

REVITALISING AUSTRALIAN ADMIRALTY JURISDICTION ON THE WORLD STAGE¹

BY

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Why does Admiralty jurisdiction matter?

As a littoral state we all readily grasp the importance of our sea routes and dependence on maritime trade and commerce. Perhaps sometimes we may be unaware of the extent of our dependence on matters maritime such as the phone call connections through particular submarine cables to the contentious supply of our vehicles' carbon fuel. The answer to this opening rhetorical matter is found in the limited but pre-eminent 128 sections found within the eight chapters of our great Constitution in which s76(iii) recognises something very important about "Admiralty and maritime jurisdiction". Such is the importance that the enshrined and eternal High Court of Australia is the potential bastion for exercise of original jurisdiction in matters of Admiralty and maritime jurisdiction. Whilst we would all like every Admiralty and maritime case in which we are involved heard in the original jurisdiction of the High Court of Australia the fact that it is potentially so vested speaks volumes as to this maritime craft found in s76(iii). Further maritime craft perhaps conveys the subtle craftsmanship and living versatile hull in this briny binary source of Constitutional law making power and judicial power.

As recently as last year one can find on the Malaysian Bar Association site² an article by the Chief Judge of Sabah and Sarawak, Tan Sri Richard Malanjum explaining the importance of an internationally recognised Admiralty court like London, Hong Kong, New York as well as the need to be able to compete with Singapore³. That Australia doesn't even feature in this identification of competition is at the heart of this presentation and the call for revitalising our Australian maritime jurisdiction. Whilst we certainly have sound foundations in the *Admiralty Act 1988* the

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² www.malaysianbar.org.my/shipping_admiralty_law/judge_set_up_admiralty_court.html

³ The statutory provisions in many different countries can be tracked down through www.admiraltylawguide.com

international importance of matters Admiralty and maritime particularly in our Pacific region are transparent in the observations of the said Chief Judge. Our Australian courts exercising Admiralty jurisdiction are competing both in our region and across the globe. This maritime market on the world stage is highly transparent and extremely sophisticated. If Australia is to compete effectively in this market it needs a revitalised Admiralty jurisdiction.

What's the matter in Admiralty jurisdiction?

Although *Shin Kobe Maru*⁴ paved the way for a more fulsome recognition of matters maritime consistent with principles of liberal interpretation of a Constitutional provision there remain important issues as to the breadth of the Commonwealth maritime legislative and jurisdictional powers. There is every reason to treat s76(iii) as of considerable breadth given the clear intention to travel beyond the disputed confines of “Admiralty” and the addition of the word “maritime” breathes life into this power way beyond that of the old UK Admiralty or Vice Admiralty courts.

Indeed the addition makes clear that a unified body of maritime and Admiralty law was intended to service the new Commonwealth without artificial restriction as to seas and so as to apply to all navigable inland waters, lakes and rivers⁵. With this apparent and intended extension it follows that State boundaries do not circumscribe this maritime legislative power. The decision in the *SS Kalibia*⁶ does not apply appropriate principles of Constitutional interpretation and adopts a notion of internal coasting trade that eviscerates the combination of s51(i), s98⁷ and s76(iii) of the Constitution, and which is reminiscent of both a reserved powers doctrine and a now alien notion of over-riding power to legislate on the matters of maritime and Admiralty law by the Parliament of the United Kingdom. At a very minimum the latter reasoning could not be supported under our Constitutional theory⁸ and

⁴ *Owners of the Ship Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404

⁵ The judicial observations in *Gibbs v Mercantile Mutual* as to whether the estuary of the Swan river was the sea indirectly reveals the limitation that flows from a narrow construction of s76(iii) at the same time as identifying the logic in recognising as to the overlap of maritime perils whether addressing inland waters or the open sea.

⁶ *Owners of the SS Kalibia v Wilson* (1910) 11 CLR 689

⁷ The extended trade and commerce power excludes preferential treatment in s. 99 and must also be read in light of the scope of matters of trade and commerce addressed in s. 100- 104

⁸ Gummow J expressed doubts about the reasoning in *SS Kalibia* at first instance in the *Shin Kobe Maru* (1991) 32 FCR 78 at 86-87

recognition of Australia as an independent sovereign state. There is also scope to argue that the recognition in *Blunden v Commonwealth*⁹ as to the source of internal maritime law drives the implication of substantive law making power home as the limitation of the State legislative powers would have left an obvious and material vacuum in the scope and efficacy of the s. 76 (iii) Constitutional power.

The rejection of the argument in 1910 that this grant concerning maritime and Admiralty jurisdiction necessarily implied power to legislate substantively on maritime and maritime law is with respect unconvincing and arguably is seriously flawed. There are a number of High Court decisions that have picked up the reasoning in the *SS Kalibia* but without it appears any detailed analysis of the reasoning in that case, the US authorities or any substantial attack upon the decision¹⁰. Once it is recognised that s76(iii) intended to embrace a uniform body of maritime and Admiralty jurisdiction throughout the Commonwealth this can only be achieved by power to legislate on maritime and Admiralty law. To construe s76(iii) as a procedural provision limited merely to the determination of a fulsome class of controversies is a shallow interpretation of this significant expansion of law making power within Chapter III. Nor should s77 be construed as contrary to this implication of substantive maritime law making power. The making of laws as to matters “Of Admiralty and maritime jurisdiction” are five words of enormous scope and depth each expanding the reach of Parliament. When focus is given to the unique use in this placitum of the term “jurisdiction” there must be work for this term to do beyond opening reference to original jurisdiction at the commencement of the section and it is given real work if that term advances the implication of substantive law making power to sustain the conferred jurisdiction. If the Parliament is beholden to the States to make intra-state Admiralty and maritime laws as the States deem fit the fragmentation of this “jurisdiction” achieves the very opposite of uniformity and certainty in the protection and regulation of mariners, maritime assets, maritime environment and maritime commerce.

The very nature of “jurisdiction” in the context of Admiralty and maritime evokes by necessary implication the right to substantively deal with matters *jure belli*, the right

⁹ (2003) 218 CLR 330 at 337-338

¹⁰ *Newcastle Hunter River and SS Co v AG* (1921) 29 CLR 357; *R v Turner* (1927) 39 CLR 411; *R v Burgess* (1936) 55 CLR 608; *Victoria v Commonwealth* (1937) 58 CLR 618; *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 42; *Elliott v Commonwealth* (1936) 54 CLR 657; *Kirmani v Captain Cook Cruises* (1985) 159 CLR 351

to substantively deal with protection and regulation of mariners, maritime assets, maritime environment and maritime commerce. The jurisdiction is arguably hollow if devoid of legislative power to address maritime law and the clear intention of uniformity cannot be achieved unless the implication of law making power is given effect. If Admiralty Courts exercise powers so as to embrace protection of mariners are not laws that protect mariners necessarily included within laws of Admiralty and maritime jurisdiction. If Admiralty courts exercise powers as to salvage informed by notions of equitable principle why would laws that substantively address salvage not be part of the law making power under s76(iii). While undoubtedly the treaties power overcomes much of the impediments crystallised by the *SS Kalibia* there are numerous areas of overlap, inconsistency or vacuum in the regulation attaching to non seagoing ships, to intra-state coastal trade, regulation and protection of maritime environment and maritime assets not to mention the multiplicity of State laws concerning maritime commerce.

There is obviously a powerful public interest to be advanced by uniform standards as to safety, survey, manning, construction and navigation a matter that could hardly have been absent from the scriveners of the Constitution in formulating s76(iii). Moreover the US Supreme Court decision in *In re Garnett* (1891) 141 US 1 could hardly have been out of the minds of the framers of our Constitution. That opinion delivered by Bradley J noted

“It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several states, in order to find authority to pass the law in question. The Act of Congress which limits liability of shipowners was passed in amendment of the maritime law of the country, and the power to make such amendment is co-extensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but in maritime matters, it extends to all matters and places to which the maritime law extends”.

The same co-extensive power of enactment of matters of maritime law having operation over the whole territorial domain of that law was identified in *Butler v Boston and Savannah SS Co* 130 US 527; see also *Hartford Accident Co v Southern Pacific Co* 273 US 207; *O'Donnell v Great Lakes Dredge and Dock Co* 318 US 36 and Bradley J continued in speaking of application of maritime law in the US to navigable rivers above tide-water that this was well settled and after citing a substantial body of Supreme Court case law continued

“In all these cases it was held that the Admiralty and maritime jurisdiction granted to the federal government by the Constitution of the United States is not limited to tidewaters, but extends to all public navigable lakes and rivers. In some cases it was held distinctly that this jurisdiction does not depend on the question of foreign or interstate commerce, but also exists where the voyage or contract, if maritime in character is made and performed wholly within a single State”.

In the *Lottawanna* 88 US 21 the opinion was expressed:

“It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. The Constitution must have referred to a system law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.”

While it is true that the plenary trade and commerce power is so qualified the sphere of Admiralty and maritime law is not so confined and is not so confined in s76(iii).

In the opening opinion of Clifford J in *The Belfast* 74 US 4 there appears the following:

“Principally subjects of Admiralty and maritime jurisdiction are maritime contracts and maritime torts, including captures *jure bellis*, and seizures on water for municipal and revenue forfeitures.

- (1) Contracts, claims or service, purely maritime, and touching rights and duties appertaining to commerce and navigation are cognizable in Admiralty.
- (2) Tort or injuries committed on navigable waters, of a civil nature are also cognizable in Admiralty courts”

This broad approach to the US equivalent of our s. 76 has also been addressed in numerous other US Supreme Court decisions, *Southern Pacific Co v Jensen* 244 US 205; *United States v Flores* 289 US 137; *Detroit Trust Co The Thomas Barlum* 293 US 21; *Chelentis v Luckenback SS Co Inc* 247 US 318, *Oil Workers v Mobil Oil Corp* 426 US 407. Justice Frankfurter also gives a useful summary of the principles supporting a broad construction of the US equivalent provision to s76 in *Romero v International Terminal Operating Co* 358 US 354, see also *Pannama R v Johnson* 264 US 375; *Knickerbocker Ice Co v Stewart* 253 US 149. There is a lovely passage in *Jackson v Magnolia* (1857) 61 US 296 after referring to the jealousy of common law courts concerning the jurisdiction of torts committed within the body of a country comments on the conferral of Admiralty and maritime jurisdiction without exceptions

as to subjects and places stating “this Court cannot interpolate one into the Constitution or introduce an arbitrary distinction which has no foundation in reason or precedent”.

In *Panama Railway Co v Johnson* (1924) 264 US 375 Justice Van Devanter delivered the opinion and at 385 said “As there could be no cases “of Admiralty and maritime jurisdiction” in the absence of some maritime law under which they could arise, the provisions presupposes the existence in the United States of a law of that character”. After acknowledging that there was a pre-existing colonial and confederation times systems under which maritime law was applied to the determination of cases, of which the framers of the US Constitution were aware the opinion continued at 386

“Their purpose was not to strike down or abrogate the system, but to place the entire subject -- its substantive as well as its procedural features -- under national control because of its intimate relation to navigation and to interstate and foreign commerce. In pursuance of that purpose, the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States”.

There is a further exegesis by Scalia J which adopts this reasoning of *The Lottawanna* post the ALRC report in *Americian Dredging Co v Miller* (1993) 510 US 443 albeit in the context of a discussion about the validity of state legislation concerning *forum non conveniens*. There are of course limitations that exist both in the US Constitution by the Eleventh Amendment, see *California er al v Deep Sea Reasearch* (1997) 523 US 491 as well as other limitations such as issues of navigability touched on in *Kaiser Aetna v Untied States* 444 US 164 although that case was dealt with under the commerce

The ALRC report no 33 recognised the issue in paras 69 and 80 as to the potential substantive law making power of s76(iii) consistent with the US cases but provides no close analysis of the decision in the *SS Kalibia* nor any detailed analysis of the reasoning in the US cases. Para 70 of the report recognises the scope of s76(iii) clearly catches waters inter fauces terrae (within a State). The suggestion in the ALRC report that the US reasoning is based upon a protective jurisdiction theory is not reflected in the cases and is itself doubtful. The recognition in para 82 of the report that the boundary between jurisdiction and substance for s76(iii) is an elusive one really leaves the issue open.

Why in 2008 do we continue to have the multiplicity of overlapping State maritime legislation when this creates and continues a want of uniformity and consistency in the important areas of maritime law upon which the Commonwealth could exercise its legislative powers, is a question in need of answer¹¹. Identifying where the problems start might begin at the level of the *Shipping Registration Act*, the unnecessary confinement as to the size and nature of navigable craft, and which should in fact be the single source of governance as to ship's mortgages (and not through a general property scheme). The confinement of the *Navigation Act* in s2 speaks for itself. How an expanded approach to s76(iii) would impact on the burdens of one of, if not the most significant and important Australian maritime institutions, namely AMSA, and its extremely successful advancement of the protection of mariners, maritime assets and the maritime environment must be kept in mind and itself sustained. The advantages of AMSA and other related maritime regulatory bodies¹² having efficient and effective powers of regulation in relation to intra-State maritime standards and hazards are obvious and essential steps to advance our great maritime nation. Whilst there are already some moves afoot to correct this position on a co-operative basis there arguably ample power within s. 76 (iii) to rectify the position.

¹¹ The problems with ballast water identified in the Victorian Report of 1968 were only addressed internationally in 2001 but this only catches international ships.

¹² National Marine Safety Committee; Australian Transport Safety Bureau; Australian Transport Council; National Transport Commission; Seafarers Safety Rehabilitation and Compensation Authority; Australian Quarantine and Inspection Service; Insurance Council of Australia; etc

Admiralty matters of tomorrow

Will the Court in Admiralty sit with maritime assessors and what if any changes are needed to remove the scope for complaint as to denial of procedural fairness and to ensure effective rights of appeal are issues for consideration. There may indeed be scope where issues arise in a maritime arbitration that require reference to the Court to permit sitting with the arbitrator where that course would facilitate the disposition of the maritime dispute. Similarly if assessors why not with judges from other jurisdictions as this has significant advantages in promoting Australia's exercise of Admiralty and maritime jurisdiction as well as advancing international uniformity, but again procedures will need to be devised to facilitate the nature and extent of the additional sitting judges input.

There has been a recent significant expansion in maritime security and maritime asset protection with the very real prospect that these are spheres of potential dispute that should perhaps be dealt with in the exercise of s76(iii) jurisdiction. The disposition of criminal matters arising from the maritime context are also likely to be areas of increased international significance and again potential matters to be dealt with by the courts vested with Admiralty and maritime jurisdiction.

There are always tragedies that call for inquiry and although we have legislation for Courts of Marine Inquiry there seems to be every reason why maritime disasters should be classed as controversies capable of disposition before a Court exercising s76(iii) jurisdiction and indeed this might have prevented the protracted string of litigation that has followed for example the *Voyager Royal Commissions*. What should happen regardless of by whom any inquisitorial maritime hearing takes place is first uniformity as to the inquisitorial maritime entity and secondly exclusivity of that process to avoid unnecessary coronial duplication.

Just as our retiring distinguished Chief Justice of Australia has pointed to the likely significance of water rights in the field of disputation there is highly likely to be an ever increasing flow of disputes both national and international as to sea rights and these are also within the reach of s76(iii). So why not the reclamation by the sea herself and inevitable maritime disputes related to the rise of the high water mark and shift of low water mark as well as the generation of new disputes as to the territorial

sea and related zones, together with the increasing destruction of coastal land based fixtures and chattels through an increasingly destructive peril of the sea.

Perhaps even more controversial in the field of maritime matters, is the issue of concurrent jurisdiction between State and Federal courts as well as the question of appellate process. Calls made questioning the role of federal courts are really generated by the deficiencies that flow from concurrent jurisdiction. The jurisdictional clock is not likely to be turned back to the exclusivity of State courts handling s76(iii) matters albeit that this may be the subject of regret. Perhaps if State courts are to continue exercising this sphere of jurisdiction re-creation of specialist Admiralty divisions and nominated Admiralty judges may advance the justification for continued concurrent vesting of this jurisdiction. Whilst eventually one might expect all s76(iii) jurisdiction to be dealt with by Federal courts there is perhaps a need to consider again the advantages of a single appellate forum.

Although perhaps more contentious aircraft could be seen as within the scope of s76(iii) and could be the subject of future reform indeed this *in rem* procedure is already available, without being exhaustive, in NZ, Singapore, Hong Kong and Canada. This was not the position at the time of the ALRC report 33 which expressly decided to exclude aircraft from the definition of ship. There is considerable scope for the use of *in rem* process concerning aircraft arising from appropriate international disputes or in aid of security for the same.

Another possible area of growth arises out of calls for Commonwealth entrenched bill of rights which could include maritime freedoms and indigenous maritime rights and could be picked up in the exercise of s76(iii) power. Perhaps one can justify this inclusion on the basis of adapting the great Tom Hughes QC's well known proposition to declare that within the chest of every Admiralty lawyer their beats the heart of an international human rights jurist.

The world's stage of Admiralty matters

When the cross section of interests that generally arise in Admiralty and maritime matters are understood it becomes crystal clear how the determination of these disputes is taking place on the world stage. Behind the cargo interests, exporters, forwarders, TT Club and underwriters may be lawyers instructing from Hong Kong,

London, Singapore or elsewhere. Shipowners interests may be not just the nexus and instructions flowing from a Protection and Indemnity Club managed overseas and there are often other foreign interests that may have input from the owner entity managers to the hull underwriters, war risks insurers, mortgagees and other maritime lien holders. But it is not just that foreign interests and overseas instructions are involved or that the respective insurers, lawyers, managers and clients input on the commencement of future disputes. Nor do the significance of maritime disputes turn solely on the tendency for the maritime rights to be sourced in international treaties or conventions. Equally the overarching global significance is not to be measured by the very important impact that maritime law has had in developing domestic law or its antiquity of origin. Rather maritime disputes are generally global disputes and as such are global disputes that might be dealt with in different international forums. The initial jurisdictional tussles will often involve multiple forums for reasons of effecting service, obtaining security or perceived tactical forum advantages. The efficient determination of maritime disputes is central to maritime commerce and nearly all involved in this sphere are operating in world maritime markets. Moreover, as referred to above, there is a worldwide market for determination of maritime disputes and Australia is but one player on that stage.

Alternative dispute resolution avenues such as arbitration might be seen as a substitute products for court determination in the demand and supply analysis of this maritime dispute market. However the arbitration process is in some respects a different and less prominent marketing profile, which is to be regretted, due to the want of publication of maritime awards in Australia. The recent creation of the Australian Maritime and Arbitration Commission is a most constructive step in advancing Australia as forum for international arbitration. As much as Australia as a forum for international maritime arbitration is to be encouraged it is essential to have effective Admiralty and maritime jurisdiction in the Australian courts as that is the ultimate forum for enforcement, certainty and consistency of maritime law. The superior court determinations of maritime disputes ripple around the globe both informing arbitral processes and other courts pursuing the common quest of international uniformity in the handling of maritime disputes.

Areas in need of urgent reform

If we were to chart the growth of Australian Admiralty jurisdiction as well as the academic, legal, political and stakeholder interests we would see a very dramatic and increased rise in the focus upon this fascinating briny area servicing maritime disputes. Admiralty jurisdiction is in a number of respects like global warming.

First, Australian Admiralty jurisdiction is not an isolated self-contained ecosystem but rather is available to serve the morass of international maritime matters that are generated around the globe.

Secondly, our Admiralty jurisdiction is interconnected not just at the level of the Australian economy but rather interconnected with international trade and the legal systems around the world.

Thirdly, just like the benefits in striving towards the object of reducing global warming, there are real and tangible benefits that flow from continuing to foster a healthy and vibrant and relevant Australian Admiralty jurisdiction. The effectiveness, efficiency, repute and gravitas of Australian Admiralty jurisdiction reflects the combined contribution of judicial determinations, judicial dispute handling, consensual dispute resolving institutions, the statutory framework, the Australian Law Reform Commission guidance, stakeholder input, resourcing of relevant bodies, cost efficiency, international competitiveness, as well as the competence, skill and diligence of those involved in servicing all of these areas from the political lawmakers to the holders of judicial power through to the legal profession, representatives on industry bodies and the professionals within maritime callings and the experts who assist in dispute resolution. The strength of the sales that drive the growth of our Admiralty jurisdiction both depend on this interconnectivity and the strength of the Australian input.

Admiralty jurisdiction is no more the cloistered domain of maritime lawyers than it is the property of the marine underwriting market or the mistress of owners of international tonnage or the servant of importers and exporters. Our Admiralty jurisdiction is a material part of our Australian economy, culture, heritage and future fabric. As such Australian Admiralty jurisdiction belongs to the people of this great Commonwealth and it is for the advancement of our great nation that we should understand, maintain, foster and develop this constitutionally enshrined international

sphere of jurisdiction. We are all well alive to the significance of Australia's expanded maritime reach through the *Convention on the Law of the Sea* in relation to our Exclusive Economic Zone, Contiguous Zone and Territorial Sea and vast wealth of maritime resources below the sea bed and in our various fisheries, as well as the international cable network linking our international communication systems and the sea roads upon which our mariners ply their trade and the pursuit of recreation, sport and industry.

In this context, does it matter that we have not set the Admiralty jurisdictional spinnaker that services criminal maritime jurisdiction or the mainsheet for prize jurisdiction? Does it matter that our Admiralty jurisdictional hull in the form of the *Admiralty Act 1988* can no longer keep pace with the new age, cutting edge, carbon fibre jurisdictional catamarans servicing the international stage through Singapore, Hong Kong, New York, London? Is it of any moment that our navigational equipment servicing the Australian Admiralty jurisdiction is operating upon a time set heavily influenced by thinking focussed on the legitimacy of international maritime jurisdiction through the eyes of the *1952 Arrest Convention* and the old jurisdictional fleet arising out of the *Admiralty Act 1840*, *Admiralty Act 1861*, *Reports of Admiralty Act 1890*, *Administration of Justice Act 1956* and *Supreme Court Act 1981* of UK origin. True it is that the visionaries who prepared the Law Reform Commission Report No 33 achieved a sterling vision and success of real and vibrant Australian Admiralty jurisdiction. But the Law Reform Commission Report was measured by the then perceived legitimacy of the scope and sphere of Admiralty jurisdiction based and weighed on the legitimacy of UK, Canadian, New Zealand and South African jurisdiction as it then stood through earlier enactments. The Law Reform Commission had a natural reticence in the germination of Australian Admiralty jurisdiction through internationally conservative maritime reform which was neither as aggressive, nor as robust as the then jurisdictional ships of South Africa or United States of America.

This is not a trade union cry for rallying but the legislature to expand the scope of trade union activity to service an increased Admiralty jurisdiction. Rather it is a sincere lament and lighthouse beacon warning of the need to keep our Admiralty jurisdictional ship sound, seaworthy and successful.

In answer to the proposition that the ALRC has already considered certain issues that simply fails to grasp that Report no 33 did not and could not take account of matters such as the International Convention on the Arrest of Ships, Geneva, 12 March 1999, the expansion of other Admiralty jurisdictions and the extremely useful expositions upon Australian Admiralty law since 1988. The call for further reform cannot be sensibly answered by focus on the excellent work of the ALRC as at 1988 rather that focus only re-enforces the need for fresh consideration by this august body to address the current scope and requirements of Admiralty and maritime jurisdiction.

Given the magic wand what reforms are most needed. Here stakeholder interests become excited, some are extremely constructive¹³ and sometimes stagnancy appears the most attractive choice. However the ALRC has demonstrated time and again what an outstanding, powerful, balanced and insightful source it is of constructive law reform. The maritime area is too significant for piecemeal reform and it is too important to have the spheres of reform languish for want of a dutiful parent. The ALRC has most ably displayed its ability to advance Australia's interests in the field of maritime law reform and although to some of the 1988 reform was not so long ago, the leaps in technology, the leaps in international trade and commerce and the leaps on the international maritime dispute stage call out for afresh reference. Consideration should then be given by the ALRC to whether a more aggressive stance should be taken as to scope of s76(iii) legislative power and how that should exercised to the benefit of all Australians.

Consideration should be given to expanding the matters of maritime jurisdiction which might be brought both in rem and *in personam*. For example damage done to a ship (like NZ, Singapore); damage done by or to maritime property including navigational equipment, navigational aids and information, wharfs, loaders and submarine pipes and cables; torts on the sea (like South Africa); marine insurance and reinsurance (Canada includes a contract of marine insurance); marine pollution; liner conference agreements; marine property/cargo title ownership or encumbrance; services supplied to the owner of a ship; enforcement of in personam maritime judgments; ship repair/equipping and reconstruction (like NZ, Hong Kong,

¹³ MLAANZ; Australian Shipowners Association; Australian Association for Maritime Affairs; Australian Federation of International Forwarders; Australian Marine Pilots Association; Australian International Marine Expert Group; Australian Peak Shippers Association; Export Consultants Group; Company of Master Mariners of Australia; Maritime Union of Australia etc.

Singapore); ship design; ship/cargo forfeiture, condemnation, seizure or restoration (like NZ, Singapore); shipping registration (like Hong Kong); fishery entitlements, UNCLOS related agreements, rights and obligations arising from the Convention and perhaps there should be scope for indigenous maritime property disputes to be dealt with under s76(iii).

The jurisdictional nexus might be refined to pierce the corporate veil of single ship owning entities that are plainly part of a larger commercial enterprise similar to South Africa or alternatively to shift the burden as to ownership or lower the threshold of jurisdictional fact. There could be explored the advantages of a general maritime security jurisdiction for other international maritime forums either at the level of a maritime attachment process similar to that in the US or at least in aid or any international maritime arbitration or in aid of any international maritime court process similar to South Africa. Consideration might be given to removing solicitor undertakings and creation of a Marshal's arrest fund to reduce the costs of arrest.

There is an imminent need to introduce the prize jurisdiction which has already been addressed by the ALRC in Report 48 and with certain recommendations for reform recommended through the ADF this legislation should be introduced forthwith. Indeed again NZ has this prize jurisdiction in its Admiralty legislation, whilst Australia does not have any applicable legislation.

Another unsatisfactory feature requiring review is the absence of vesting of s76(iii) jurisdiction in the Federal Court of Australia although vested in the State courts. Enforcement of lower court judgments on the international stage a source of concern that diminishes the attraction of remitter and this needs attention. Jurisdiction could be conferred on superior courts for the purpose of determining a "matter" in the nature of enforcement of lower court orders, if necessary with a power of referral to or reinstatement in the superior court after final orders in the court below within a specified time, with Rules dispensing with the need for fresh service, deeming the documents filed, transcript, exhibits as material before the superior court, upon which, unless leave be granted a summary hearing will take place before the superior court on the existing material as to whether the orders of the lower court should be enforced and providing that unless jurisdictional error is demonstrated in the orders of the lower court or other exceptional circumstances warranting leave are made out, that the superior court may in its discretion hear and dispose of the enforcement matter

summarily, with a discretion for summary form reasons adopting the reasons of the court below and for an expeditious entry of judgment procedure in the superior court. The conferral of jurisdiction could provide that if the superior court declines to make orders for enforcement of the final orders in the court below the orders in the lower court remain enforceable in Australia. The alternative of obtaining appropriate treaty recognition is obviously attractive, but the name of the Federal Magistrates Court should be corrected before this occurs to reflect its Chapter III status and the s. 72 appointment of its justices.

Conclusion

Although the common lawyers ridiculed the ability of maritime lawyers to find jurisdiction in a pail of seawater, I would be happy to advance the arguments, both for and against, finding maritime jurisdiction over the *Rime of the Ancient Mariner*. But the serious work of this paper is to increase the wake of calls¹⁴ for re-vitalisation of our great Australian Admiralty jurisdiction so as preserve, maintain and advance Australian interests on the world stage. These are not Siren calls luring legislative casualty but rather real lighthouse signals to minimise and prevent maritime casualty and to fuel the light upon this important Constitutional maritime power.

¹⁴ The Hon Justice Michael. Kirby AC CMG in the F.S.Dethridge Memorial Address 20/9/07; The Hon Justice James Allsop Lecture in Memory of the late Hon. Justice Richard Cooper 6/09/06; The Morella Calder Prize paper on The Substance of Admiralty Jurisdiction by Edward Cox 1998