australia and the Supreme Courts of each of the States and Territories. Whilst the Federal Magistrates Court and State courts other than the Supreme Court have been invested with jurisdiction in respect of proceedings commenced under the Act as actions *in personam* (pursuant to section 9 of the Act), those courts have not been invested with *in rem* jurisdiction. They may only exercise *in rem* jurisdiction upon the remission of *in rem* proceedings from the Federal Court or a Supreme Court pursuant to section 28 of the Act.
11. It is not necessary for a ship the subject of an *in rem* proceeding to be arrested in that proceeding and a claim may be pursued as an action *in rem* against that ship without it being arrested. But it is the ability to arrest a ship and the consequences of that arrest that give rise to one of the main advantages of the action *in rem* where it is available, namely the ability of a plaintiff either to obtain security for its claim or in the absence of such security to have recourse to the ship to meet that claim and any judgment that the plaintiff may subsequently obtain in respect of that claim.

Security for the Plaintiff's claim

12. The procedural theory of the action *in rem* prevalent and influential under English and Australian admiralty law⁴ regards a proceeding *in rem* as a device to obtain both:
 - a) personal jurisdiction over the shipowner or person alleged by the plaintiff to be liable for its claim;⁵ and
 - b) security from which the plaintiff may satisfy any judgment that it eventually obtains in respect of its claim.
13. The latter is usually achieved by the arrest (or threat of arrest) of the ship or other property capable of being arrested (*the res*) then present in the physical jurisdiction or territorial waters of the Court. In particular, if the owner of the ship under arrest (or threatened with arrest) wishes to obtain the release of that ship from arrest (or to avoid the threatened arrest) so as to thereby regain the possession and use of that ship and to avoid a judicial sale of that ship,⁶ then it can only do so by

⁴ this theory and its implications under Australian law are discussed in more detail later in this paper, particularly in light of the judgment of Allsop J in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45

⁵ in the context of the *Admiralty Act* 1988 (Cth) the 'relevant person'

⁶ the consequences and effect of a judicial sale of a ship are considered later in this paper

providing the plaintiff with some alternate security for its claim. This security may be in the form of a bail bond pursuant to Part VII of the Rules, a letter of undertaking, letter of guarantee, bank guarantee or cash deposited with the Court. In this way, a plaintiff in a proceeding *in rem* may obtain security for its claim by the arrest or threat of arrest of the ship the subject of that proceeding and present in the geographical jurisdiction of the Court.

14. This ability to obtain security for a claim in advance of judgment is not generally available where the claim is pursued in an *in personam* proceeding (even where the *in personam* proceeding is in the exercise of admiralty jurisdiction).⁷
15. Clearly there are benefits to a plaintiff where such security is provided in return for the release of the ship from arrest. It avoids (or at least minimises) the risks that the plaintiff would otherwise face in having to enforce the judgment that it hopes to subsequently obtain against the assets of the defendant, especially where the defendant and / or its assets are overseas and the recovery of the plaintiff's claim may require the enforcement of the locally obtained judgment in another jurisdiction. Where the security is provided by a third party (such as a bank, insurer or P&I club), this also protects the plaintiff from the risks and consequences of the defendant becoming insolvent or having its assets depleted by the claims of other creditors in the time it takes for the plaintiff's claim to be heard and judgment obtained.
16. In short, having acquired such security, a plaintiff will (or is at least likely to) be less affected (and possibly unaffected) by events which might occur between the commencement of the proceedings for the recovery of its claim and the obtaining of judgment on that claim and which might otherwise affect the financial viability of the defendant and thereby satisfaction of that judgment.
17. As to the amount of the security that a plaintiff may obtain in this way, where a ship has been arrested in an action *in rem*, a plaintiff is entitled to security for its claim in an amount equal to the lesser of its "*reasonably arguable best case*" including interest up to the likely date of judgment and its costs of the proceedings (*Freshpac Machinery Pty Ltd v the ship "Joana Bonita"* (1994) 125 ALR 683) or the value of the ship arrested.
18. The Courts recognise that the power to insist that a ship remain under arrest unless and until security is provided is a drastic power and one which should not be exercised oppressively. But at the same time, the authorities also indicate that the Court should ensure that the plaintiff is not left without sufficient security to cover what it would be entitled to in the event that its claim is ultimately successful and should be comfortably satisfied that the amount of security to be provided in return for the plaintiff's agreement to the release of the ship from arrest is likely to be sufficient to meet the plaintiff's claim including interest and costs.

⁷ a comparison of arrest and such interlocutory relief as may be available in actions in personam (such as interim freezing orders) is considered later in this paper.

19. In balancing these considerations, the Court does not generally undertake a detailed assessment of the quantum of the plaintiff's claim or the damages or other amount that the plaintiff is likely to recover in the event that its claim succeeds. This is especially bearing in mind that this task of determining the amount of security to be provided is usually undertaken:
- a) first, at a very early stage of the proceedings where generally all there is before the Court is a brief statement of the plaintiff's claim and particulars of that claim (in the Writ in Rem and possibly the affidavit in support of the application for the arrest of the ship) and no evidence of the damages or other amounts claimed or of the quantum of those damages claimed;
 - b) secondly, as a matter of urgency because it is important that the ship be released as soon as reasonably practicable, especially where the ship under arrest is a commercial vessel; and
 - c) thirdly, where the plaintiff has no right to re-arrest the ship (in Australia) in respect of its claim once it has been released from arrest, even if it subsequently appears that the amount of the security provided at the time of its release is or is likely to be insufficient to meet the plaintiff's claim. Once it is released from arrest, a ship may only be rearrested in Australia by the plaintiff in respect of that same claim by order of the Court and in the circumstances contemplated by section 21(1) of the Act.
20. Provided that the amount sought is reasonable and supportable on the face of the limited material then available, generally speaking a plaintiff will be entitled to security in the amount that it seeks (up to the value of the ship arrested). Subject to the determination by the Court of the appropriate amount of security to be provided, the plaintiff will also be entitled to refuse to agree to the release of the ship from arrest until the amount of security sought has been provided.⁸
21. As Sheppard J observed in *Freshpac Machinery Pty Ltd v the ship "Joana Bonita"* (op cit) if the Court errs on the side of caution and is found to have provided for security in a greater sum than was actually necessary to protect the plaintiff's claim, that is one of the incidents of the balancing exercise that is involved in and thereby a consequence of the invocation of this jurisdiction.
22. Even if no security is provided for the release of a ship under arrest, the plaintiff still has a measure of security in respect of its claim. This is because in those circumstances, from the moment of the arrest of the ship, the plaintiff in effect acquires a prejudgment security for its claim in the form of the ship or *res*,⁹ which will remain under arrest for the duration of the proceeding and be thereby available

⁸ An unreasonable demand for excessive security or an unreasonable refusal to agree to the release of the ship from arrest where reasonable security has been offered may provide a basis for an action for damages under section 34 of the Act (which section is discussed later in this paper).

⁹ *Aichhorn & Co. KG v the ship mv "Talabor"* (1974) 132 CLR 449 at p. 455; *The Cap Bon* [1967] 1 Lloyd's Rep. 543 @ p.547)

to the plaintiff to enforce any judgment that it may subsequently obtain on its claim in the *in rem* proceeding. This would be by way of the judicial sale of the ship pursuant to rules 69 and 70 of the Rules. In this way, the proceeds of sale of the ship arrested in the proceeding may eventually provide a fund from which the judgment obtained by the plaintiff in respect of its claim in the proceedings may be satisfied.¹⁰ To this end, the judicial sale of a ship under arrest in an *in rem* proceeding has been described as:

the final blunt instrument ensuring that the "security" for judgment obtained by a claimant through arrest is finally reflected in funds.¹¹

23. In appropriate circumstances – such as where the ship under arrest is “*deteriorating in value*” so that any delay in its sale will eat into and thereby reduce the security that it otherwise represents – a plaintiff may be able to obtain an order for the judicial sale of a ship under arrest even before it has obtained any judgment on its substantive claim.¹² In this way, the proceeds of the sale of the ship will remain in Court and be available to satisfy any judgment that the plaintiff may eventually obtain in the proceeding.¹³

Comparison with interim relief in *in personam* proceedings

24. Admittedly a plaintiff in an *in personam* proceeding may possibly be able to achieve some measure of security for its claim for the recovery of a debt or damages through an application in that proceeding for an interim preservation order or freezing order (as the *mareva* injunction is now known).¹⁴ But there are material differences between that relief and the arrest of a ship in an action *in rem* and the circumstances in which each may be obtained,¹⁵ which tend to favour the action *in rem*, especially where both remedies are available. Of these differences, there are three that I particularly wish to refer to in this paper

Provision of security for the plaintiff's claim

25. The first is the ability of a plaintiff to an action *in rem* to obtain security for its claim and the benefits to that plaintiff where such security is provided. As I have already indicated, the ability to arrest a ship in an *in rem* proceeding and the risk that that ship may be sold in that proceeding in order to meet the plaintiff's claim usually provides a powerful inducement to the owner of that ship to provide

¹⁰ subject to possible claims by other *in rem* claimants, including those with a higher priority

¹¹ Enforcement of Maritime Claims by DC Jackson (4th ed) at [15.125] (p. 427)

¹² see rule 69(1) and (5) and *Marinis Ship Supplies (Pty) Ltd v the ship "Ionian Mariner"* (1995) 59 FCR 245

¹³ again, subject to possible claims by other *in rem* claimants, including those with a higher priority

¹⁴ for instance pursuant to Order 25A of the Federal Court Rules or UCPR Pt. 25 r.11 in NSW. A detailed and useful treatment of freezing orders and the circumstances in which they may be granted can be found in Freezing and Search Orders (Mareva and Anton Pillar Orders) by Peter Biscoe (2nd ed) (2008) (*Biscoe 2nd ed*)

¹⁵ There is a useful comparison of the preconditions, incidents and consequences of the arrest of a ship as part of an *in rem* proceeding and what was then known as the *mareva* injunction in the ALRC report Civil Admiralty Jurisdiction 1986 (ALRC 33) at para. [245]. A summary of this comparison also appears in *Biscoe* (2nd ed) at para. [1.15].

alternative security for the plaintiff's claim. I have already described the benefits of such security where it is provided.

26. In contrast, an application for a freezing order, even if successful, only results in freezing the assets of the defendant. It does not provide the plaintiff with security for the judgment that it hopes to obtain in relation to its substantive claim.¹⁶ Nor does it usually prompt or result in the provision of security for the plaintiff's claim, in particular security from a third party. Even where a freezing order has been obtained, the plaintiff still faces risks associated with the possible insolvency of the defendant, the competing claims of other creditors of the defendant and the defendant's assets being insufficient to meet all its liabilities.
27. Even where no security is provided and the ship the subject of the *in rem* proceeding remains under arrest, it still provides a potential source of funds against which any judgment obtained by the plaintiff might be enforced. This is in the manner I have already described. The commencement of the *in rem* proceeding against the ship and its arrest in that proceeding in effect confers on the plaintiff to that proceeding a limited security over that ship from that time onwards. This benefit was recognised as long ago as 1842 by Dr Lushington in *The "Volant"* (1842) Wm Rob 383 at 387:

An arrest offers the greatest security for obtaining substantial justice, in furnishing a security for prompt and immediate payment. The arrest enables the court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and judgment.

28. In contrast, a freezing order generally does not inhibit execution against the assets frozen by any other creditor of the defendant, before the plaintiff has obtained its judgment. It confers no priority on the plaintiff in respect of its enforcement of its claim against the frozen assets and over the claims of other unsecured creditors. Nor does such an order give priority to the plaintiff in the event of the liquidation of the defendant. It may not prevent a defendant from carrying on business in the ordinary way through the use of the otherwise frozen assets, even if there is a perceived danger that those assets will be lost to the plaintiff. The terms of a freezing order usually do not prevent the defendant from borrowing further money during the period in which the proceedings are underway, thereby increasing the defendant's total indebtedness and the potential of unsecured claims, particularly in the event of a liquidation.¹⁷ To the extent that Lord Denning MR suggested in *Z Ltd v A-Z* [1982] QB 558 at 573 that a *mareva* injunction operates *in rem* as the arrest of a ship does, it is now generally accepted that he was in error and went too far.¹⁸

¹⁶ (*Biscoe 2nd ed*) at [1.12]

¹⁷ (*Biscoe 2nd ed*) at [1.12]

¹⁸ see *Babanaft International Co SA v Bassatne* [1990] Ch 13; *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191 at 215; *Cretanor Maritime Co. Ltd v Irish Marine Management Ltd* [1978] 1 WLR 966

29. The position was summarised by Nigel Meeson QC¹⁹ in the following terms:

By arrest security is obtained for the claim. This is to be contrasted with what is perceived to be the obtaining of security by means of a freezing injunction. A freezing injunction is not security but an *in personam* procedure that merely preserves a fund against which execution may be taken. However, it is liable to be defeated by insolvency process or by a prior execution creditor. An arrest of a ship makes that ship real security which cannot be defeated by insolvency and is available only for maritime claims. It will only be defeated by a maritime claim having greater priority.

30. Admittedly, where no security is provided for the release of the ship from arrest and there is a judicial sale of the arrested ship, the plaintiff still faces the risk that other maritime claimants, including possibly those with claims attracting a higher priority (such as crew, mortgagees or maritime lien holders) may also make a claim on the fund representing the proceeds of sale of the ship under arrest and in doing so exhaust or deplete the fund before the plaintiff's claim is able to be satisfied from it. This can include maritime claimants with a higher priority who may bring proceedings after the plaintiff's action²⁰ and indeed possibly only after the sale of the ship. This is especially given (in Australia) the regime provided for by rule 73 and Form 28 of the Rules, which contemplates, prior to the distribution of the proceeds of sale, the publication of an invitation to other potential maritime claimants to bring proceedings against the proceeds of sale (and thereby share in the distribution of those proceeds) in respect of any claim that they may have otherwise had against the ship.²¹ In this respect, it was said in ALRC 33 at para. [245] that arrest may not be much superior to a *mareva* injunction (or thereby a freezing order) from the point of view of a claimant who ranks low on the admiralty scale of priorities. This may be especially so where the shipowner is insolvent or in liquidation and there is a strong prospect and good reason for other maritime claimants to pursue any claims that they have against the proceeds of the sale of the ship achieved through another claimant's request. But even in those circumstances, the plaintiff will still generally have priority in its access to the funds produced by the sale of the arrested ship over the claims of other unsecured non-maritime claimants, as well as any liquidator of the defendant or any other person standing in the shoes of the defendant ship owner, if by chance there is something left after the other maritime claimants with priority have been satisfied. Whilst the plaintiff may be no better off by reason of its entitlement to bring an action *in rem*, it is certainly no worse off.

Matters required to be proved to get the order

31. The second material difference between an arrest and interim relief in an *in personam* proceeding is the matters that are required to be proven in order to obtain the arrest of a ship, as opposed to a freezing order.

¹⁹ in *Admiralty Jurisdiction and Practice* 3rd ed. (2003) at paragraph [1.53]

²⁰ as occurred in *Patrick Stevedores No. 2 Pty Ltd v the ship "Turakina"*

²¹ the reasoning behind this is discussed in foot note 67 below

32. The grant of interlocutory injunctions, interim preservation orders and freezing orders are in the discretion of the Court and generally only available in certain limited circumstances, such as upon proof of a likelihood of the dissipation of assets out of the jurisdiction or other than in the ordinary course of business or upon proof of some such other conduct that gives rise to a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied. The doctrinal basis of the freezing order is found in the power of the court to prevent the frustration of its process, in particular to take steps to ensure that judgments are not made valueless or diminished in value. It is an interim remedy.²² Whilst said to be “*quite common place*”, a freezing order is a drastic remedy and should not be granted lightly.²³ In order to obtain such an order, a plaintiff must generally establish :
- a) first that it either has a judgment or (more usually where the order is sought prior to judgment) a “*good arguable case*” on an accrued or prospective cause of action (so far as its substantive claim is concerned);²⁴ and
 - b) secondly, that the balance of convenience is in favour of the granting of the interim preservation order or the making of the freezing order sought. Generally this requires proof of a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because the defendant (judgment debtor or prospective judgment debtor) may *inter alia* remove their assets from the jurisdiction or dispose of or otherwise deal with their assets so as to thwart any later attempt at enforcement of the judgment or prospective judgment.²⁵
33. The onus of proving each of these matters rests squarely upon the plaintiff moving the Court for such relief.
34. The second of these two conditions is said to be “*the heart and soul of the freezing order jurisdiction*”.²⁶ As I have already observed, the object of the application for a freezing order at an early stage of proceedings (as with its predecessor, the *mareva* injunction) is to prevent the frustration of a monetary judgment which the applicant hopes to obtain, by restraining the defendant from removing assets or dissipating them so that they are no longer available to meet the prospective judgment. But the consequences of such an order may be severe and express safeguards are often imposed such as limiting the value of the assets restrained to the amount reasonably claimed including interest and costs (which is admittedly analogous to the similar limitation imposed on the amount of security that may be obtained by a plaintiff in an *in rem* action) and permission to the defendant to meet

²² (*Biscoe 2nd ed*) at [1.11]

²³ (*Biscoe 2nd ed*) at [1.13]

²⁴ (*Biscoe 2nd ed*) at [1.9]

²⁵ (*Biscoe 2nd ed*) at [1.9]

²⁶ (*Biscoe 2nd ed*) at [1.9]

normal or reasonable legal and business expenses.²⁷

35. In contrast, subject to compliance with the Act and the requirements of the Rules, a plaintiff in an action *in rem* may arrest the ship the subject of that proceeding as of right in that proceeding.²⁸
36. The ability to arrest does not depend upon or require the exercise of the discretion of the Court in which the proceeding has been commenced. Nor does it depend upon or require a consideration of the balance of convenience and whether that balance lies in favour of the arrest of the ship the subject of the proceeding. In Admiralty, if a plaintiff is entitled to arrest a vessel, the inconvenience or potential damage caused to third parties is not relevant.²⁹
37. It also does not depend upon any assessment of the strength of the plaintiff's case before the arrest can take place, let alone require the Court to be persuaded by the plaintiff that it has an arguable or reasonably arguable case or that there is a serious question to be tried, so far as the plaintiff's substantive claim is concerned.
38. The arrest of the ship the subject of the *in rem* proceeding also does not depend upon or require proof of the risk of a dissipation of assets³⁰ or that the ship will be removed from the jurisdiction and thereby the possibility of enforcement once a judgment has been obtained. Whilst commonly arrest proceedings are instigated against foreign ships which would otherwise leave Australian waters but for their arrest, the intention to depart Australia is not itself an element that must be proved before the ship can be arrested. Conversely, an application for the arrest of a ship will not be defeated merely by the fact that the ship is to remain in the jurisdiction of the Court or within Australia or Australian waters for the foreseeable future, including up until when any judgment is likely to be given on the plaintiff's claim.
39. The arrest of a ship is also not subject to any safeguard or qualification that would limit the arrest in such a way as to permit the defendant (shipowner) to continue to use the asset in the ordinary course of its business or prevent the arrest from interfering with its ordinary course of business. Indeed, the utility of the arrest of a ship is generally at its highest where the ship that has been arrested is otherwise required by the defendant / shipowner for its business and its arrest is preventing the defendant / shipowner from earning income from its use.

²⁷ so as not to prevent a defendant from dissipating or using its assets in the ordinary course of its business (*Biscoe 2nd ed*) at [1.9]

²⁸ see ALRC 33 Civil Admiralty Jurisdiction (1986) at [245]. Although the Rules provide that a Registrar "*may*" issue an arrest warrant, it is submitted that if the requirements of the Rules are otherwise satisfied then the Registrar should issue a warrant when sought. Moreover, once the warrant has been issued, then a request for its execution must be acted upon by the Marshal

²⁹ ALRC 33 at [245]

³⁰ ALRC 33 at [245]

Damages for wrongful arrest

40. A third difference has to do with the shipowner's remedy if the arrest of its ship proves to be unjustified.
41. An interlocutory injunction or interim preservation order or freezing order is generally only made upon the plaintiff giving an undertaking as to damages, in particular the "*usual undertaking as to damages*" or "*usual undertaking*".³¹
42. In the event that an interlocutory injunction is granted or an interim preservation or freezing order made and the plaintiff's claim is ultimately unsuccessful, any loss or damage suffered by the defendant (or any other person affected by the injunction or order) as a consequence of the granting of that injunction or the making of that order may be recoverable from the plaintiff pursuant to the undertaking given.³²
43. However, no such undertaking is required of a plaintiff wishing to arrest a ship the subject of an *in rem* proceeding. Rather, the only remedy for a person adversely effected by the arrest of a ship or other property³³ is an action for damages pursuant to section 34 of the Act which provides :

34 Damages for unjustified arrest etc.

- (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.

44. I do not discuss in detail in this paper the scope and operation of section 34. It is a topic in itself.³⁴ However in the present context (of comparing the right to arrest with interim relief in actions *in personam*) it is sufficient to observe the following.

³¹ namely an undertaking to pay to any party adversely affected by the interlocutory injunction or interim preservation or freezing order such compensation if any as the court thinks just in such manner as the Court directs (see Federal Court Practice Note 3; UCPR (NSW) Part 25 rule 8)

³² *Air Express Limited v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249

³³ or as a consequence of a plaintiff claiming an excessive amount of security in return for its agreement to the release of the ship or property under arrest or for unreasonably refusing to agree to the release of a ship or other property under arrest

³⁴ see for example "Damages for Wrongful Arrest: section 34, *Admiralty Act 1988*" by Michael Woodford in [\(2005\) 19 MLAAZ Journal 115](#)

45. First, as is apparent from the terms of the section quoted above, damages may only be recovered under section 34 where in arresting the ship or other property³⁵ the plaintiff has acted “*unreasonably and without good cause*”. These are matters that the person claiming damages must prove.
46. This is a more stringent test for the recovery of damages than that found in the usual undertaking. In particular, a plaintiff will not necessarily be liable under section 34 of the Act for any damages that the owner of the ship arrested (or any other person interested in that ship) may have suffered as a consequence of its arrest, merely because the plaintiff’s substantive claim was unsuccessful or merely because the arrest of the ship has been set aside.
47. There have been no decided cases in Australia as yet on the application of the test found in section 34 or what must be proved in order to satisfy it. It is therefore still a matter of some conjecture as to precisely what conduct would be sufficient to give rise to an entitlement to damages under this test, whether the phrase “*unreasonably and without good cause*” is to be construed as a whole or whether the phrase is to be construed as containing in effect two separate requirements and if so what if anything the addition of the words “*without good cause*” add to the requirement that the plaintiff have acted “*unreasonably*” in arresting the vessel. Nor has there been any indication by any court in Australia as yet of the extent to which the test in section 34 represents a departure from the common law test of *crassa negligentia* (which still applies in England, Canada and New Zealand) under which damages for wrongful arrest are only available where the plaintiff had acted in bad faith, malice or with gross negligence. But even if the test in section 34 represents a less stringent approach to the traditional test in admiralty (as seems likely), it does nevertheless still appear to be a more onerous test for the recovery of damages than that inherent in the usual undertaking.

Arrest as interim preservation

48. The above comments are made where the ship is arrested in the context of a claim for damages or the recovery of a debt and in effect represents security for that claim. But they equally also apply if the claim that is the subject of the *in rem* proceeding is more in the nature of a proprietary maritime claim, such as a claim for possession or title to a ship.
49. In those circumstances, the arrest of the ship and its detention by the Court pending the determination of the plaintiff’s substantive claim is more in the nature of an interim preservation order. It will generally not be appropriate in those circumstances for the ship to be released from arrest prior to the determination of the plaintiff’s substantive claim, even upon the provision of security.
50. But even in this situation, the plaintiff still has the benefit of an entitlement as of right to the arrest of the ship in that proceeding (subject to compliance with the

³⁵ or in demanding what subsequently proves to be excessive security or in failing to give consent to the release of a ship or other property under arrest

Act and Rules and assuming that the ship is within the jurisdiction of the Court) without having to give the usual undertaking as to damages or having to persuade the Court of the matters that would warrant the exercise of its discretion in favour of granting the interim relief sought, which it would have to do were it to seek that relief by way of an interlocutory injunction or interim preservation order in an *in personam* action.

Other factors relevant to the comparison

51. Admittedly, there are some aspects of the comparison between arrest and interlocutory relief in the nature of a freezing order which are said not to favour arrest and the action *in rem*.
52. For instance, only the wrongdoing ship or a surrogate ship³⁶ may be arrested in admiralty or by way of an *in rem* proceeding. This imposes potential limitations on a plaintiff with a claim is against a single ship owning company³⁷ or where the ship the subject of the plaintiff's claim has sunk or no longer exists.
53. Further, generally speaking only a single ship may be arrested in respect of any single cause of action.³⁸ Whilst that proposition has been ameliorated to some extent with the addition of surrogate ship arrest, it is only possible to arrest more than one ship in Australia in respect of the one claim in the limited circumstances provided for by section 20(4) of the Act.³⁹ But where the general position applies, this may be of importance if the plaintiff's claim exceeds the value of the ship against which *in rem* proceedings are commenced in the enforcement of that claim, at least so far as the abovementioned benefits of security etc are concerned.⁴⁰ It may also be of importance if there is more than one claimant seeking to enforce its claim against that ship or more particularly the proceeds of the sale of that ship and the plaintiff is therefore likely to suffer a shortfall in the

³⁶ within the meaning of section 3(6) of the Act and in Australia provided that the requirements of section 19 of the Act are satisfied

³⁷ which as ALRC report recognised at [138] is recognised as legitimate way in which a shipowner may conduct its business and is not of itself sufficient reason to pierce the corporate veil so as to assimilate the ships of one related company with those of another and thereby expose those ships to the risk of arrest for the liabilities of associated companies

³⁸ see ALRC paras. [245] at p.197 and [210], *the Banco* [1971] P 137; *Patrick Stevedores No. 2 Pty Ltd v mv "Skulptor Konenkov"* (1996) 64 FCR 223 and section 20 of the Act.

³⁹ although it may be possible to pursue *in rem* actions and arrest more than one ship in different jurisdictions in respect of the one claim – see *Patrick Stevedores No 2 Pty Ltd and others v proceeds of sale of the vessel mv "Skulptor Konenkov"* (1997) 144 ALR 394; *Centro Latino Americano de Comercio Exterior SA v the owners of the ship "Kommunar" (the "Kommunar" no. 2)* [1997] 1 Lloyd's Rep. 8

⁴⁰ as will be seen later in this paper, a plaintiff in that case may not be entirely without remedy. Where there has been an appearance in the *in rem* proceeding by the relevant person liable for that claim and a judgment has been obtained by the plaintiff in that proceeding on that claim, the plaintiff may be able to enforce that *in rem* judgment against any other assets belonging to the relevant person in that jurisdiction or any other jurisdiction in which the judgment may be able to be enforced.

recovery of its claim.⁴¹

54. Further, as was noted earlier, where a ship is arrested in Australia in respect of a claim and security is provided for its release from arrest, the amount of that security will be up to the value of the ship. If the plaintiff's claim exceeds the value of the ship and security is provided, the claim will be under-secured.⁴² Unless it can bring itself and its claim within the circumstances permitted by section 20(4) of the Act, the plaintiff will not be able to obtain top up security in Australia in respect of the shortfall.⁴³ This may present disadvantages to a plaintiff with claims that are disproportionately large when compared to the value of the ship which has given rise to the claim as well as a plaintiff with claims arising out some complaint or incident concerning a relatively small ship.
55. In contrast to the above, a freezing order may be obtained against all or any of a defendant's assets up to the value of the claim.
56. But as was also recognised both in ALRC 33⁴⁴ and by Justice Sheppard in *Patrick Stevedores No. 2 Pty Ltd v mv "Skulptor Konenkov"* (1996) 64 FCR 223, these two remedies are not necessarily exclusive. In particular, a plaintiff may be able to obtain, cumulatively, both an order for the arrest of a ship in an action *in rem* and a mareva injunction (or freezing order) against the shipowner or other assets of the shipowner, including those that may not be the subject of *in rem* proceedings.⁴⁵ Accordingly, even in these circumstances, the availability to a plaintiff of the *in rem* action and associated ability to arrest a ship or other property in respect of that plaintiff's claim remains a useful adjunct to that plaintiff's ability to seek appropriate interlocutory relief such as a freezing order.
57. It has also been suggested that a freezing order may be a cheaper remedy than arrest, given the potentially high costs of maintaining a vessel under arrest.⁴⁶ But as was noted in ALRC 33 at para. [245], the commercial reality is that in most cases a security or guarantee of some sort is offered to secure the immediate release of the ship under arrest and only rarely will the cost of the custody of the

⁴¹ this was the concern that prompted the unsuccessful application to consolidate the two funds in *Patrick Stevedores No. 2 Pty Ltd v mv "Skulptor Konenkov"* (1996) 64 FCR 223

⁴² the plaintiff is in effect put in the same position as it would be if no security had been provided and the ship was sold

⁴³ a plaintiff in those circumstances may be able to obtain top up security by pursuing *in rem* proceedings against either a surrogate ship or the wrong doing ship (if the proceeding taken in Australia were against a surrogate ship) in another jurisdiction, although its ability to do so will depend on the availability of *in rem* proceedings in those circumstances in that foreign jurisdiction at paras. [245] – [247]

⁴⁵ as was the case in *The "Irina Zharkikh"* [2001] 2 Lloyd's Rep. 319; [2001] 2 NZLR 801 and *Morelines Maritime Agency Ltd v the ship "Skulptor Vuchitich"* (1996) 62 FCR 602 at 606 where there was both an *in rem* proceeding against the ship and a mareva injunction, although in that case obtained by different claimants. The issue in that case was being certain forklifts and other equipment on board the ship was subject to the arrest proceeding (as part of the ship) and thereby liable to be sold along with the ship or subject to the mareva injunction.

⁴⁶ ALRC 33 at para. [245]; *Biscoe* (2nd ed) at [1.15]

ship under arrest be an issue.⁴⁷ Moreover, even where the ship is not released from arrest upon the giving of security and is eventually sold, the recovery of the costs of maintaining its arrest from the proceeds of the sale of the ship is afforded a very high priority, second only to the Marshal's own fees and expenses.⁴⁸ Moreover this is so even if the proceeds of sale are insufficient to otherwise meet the arresting party's substantive claim, for instance because other later claimants⁴⁹ have come along with claims that have a higher priority.⁵⁰ This beneficial priority should ameliorate to some extent the disadvantage that may otherwise be presented by the risk of the high costs of maintaining the arrest.

58. Despite these potential downsides, following their comparison of arrest and *mareva* injunction, the Australian Law Reform Commission nevertheless concluded in ALRC 33:

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. 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. 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'.

Further procedural aspects

59. There are two further procedural aspects associated with the arrest of a ship which I wish to refer to briefly in this paper.
60. The first is as to the relative ease with which a ship may be arrested. It is not usually necessary for a plaintiff to apply to a judge of the Court for the arrest of a ship, in the same way as it is to obtain an interlocutory injunction or interim preservation or asset freezing order. Rather the application for arrest is usually done through the Registry, with the filing of three short documents each in accordance with a prescribed form.
61. In particular, once an *in rem* proceeding has been commenced, the plaintiff may obtain the arrest of the ship the subject of that proceeding by lodging with the

⁴⁷ where the costs of arrest start to eat into the value of the security then it may be possible to apply for the sale of the ship *pendent lite* in an attempt to ameliorate the effect of that

⁴⁸ *The "World Star"* [1987] 1 Lloyd's Rep. 452 at 454. This also includes the legal costs incurred in arresting the ship (*Patrick Stevedores No. 2 Pty Ltd v the ship "Turakina"* (1999) 95 FCR 52 – in that case on an indemnity basis).

⁴⁹ such as mortgagees, the Master and crew (in respect of wages) or maritime lien holders

⁵⁰ as was the case with *Patrick Stevedores No. 2 Pty Ltd* in relation to its arrest of the *Turakina*, where the vessel's mortgagees subsequently appeared and obtained the order for sale of the ship and then made a claim upon the proceeds of sale which (along with the claims of the crew) had a higher priority than *Patrick's* claim and exhausted the fund represented by the proceeds of sale before *Patrick's* own claim for outstanding stevedoring fees could be paid

Registry an application for an arrest warrant (Form 12) together with the required affidavit in support (Form 13) and a draft arrest warrant (r. 39). The plaintiff is also required to disclose at the time of the application any knowledge of any matter that could affect the safety of the Marshal, ship or those on board (r.39A). Assuming the documents filed with the Court are in order and the Registrar is not aware of any of the matters listed in r.40(3)(a) to (c), the Registrar will issue the plaintiff with an arrest warrant. A request is then made of the Marshal to execute the warrant and it upon the execution of the arrest warrant (under r.43) that the ship is arrested.⁵¹

62. The application for the arrest of a ship is therefore generally simpler and quicker than an ex parte application for interim relief in an *in personam* proceeding and has the appearance of being more administrative in nature.
63. Moreover, once the ship has been arrested, it will remain under arrest until such time as it is either released from arrest upon the application of the parties (for instance pursuant to an application made under either r. 51 or r. 52) or by order of the Court (for instance if there is a successful challenge either to the arrest itself or the proceedings generally, such as a jurisdictional challenge). The arrest does not take effect for a short time only or require further orders extending its duration once the defendant has appeared or has an opportunity to be heard, in the same way as an interlocutory injunction or interim preservation or freezing order does when first made. In the absence of an application by the parties or the Marshal, the arrest does not automatically come back before the Court in the same way as an interlocutory injunction or interim preservation or freezing order.
64. The second aspect has to do with the duty of disclosure of the plaintiff upon an application for the arrest of a ship. The application for an arrest warrant is made ex parte, that is, in the absence of the defendant or any one interested in the ship who may or may not yet have appeared in the proceeding. As such, arguably, a plaintiff applying for the issue of an arrest warrant with the intention of arresting the ship is under the same duty of full and frank disclosure as a plaintiff seeking an interlocutory injunction on an ex parte basis in an *in personam* proceeding, namely a duty to place before the Court at the time of their application all matters relevant to the relief sought including such matters as might be raised by the defendant if it had been present at the time of the application.
65. Formerly, the position in England was that a plaintiff applying for the arrest of a ship was under such a duty.⁵² That approach was followed in Australia by Lockhart J in the Federal Court of Australia in *Sea Containers Ltd v the owners of the vessel "Seacat 031"* (unrep'd 7 June 1993 (BC9305244)).

⁵¹ The steps that the Marshal takes both at the time of arrest and in preparation beforehand are conveniently set out in the Marshal's manual available on the Federal Court web site

⁵² *the Vasso* [1984] 1 QB 477 at 491-92; *the "Stephan J"* [1985] 2 Lloyd's Rep. 344 at 346; *the Kherson* [1992] 2 Lloyd's Rep. 261 at 268-69

66. However, more recently and following a change in the relevant rules of Court, it has been held in England that there is no duty of full and frank disclosure on a plaintiff seeking the arrest of a ship.⁵³ In particular, in England the Court has found first that the amendments to the English Rules had transformed the issue of the warrant of arrest from a discretionary remedy into one in respect of which the plaintiff had a right both to its issue and arrest if the requirements of the relevant rules were satisfied and secondly that the requirement of full and frank disclosure had no real substance except in the context of an application for a discretionary remedy. Although there have since been further changes to the English Rules, it is generally considered that the obligations associated with *ex parte* disclosure are probably still not required in England.⁵⁴
67. As I have already noted, in *Sea Containers Ltd v the owners of the vessel "Seacat 031"* Lockhart J found that there was a duty of disclosure on an applicant for the arrest of a ship and was prepared to discharge the arrest warrant that had been issued in that proceeding (unusually following an application to a judge of the Court rather than through the Registry in the manner contemplated by the Rules and described above) on the basis of the non-disclosure by the plaintiff of information which, had it been disclosed to the judge who had granted the issue of the arrest warrant, would have undermined the impression given by the evidence which had been put forward on the *ex parte* application for that warrant. In doing so, his Honour accepted that the applicable principles to be applied were those expressed by Sheen J in *the "Stephan J"* [1985] 2 Lloyd's Rep. 344 (specifically in the context of an application for arrest) and Isaacs J. in *Thomas A Edison Ltd v Bullock* (1913) 15 CLR 679 (in another context).
68. But this judgment was delivered shortly after the decision in *the "Varna"* and Lockhart J does not appear to have been referred to either that judgment or the argument which prevailed in that case. There is therefore possibly a question as to whether the approach in England in *the "Varna"* would (or having regard to the terms of the Rules in Australia could) be applied in Australia and an applicant for the arrest of a ship thereby not be under a duty of full and frank disclosure.
69. That question arose, although was not decided, in *The Zoya K* [1997] FCA 379 at first instance. One of the grounds on which the arrest in that case was sought to be set aside was that the plaintiff's solicitor had failed to disclose relevant material at the time of applying for an arrest warrant. However, Tamberlin J found that there had been no failure to disclose on any basis and that the Court therefore did not need to decide whether the position in *the "Varna"* also applied under the Rules in Australia and whether or not an applicant for an arrest warrant was under a duty of full and frank disclosure.⁵⁵ However his Honour did state that if it had been shown

⁵³ *the "Varna"* [1993] 2 Lloyd's Rep. 253; approved by the Court of Appeal in *Hali-Ioannou v Frangos* [1999] 2 Lloyd's Rep. 337 at 353

⁵⁴ *Admiralty Jurisdiction and Practice* (3rd ed) Meeson at [4.42]; see also "*Possible Issues in Admiralty Reform (a) beneficial ownership and jurisdictional facts; and (b) the nature of arrest and disclosure*" paper presented by Allsop J at MLAAZ Conference 2003.

⁵⁵ the issue was not taken on appeal and therefore not dealt with by the Full Court (1997) 79 FCR 71

that there was credible relevant evidence known to the deponent of the affidavit in support of the arrest warrant but withheld from the Court on that application, there may have been a ground for release in that case.

70. Whilst the “Varna” was also referred to in the judgment of the Full Court of the Federal Court in *Tisand Pty Ltd v Owners of the Ship MV ‘Cape Moreton’ (Ex ‘Freya’)* (2004) 210 ALR 601, this was only in passing, the Court stating that it was unnecessary to discuss “*the curial incidents of the procedure of the arrest such as the obligations of disclosure*” in that case.
71. Otherwise, this question does not appear to have been the subject of further judicial consideration in Australia.
72. However, until the Courts say otherwise, in my opinion a plaintiff in an *in rem* proceeding wishing to arrest a ship (and those legal practitioners representing such a plaintiff) should treat themselves as being under a duty of full and frank disclosure⁵⁶ and therefore a duty to disclose all matters that may be relevant to the arrest of the ship, even if adverse to the plaintiff’s interests.
73. At the very least, a plaintiff (and its legal advisors) should consider itself (themselves) as being under an obligation:
 - a) to give full and frank disclosure of those matters that are required to be addressed in the affidavit in support of the application for the issue of the arrest warrant;
 - b) to give full disclosure of any matters affecting the safety of the ship, the Marshal and those on board the ship, as required by r.39A; and
 - c) to give full disclosure of any of the matters listed within r.40(3)(a) to (c) if known to the plaintiff, and which if known to the Registrar would prevent the Registrar from issuing the warrant for arrest.
74. Indeed, if there are matters within that last category known to the plaintiff or its legal representatives – or even other matters which might be thought to be potentially adverse to the application for arrest if disclosed or which should otherwise be disclosed to the Court – then it may be more appropriate for the application for the arrest warrant to be made to a judge of the Court (rather than in the Registry as the Rules otherwise contemplate) where those matters can not only be disclosed to the Court but also reasons or submissions may be given as to why the arrest should nevertheless still proceed.⁵⁷
75. Finally in this regard, whatever the position may be so far as initial disclosure is concerned, should it subsequently become apparent that evidence that had been

⁵⁶ in much the same way as an applicant for an interlocutory injunction or freezing order

⁵⁷ as I have already noted was initially done in *Sea Containers Ltd v the owners of the vessel ‘Seacat 031’* (unrep’d 7 June 1993 (BC9305244))

placed before the Court on an arrest or in support of an application for an arrest warrant was incorrect, then it is incumbent on the solicitor for the plaintiff to correct that forthwith (*The Zoya K* [1997] FCA 379 at 36).

Obtaining jurisdiction over a foreign defendant

76. A second possible advantage of the use of *in rem* proceedings⁵⁸ is as a device to obtain personal jurisdiction over the owner of the ship the subject of the *in rem* proceedings for the purposes of pursuing a claim against that person.
77. Subject only to exceptions in the Act regarding inland waters⁵⁹ and the innocent passage of foreign ships passing through the territorial sea,⁶⁰ a writ *in rem* issued out of the Federal Court may be served on the ship the subject of that writ anywhere within Australia including within the external territories and the Australian territorial sea.⁶¹ Subject to the same possible exceptions, a writ *in rem* issued out of the Supreme Court of a State or Territory may also be served at any place within Australia, including within the limits of the territorial sea, if at any time the writ was effective for service the ship was within the locality within which that court may exercise jurisdiction.⁶² Otherwise, such a writ issued out of the Supreme Court of a State or Territory may only be served within that State or Territory which includes the limits of the territorial sea adjacent to that State or Territory.⁶³ In these ways, the mere presence of the ship within Australia or Australian waters is sufficient to ground the Court's jurisdiction to entertain the claim that is the subject of that proceeding.
78. This is so :
- a) in respect of all ships, including all foreign ships irrespective of the place of residence or domicile of the owners (s. 5(1)(c) of the Act);⁶⁴
 - b) irrespective of where the cause of action the subject of the proceeding arose and even where the claim or cause of action arose overseas and has no connection with Australia (s. 5(1)(b) of the Act);⁶⁵ and
 - c) where all the parties to the proceeding are domiciled or resident overseas and have no connection with Australia, apart from the proceeding.
79. The jurisdiction conferred on the Australian courts by the *Admiralty Act*, including the jurisdiction to entertain proceedings *in rem*, is a truly international one.

⁵⁸ and one that also flows from the procedural theory of actions *in rem* referred to in para. 12 above

⁵⁹ section 5(3) of the Act

⁶⁰ section 22(4) of the Act

⁶¹ section 22(1) of the Act

⁶² section 22(2)(a) of the Act

⁶³ section 22(2)(b) of the Act

⁶⁴ subject again to the exception for inland water way vessels and causes of action arising on inland waters – s. 5(3)

⁶⁵ again subject to the exception for causes of action arising in respect of inland water way vessels or in respect of the use or intended use of a ship on inland waters – s.5(3)

80. Moreover, the arrest of the ship in the proceeding, its threatened detention pending the determination of the plaintiff's claim and the possible sale of the ship in the event that the claim is successful, may prompt the owner of the ship or the person who is alleged to be liable for the plaintiff's claim to come to this jurisdiction in order to defend the claim and reclaim the ship.
81. Where that occurs and where the person who appears in the *in rem* proceeding to defend the claim is the person who is liable for that claim, then the proceeding takes on a hybrid status, both retaining its original status as an action *in rem* but also continuing as if it were an *in personam* action against the person who has appeared.⁶⁶ In those circumstances, the person who has appeared will be personally liable for any judgment that the plaintiff may obtain in the proceeding for the full amount of that judgment and even if the amount of the judgment exceeds the value of the ship (section 31 of the Act).
82. In this way, through the commencement of an *in rem* proceeding against a ship in Australia and the service of the ship here, the person who would be liable for the plaintiff's claim may in effect be brought to this jurisdiction to defend that claim. Even if the claim has no connection with Australia, a plaintiff may find the prosecution of its claim here preferable to having to pursue that claim and the person liable for it in some other foreign jurisdiction in which that person is otherwise resident or to which it is otherwise amenable. This is quite apart from the benefits to the plaintiff if security is provided for the release of the ship from arrest in that proceeding.
83. This is of course subject to the possibility of an application by the defendant or person liable for the claim for a stay of the Australian proceeding on the grounds of forum non conveniens (*Seereederei Baco Lines GmbH v "Al Aliyu"* [2000] FCA 656) or in reliance upon an arbitration clause (*Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc.* (1998) 90 FCR 1; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45) or foreign jurisdiction clause (*Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc.* (1998) 90 FCR 1).
84. But even if such an application were to be made and the Australian court were to conclude that it is appropriate for the proceedings before it to be stayed on either basis, it is nevertheless also open to the Court to do so on terms that the ship or other property the subject of the *in rem* proceeding that is being stayed be retained by the Court as security for the satisfaction of any award or judgment that may be made in the arbitration or proceedings in the court of a foreign country or that equivalent security be provided for the satisfaction of any award or judgment that might be made in the arbitration or court of the foreign country. This is pursuant to section 29 of the Act.

⁶⁶ *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [109]; *Caltex Oil (Australia) Pty Ltd v the dredge "Willemstad"* (1976) 136 CLR 529. This topic is discussed in more detail later in this paper.

85. In this way, even if the underlying substantive claim is not eventually heard and determined in Australia, the initiation of the *in rem* proceeding here may nevertheless allow the plaintiff to obtain security for the litigation of its claim elsewhere, including by way of arbitration or an *in personam* action in another jurisdiction, which security the plaintiff would not otherwise be entitled to in respect of the pursuit of its claim there.
86. Associated with this aspect of admiralty jurisdiction is the possible scope for a plaintiff to commence an action *in rem* in Australia against a ship and to arrest that ship in that proceeding solely for the purposes of obtaining security for a claim that is either currently being pursued or intended to be pursued as an arbitration (whether locally or overseas) or in foreign *in personam* proceedings elsewhere (*Allonah Pty Ltd v the ship "Amanda N"* (1989) 21 FCR 60).

The benefits of a judicial sale

87. Significantly, when a ship under arrest is sold by an admiralty Court, it is sold free of all encumbrances. The effect of a judicial sale is to extinguish all maritime liens and statutory rights of action *in rem* over the vessel at the time of its sale.⁶⁷ This includes not only the claim of the plaintiff or other claimant who has obtained the order for sale, but also all other maritime claimants who may have a claim against that ship. Following a judicial sale of a ship under arrest, all maritime liens and claims against that ship are in effect transferred and against the fund in Court represented by the proceeds of sale (*The Acrux* [1962] 1 Lloyd's Rep. 405 at 409).
88. Accordingly, upon the judicial sale of a ship under arrest, the purchaser obtain a clear title to the ship good against the whole world and free of all claims, liens, encumbrances (*The Tremont* (1841) 1 Wm. Rob 163 166 ER 534; *The Acrux* [1962] 1 Lloyd's Rep. 405 at 409; *The Cerro Colorado* [1993] 1 Lloyd's Rep. 58 at 60).
89. This is to be contrasted with the sale of a ship by a sheriff in enforcement of a judgment *in personam* under (for example) a writ of execution or writ of *fi fa* (*James W Elwell* [1921] P 351 at 355) which does not provide the purchaser of the ship with any better title than that held by the debtor. Accordingly, the sheriff and any purchaser from him will thereby take the vessel subject to any existing liens.
90. The difference between these two positions is not without significance. Where a ship is sold by judicial sale and the purchaser acquires a clear title, it can be expected that the ship is likely to achieve a higher price⁶⁸ than if the sale was by the sheriff and the ship remained subject to any existing maritime liens (whether or not proceedings had yet been commenced in respect of those liens) or any

⁶⁷ it is for this reason that before the proceeds of sale are distributed, the Court invites any maritime claimant who might otherwise have a claim against the ship to bring an action in respect of that claim against the proceeds of sale, otherwise it will be unable to enforce its claim in admiralty and will thereby miss out on the benefits of the availability of an action *in rem* in respect of that claim

⁶⁸ or achieve the best possible price (*The "Constellation"* [1965] 2 Lloyd's Rep. 538 at 542)

statutory actions in rem in respect of which proceedings had been commenced prior to the sale of the ship (even if those proceedings had not yet been served).

91. This is of benefit to the plaintiff, insofar as there is a greater amount available to satisfy its judgment. It is also beneficial generally in that it promotes the use and utility of judicial sale as a remedy to recover maritime claims.
92. However, there is admittedly a qualification to the foregoing. Despite being a well established principle, it depends for its recognition upon international comity, in particular the mutual recognition of the order for sale between States (*The Acrux* [1962] 1 Lloyd's Rep. 405) and the courts of different States. This is especially where the ship that is being sold in one jurisdiction is registered in another. In some circumstances it may not be possible in fact to relieve a ship of all encumbrances and liens if other countries with which the vessel is connected refuse to recognise the judicial sale of the ship as having that effect.
93. For instance, in the *Emre II* [1989] 2 Lloyd's Rep 182 the defendant submitted (at p. 185) that the Turkish authorities (with whom the arrested vessel was registered) would not delete from the Register a ship sold by the English court. In this regard Sheen J. noted that the effect of such lack of comity is to reduce the value of the ship, that when the ship is advertised for sale it will have to be made clear to any potential purchaser that there may be some difficulty in having the vessel deleted from the Turkish Register. His Honour further said that if it becomes necessary to sell the ship the defendant's solicitor should obtain clear instructions from the relevant authorities in Turkey as to whether they will recognise and act upon a sale by order of the English Court. These instructions should be communicated to the Marshal so that he may advertise the ship appropriately.
94. In *Cerro Colorado* [1993] 1 Lloyd's Rep. 58 at 61, after stating the position so far as English court were concerned, Sheen J. said :

I can only express the hope that the Spanish Court will, as a matter of comity, recognise the decrees made by this Court, which endeavour to give effect to the International Arrest Convention. From time to time every shipowner wants to borrow money from his bank and give as security a mortgage over his ship. The value of the security would be drastically reduced if when it came to be sold by the court there was any doubt as to whether a purchaser from the court would get a title free of encumbrances and debts.
95. In that case an advertisement that had been published warning potential purchasers from the Marshal that they may be purchasing a vessel still subject to rights and encumbrances was considered by Sheen J. to be contempt of the Court as it tended to interfere with the administration of justice.

The nature of *in rem* proceedings

96. Before leaving this part of the paper and turning to consider the particular types of claims that might be pursued by way of an action *in rem*, there are three further observations I would make on the nature of the *in rem* proceeding.

97. The first is that, at least in Australia,⁶⁹ despite the prevalence and influence of the procedural theory and the recognition that to a significant degree that theory underpins the *Admiralty Act*, the action *in rem* is not to be regarded as merely the equivalent of an action *in personam* between the plaintiff and (in the language of the Act) the ‘*relevant person*’ or person alleged to be liable for the plaintiff’s claim and against whom any proceeding would be commenced if that claim were to be pursued as an action *in personam* rather than an action *in rem*.⁷⁰
98. As Justice Allsop explained in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [99] – [130], when the action *in rem* is first commenced it is an action against the ship; it is not simply an action against the relevant person at that time. In some situations, this distinction may be important.⁷¹
99. If, after service on the ship, there is an appearance by the relevant person in the *in rem* proceeding, then that proceeding will thereafter continue both as an action *in rem* and also as if it were an action *in personam* against the person appearing.⁷² Moreover, in those circumstances, the relevant person is by reason of their appearance thereby not only potentially liable *in personam* for any judgment obtained by the plaintiff in the proceeding, but also potentially liable for the full amount of the plaintiff’s claim. In other words, the liability of a relevant person who appears to defend an *in rem* proceeding is not limited by or to the value of the ship arrested in that proceeding.⁷³ Accordingly, if the relevant person appears in the *in rem* proceeding and the plaintiff recovers a judgment that exceeds the value of the *res*, then the relevant person is liable for the full amount of the judgment obtained including thereby the amount by which that judgment exceeds the value of the *res*, which amount the plaintiff may recover by enforcing the judgment that it obtained in that proceeding against any other assets that the relevant person may have either in that jurisdiction or any other jurisdiction in which that judgment is able to be enforced.
100. To this extent, the commencement of the action *in rem* may also result in an *in personam* judgment that is able to be enforced generally against the assets of the

⁶⁹ cf the position under English law as set out in *Republic of India v India Steamship Co Ltd (No 2) (The ‘Indian Grace’)* [1998] AC 878. In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 Allsop J (with whom Finkelstein J agreed) declined to follow the *Indian Grace* and the approach taken by the House of Lords in that case

⁷⁰ see definition of ‘relevant person’ in section 3(1) of the *Admiralty Act* 1988 (Cth)

⁷¹ as it was in *Comandate*, where the nature of the *in rem* action was relevant to whether the plaintiff’s commencement of *in rem* proceedings in respect of its claim in that case amounted to conduct inconsistent with insisting on its rights under an arbitration agreement and thereby amounted to a waiver or election not to proceed with the determination of the dispute by arbitration. The Full Court held that the commencement of the *in rem* action as not the same as an action *in personam* by Comandate against Pan and therefore did not amount to an election between inconsistent rights or an abandonment of the arbitration agreement between them.

⁷² or as Gibbs J said in *Caltex Oil v The Dredge ‘Willemstad’* (1976) 136 CLR 529 the action proceeds as if it were an action *in personam* (without ceasing to be an action *in rem*) against that person

⁷³ in Australia, this is reflected in section 31(1) of the Act

relevant person (person appearing), should that be necessary. I have already commented on the potential relevance of this earlier in this paper under the heading “*Obtaining jurisdiction over a foreign defendant*”.

101. If, however, the person who appears in the *in rem* proceeding to defend the plaintiff’s claim is not the relevant person who it is alleged by the plaintiff is liable for that claim, but some other person interested in the ship,⁷⁴ then that person does not by appearing become exposed to any personal liability to the plaintiff in respect of its claim⁷⁵ (that is other than for the costs of the proceedings – see section 31(2) of the Act). In this situation, there is no call to characterise the proceeding as other than an action *in rem*. Moreover, if the relevant person does not appear to defend the *in rem* proceeding, then the successful plaintiff is limited in the enforcement of any judgment that it may obtain to the ship or other property under arrest in the proceeding, which is available to the plaintiff as one of all maritime claimants who may come in to assert their rights over the *res* or the funds from its sale.⁷⁶ If in this situation the plaintiff obtains a judgment in excess of the value of the *res*, then it will be unable to recover the shortfall either in the *in rem* proceeding or by the enforcement of any judgment obtained in that proceeding against any other assets of either the person who appeared in the proceeding or the relevant person liable for the claim. If any such shortfall is to be recovered, then it will need to be through the commencement of either:
- a) a fresh *in rem* action in a jurisdiction if any in which the person liable for the plaintiff’s claim may have other maritime assets susceptible to admiralty proceedings (and if in Australia, provided that such a second *in rem* action is available pursuant to section 20(4) of the Act); or
 - b) a fresh *in personam* proceeding in a jurisdiction in which the person liable for the claim is otherwise amenable and which might lead to an *in personam* judgment that may be able to be enforced against other assets belonging to that person.
102. Similarly, if there is no appearance in the *in rem* proceeding by any one at all on behalf of the ship or to defend the plaintiff’s claim in that proceeding, then the proceeding remains an action *in rem* only and the plaintiff is again limited to enforcing any judgment that it might obtain in that proceeding against the *res*. Again, if the value of the *res* is less than the full amount of the plaintiff’s claim or any judgment that the plaintiff may eventually obtain in respect of its claim, then the plaintiff will suffer a shortfall, which if it is to be recovered, will need to be through the commencement of a further fresh proceeding elsewhere (if available).
103. Whilst the position of the plaintiff in this situation is not as favourable as where

⁷⁴ such as a mortgagee, charterer or operator (as occurred in both *the ‘Iron Shortland’* (1995) 59 FCR 535 and *the ‘Zoya K’* [1997] FCA 379) or a subsequent purchaser

⁷⁵ unless they put up some security for the plaintiff’s claim in order to obtain the release of the ship from arrest and are personally liable under that security

⁷⁶ see *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [109]

the relevant person appears, that plaintiff will not be any worse off (in particular any worse than it would have been if there had been no action *in rem* available to it) and insofar as it has been able to obtain some recovery in the *in rem* proceeding through the provision of security or the sale of the *res* (albeit limited to the value of the ship) the plaintiff will be to that extent at least better off.

104. The second point to note is that (as was again explained by Allsop J in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*) the action *in rem* is more than merely a procedural device, but also carries with it certain substantive rights. This is especially so of maritime liens, which attach to a ship at the time that the cause of action giving rise to the lien occurs and which are not defeated by a subsequent change in ownership of the ship subject to that lien.⁷⁷ Even where the claim is one that may only be pursued as a statutory action *in rem*, once a proceeding on that claim has been commenced, any subsequent change in the ownership of the ship the subject of that proceeding and claim will be ineffective to defeat either the proceeding or the claim against that ship. Moreover this is so, even if the ship has been sold before it has been served with the originating process by which that proceeding was commenced.⁷⁸
105. In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* Allsop J relied in part upon the existence of these substantive rights associated with the action *in rem* in support of both his rejection of the House of Lord's characterization of the action *in rem* as being no more than an action *in personam* between the plaintiff and relevant person and his conclusions as to the operation and effect of an *in rem* proceeding discussed earlier in this paper.
106. But perhaps more relevantly for present purposes, these substantive rights associated with the action *in rem* also reflect and give rise to the element of security that is afforded to a plaintiff to the action *in rem* in respect of the pursuit of its claim against the *res* in that proceeding and may allow the pursuit of the plaintiff's claim against the *res* even where the relevant person has sought to dispose of or alienate that asset in an attempt to avoid the enforcement of any claims against it (but has done so too late).
107. In particular, the action *in rem* can in effect create substantive rights over a ship in respect of an statutory right *in rem* and, in the case of maritime liens, give effect to the substantive rights that accrue with the lien. Moreover, these rights are capable of altering the relationship which exists between the parties to the underlying claim, for instance by turning a mere claim *in personam* upon the commencement of *in rem* proceedings into a claim with some security. These rights are also capable of affecting others with similar rights or with personal claims (or mere *in personam* claims) against the owner of the ship, in particular by the acquisition of a priority or higher priority over such persons.

⁷⁷ and even if the change in ownership occurs before proceedings on the lien have been commenced
⁷⁸ see *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [108]

108. For example, the personal liability of a shipowner⁷⁹ is a prerequisite to the issue of *in rem* proceedings on claim under sections 17 and 19 of the Act. By providing that those causes of action which are general maritime claims can be brought as an action *in rem* pursuant to those sections, the legislature has endowed a maritime claimant with such a claim in effect with a proprietary right arising on the issue of the *in rem* process and attaching to that claim. This right arises on the commencement of the proceedings (cf the rights associated with a maritime lien). But once created, it is a security interest over the ship the subject of the *in rem* proceeding that cannot be defeated by a subsequent change in ownership, which can be enforced by the arrest procedure and which grants priority to the maritime claimant over those with the priority of a mere personal claim. Where a number of ships are named in the *in rem* writ, then the claim asserted in that writ is thereby potentially secured from the commencement of those proceedings over each of the ships so named (although in the end the right and security may only be exercised against one of those ships). Further, the right acquired is one for which there is no formality (other than in relation to the commencement of the *in rem* proceeding, which as has already been noted, is relatively straight forward) and no registration required. The debt or claim that is the subject of the right travels with the ship (as if it were attached to the hull) and can be enforced in admiralty wherever the ship is found (subject of course to the local requirements of the jurisdiction in which the ship is located and the extent to which claims in admiralty may be pursued there). As I have already noted, when the right is exercised, it may also confer a priority on the claimant over competing claims, in particular non-maritime ones.
109. Similar rights and priority also exist with maritime liens, although of course in the case of the maritime lien, the right arises and attaches to the ship immediately upon the events giving rise to the lien rather than upon the commencement of the *in rem* proceeding. In the case of the maritime lien, the action *in rem* is the means of enforcing the rights produced by the lien, rather than the means by which those rights arise.
110. The third observation is to recall that the action *in rem* is separate and distinct from an *in personam* proceeding in respect of the same claim and does not merge in (and is not overcome by) any *in personam* judgment that the plaintiff may have obtained in respect of that claim.⁸⁰ This would also appear to be the position in New Zealand⁸¹ although it is no longer the situation in England.⁸² In the “*Irina Zharkikh*” in New Zealand, Justice Young declined an invitation to find that the “*Rena K*” had been overruled by decision of the House of Lords in the “*Indian Grace*” (no. 2) and was therefore no longer good law and should no longer be followed in New Zealand. A similar outcome can be inferred as applying in Australia from the judgment of Allsop J in *Comandate Marine Corp v Pan*

⁷⁹ or demise charterer in the context of proceedings commenced pursuant to section 18 of the Act
⁸⁰ *Ocean Industries Pty Ltd (receivers and managers appointed) v owners of the “Steven C”* (1991) 104 ALR 353, applying *The “Rena K”* [1979] QB 377 at 405; see also *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [110]

⁸¹ the “*Irina Zharkikh*” [2001] 2 Lloyd’s Rep. 319

⁸² see *The “Bazias 3”* [1993] 1 Lloyd’s Rep, 101 and the “*Indian Grace*” (no. 2) [1998] AC 878

Australia Shipping Pty Ltd (with whom Finkelstein J agreed) and his Honour's rejection of the "*Indian Grace*" (no. 2) and continued citation with approval of both the "*Rena K*" and the "*Steven C*".

111. Accordingly, a plaintiff may still pursue a maritime claim as an action *in rem* even after it has obtained a judgment *in personam* or an award in an arbitration in respect of that same claim, to the extent that the claim remains unsatisfied and subject of course to such factors as the claim not being time barred and the plaintiff being able to satisfy the requirements of the Act for the pursuit of an action *in rem*. This continued entitlement may be of relevance, bearing in mind that under the Act the right to pursue a claim as an action *in rem* does not extend to a claim for the satisfaction or enforcement of an *in personam* judgment generally (even where the underlying claim is itself a maritime claim for the purposes of the Act) and is instead limited to:
- a) a claim for the enforcement or satisfaction of a judgment obtained in a proceeding *in rem* or a proceeding in the nature of an action *in rem* (which under Australian law is a proprietary maritime claim⁸³ and can therefore only be enforced against the ship that is the subject of that judgment);⁸⁴ and
 - b) a claim for the enforcement of, or a claim arising out of, a arbitral award made in respect of a proprietary maritime claim or a claim of the type listed in section 4(3) of the Act.⁸⁵
112. Provided that the underlying claim is one that is able to be pursued as an action *in rem* in the first place, a plaintiff will not be prevented from pursuing that claim as an action *in rem* merely because it has earlier obtained a judgment *in personam* in respect of that same claim.⁸⁶ Having obtained that judgment, if it remains unsatisfied, the plaintiff is not thereby limited to its remedies in the enforcement of that *in personam* judgment even against any ship belonging to the defendant (such as by a writ of execution).⁸⁷ Nor is the plaintiff deprived of the status of a secured creditor (in the admiralty sense) in respect of that claim and any ship against which the claim might be pursued *in rem*.
113. In *Patrick Stevedores No. 2 Pty Ltd v the proceeds of sale of the vessel mv "Skulptor Konenkov"* (1997) 75 FCR 47 and *Morelines Maritime Agency Ltd v the proceeds of sale of the ship mv "Skulptor Vuchetich"* [1997] FCA 342 (BC 9702138), Sheppard J. permitted a number of claimants who had brought *in rem* claims against the proceeds of sale of the above two vessels to participate in the

⁸³ section 4(2)(c) of the Act

⁸⁴ and not a surrogate ship. It would also not be able to be enforced against the original ship where it has been sold pursuant to the earlier judgment

⁸⁵ section 4(3)(u) of the Act

⁸⁶ and provided of course that that earlier judgment has not been fully satisfied

⁸⁷ although a ship may be sold pursuant to a writ of execution (*the James W Ellwell* 1921 P 351), it does not have the same effect as a judicial sale (in particular it does not confer a clean title free of all liens or encumbrances) and for that reason is generally considered a more inferior remedy

distribution of those proceeds and recover their claims or so much as was still owing in respect of their claims from the proceeds of sale notwithstanding that those claimants had commenced proceedings elsewhere in respect of those claims, obtained judgments in those other proceedings and had received some payments in respect of those claims from their earlier proceedings. In one instance, a claimant who had settled the claim when made elsewhere was permitted to recover in an action *in rem* against the proceeds of sale the amount owing to it under that settlement.

THE NATURE OF THE CLAIMS THAT MAY BE PURSUED *IN REM*

114. Having identified the possible advantages to a plaintiff of the action *in rem* and the associated right to arrest the ship the subject of that action, it is however also necessary to recognise that there are certain limitations on the ability both to pursue a claim as an action *in rem* and to arrest a ship in the pursuit of that claim.
115. The Act does not itself provide for the arrest of a ship or other property. That entitlement is to be found in Part VI of the Rules, in particular rules 39, 40 and 43. Relevantly, under the Rules, the entitlement to arrest a ship or other property in an action *in rem* rests upon the entitlement of the plaintiff to commence an *in rem* proceeding against that ship or other property under the Act.⁸⁸
116. In other words, a plaintiff may only arrest a ship in relation to a claim if it is able to commence an *in rem* proceeding against that ship in respect of that claim under the Act. If the intended claim is of a type that under the provisions of the Act is not able to be pursued as an action *in rem* then it will not be possible to arrest any ship in relation to that claim. This might occur, for example, because the claim that it is wished to pursue is not a maritime lien and does not fall within the list of maritime claims found in section 4 of the Act. Equally, if the claim can be pursued *in rem* but not against the particular ship in question, then it is also not possible to arrest that ship in the pursuit of that claim. This might occur, for instance where the person liable for the claim is no longer the owner of that ship at the time the *in rem* proceedings are commenced, as section 17(b) of the Act requires.⁸⁹
117. In order to pursue a claim as an action *in rem* and to thereby arrest a ship in respect of that claim, it is necessary to identify:
 - a) first, the particular ship which is to be the subject of the proposed *in rem* proceeding;
 - b) secondly, the nature of the claim that is sought to be pursued against that ship. This is for the purposes of determining that the proposed claim is one that is capable of being pursued as an action *in rem* under the Act;

⁸⁸ rule 39 and *Tisand Pty Ltd v Owners of the Ship MV 'Cape Moreton' (Ex 'Freya')* (2004) 210 ALR 601; 143 FCR 43

⁸⁹ and as occurred in *Tisand Pty Ltd v Owners of the Ship MV 'Cape Moreton' (Ex 'Freya')* (2004) 210 ALR 601; 143 FCR 43

- c) thirdly, the relationship between that claim and the ship the subject of the proceeding or in the case of surrogate ship arrest the relationship between the claim and the ship in respect of which the claim is said to arise;
- d) fourthly, in the context of *in rem* proceedings pursuant to sections 17, 18 or 19 of the Act, the identity of the “*relevant person*”, that is the person who it is alleged would be liable for the plaintiff’s claim had it been commenced as an action *in personam*;⁹⁰
- e) fifthly, the relationship of the relevant person to the ship in respect of which the claim is made at the time the cause of action arose (and in particular whether that person was the owner or charterer or person in possession or control of the ship at that time); and
- f) finally, the relationship of the relevant person to the ship at the time the proceedings are commenced, and in particular whether at that time the relevant person was the owner of that ship (in the context of *in rem* proceedings brought pursuant to sections 17 or 19 of the Act) or the demise charterer of that ship (in the context of proceedings brought pursuant to section 18).

118. I do not propose to address each of these requirements in this paper. Rather, I have confined my comments to the second of the above requirements, namely the nature of the claims that are capable of being pursued as an action *in rem* under the Act and in respect of which a ship may be arrested.
119. Part III of the Act is entitled “*Rights to proceed in Admiralty*”. As I have already mentioned, section 14 of the Act provides that a proceeding shall not be commenced as an action *in rem* except as provided for by the Act. Sections 15 to 19 of the Act deal with the circumstances in which proceedings may be commenced as an action *in rem* against a ship or other property.
120. More particularly, sections 15 to 19 deal with different types of claims, namely maritime liens (s. 15), proprietary maritime claims (ss. 16 and 18) and general maritime claims (ss. 17, 18 and 19). It is only in respect of these three types of claims that proceedings *in rem* may be commenced under the Act and for which a ship (or other property) may be arrested under the Rules. Unless the claim to be pursued is a maritime lien or a proprietary or general maritime claim as defined by the Act, then it is not possible to bring an *in rem* proceeding in respect of that claim or to arrest a ship in the pursuit of that claim. Moreover, the nature of the claim to be pursued may also determine under which section the proceeding *in rem* is to be commenced, which in turn may determine the ship (or other property) that might be the subject of that proceeding and the requirements that must be met in order for that *in rem* proceeding to be commenced against that ship and in respect of that claim.

⁹⁰ see definition of “*relevant person*” in section 3(1) of the Act

Maritime claims

121. Maritime claims are defined in section 4 of the Act. They are divided into “*proprietary maritime claims*” and “*general maritime claims*”. The particular types of claims that fall within the former description are listed in section 4(2) of the Act. The specific types of claims that are general maritime claims are listed in section 4(3).
122. The lists of claims in sections 4(2) and 4(3) do not exhaust the scope of those claims that might be included as maritime claims in the Act in the exercise of the powers conferred on the Commonwealth Parliament by section 76(iii) of the Constitution. These lists of claims may be added to from time to time.⁹¹
123. But the lists of claims found in sections 4(2) and 4(3) are both closed lists and at any one point of time represent the totality of those claims that are proprietary maritime claims and general maritime claims respectively and which might be pursued in an *in rem* proceeding in Australia at that time.
124. Accordingly, if it is wished to pursue a claim as an action *in rem* or to arrest a ship in respect of such a claim, the claim must fall within one or more of the categories of claims listed in section 4(2) or 4(3) of the Act (unless it is a maritime lien, as to which see below). If it does not, then it cannot be the subject of an action *in rem* and a ship or other property cannot be arrested in the enforcement of that claim
125. It is beyond the scope of this paper to consider all the potential claims listed in section 4(2) and section 4(3) of the Act let alone to comment upon them in any detail. For present purposes I propose to make only two general observations.
126. First, the distinction between a proprietary maritime claim and general maritime claim can be important in a number of respects. For instance, the right to proceed *in rem* on a proprietary maritime claim is found in section 16 of the Act. It is a right that may only be exercised under that section against the ship (or other property) that is the subject of that claim.⁹² It is not possible to pursue a proprietary maritime claim against a surrogate ship under section 19 of the Act (*Vilona v the ship “Anilham”* [2001] FCA 411). The right to pursue a surrogate ship under section 19 – that is the right to pursue not the ship in respect of which the claim arises but another ship belonging to the “*relevant person*” who is alleged to be liable for that claim – is confined to general maritime claims.
127. The second observation is as to the scope of the claims that fall within those listed in section 4. The categories of claims listed in each of sections 4(2) and 4(3) are not mutually exclusive. The categories or types of claims that may amount to a

⁹¹ such as for example, the recent addition to the list of general maritime claims in s. 4(3) of the Act of paragraph (ba) and claims under the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) which gives effect to the *Bunker Oil Convention*

⁹² although it is also possible to pursue a proprietary maritime claim against a demise chartered ship under section 18 of the Act if the requirements of paragraphs (a) and (b) of that section are otherwise satisfied

general maritime claim within section 4(3) are extensive. In many instances, these claims are also described as ones “*relating to*” or “*in respect of*” the subject matter specified, which words have been construed broadly and as being of wide import.⁹³ This is quite apart from the broad and liberal approach that is taken to the interpretation of the Act generally, in particular to those provisions of the Act conferring jurisdiction.⁹⁴

128. Nevertheless, the claims listed in sections 4(2) and 4(3) are all claims that are expressed to (or impliedly) concern or relate to “*a ship*”. They therefore contemplate some connection between the claim and a particular ship or ships. That being so, it is not sufficient for the pursuit of an action *in rem* that the intended claim be one against a shipowner either generally or in respect of its ships or operations generally (*Port of Geelong Authority v the ship “Bass Reefer”* (1992) 37 FCR 374). Nor is it sufficient that the person who is alleged to be liable for that claim happens to own a ship. It is therefore not possible to pursue as an action *in rem* against a ship a claim that is not related to (or concerns) that ship, or in the case of surrogate ship arrest, a general maritime claim that is not related to (or concerns) some other ship that was at the time the cause of action arose owned or chartered by or in the possession or control of the owner of the surrogate ship. This distinction between a claim against a ship and a claim against a shipowner generally was addressed by both Foster J in the *Port of Geelong Authority v the ship “Bass Reefer”* (1992) 37 FCR 374 and the Full Court of the Federal Court in *Opal Maritime Agencies Pty Ltd v the proceeds of sale of the “Skulptor Konenkov”* (2000) 98 FCR 519.
129. Accordingly, in order to pursue a claim as an action *in rem* against a ship or other property, there must be some connection between that claim and either the ship that is intended to be the subject of the *in rem* proceeding (in the case of proceedings commenced pursuant to sections 15, 16, 17 and 18) or of which the ship the subject of the *in rem* proceeding is intended to be a surrogate (in the case of proceedings commenced under section 19 of the Act).
130. The action *in rem* may therefore be of limited (if any) utility to the creditor of a person who also happens to own a ship or who has advanced monies or credit even to a shipowner but in respect of the business and affairs of that shipowner generally rather than in relation to any specific ship or ships.⁹⁵

Maritime liens

131. Section 15 of the Act provides that a proceeding on a maritime lien or other charge in respect of a ship or other property may be commenced as an action *in rem* against that ship or other property.

⁹³ *Port of Geelong Authority v the ship “Bass Reefer”* (1992) 37 FCR 374; *Caravelle Investments Pty Ltd v Martaban Ltd* (1999) 95 FCR 85; *Heilbrunn v Lightwood plc* (2007) 64 FCR 1

⁹⁴ *Elbe Shipping SA v the ship “Global Peace”* (2006) 154 FCR 439 at [74]; *Tisand Pty Ltd v the owners of the ship “Cape Moreton” (ex “Freya”)* (2005) 143 FCR 43 at [59]-[65]

⁹⁵ as to the possible use of *in rem* proceedings by the lawyer of a shipowner to recover its fees, see *Clifford Chance v the owners of the vessel “Atlantic Trader”* [1991] 2 Lloyd’s Rep. 324

132. A maritime lien is a species of charge that attaches to property – most commonly a ship – to secure certain types of claims. It was described by Allsop J in *Comandate Marine Corp. v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [112] as

... a creature of maritime law and is generally described by reference to cases such as “the ‘Bold Buccleugh (1851) 7 Moo PC 267 at 284-85, 13 ER 884 at 890-91 as a non-possessory claim or privilege upon a ship carried into effect by legal process by in rem action. It is inchoate from the time of the events giving rise to it, attaching to the ship, travelling with the ship into anyone’s possession (even a bona fide purchaser for value without notice, except a purchaser at an Admiralty Court sale) and perfected by legal process relating back to first attachment.

133. In Australia, the claims that are maritime liens include those listed in s. 15(2) of the Act, namely claims for salvage, for damage done by a ship (*the damage lien*), for the wages of the master or a member of the crew of a ship and for master’s disbursements.

134. But in contrast to sections 4(2) and 4(3) of the Act, the list of maritime liens in section 15(2) is not a closed list. Section 15(2) expressly states that the reference to a maritime lien “includes” reference to the four liens listed in paragraphs (a) to (d) of that sub-section. It is possible that the categories of maritime liens which could be used to found an action *in rem* against a ship or other property (and thereby allow the arrest of that ship or other property in Australia) may be extended beyond those listed in section 15(2) of the Act. As Allsop J noted in *Elbe Shipping SA v the ship ‘Global Peace’* (2006) 154 FCR 439 at [131]:

... the word “includes” in s 15(2) reflects the fact that the Act leaves open the possibility of other maritime liens being recognised beyond those listed. This might occur by reference to the development of Australian maritime law in this respect, or by the recognition of foreign maritime liens by reference to principles of private international law different to those expressed by the majority of the Privy Council in *The ‘Halcyon Isle’*

135. In *Global Peace*, the plaintiff sought to advance a claim *in rem* in part on the basis of a maritime lien which was said both to arise from the alleged commission of a tort on the high seas and to be recognised under Australian law and which was different from the damages lien referred to in section 15(2)(b) of the Act. In disputing the existence of this lien, the defendant argued against the recognition of new maritime liens, including the lien propounded by the plaintiff. This was especially in light of section 6 of the Act, which provides:

6 Certain rights not created or affected

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.

136. As Allsop J observed, section 6 was consistent with the approach to the formulation of the whole Act on the basis of the perceived limitation of the

legislative power of the Commonwealth under section 76(iii) found in the judgment of the High Court in the *owners of the SS Kalibia v Wilson* (1910) 11 CLR 689 to the effect that the Commonwealth Parliament does not have implied power under section 76(iii) of the Constitution to legislate for Admiralty and maritime substantive law. In that regard Allsop J went on to comment in the following terms on both the scope of section 76(iii) and the duty of the Court when confronted with a claim asserting a maritime lien:

It is unnecessary and inappropriate to discuss whether The ‘Kalibia’ reflects the current Constitutional position given the emergence of Australia as a fully independent nation state ... It is sufficient to say that s 76(iii) provides for Parliament to confer or invest Admiralty and maritime jurisdiction. The absence (according to The ‘Kalibia’) of a coterminous legislative power to deal with substantive law matching the reach of judicial authority over admiralty and maritime controversies does not limit the full import and implication of the grant of judicial power. The conferral of jurisdiction is not a matter of mere procedure. It is the conferral of a species of government power to quell controversies. Subject to limited circumstances that may exist by way of an exception, courts have a duty to exercise the power if jurisdiction is invoked. Thus, judges have a responsibility to ascertain and declare the general maritime law of Australia, as part of the common law of Australia. If that includes ascertaining and declaring the law of maritime liens, that is part of the task.

When one has recourse to the ALRC Report, it appears clear that the intention was to leave the determination of the extent or scope of the maritime lien to the courts. The non-exhaustive list in s 15(2) was placed in the Act for educative or information purposes: see [122] of the ALRC Report. There was no intention, for instance, to eliminate bottomry or respondentia as bases for liens on the ship or cargo. The Report recognised that the Act was to be jurisdictional in scope, but made no attempt to define the nature and extent of the maritime lien.

137. In the end, his Honour found that in the circumstances before him it was not necessary to decide whether Australian law recognised a maritime lien arising from a tort on the high seas, independently of the damage lien. This was especially where the plaintiff’s claim in that proceeding fell within the existing lien described in section 15(2)(b) in any event.
138. Nevertheless his Honour’s comments in the passage quoted above reflect a broader and potentially more liberal view of the scope and operation of section 15 and what may amount to a maritime lien for the purposes of the commencement of *in rem* proceedings pursuant to that section, leaving open the possibility of the Court finding at some future time a potentially broader jurisdiction than might otherwise have been thought to be found within the words of the section. Arguably, these comments also leave open the potential for the categories of claims that would amount to maritime liens (including for the purposes of the commencement of *in rem* proceedings and thereby the arrest of a ship) to be possibly expanded by the Commonwealth Parliament by legislation.
139. A similar lien to that asserted in the *Global Peace* was also subsequently advanced before the Supreme Court of New South Wales in *Rail Equipment Leasing Pty Ltd v CV Scheep. Emmagracht* [2008] NSWSC 850, although in that case it was in

support of an entitlement claimed by the ship owner to arrest cargo⁹⁶ in respect of a claim for damage which the cargo was alleged to have done to the ship in the course of the ship's passage to Australia. In particular, it was argued by the shipowner in that case that the damage to its ship gave rise to a maritime lien over the cargo which caused that damage and for which the ship owner could arrest the cargo pursuant to section 15 of the Act. Such a lien clearly did not fall within any of the maritime liens listed in section 15(2) of the Act and would only permit an action *in rem* against the cargo if it otherwise amounted to a maritime lien on some other basis (such as arising from a tort on the high seas) as the shipowner claimed.

140. However, Rein J doubted that any maritime lien over cargo for a tort on the high seas was known or recognised by Australian law and was not satisfied that the Court had jurisdiction to deal with a claim upon the cargo based on s 15 of the Act. In doing so, his Honour only dealt with the particular lien that had been asserted by the shipowner in that case and whether or not it had been made out. He did not address (nor needed to address, in view of his findings as to there being no such lien as that asserted) the broader question as to the possible availability of maritime liens other than those listed in section 15(2) of the Act and if so whether *in rem* proceedings might be brought in respect of such additional liens, which Allsop J had adverted to in the passage from *Global Peace* quoted above. In particular, Rein J did not reject the maritime lien asserted in that case by the shipowner on the basis that it was not possible to have a maritime lien other than those listed in section 15(2) of the Act; it was simply that Australian law did not recognise the particular lien asserted by the shipowner in that case.
141. Apart from the possibility of new maritime liens or the rediscovery of old liens, the other way in which Allsop J contemplated (in the passage quoted from *Global Peace* above) the maritime liens within section 15 being possibly extended was via the recognition of foreign maritime liens as maritime liens for the purposes of that section and thereby the Act by reference to principles of international law different from those expressed by the majority of the Privy Council in the *Halcyon Isle*.
142. In the *Halcyon Isle* [1981] AC 221 the Privy Council ruled by a “bare majority”⁹⁷ of 3:2 that the recognition of a ship repairers’ right to enforce its claim by way of a maritime lien and also the priority to be afforded to that claim were to be adjudged according to the law of the forum in which the claim was being pursued, rather than the law governing the claim or underlying cause of action. In particular, the majority held that the characterisation of a claim was to be regarded as relating to the remedy rather than the underlying rights inherent in that claim. It was therefore procedural in nature and as such to be dealt with by the law of the forum (in that case, Singapore law, which was indistinguishable from English law). Unless the claim or facts giving rise to that claim created a maritime lien under the law of the forum, the majority held that the claim was not to be treated as a maritime lien.

⁹⁶ that is, “other property” within the meaning of section 15 of the Act

⁹⁷ ALRC report no. 33 “Civil Admiralty Jurisdiction” at para. [123]

Moreover this was so notwithstanding that the claim was recognised as a maritime lien under the law governing it (namely US law in that case).

143. However, in what has been described as a powerful dissent,⁹⁸ the minority of the Privy Council concluded that the balance of authority, comity of nations, private international law and natural justice all required that English law ought recognise the maritime lien created by the law of the United States as a maritime lien. The minority held that the nature of the maritime lien was a substantive right and therefore in determining the nature of the claim in the local jurisdiction, the Court ought to apply the *lex causae* or law governing the claim (namely US law) rather than the law of the forum.
144. The decision of the majority of the Privy Council has been followed elsewhere in the Commonwealth, although not universally. In particular, it has not been followed in Canada or South Africa.
145. The Australian Law Reform Commission considered this issue in its report ALRC 33 and concluded (at paragraph [123]) that although the dominant view expressed to the Commission favoured the Canadian and South African approach rather than that of the majority of the Privy Council, the matter was best left to be resolved through further attempts at international unification. In the absence of any formal international agreement, the Commission concluded that:

the question is best left to the courts to resolve, taking into account developments in other jurisdictions.

146. In Australia, the majority view in the *Halcyon Isle* was followed by Sheppard J in *Morelines Maritime Agency Ltd v the proceeds of sale of the 'Skulptor Vuchetich'* [1997] FCA 432 at [78] – [83]. In that case his Honour declined to treat a claim by Transamerica Leasing Inc (TLI) for monies owing under a container hire agreement as a maritime lien notwithstanding that it was said to give rise to a maritime lien under US law. This was because, applying the majority view, the question of whether the claim should be treated as a maritime lien was to be decided by determining how the facts giving rise to the claim were treated under Australian law and his Honour found that under Australian law a claim for monies payable under a container hire agreement did not give rise to a maritime lien (nor indeed did they even give rise to a general maritime claim). In those circumstances, his Honour concluded that TLI was not a maritime claimant and therefore not entitled to pursue its claim for the recovery of the monies owing by the shipowner under the container hire agreement as a maritime claim against the fund representing the proceeds of the sale of the ship the subject of those proceedings.

⁹⁸ “Foreign Maritime Liens : should they be recognised in Australian Court” by M Davies and K Lewins (2002) 76 ALJ 775

147. In an article published in December 2002,⁹⁹ Martin Davies and Kate Lewins suggested that the approach in the *Halcyon Isle* and its adoption in Australia should be reconsidered in light of the decisions of the High Court of Australia in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 and *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, in which the High Court recognised that torts committed out of the jurisdiction – including overseas – were to be governed by the *lex loci delicti* or law of the place of the wrong.¹⁰⁰ The adoption of such an approach to the law of tort, it was argued, is more consistent with the approach taken by the minority of the Privy Council in the *Halcyon Isle*, at least so far as the characterisation of the claim (and whether it is a maritime lien) is concerned. If the approach taken by the High Court in relation to the law of torts were also to be applied to the characterisation of maritime liens in Australia then conceivably the scope of the liens which might be the subject of *in rem* proceedings under section 15 of the Act may be increased, at least where the claim arises overseas and is treated as a maritime lien by the *lex causae*.
148. It is beyond the scope of this paper to canvass in detail whether the view of the majority of the Privy Council in the *Halcyon Isle* should or is likely to continue to be applied in Australia or whether Australian courts may (or should) now prefer the approach of the minority of the Privy Council, especially given the High Court’s treatment of foreign torts in *Zhang*.
149. But if the approach of the minority were to be accepted and followed in Australia so far as the characterisation of a claim is concerned, then it would potentially expand the scope of claims that might be pursued as maritime liens in Australia and in respect of which a ship may be arrested in Australia pursuant to section 15 of the Act. This may be particularly relevant in the case of the insolvency of a ship owner (as it was in the *Morelines* proceedings before Sheppard J), where there are many competing claims for a limited fund created from the proceeds of sale of a ship and the question of the characterisation of a claimant’s claim may be important in determining whether that claimant is entitled to pursue its claim against the fund as a claim under the Act and is thereby entitled to a share of that fund.
150. Moreover, if the approach of the minority were to be followed in Australia, it may also have an impact on the priority of competing claims, in particular competing claims on a fund representing the proceeds of sale of a ship sold in an *in rem* proceeding in Australia. If for instance the foreign claim is (in accordance with the view of the minority) afforded the status of a maritime lien for the purposes of proceedings against that fund in Australia (consistent with its status under the *lex causae*) then that claim may have a higher priority in the distribution of the fund (in particular over those claimants who only have general or proprietary maritime claims) than it would if the claim was to be characterised as if the circumstances

⁹⁹ “Foreign Maritime Liens : should they be recognised in Australian Court” by M Davies and K Lewins (2002) 76 ALJ 775

¹⁰⁰ This was in lieu of the 2 step test in *Phillips v Eyre* which once satisfied resulted in the court applying the tort law of the forum to the foreign tort (*Thompson v Hill* (1995) 38 NSWLR 714).

giving rise to it had occurred in Australia (consistent with the approach of the majority view) and under Australian law it did not have the character of a maritime lien (for instance because under Australian law the facts giving rise to the claim would only give rise to a general maritime claim or (as with the claim of TLI in *Morelines*) did not entitle the claimant to pursue a claim *in rem* at all).

Associated jurisdiction

151. The jurisdiction of the courts under the Admiralty Act extends beyond maritime liens and maritime claims in at least one respect. This is the extent to which jurisdiction is conferred on “*associated matters*” pursuant to section 12 of the Act, which provides :

12 Jurisdiction in associated matters

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.

152. The scope of this additional jurisdiction in respect of “*associated matters*” was also considered by Allsop J in *Elbe Shipping SA v the ship “Global Peace”* (2006) 154 FCR 439 at paras. [59] – [67], in particular in the context of proceedings *in rem*.
153. As his Honour there observed,¹⁰¹ provisions such as section 12 of the *Admiralty Act* and section 32 of the *Federal Court of Australia Act* dealing with associated jurisdiction confer or invest jurisdiction in a matter which, by reference to sections 75 and 76 of the Constitution, could be (but has not been) conferred (or invested) on the Court, if that matter is associated with a matter in respect of jurisdiction that has been conferred or invested on the Court, and that jurisdiction has been invoked by a plaintiff through the commencement of proceedings. If jurisdiction of the Court is extended to an associated matter by operation of section 12, then the authority of the Court is widened to hear that associated matter which is otherwise not within the Court’s jurisdiction.¹⁰² In this way, the jurisdiction of a Court seized with a matter under the Act is expanded by section 12 of the Act to entertain matters beyond those which have been expressly conferred by the provisions of the *Admiralty Act*. That is, provided that this additional (or associated) matter is associated with a matter within jurisdiction and can itself be characterised as a matter of “*Admiralty and maritime jurisdiction*” within the meaning of section 76(iii) of the Constitution.¹⁰³

¹⁰¹ *Global Peace* at [60]

¹⁰² *Global Peace* at [64]

¹⁰³ in this regard, section 12 of the Act does not deal with other kinds of matters contemplated by sections 75 and 76 of the Constitution, although the Federal Court may nevertheless have such jurisdiction in respect of a matter within its admiralty jurisdiction pursuant to section 32 of the Federal Court of Australia Act

154. Accordingly, the effect of section 12 of the Act is to confer jurisdiction on a court, otherwise seized with a matter under the Act in respect of a claim that is of a maritime nature notwithstanding that it may not be a maritime lien or does not otherwise fall within any of the closed categories of proprietary or general maritime claims listed in section 4 of the Act.
155. But perhaps more significantly, Allsop J also held that section 12 deals only with the authority of the Court to adjudicate a claim or dispute and not the statutory permission to commence a proceeding in respect of that claim or dispute as a certain type of action.¹⁰⁴ In particular, his Honour found that section 12 of the Act does not deal in terms or in subject matter with the permission to bring a proceeding as an action *in rem*. Accordingly, his Honour concluded that whilst section 12 might be relied upon to expand the scope of claims that might be brought within the jurisdiction of the Court, through associated matters, there is no statutory permission within either section 12 or otherwise within the Act to commence a proceeding in vindication of that associated matter as an action *in rem*. Nor is there any basis on which that associated matter could be included in an action *in rem* along with other claims properly the subject of *in rem* proceedings under the Act and simply on the basis that the associated matter is a matter associated with those other claims.
156. If such an associated matter were to be pursued by the plaintiff to an action *in rem*, then it would have to be commenced as an action *in personam*.¹⁰⁵
157. The same position obtains in relation to claims that might be said to be accrued to a claim which is a maritime lien or other charge or a proprietary or general maritime claim and thereby within the “*accrued jurisdiction*” of the Federal Court of Australia. Whilst the Federal Court may have jurisdiction to determine an accrued claim in conjunction with its determination of the claim based on the maritime lien or maritime claim for which there is jurisdiction expressly under the *Admiralty Act*, the Act does not allow that accrued claim to be pursued either as an action *in rem* or as part of an action *in rem* properly commenced in respect of a claim within jurisdiction.¹⁰⁶
158. Undoubtedly section 12 of the Act provides a means by which a Court exercising jurisdiction under the Act may be able to entertain claims of an admiralty and maritime nature which are not expressly found in the Act. As Dr Cremean states at p. 122 of his book Admiralty Jurisdiction (3rd ed):

... there is clear potential in s12 for a growth in jurisdiction of the courts under the Act. This could come from insurance claims, marine and non-marine alike. It could also come from parties who are otherwise interested in the outcome of proceedings,

¹⁰⁴ *Global Peace* at [64]

¹⁰⁵ *Global Peace* at [65]

¹⁰⁶ *Global Peace* at [67]. This is of course not an issue for proceedings in the State Supreme Courts, which have wide plenary powers and jurisdiction in respect of matters where the Court is seized of jurisdiction and therefore do not have to have regard to an accrued to bring some claims within its jurisdiction or determine those claims.

intervening in those proceedings. There is no need to read s12 restrictively. Certainly the evident endeavour of the section is to increase the jurisdiction beyond those matters specified in other provisions.

159. This would also be further expanded in the case of the Federal Court by section 32 of the *Federal Court of Australia Act*.
160. Where the principal action brought in the exercise of the admiralty jurisdiction of the Court is by way of an action *in personam*, then no difficulties arise in including in that proceeding the associated or accrued claim.
161. But where the principal action is a proceeding *in rem*, then there are a number of consequences including procedural consequences that flow from the above conclusions of Justice Allsop in *Global Peace*.
162. First, it is not possible to pursue the associated (or accrued) matter as an action *in rem*. Moreover, this would be so whether the proceedings were commenced in the Federal Court or Supreme Court. This represents a limitation on the utility of the associated jurisdiction conferred by section 12 of the Act.¹⁰⁷ If the associated claim cannot be pursued as or within an action *in rem*, the Plaintiff would not be entitled to security in respect of that claim (even if it is otherwise entitled to security in respect of the claim or that part of its claim that is within the admiralty jurisdiction conferred on the Court by the Act). In some circumstances, this may be of no practical importance and may not adversely affect a plaintiff, such as where the associated claim is no more than a different way of arguing for the same damages that are sought by the plaintiff's claim that is within the jurisdiction conferred by the Act and for which the plaintiff would be entitled to arrest the ship and thereby security in any event. But it may be relevant (and indeed may adversely impact on a plaintiff and its intended claims) if the damages or other relief sought or claimed under the associated claim go beyond the damages or relief sought by that claim or part of the plaintiff's claim that is within jurisdiction (that is the Court's admiralty jurisdiction) and which is properly the subject of the *in rem* proceeding. As I have already stated, in those circumstances, the Plaintiff would not be entitled to arrest the ship in respect of the associated claim. Nor would the plaintiff be entitled to security for that claim. The Plaintiff would also not be entitled to obtain a judgment against the ship (if no security was otherwise provided and the ship remained under arrest) in respect of that associated claim and may therefore not be able to enforce that claim against the proceeds of any sale of that ship (or at least not be able to enforce the claim against the proceeds with the priority of a maritime claimant; rather the plaintiff may have to wait for all maritime claimants to be satisfied and if there is still any proceeds remaining then seek to enforce its associated claim against them in the same way a plaintiff with an *in personam* claim would).

¹⁰⁷ as it also does on both the Federal Court's associated jurisdiction under section 32 and its accrued jurisdiction

163. Secondly, although the associated matter may be pursued as an action *in personam*, it would have to be commenced as a separate proceeding, in particular separate to any action *in rem*. This is especially having regard to rule 18 of the Rules (as Allsop J noted in *Global Peace* at [67]).
164. If the person who is alleged to be liable for the associated or accrued claim is not present in Australia, then the initiating process in the associated *in personam* proceeding will either :
- a) have to be served on the defendant (or relevant person) within Australia if they are subsequently present in Australia; or otherwise
 - b) have to be served on the defendant (or relevant person) outside of Australia and pursuant to the rules for service *ex juris* applicable in the Court in which the proceeding is commenced.
165. The mere presence in Australia or Australian waters of the ship or other property the subject of the *in rem* proceedings would be of no assistance in relation to the service of the initiating process for the associated *in personam* proceeding, notwithstanding that it would be sufficient for service of the writ *in rem* that commenced the principal *in rem* proceeding.
166. The second of the two courses referred to in paragraph 164 above may in turn require the plaintiff to obtain the leave of the Court before service could be effected overseas (as it would in the Federal Court pursuant to FCR O.8 r.3(1)(a)). In doing so, it may be necessary for the plaintiff to establish some connection between the associated or accrued claim and Australia which would permit service of the initiating process in the *in personam* proceeding out of the jurisdiction (e.g. FCR O.8 r.2). Precisely what this would entail may depend on the particular Court in which the *in rem* proceeding was commenced and the terms of that Court's *ex juris* rules. These requirements may differ between the Courts.
167. In *Global Peace* as the cause of action that was within the associated jurisdiction was alleged to have occurred within the Australian territorial sea, there was no difficulty in establishing a connection with Australia and his Honour found that “*plainly service ex juris would be available*”.¹⁰⁸ In that case, his Honour was also prepared to consider an application for substituted service. However the position may be different where the cause of action sought to be relied upon occurred outside of Australia and the parties to the proceedings are both resident or domiciled outside of Australia. Whilst that is no bar to the prosecution of the claim within the jurisdiction conferred by the Act as an action *in rem*, it may prevent the pursuit of the associated matter as part of that claim unless the defendant submits to the jurisdiction of the Court or is otherwise present or able to be served within the jurisdiction.

¹⁰⁸ *Global Peace* at [143]

168. In those circumstances, a question may arise as to whether the plaintiff is able to rely upon an appearance filed by the defendant (or relevant person) to the *in rem* proceeding either as a submission to the jurisdiction of the Court generally or a presence within the jurisdiction for the purposes of the associated *in personam* proceeding or service of the originating process issued in that *in personam* proceeding. This is especially bearing in mind my earlier comments as to the hybrid status of the *in rem* proceeding once an appearance has been filed. If it can, then the plaintiff may be able to serve the initiating process in the *in personam* proceeding on the address for service in the notice of appearance and thereby avoid the difficulties described above. But if the plaintiff cannot or if there is no appearance by the relevant person on behalf of the ship¹⁰⁹ then the plaintiff may not be able to pursue its associated claim, notwithstanding section 12 of the Act (and the apparent conferral of jurisdiction on the Court in respect of such an associated claim).
169. To the extent that other sources of what is arguably admiralty and maritime jurisdiction might also be found in the Federal Court through s. 39B(1A)(c) of the *Judiciary Act* 1903 (Cth), as well as through the general jurisdiction of the State Supreme Court where proceedings are commenced in a State court, they would also be constrained along the lines described above (in particular insofar as it might be wished to pursue those claims as or within an action *in rem*). Whilst such ancillary matters might also be capable of being dealt with by the Court in conjunction with a matter brought within the jurisdiction conferred on the Court by the *Admiralty Act* and invoked by a plaintiff including by way of an action *in rem*, this would only be so insofar as that ancillary matter was and could be pursued as an action *in personam*. It would also be subject to any jurisdictional or other restrictions on that Court in that regard. It would not be possible to pursue such ancillary matters or ancillary claims as an action *in rem* or to include such ancillary claims within the scope of an action *in rem* brought in the exercise of the admiralty jurisdiction expressly conferred by the Act or to arrest a ship or other property in respect of such an ancillary claim.

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3 September 2009

¹⁰⁹ for example because the appearance is by some other person who is not the relevant person but who nevertheless has an interest in the ship, as occurred in both *the 'Iron Shortland'* (1995) 59 FCR 535 and *the 'Zoya K'* [1997] FCA 379