

National Admiralty Seminar 2010¹
Personal Property Securities Act 2009 and the Admiralty Act 1988
Implications in matters maritime and reform

by

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Introduction

1. This paper seeks to identify some of the issues that are likely to arise in relation to *Personal Property Securities Act 2009 (PPSA)* in relation to matters maritime and seeks to identify some of the areas that might be the subject of review by the Australian Law Reform Commission of the *Admiralty Act 1988*. There is scope to contend that the *Admiralty Act 1988* is now substantially out of balance with Australia's international interests, outdated and needs review to maintain a modern and effective Admiralty jurisdiction that is internationally competitive and internationally relevant.
2. The incomplete tinkering that has occurred in relation to maritime law through the PPSA is a timely reminder of the need to more fully review the interaction of the PPSA with international maritime law. The oceans of international maritime law were a topic not adequately addressed at the time of drafting the initial PPSA. It appears from the legislative history of the PPSA and the secondary material giving rise to the new legislation that there has been inadequate consideration as to the implications of this reform in the sphere of maritime law. The belated patchwork that has occurred as a result of the 2009 amendment is a reflection of the inadequate attention to reform in the broad ranging ramifications of the PPSA and its implications for the ongoing importance of Australia's international maritime jurisdiction.
3. The importance of the international maritime jurisdiction is central to an understanding of the consequences of this type of domestic legislation on the wider uniform codification that has been occurring in international maritime

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trade and commerce. International codification of maritime trade and commerce has been developing a uniformity of legal doctrine refined by the international stakeholders and embodied in treaties, protocols and multi-lateral agreements. The worthy object of codification of personal property security interests at the domestic level for consumer and revenue objects needs to be balanced against the international codification of legal doctrine and advancement of economic interests in the increasingly accessible and contracting world markets. Maritime trade and commerce for Australia given its geographic size and location could not be of greater importance in the sphere of international economic interests. The international jurisdiction exercised by Federal Court of Australia in its exercise of Commonwealth judicial power in matters of maritime and admiralty jurisdiction under s. 76 (iii) of the *Constitution* has a global reach and vital significance for Australia. The judicial determinations of the Federal Court of Australia not only quells the international maritime controversy but also advances certainty within international maritime trade and commerce as a result of the judgment having international authoritative guidance as a matter of judicial comity.

4. The PPSA does not reflect an international code or treaty and its potential impact within the sphere of international maritime trade and commerce has not been fully addressed by the drafters. Nor has there been adequate consultation with the international maritime stakeholders. Moreover the impact of the PPSA on the international admiralty and maritime jurisdiction conferred by the *Constitution* has not been the subject of detailed analysis. It is essential from the viewpoint of international trade and commerce that these areas of maritime interests affected by the PPSA are much more closely reviewed. This paper cannot fully address these areas of maritime interest and all the maritime stakeholders need to input upon the consequences and constraints of the proposed reform effected by the PPSA. The impact of the PPSA should be considered from the viewpoint of Australia's international maritime trade and commerce interests and the potential ramifications in the exercise of the Constitutional admiralty and maritime jurisdiction.
5. This paper touches upon some of the potential inadequacies in relation to the PPSA, and the implications for matters maritime, as well as addressing areas of

potential focus for reform by the ALRC of the *Admiralty Act 1988*. Included within the call for consideration of the impact of the PPSA in this maritime sphere is a call for reform of the *Admiralty Act 1988*.

Personal Properties Securities Act 2009

6. The State referral legislation is founded upon the assumption that what the State gives in accordance with s. 51 (xxxvii) the State can take away. Whilst there is authority of the High Court of Australia to support this approach there was no detailed analysis of the impact of this theory in the light of Chapter III or s.109 of the *Constitution*. Of greater concern is perhaps the qualified “matters” and specifically the exclusion of matters that exclude or limit the operation of a law of the State seems destined to encounter Constitutional reefs. The definition of “licence” given the reference to “or otherwise deal with personal property” which is excluded from the extended meaning of “security interest” might also encounter problems. The “if and to the extent” language confining the extent of the reference is a curious condition and the capacity of the State to terminate the reference piecemeal is also possibly troubling. Nor is it clear that the State decreed effect of determination would be valid.
7. Another area on Constitutional concern are first s.206(2) purporting to confine s.39B of the *Judiciary Act 1903* and s. 217 that seems to have a slight issue of incompatibility with s. 72 of the *Constitution*. Further s.283 appears to direct the exercise of jurisdiction in a manner potentially inconsistent with Chapter III and the separation of powers. Also it remains to be seen whether the provisions survive any attack under s. 51 (xxxi) of the *Constitution*.
8. However it is the matters maritime in relation to the *PPSA* on which we wish to primarily focus. We query whether s.256 of the *PPSA* should have expressly given the *Admiralty Act 1988* priority in the case of any inconsistency. Section 52J of the *Torres Strait Fisheries Act 1984* amended by the *Personal Property Securities (Consequential Amendments) Act 2009* purports to give effect to seizure or forfeiture despite what is described as an Admiralty event which includes the exercise of judicial power by a Chapter III court affecting the sale of a boat. This raises a combination of Constitutional issues as to the validity of

this provision. First, from the viewpoint of impermissible interference in the exercise of judicial power and second, in relation to the acquisition of property on just terms under s51 *Placitum* (xxxi). Further these detention provisions do not sit neatly with s. 36 of the *Admiralty Act 1988*. The same issue arises under s108A of the *Fisheries Management Act 1991*. These are important areas of concern that should not be left unresolved and warrant attention of both the PPSA and the *Admiralty Act 1988* by the ALRC

9. The *Personal Property Securities (Consequential Amendments) Act 2009* Schedule 3 amends s32 of the *Admiralty Act 1988* to pick up the statutory provision relating to rectification of Personal Property Securities Register under s59A of the *Shipping Registration Act 1981*. The language of s32 works in a limitation in respect of the jurisdiction so conferred on Federal Court as it is confined to proceedings “*of a proprietary maritime claim*”. Quite how this Commonwealth act is able to take itself out of the jurisdiction already conferred by s39B is another sleeping issue. However it seems appropriate to ensure that there is no scope for limitation in relation to the jurisdiction conferred on the Federal Court of Australia in relation to rectification of the PPS Register and s32 of the *Admiralty Act 1988* should possibly be amended to provide power for rectification of the Registers by the Federal Court of Australia in any maritime matter.
10. There is a need to consider the inconsistencies that may arise in relation to seizure under s123 of the PPSA and the arrest of a vessel under the *Admiralty Act 1988*. The *Personal Property Securities (Consequential Amendments) Act 2009* addresses the priority in relation to the detention of a ship under the *Marine Navigation Levy Collection Act 1989*, under the *Marine Navigation (Regulatory Functions) Levy Collection Act 1991* or under the *Navigation Act 1912*. It is difficult to see why a similar priority was not given to *in rem* proceedings in Admiralty where the property has been arrested.
11. There are a vast sea of maritime related transactions that may now fall within the PPSA from the P&I club letters in replacement of the arrested property which create a conditional right to arrest rather, than a mere guarantee, to the security interests that may be created under bills of lading, freight agreements, charterparties, container hire agreements, cargo storage, handling and

stevedoring agreements, bunkering agreements, supply of necessaries, tug hire, salvage and towage agreements, ship sale and mortgage. This overlap of the *PPSA* may extend to the security for legal fees in a maritime cause to security/monies paid in advance against the Marshal's expected fees and expenses. All these areas should be the subject of careful review by the ALRC of the *PPSA* specifically in light of Australia's maritime interests together with a review of the *Admiralty Act 1988*.

Admiralty Act 1988

12. There are a number of provisions in the *Admiralty Act 1988* that require review for possible expansion consistent with Australia's interest and in light of the *PPSA*. Section 4(2) as to the meaning of proprietary maritime claim could be expanded to include a reference to all maritime property. In any event s.4(2) should be expanded to include any maritime property relating to a ship so as to pick up bunkers, cargo on a ship and equipment of a ship.
13. The scope of co-owners disputes should be expanded so as to include a share in a ship and s4(2)(c) should be expanded to include security for enforcement of either judgments or awards. The scope of maritime claims could arguably be expanded to catch all property that is attached to, operates upon or below the seabed. This would catch a much wider sphere of maritime property and would be consistent with the much wider sphere of maritime property capable of adversely affecting the maritime environment. Equally an expansive approach to the maritime jurisdiction in Australia might include attachment of property used for trade and commerce above the surface of the sea so as to catch aircraft. Each of the jurisdictional heads found in s. 4 (3) should be reviewed in light of the comparative approach in other jurisdictions and in light of the dominant international maritime trade and commerce interests of Australia.
14. The potential substantive law making power on matters of admiralty and maritime jurisdiction have been raised on other occasions and it is appropriate to recognise that s. 76 (iii) of the *Constitution* is a potential source of complete uniformity in regulation of maritime safety on all navigable waters. The scope for inconsistent State legislation on maritime safety for internal navigable

waters does warrant further consideration as to exercise of the full Constitutional law making power in this field of matters maritime and admiralty. This means the definition of “ship” in s.3 should be revisited and so too should s. 5(3) and (4).

15. The categories of general maritime claims could be expanded to include all maritime property and to make clear that the claims may be against persons interested in the maritime property or arising or in relation to claims arising out of the use of the maritime property. Arguably s. 4 (3) (a) should be expanded to pick up all sources of damage to maritime property and at least damage done “to a Ship, cargo, goods and /or all commercial interests in the voyage or intended voyage and/or freight”. Section 4 (3) (c) could be expanded to cover loss of life or injury sustained in connection with the loading and/or unloading of cargo and goods with shore equipment and/or by barge or other roadstead equipment or vessel used from shore to ship. Section (3) (d) could be expanded to catch a wider range of interests who’s act or omission might be raised and a more expansive connection with a ship, cargo or goods. Section 4 (3) (e) and (f) might be expanded to goods “carried in part by sea” in replacement of the reference to “a ship”. Section 4 (3) (h) to (r) might all have the words “in respect of” replaced by “relating to”. Section 4 (3) (r) to (t) might be expanded to include commercial interests in the ship, cargo, goods and freight.
16. Whether s.6 should remain in its current form depends upon whether a more expansive view is taken of the legislative power found in s. 76 (iii) of the *Constitution* but this should be included in any review.
17. Arguably s. 9 should be more fulsome in the conferral of in personam maritime jurisdiction on the Federal Court of Australia so that at least the same jurisdictional vesting has occurred for any court of a State as that found in s. 39 of the *Judiciary Act 1903*. The exclusivity of the jurisdiction for matters maritime and admiralty should perhaps be made clear by s. 9 and/or s.10 so that non-consensual administrative bodies do not assert or exercise administrative power that is inconsistent with the jurisdiction so conferred or inimical to the interests underlying the maritime and admiralty jurisdiction. Further the vesting under s.10 and s.25 should be re-considered in light of the development of maritime law since introduction of the *Admiralty Act 1988*.

18. Arguably s.12 could be expanded to any associated matter that could otherwise be dealt with by the integrated court system established by the *Constitution*. This might be more controversial depending upon views as to the scope of accrued jurisdiction and the extent to which associated matter should be confined to federal matters. There are sound reasons why this sphere of jurisdictional distinction should be revisited starting with the consequences of the High Court of Australia's decision in *Kirk*. This also means that the limitation found in s.13 should be reviewed.
19. Sections 14 to 19 are the key provisions as to the right to proceed in admiralty by the *in rem* process. These provisions operate on a narrower sphere of maritime property and maritime interests than could be addressed under s. 76 (iii) of the *Constitution*. If a wider approach was taken to maritime property that could be the subject of *in rem* process then a much greater role in the advancement of international maritime trade and commerce. Arguably all the references to “ a ship or other property” could be reflect an expanded sphere of maritime property the subject of *in rem* process and the current construction to property associated with ship could be removed. The full scope of maritime liens needs to be reviewed in relation to s.15 and there are limits in the language used in both subsections that could be addressed. Torts on the high seas should perhaps be expressly included without the limit to the ship or property. The scope of interests in the ship or property that might sustain the jurisdictional nexus could also be expanded. Further consideration could be given to the applicable substantive law in relation to maritime liens and scope for application of more than one law system to the controversy.
20. The expansion if any of s.4(2) will impact on the scope of s.16 and the limited interests in s.17 to 19 could be reviewed to consider a wider scope of *in rem* process. Specifically a wider inclusive definition of “owner” could be considered so as to include registered interests, in whole or in part, and to permit inclusion of the shareholding interests, trusts or structures and control behind corporate vehicles. The scope of chartering interests might be expanded to included slot or space charterers as well as time and voyage charterers in the second limb of s.17, s.18 and s.19.

21. Sections 27, 28 and 30 assume an absence of international significance for the purpose of enforcement that that is not necessarily correct and both retransfer and removal from remitter should be addressed. Further there are potentially wider issues as to parties, matter and joinder that are arguably not fully addressed given the potential difference in relation to powers of service. This also impacts on s.34 claims.
22. Section 29 could be substantially expanded to embrace enforcement and/or security for all maritime proceedings around the world. The current limitations are clearly too narrow and arguably confined by s. 4. In any event the nexus to potential arrest should be made patent and the scope of maritime property should be expanded.
23. Section 32 should be expanded to include all matters arising under or relating to the *Shipping Registration Act 1981*. Section 33 could be expanded in relation to the scope of maritime property and the scope of interests the subject of potential claim.
24. Section 34 should be reviewed in light of the expansion of the maritime property and a clearer identification of the subjective and objective elements could be spelt out. The direct causal nexus also perhaps requires some clarification and the procedure for third party loss and damage should perhaps be spelt out together with the absence of any wider submission by pursuit of such claim.
25. Section 36 should perhaps include jurisdiction to deal with any dispute arising from the detention including a s.34 type claim against wrongful detention.
26. Section 37 assumes a three year time bar is appropriate however there are sound reasons why in this international sphere a longer period may not be more appropriate and in any event there could be an extension for the purpose of belated joinder/ cross claims/arbitral determinations as well as a broader power to extend more clearly including contractual bars in so far as considered contrary to the ordinary maritime and admiralty jurisdiction exercised by the Court or otherwise inimical to public interests. The same considerations arise in relation to s.56 which amended the *Navigation Act 1912*.

27. Whether in any review all matters arising under the *Navigation Act 1912* should be included within the conferred admiralty jurisdiction should be addressed as well as the exclusion in s. 54.

Conclusion

28. The possible areas of reform of the *Admiralty Act 1988* are ones that now are ripe for reconsideration given the combined significance of the need to review the impact on Australia's maritime interests of the *PPSA*. This paper calls for an urgent referral of both the *Admiralty Act 1988* and the *PPSA* by the ALRC. Indeed this referral should take place before the registration commencement time of the *PPSA* commences.

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