LECTURE IN MEMORY AND HONOUR OF THE HONOURABLE JUSTICE RICHARD COOPER

'AUSTRALIAN ADMIRALTY AND MARITIME LAW – SOURCES AND FUTURE DIRECTIONS'

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I INTRODUCTION

It is a great honour to be asked to give the second Annual Richard Cooper Memorial Lecture, especially following such an eminent scholar, teacher, practitioner and seafarer as Professor Edgar Gold.

This is not the time to express fully the loss to maritime law and scholarship that the untimely passing of Richard Cooper caused. It is necessary to say, however, that it was, and is, a national tragedy.

Richard Cooper was intimately involved in the law reform of the 1970s and 1980s which produced the Australian Law Reform Commission Report on Civil Admiralty Jurisdiction which led to the enactment of the *Admiralty Act 1988* (Cth).[1] He had a strong belief in the need for a clear and coherent body of maritime law in this nation. He recognised the significant steps required to achieve that aim, not the least of which was the breaking of the colonial bindings of our thinking in a field where Australia's interests are so vital.

This evening, I seek to give a perspective on the Admiralty and maritime grant in s 76(iii) of the Australian Constitution and to emphasise the rich and diverse sources of this branch of the general law. Section 76(iii) is a Constitutional recognition of the existence of a rich and fascinating body of law of singular importance to this nation. The scope of s 76(iii) and the consequences of its place in the Constitution are important elements in the future development of maritime law in this country.

I was privileged to have the benefit of discussion and debate with Richard Cooper on this topic. Whilst the errors that may exist in this evening's lecture are mine alone, I am indebted to him for his inspiration about this topic. I must also recognise the illumination on this topic from the 1981 Dethridge Memorial Address by the Hon. Howard Zelling[2] and the article by the distinguished American judge the Honourable John R Brown in 1993.[3]

During the process of reform of the 1970s and 1980s, considerable intellectual energy was expended upon illuminating the nature and extent of colonial and Australian Admiralty and maritime jurisdiction. Some of that work expressed a justifiable lamentation at the stunted complexity of the then position governed by the

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1 Richard Cooper's involvement in this reform culminated in his role as consultant to the Australian Law Reform Commission. Before that his influence was important in the formulation of the views of the Maritime Law Association of Australia and New Zealand, from the 1970s.

2 Zelling, 'Of Admiralty and Maritime Jurisdiction' (1982) 56 *Australian Law Journal* 101.

3 Brown, 'Admiralty Judges: Flotsam on the Sea of Maritime Law' (1993) 24 *Journal of Maritime Law and Commerce* 249.

Colonial Courts of Admiralty Act 1890 (Imp) under the shadow of s 76(iii) of the Australian Constitution.[4]

Many of these difficulties and complexities were cured by the clear terms and simple structure of the *Admiralty Act*. There remain, however, dormant questions of a basal character which, at some point, will need to be addressed if this nation is to have fully coherent and robust national Admiralty and maritime arrangements. These questions were recognised by the Law Reform Commission,[5] but its approach was not to recommend steps into potentially controversial territory; rather, its avowed aim was to reduce Australian Admiralty jurisdiction into simple, clear and coherent terms, upon its Australian Constitutional, rather than a colonial and Imperial, foundation. This aim was amply and luminously achieved.

There is a tendency, understandable given our colonial past, to examine Australian Admiralty and maritime law from an exclusively English or Imperial historical perspective. The nature and development of Australian maritime law must, however, be assessed and approached by reference to Australia as a fully independent member of the community of nations. Two elements are important in the last sentence: independence and membership of the community of nations. These two elements reflect the ever-present necessity in maritime law to balance domestic national interests with the interests of harmony in the wider world of participation in the community of nations. As a colony, these strands of interest were mediated through the institutions, law and interests of a great imperial power. Now, we must strike our own balance.

Admiralty and maritime jurisdiction is not just a collection of suits found to have been within the cognisance of, and administered by, the English Admiralty Court (exemplified by the action *in rem* against a ship itself and the capacity to arrest the ship irrespective of the presence within the jurisdiction of any party said to be personally responsible for any claim). It is more than that. It is a body of law, and the administration of a body of law, with roots in public international law, civil law, international commerce, international agreement and the laws of nations. Its history is rich and its contents are vibrant and modern. It is only an arcane or obscure branch of the law to those whose legal thinking is informed exclusively by land-based human activity. It is a branch of the law central to the economic life of this country, being a great trading nation accounting for a significant portion of the world's maritime task, both by volume and by value. It is a branch of the law of immense public importance to an island continent with claims over, and responsibility for, vast marine areas, including Antarctic seas. It is the law of maritime affairs.

Admiralty courts in England had their origins in the civilian tradition. Until the 19th century, the court dealing with Admiralty law was *not* a common law court or a Chancery court, but a civilian court. Competition over centuries that has been called an 'incessant war of jurisdiction'[6] saw the English Admiralty Court's jurisdiction diminished from its former medieval claims by the time of the fashioning of the Constitution of the United States of America. There were reforms in England in the

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4 For example see H Zelling, 'Constitutional Problems of Admiralty Jurisdiction' (1984) 58 *Australian Law Journal* 8; C A Ying, 'Colonial and Federal Admiralty Jurisdiction' (1981) 12 *Federal law Review* 236.

5 See generally the Australian Law Reform Commission, *Civil Admiralty Jurisdiction*, Report No 33 (1986) ch 5.

6 Scott LJ in *The Beldis* [1936] P 51, 85.

19th century[7] which saw some extension of jurisdiction to the Admiralty Court. In 1873,[8] as part of the general jurisdictional reforms of the 19th century, Admiralty jurisdiction was swept into the common law courts and the civilian Admiralty Court was abolished.

In Australia, until the operation of the *Colonial Courts of Admiralty Act 1890* (Imp), the Vice-Admiralty courts established in the colonies from the earliest settlement were Imperial courts, separate from the local colonial courts.

The Australian Constitution did not immediately form a fully independent nation state, but a federal colony.[9] Nevertheless, it was an organic document of self-government, which, through the passage of 20th century domestic and world politics and affairs, stands as the Australian national federal compact.

To appreciate the full potential scope for a national and coherent body of Admiralty and maritime law in Australia, it is necessary to explore s 76(iii) of the Constitution and its context. Section 76(iii), in its terms, is concerned with the conferral of jurisdiction on the High Court, as follows:

> The Parliament may make laws conferring original jurisdiction on the High Court in any matter:
> …
> (iii) of Admiralty and maritime jurisdiction;
> …

This is only one paragraph (of nine) in ss 75 and 76,[10] which, taken together, define the content of the Commonwealth polity's judicial power to resolve controversies: the judicial power of the Commonwealth, or, federal jurisdiction.

Section 77[11] of the Constitution provides for the Commonwealth Parliament to have authority to legislate to confer jurisdiction that is referred to in ss 75 and 76 on

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7 The *Admiralty Court Act 1840* (UK) and the *Admiralty Court Act 1861* (UK).

8 The *Supreme Court of Judicature Act 1873* (UK).

9 When Australia became a fully independent nation state is not a straightforward question. On one view, it was not until the passing of the *Australia Acts* (Cth) and (UK). On another view, it was the adoption of the *Statute of Westminster*. There are other possibilities.

10 The full text of ss 75 and 76 is as follows:

s 75 Original jurisdiction of High Court

In all matters:

(i) arising under any treaty;
(ii) affecting consuls or other representatives of other countries;
(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
(iv) between States, or between residents of different States, or between a State and a resident of another State;
(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

s 76 Additional original jurisdiction

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

(i) arising under this Constitution, or involving its interpretation;
(ii) arising under any laws made by the Parliament;
(iii) of Admiralty and maritime jurisdiction;
(iv) relating to the same subject-matter claimed under the laws of different States.

11 '77 Power to define jurisdiction

other federal courts and invest such jurisdiction in State courts, including the power to make conferral of jurisdiction on federal courts exclusive. The power of the Commonwealth Parliament to provide (at its choice) for the exercise of federal jurisdiction by the courts of the States was a significant point of distinction from the Constitution of the United States. Parliament has exercised this power since the passing of the *Judiciary Act* in 1903. The wielding of governmental power (using that expression in the broad sense) being the judicial power of one polity could be, and has been, entrusted to the courts of other polities. This, of itself, was, and remains, a significant political achievement. The trust, respect and comity between the polities and their courts for each other reflected in this arrangement are aspects of the federal compact of the highest importance, and not to be taken for granted or undermined in any way.

II ARTICLE III SECTION 2 OF THE UNITED STATES CONSTITUTION

The context of the Admiralty and maritime grant in s 76(iii) was not only colonial, but also national and international. There is no doubt that s 76(iii) was taken from the terms of Article III section 2 of the United States Constitution, which, relevantly, was in the following terms:[12]

> The judicial Power shall extend … to all Cases of admiralty and maritime Jurisdiction; …

The relevant similarity between the two Constitutions did not end with the text of the provisions dealing with Admiralty and maritime jurisdiction. One can see in

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> With respect to any of the matters mentioned in the last two sections the Parliament may make laws:
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> (i) defining the jurisdiction of any federal court other than the High Court;
> (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
> (iii) investing any court of a State with federal jurisdiction.'

[12] The full text of Article III section 2 was as follows:

> *The judicial Power shall extend* to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; *to all Cases of admiralty and maritime Jurisdiction*; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
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> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

the text and structure of the whole of Article III section 2 the origin of the form and terms of ss 75 and 76 of our Constitution. The similarity also extended to the place of each provision in the structure of each Constitution: the Admiralty and maritime provision appeared in the part of the Constitution providing for the Federal Judicature and its jurisdiction.[13] In each Constitution, the enumerated heads of legislative power were contained in another part of the document. Also, the legislative powers in each Constitution included one for trade and commerce beyond one State and an incidental power.[14] Neither Constitution stated expressly that the national legislature had authority to legislate in respect of Admiralty and maritime *law* as opposed to *jurisdiction*.

The influence of United States Constitutional learning leading up to the formation of the Australian Constitution is clear.[15] It is, therefore, instructive to explore the development of Article III section 2 insofar as it concerned admiralty and maritime jurisdiction in the United States up to 1900 (as the jurisprudence available and known to at least some of the framers of our Constitution) and thereafter (as a means of assessing the reliability of the earlier, 19th century, jurisprudence).[16]

A number of important questions arose in the 19th century in connection with the United States admiralty grant: first, the meaning of the phrase 'admiralty and maritime jurisdiction' itself, which issue included the question whether it was a phrase to be understood by reference to the laws of nations or by reference only to practice and procedure in the English Admiralty Court; secondly, whether the Congress had legislative power over the subject of admiralty and maritime *law* and not merely over the conferral of *jurisdiction*; thirdly, whether admiralty and maritime jurisdiction extended past the influence of the tide and extended into the great arterial rivers and lakes of the North American continent; and, fourthly, the extent to which admiralty and maritime jurisdiction of federal courts was exclusive of state courts.

Time does not permit a discussion of all of these questions. The first two are the most relevant for understanding of future direction of Admiralty and maritime law in Australia. I will also touch upon the third. I will ignore the fourth, the complexities of which, together with the relationship between Admiralty law and state legislation have bedevilled the law in the United States.[17]

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[13] Each constitution had separate sections dealing with the powers of the legislature, the courts and the executive.

[14] As to trade and commerce, see s 51(i) in the *Australian Constitution* and Article 1 Section 8(3) in the *United States Constitution*. As to the incidental power, see s 51(xxxix) in the *Australian Constitution* and Article 1 Section 8(18) in the *United States Constitution.*

[15] *D'Emden v Pedder* (1904) 1 CLR 91, 113; Hunt, *American Precedents in Australian Federation* (1930); L Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002) 1-2; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 512.

[16] Relevant to the Admiralty and maritime jurisdiction in Article III section 2 were cognate questions about the interpretation and operation of the *Judiciary Act 1789*.

[17] This is not intended to be a full analysis of the United States position. Rather, I simply seek to draw important elements from the United States law of possible relevance to the Australian context.

A *The Meaning of the Phrase 'Admiralty and Maritime Jurisdiction'*

Early in the 19th century, some United States judges took the view that the phrase 'admiralty and maritime jurisdiction' was to be taken to refer to the Admiralty jurisdiction of England.[18] This approach, if persisted with, would have imported into a branch of United States law the restrictions on the jurisdiction to which the efforts of the common law courts had subjected the English Courts of Admiralty.[19] The sweeping and scholarly judgment of Story J in *De Lovio v Boit*[20] (sitting as a circuit judge) exploded this notion. After a destructive examination of the limitations on Admiralty in England, Story J expressed the content of the phrase 'of admiralty and maritime jurisdiction' in Article III section 2 in a manner informed by the laws of nations as the jurisdiction which regulates maritime commerce and affairs based on the civil law and the customs and usages of the sea.[21]

This broad conception of the content of the phrase and the international sources of admiralty and maritime law gave rise to some controversy at the time, but it has not been departed from.[22]

The breadth of the sources of the phrase gave rise to the recognition that there was a general maritime law, with its sources beyond the common law and equity jurisprudence of English courts.[23] In 1828, Marshall CJ said: 'Admiralty cases [do not] arise under the constitution or laws of the United States [but] are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.'[24]

One needs to be careful at this point. However broadly the judges expressed themselves in these cases, later authorities have made clear that this international source of the general maritime law did not make it other than the maritime law *of the United States*.[25] In 1875, the Supreme Court, in *The 'Lottawanna'*,[26] made clear that

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[18] See for example, *United States v McGill*, 4 US 426, 429-30 (1806) (Washington J sitting as a circuit judge).

[19] The history of that conflict in general terms is too well known to require elaboration. Its detail can be found in *De Lovio v Boit*, 7 F Cas 418 (1815); F Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800* (1970) 4-11; W D Robertson, *Admiralty and Federalism* (1970) ch 3; G Gilmore and C L Black, *The Law of Admiralty* (2nd ed, 1975) 8-10; R G Marsden, *Select Pleas in the Court of Admiralty* (1894) vol 1, xiv; Holdsworth, *A History of English Law* (7th ed, 1956) vol 1, 544-68.

[20] 7 F Cas 418 (1815).

[21] Ibid 443:

> [T]hat maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe; that jurisdiction, which under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse and the warfare of mankind.

[22] The Supreme Court, in 1847, in *Waring v Clarke*, 46 US 441 (1847) (see also *Morewood v Enequist*, 62-64 US 677, 678 (1859)), expressed the matter in similar terms and, in 1870, in *Insurance Co v Dunham*, 78 US 135 (1870), unanimously approved it.

[23] *The 'Scotia'*, 81 US 170, 187-88 (1872).

[24] *American and Ocean Insurance Co v 356 Bales of Cotton*, 26 US 511, 545-46 (1828).

[25] *The 'Lottawanna'*, 88 US 558, 573-75 (1875); Holmes J in *The 'Western Maid'*, 257 US 419, 432 (1922); *Moragne v States Marine Lines Inc*, 398 US 375, 386-88 (1970); to the

the international sources of maritime law, distinct from the terrene common law, informed the development of United States maritime law as a distinct branch of municipal law. Bradley J in *The 'Lottawanna'*[27] referred to the 'general maritime law' as the 'basis and groundwork' for municipal recognition.[28] The roots, sources and informing considerations of this branch of the law were maritime and international. The law itself was municipal.

Two further opinions of Story J, sitting as a circuit judge, illustrate the separate international and maritime sources of the development of the general maritime law in the United States: *Harden v Gordon*[29] and *Reed v Canfield*.[30]

In both these cases, Story J developed rules of maritime law unconstrained by apparently applicable rules of contract and common law. In *Harden v Gordon*, Story J set aside the articles of a seaman which had purported to restrict his right to maintenance and cure to access to a medicine chest on board the ship. In so doing, Story J recognised the concern for seamen that an Admiralty court will exhibit.[31]

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same effect in England see *The 'Tojo Maru'* [1972] AC 242, 290-1; and in Australia see *Blunden v Commonwealth* (2003) 218 CLR 330, 337-8, [13] and *Elbe Shipping SA v The Ship 'Global Peace'* [2006] FCA 954, [51].

26 88 US 558 (1875).

27 88 US 558 (1875).

28 At 573 stating:

> Each state adopts the maritime law, not as a code having any independent or inherent force, proprio vigore, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world.
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> This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole.
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> …
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> That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' without defining those terms, assuming them to be known and understood.

29 11 F Cas 480 (1823).

30 20 F Cas 426 (1832).

31 In dealing with the contractual articles Story J said at 485:

> Every court should watch with jealousy an encroachment upon the rights of

The juridical foundations for Story J's approach were said to be general principles of justice, doctrines of general equity and the customs and usages of the sea. The case and the principles of the maritime law expressed by Story J in it were approved a century later in *Garrett v Moore-McCormack Co*.[32]

In 1832, in *Reed v Canfield,* Story J reached beyond the common law, stating that seafarers were 'in some sort co-adventurers upon the voyage' and thus were both entitled and subject to 'peculiar rights, privileges, duties and liabilities'. In this case, the shipowner was liable for the expenses of a crewman who suffered frostbite in returning to his ship after shore leave until he reached the completion of his cure, as far as ordinary medical expenses were concerned. A century later the Supreme Court in *Farrell v United States*[33] agreed with this analysis. Story J also departed from the common law by rejecting the defence of contributory negligence.

Story J was not alone in this work which recognised the separate sources and development of the general maritime law. For instance, Chase J in 1865 (sitting as a circuit judge) in *The 'Sea Gull'*[34] refused to recognise the common law rule that saw the end of a cause of action with the death of the plaintiff. The husband of a stewardess on the steamer *Leary* who had been killed in the collision of *Sea Gull* with *Leary* successfully sued *Sea Gull* as defendant.[35]

The present relevance of these cases is not the precise state, or direction of the development, of United States admiralty and maritime law in the first half of the 19th century, but the recognition, at least, that the sources of the general maritime law in the United States were maritime and international in character, based on enlarged principles of justice combined with the customs and usages of the sea. It is undoubted that this approach continued for much of the 20th century.[36] For example, in 1959, in *Kermarec v Compagnie General Transatlantique*[37] the Supreme Court

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> seamen because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily over reached. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favour and guardianship. They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectations, wards with their guardians, and cestuis que trust with the trustees. … If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable …

[32] 317 US 239 (1942).

[33] 336 US 511 (1949).

[34] 21 F.Cas 909 (1865): See *Moragne v States Marine Lines Inc*, 398 US 375, 387-88 (1970) for other cases to the same effect.

[35] The Supreme Court, however, in 1886, in *The 'Harrisburg'* 119 US 199 rejected this particular doctrinal difference between the maritime law and the common law. Though, see now, *Moragne v States Marine Lines Inc*, 398 US 375 (1970).

[36] See *The 'T J Hooper'*, 60 F 2d 737 (2nd CCA, 1933); and *Kermarec v Compagnie General Transatlantique*, 358 US 625 (1959). For a discussion of the vicissitudes of the approach to the status or place of maritime law see Brown, above n 3; C S Haight, 'Babel Afloat: Some Reflections on Uniformity in Maritime Law' in J D Kimball (ed), *The Healy Lectures* (2003) 59; R Force, 'Deconstructing Jensen: Admiralty and Federalism in the 21st Century' in J D Kimball (ed), *The Healy Lectures* (2003) 99.

[37] 358 US 625 (1959).

refused to apply the existing common law rules governing an occupier's liability in respect of a gratuitous licensee in deciding upon a claim in respect of an injury to a visitor to a crew member on board the ship *Oregon*. The Court held that the rights and liabilities of the shipowner were to be measured by the standards of the general maritime law freed from inappropriate common law concepts. It held that the distinctions in the law of occupier's liability such as the different duties in respect of licensees and invitees were inherited from a land-based culture traceable to a feudal heritage and were foreign to fundamental principles of admiralty and maritime law which were based on traditions of simplicity and clarity.[38] Adopting this approach, the Court held that the shipowner owed a duty to exercise reasonable care for all those on board the vessel for purposes not inimical to the owner's legitimate interests.

B *The Existence of Legislative Power Over The Subject of Admiralty and Maritime Law*[39]

The express terms of the admiralty and maritime grant in Article III section 2 referred to 'jurisdiction'. During the American colonial period the word 'jurisdiction' was often used to refer to a general authority to govern.[40] The text of Article III and the history of the Constitutional Convention appear to make clear, however, that what was being referred to was judicial authority, and not legislative authority.[41] That said, the full implication of judicial power should be recognised. The conferral of jurisdiction is not a matter of mere procedure. It is the conferral of a species of governmental power to quell controversies. Courts and judges invested with this power have a duty to exercise it if jurisdiction is invoked,[42] and thus they have the responsibility to ascertain and declare the general maritime law.[43] Thus understood, there can be no doubt that there was a Constitutional recognition of a substantive general maritime law ascertained, developed and declared by the federal courts. (The same (with a recognition of the role of State courts at the choice of Parliament) can be said of s 76(iii).)

The early United States cases tended to found Congressional authority over maritime matters on the commerce power and the importance of intercourse between nations and interstate trade.[44] The inherent tension in the use of the commerce clause as the foundation of this power was ultimately resolved by recourse to Article III section 2 as an independent source of authority for Congress to legislate upon admiralty and maritime matters. In 1851, in *The 'Genesee Chief'*,[45] Taney CJ

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[38] Ibid 628-32.

[39] See generally the note 'From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century' (1953-54) 67 *Harvard Law Review* 1214.

[40] D W Robertson, above n 19, 136.

[41] See Goodman, 'Eighteenth Century Conflict of Laws: Critique of an Erie and Klaxon Rationale' (1961) 5 *American Journal of Legal History* 326 and Robertson, above n 19, 136.

[42] *The 'St Lawrence'*, 66 US 522, 526 (1862).

[43] *The 'Resolute'*, 168 US 437, 439 (1897).

[44] See *Gibbons v Ogden*, 22 US 1; *The 'Daniel Ball'*, 77 US 557, 564 (1870); query whether *Waring v Clarke*, 46 US 441 (1847) can be seen as more widely based: cf Robertson, above n 19, 142-43*; Moore v American Transportation Co*, 65 US 1, 6 (1861); *Providence & New York Steamship Co v Hill Manufacturing Co*, 109 US 578 (1883); *The 'Thomas Jefferson'*, 23 US 428 (1825); and see the legislation drafted by Story J to extend federal jurisdiction to lakes and inland navigable waters: 5 Stat 726 (1845). The taxation power was also relevant in respect of some laws.

[45] 53 US 263 (1851).

founded the validity of an amendment to the *Judiciary Act* extending federal admiralty jurisdiction to lakes and river waterways on the admiralty and maritime clause in Article III section 2, not on the commerce power. In 1874, in *The 'Lottawanna'*,[46] Bradley J recognised the lack of complete coterminousness of the grant of judicial power in Article III section 2 and the commerce power. In 1889, in *Butler v Boston and Savannah Steamship Co*,[47] Bradley J confirmed the admiralty and maritime grant in Article III section 2 as a source of legislative power.[48] He reiterated this, unequivocally, two years later in 1891 in *In re Garnett*.[49]

This approach vindicated the strong views of Story J, expressed extra-judicially in his Constitutional treatise, that the structure of the Constitution implied Congressional legislative power coterminous with the reach of the judicial power.[50] That is, the legislature had power to make laws over matters which were the responsibility of the federal courts to decide, and upon which the federal courts had a responsibility to declare the law.

This coterminous arrangement of the powers of the two branches of government was affirmed in 1917 in *Southern Pacific Co v Jensen*[51] and in 1924 in *Panama Railroad Co v Johnson*.[52] The existence of admiralty and maritime law as a branch of United States law and its national significance can be seen in the words of Van Devanter J delivering the opinion of the Supreme Court in *Panama Railroad*[53] as follows:

> As there could be no cases of 'admiralty and maritime jurisdiction' in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in Colonial times and during the Confederation and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime

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46 88 US 558, 576-7 (1874).

47 130 US 527 (1889).

48 In dealing with Congressional and Massachusetts legislation concerning limitation of liability he said at 557:

> As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislatures.

49 141 US 1 (1891), saying at 12:

> It is unnecessary to invoke the power given to Congress to regulate commerce in order to find authority to pass the law in question. The act was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive 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.

50 Story, *Commentaries on the Constitution of the United States* (1833) 584, [821]:

> The framers of the Constitution adopted two fundamental rules with entire unanimity: First, that a national judiciary ought to possess powers co-extensive with those of the legislative department. Indeed the latter necessarily flowed from the former and was treated, and must always be, as an axiom of political government.

51 244 US 205, 215-16 (1917).

52 264 US 375, 385-86 (1924).

53 Ibid.

> law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. 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. …

It can also be seen in the words of McReynolds J in *Southern Pacific Co v Jensen*[54] when he said:

> Article III § 2, of the Constitution, extends the judicial power of the United States 'To all cases of admiralty and maritime jurisdiction;' and Article I, § 8, confers upon the Congress power 'To make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.' Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. *Butler v Boston & Savannah Steamship Co*, 130 US 527; *In re Garnett*, 141 US 1, 14. And further, that in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction. *The 'Lottawanna'*, 21 Wall. 558; *Butler v Boston & Savannah Steamship Co*, 130 US 527, 557; *Workman v New York City*, 179 US 552.

One important reason for this implication based on Article III Section 2 was the need for uniformity and clarity in the dealing with maritime affairs and commerce without the need to discriminate functionally and geographically in respect of what people or vessels were doing. Vessels use the same navigable water whether they are engaged in foreign, interstate or intrastate trade.[55]

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[54] 244 US 205, 214-15 (1917); Gilmore and Black, above n 19, 45-7 describe maritime law as a world-wide and ancient branch of the law comprising the laws, customs and usages in respect of shipping and the sea reflected in judge made law, statutes, codifications, international conventions and public law. It is unnecessary to deal with the more controversial issues in *Jensen*, in particular the relationship between maritime law and the common law and statutes of a state: see Gilmore and Black at 403-6.

[55] As one leading United States text on Constitutional law said at the time (Hare, *American Constitutional Law* (1889) 109):

> It is the character of the traffic as internal, inter-State or foreign, and not whether it takes place over a road or river, by boat or railway, which must be considered in applying the commercial power; but admiralty jurisdiction has a wider scope, and may be exercised over all boats using the navigable waters of the United States. Vessels use the same waters whether they are engaged in foreign or domestic trade; and as disorder and litigation would result if they were governed by different rules, Congress may make and the admiralty enforce such regulations as are requisite to give certainty to title, maintain order and prevent the collisions which may be as disastrous on a river as at sea. The craft which is plying to-day between places in the same State may to-morrow extend her voyage to another, or proceed to sea; and it is therefore essential that she in common with all others which are or may be engaged in coasting or foreign trade, shall be governed by the same rule.

Later cases made explicit the role of the 'necessary and proper clause' (the equivalent of the incidental power in our Constitution) in the implication of the legislative authority of Congress over admiralty and maritime law.[56]

Thus, it is (and was by 1900) clear that Congress has (and had) power to legislate for the subject matter recognised by the admiralty and maritime constitutional conferral of judicial authority: admiralty and maritime law.[57] This conclusion arose as an incident of or implication from the text and structure of the Constitution aided by the necessary and proper clause.

The limit of Congressional authority brought about by the Constitutional recognition of the existence of the general maritime law was that Congress could not fundamentally alter the boundaries of what was admiralty and maritime law.[58]

C *Whether Admiralty and Maritime Jurisdiction Extended Inland Beyond Tidal Waters*

The decision of Story J in *De Lovio v Boit* was a clear declaration of independence of United States jurisprudence from English precedent. One aspect of English law (though not one at issue in *De Lovio v Boit*) was the seaborne limits of admiralty. Two statutes of Richard II in 1390 and 1392[59] that had been the legal foundation of many of the attacks of the common lawyers upon Admiralty contrasted things done within the realm with things done upon the sea (only the latter being the subject of Admiralty jurisdiction) removing Admiralty's jurisdiction over contracts, pleas and quarrels and all other things arising within the bodies of counties. Thus, any contract made within the body of a county (*infra corpus comitatus*) including charterparties, policies of marine insurance and other maritime contracts was held to be outside the jurisdiction of the Admiralty Court. This meant that Admiralty never had jurisdiction over tideless streams. The Continent had no such notion as a limit to maritime jurisdiction.[60] Surprisingly,[61] in 1825, Story J accepted the limitation on United States admiralty and maritime jurisdiction in *The 'Thomas Jefferson'*[62] in respect of a vessel working above the ebb and flow of the tide.[63] From 1857, however, the tidewater doctrine was swept away in *The 'Genesee*

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[56] *The 'Thomas Barlum'*, 293 US 21, 42 (1934).

[57] See *Moragne v States Marine Lines Inc*, 398 US 375 (1970); *Romero v International Terminal Operating Co*, 358 US 354, 360-1 (1959).

[58] *Panama RR Co v Johnson*, 264 US 375, 386-7 (1924). It is unnecessary to discuss this issue and the related question of the relationship between state legislation and the maritime law in the United States. It suffices to say that the role of the High Court as more than a federal court – as the ultimate appellate court in state and federal matters (the keystone of the federal arch) and the existence of one common law of Australia – place Australia in a different position to the United States.

[59] 13 Ric II c 5 and 15 Ric II c 3.

[60] Angell, *Tide Waters* (2nd ed, 1847) 79; Note in (1953-54) 67 *Harvard Law Review* 1214, 1217, (22).

[61] In particular, given the views expressed by lower courts before 1825 emphasising the need for national authority over the great navigable arteries of the Union: see the note in (1953-54) 67 *Harvard Law Review* 1214, 1218.

[62] 23 US 428 (1825).

[63] Considerable speculation has occurred to explain what was seen as an atypical approach of Story J – see Robertson, above n 19, 105-9; and the note in (1953-54) 67 *Harvard Law Review* 1214, 1215-19.

Chief'[64] *The 'Magnolia'*[65] and *The 'Eagle'*,[66] after having been strained to the limit in earlier cases.[67]

The importance of this development of United States admiralty and maritime law is the recognition of the capacity of that law to develop away from the stunting strictures of English Admiralty jurisdiction under the effects of the common law courts when the demands of national commercial and maritime development called for it. The notion that a national maritime jurisdiction in the Continental United States could ignore the great maritime arteries of the Union and the large inland seas of the Great Lakes ultimately had to be rejected. The manifest national interests of the Union simply demanded it.

D *Concluding Remarks on Article III Section 2*

Underlying the approach to the United States admiralty and maritime power were a sense of national independence and a clear and confident recognition of the subject matter as nationally important. The experience of a weak central government during the period of the Confederation left its scars on those who framed the American federal compact.[68] There was also a recognised need for commercial simplicity in the formation of the United States Constitution.[69] With these considerations in mind the Constitution was interpreted accordingly.

III SECTION 76(III) OF THE AUSTRALIAN CONSTITUTION

In Australia, s 76(iii) has not received the detailed attention that the equivalent part of the Article III Section 2 did in the 19th Century. To a significant degree, at least in the first half of the 20th century, the approach to the Constitutional provision and the subject of maritime affairs generally was governed by a recognition of Australia's subordinate colonial position and of the Constitution being (at the time of its creation and for many years thereafter) a federal compact for a group of colonies. Time, political development and Australian nationhood have moved on. To some extent, that development has been recognised in Australian law.

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64 53 US 443 (1851).

65 61 US 296 (1857).

66 75 US 15 (1868).

67 See *Peyroux v Howard*, 32 US 324 (1833); and *Waring v Clarke*, 46 US 441 (1847).

68 Not for nothing would Hamilton say:

> The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes … These so generally depend on the laws of nations and so commonly affect the rights of foreigners that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present Confederation, submitted to federal jurisdiction.

69 Small and Jayson (eds), *The Constitution of the United States of America* (1964) (referred to in *Cowen and Zine's Federal Jurisdiction in Australia* (3rd ed, 2002) 72) said the following:

> Since one of the objectives of the Philadelphia Convention was the promotion of commerce through removal of obstacles occasioned by the diverse local rules of the States, it was only logical that it should contribute to the development of a uniform body of maritime law by establishing a system of federal courts and granting to these tribunals jurisdiction over Admiralty and maritime cases.

A *The Meaning of the Phrase 'Admiralty and Maritime Jurisdiction'*

The first aspect discussed above in the United States context, the scope of the admiralty grant, has now been unequivocally settled by the High Court in terms similar to those expressed by Story J in *De Lovio v Boit.* In *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc*[70] the High Court, in a unanimous joint judgment, made clear the broad Constitutional scope of s 76(iii). It was not limited by English and colonial history; it was not tied to the state of Admiralty jurisdiction in England or the local colonies as at 1900 or 1890. Rather, the Court said that s 76(iii):[71]

> extends to matters of the kind generally accepted by maritime nations as falling within a special jurisdiction, sometimes called Admiralty and sometimes called maritime jurisdiction, concerned with the resolution of controversies relating to marine commerce and navigation.

This view swept away the doubts and hesitations about the scope or reach of s 76(iii) that had been expressed by Isaacs J in *John Sharp and Sons Ltd v Ship 'Katherine Mackall'*[72] and passed over the caution (if I may put it that way without any intended disrespect) of Dixon J in *McIlwraith McEachern Ltd v Shell Co of Australia Limited*.[73] It vindicated the submission of Sir Owen Dixon, when he had been senior counsel for the Commonwealth, in *The 'Katherine Mackall'* at 424, the views of Gibbs J in *China Ocean Shipping Co v South Australia*,[74] the views of Zelling J in the 1981 FS Dethridge Memorial Address 'Of Admiralty and Maritime Jurisdiction'[75] and the views of the Australian Law Reform Commission.[76] This had been the view of the Full Court of the Federal Court in the decision under appeal in *The 'Shin Kobe Maru'*[77] and of Gummow J at first instance in the same case.[78]

It is important to stress that the judgments at all levels in *The 'Shin Kobe Maru'* came to the width of s 76(iii) by a process of the liberal construction of an Australian Constitutional provision. It was unnecessary for the High Court to deal with the issue of the international sources of the law or with some contestable decisions about the limitations of Article III section 2. Nevertheless, all the judgments in the case, in particular that of Gummow J at first instance, display a recognition of the contextual relevance of the nature and scope of the grant in Article III section 2.[79]

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[70] (1994) 181 CLR 404.

[71] Ibid 424.

[72] (1924) 34 CLR 420, 427-8.

[73] (1945) 70 CLR 175, 208-9.

[74] (1979) 145 CLR 172, 204.

[75] Found in, *FS Dethridge Memorial Addresses 1977-1988* (1989). Also found in (1982) 56 *Australian Law Journal* 101.

[76] At [70] of the ALRC Report, above n 5.

[77] (1992) 38 FCR 227, 235, 245-7.

[78] (1991) 32 FCR 78, 100-11.

[79] The scope of s 76(iii) is not crucial in many cases. The Law Reform Commission took the view that the simplification of the administration of Admiralty jurisdiction suggested the benefits of a closed defined list of maritime claims, without a catch-all provision using the Constitutional reach of s 76(iii) as the boundary of the conferral and investiture by the Act. However, it can be relevant in the operation of the associated jurisdiction of the court in the manner recently displayed in *Elbe Shipping SA v The Ship 'Global Peace'* [2006] FCA 954. If there is a claim in the writ that falls within the lists in s 4(2) and (3) of the *Admiralty Act*, that will give the court jurisdiction to hear an Admiralty or maritime matter not conferred or invested, but which could be, given the scope of s 76(iii).

There has been less occasion for the High Court to deal with the issue of the international sources of the maritime law of Australia. Admiralty and maritime jurisdiction, to the extent that Parliament has conferred or invested it, is federal jurisdiction. Therefore, ss 79 and 80 of the *Judiciary Act 1903* (Cth) are applicable. These important sections provide for the operative law in any dispute in federal jurisdiction.[80] Central to their operation is the common law of Australia. The 'common law' in this context is the general law.

In *Blunden v Commonwealth*[81] Gleeson CJ, Gummow J, Hayne J and Heydon J discussed the place of maritime law as part of the law of Australia. They did so by adopting and approving what Lord Diplock had said in *The 'Tojo Maru'*.[82] This involved a rejection of any notion of a free-standing international maritime law affecting or creating municipal rights and obligations, as an external body of law, and of its own force. *Blunden* is not, however, a rejection, but on the contrary, a recognition, of the breadth and international character of the sources of maritime law. That this is so can be seen from the passages from *Moragne v States Marine Lines Inc*[83] cited by their Honours.[84]

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[80] Section 79: 'The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.'
Section 80: 'So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, *the common law in Australia* as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.' (Emphasis added.)

[81] (2003) 218 CLR 330, 337-8, [13].

[82] [1972] AC 242, 290-1:

> Outside the special field of 'prize' in times of hostilities there is no 'maritime law of the world,' as distinct from the internal municipal laws of its constituent sovereign states, that is capable of giving rise to rights or liabilities enforceable in English courts. Because of the nature of its subject matter and its historic derivation from sources common to many maritime nations, the internal municipal laws of different states relating to what happens on the seas may show greater similarity to one another than is to be found in laws relating to what happens upon land. But the fact that the consequences of applying to the same facts the internal municipal laws of different sovereign states would be to give rise to similar legal rights and liabilities should not mislead us into supposing that those rights or liabilities are derived from a 'maritime law of the world' and not from the internal municipal law of a particular sovereign state.

[83] 398 US 375, 368-88 (1970). See also *The 'Lottawanna'*, 88 US 558, 573-5 (1875).

[84] *Moragne* at 386-88 which included the following statement by Harlan J delivering the opinion of the Court 386-87:

> Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages. … These factors suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common-law rule, criticized as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea. (Footnotes omitted.)

For a somewhat more pessimistic view as to the effect of Lord Diplock's views in *The*

In this context, and as an aside, it is beyond this lecture to discuss the debate on the question of a *lex mercatoria*, and, as part of that, a *lex maritima,* in particular in the context of international arbitration and the possibility of the development of a general maritime law as a supra-national law rather than as part of a body of national municipal law. [85]

The uncontroversial recognition of the separateness of the sources of maritime law can be seen in a number of areas. The law concerning the nature and creation of maritime liens and of the priorities between them is quite different to equitable and common law notions on cognate topics. The reasons for the differences arise from the different informing considerations of maritime affairs. The roots of salvage, general average and maintenance and cure are civilian.[86]

The question is not just historical. The need to have regard to the separate character of maritime law and its international sources arises not infrequently. The notion of a ship as a mere chattel can lead to mechanical application of land-based rules to that premise that are quite inappropriate. Whilst a ship is undoubtedly a chattel, it is, as Turner LJ said in *McLellan v Gumm*,[87] unlike any ordinary personal chattel. It is often a working commercial enterprise, the home and workplace to the ship's complement, engaging in activities that have inherent danger to those on board and to her physical surroundings, flying the flag of one country, plying the high seas and entering and leaving numerous national territorial seas.

An appreciation of these types of considerations assists in the development of the maritime law as a branch of the general law. For instance, the question of the proper law governing assignment of property in ships is surprisingly lacking in authority. Treating the ship as a chattel (like a necklace, a ring or a motor vehicle) one is directed by orthodox principle to the *lex situs* of the chattel. This can bring about absurd results as a principle translated into maritime law. Many countries have legislation dealing with registration of ships. Some provide for title by registration. Some provide for registration of title otherwise gained. All, however, direct themselves only to the ships that are, or should be, registered on that country's register. The flag of a ship is central to the notion of the nationality of a ship (a notion not without its complexity[88]). Why should the relevant law governing the sale of a Greek ship be governed by the law of Japan merely because she is lying off Yokahama? For the reasons given by the Full Court of the Federal Court in *The 'Cape Moreton'*,[89] the maritime considerations attending the registration, flagging and working of ships militate in favour of the law of the flag as the law governing the assignment of property in, and title to, the ship (subject to contrary local statute and public policy), not merely when the ship is on the high seas, but also when she is located in some national jurisdiction different from the flag state.[90]

'Tojo Maru', see Zelling, above n 4, 12.

85 For a helpful introduction to these questions, see W Tetley, 'The General Law Maritime' (1994) 20 *Syracuse Journal of International Law and Commerce* 105, 134.

86 See W Tetley, 'Maritime Law as a Mixed Legal System' (1995-99) 23 *Tulane Law Rev* 317. For a helpful and illuminating discussion of the theoretical and practical significance of the broad international sources of maritime law, see W Tetley, *International Maritime and Admiralty Law* (2002).

87 (1866-67) LR 2 Ch App 290.

88 H Meyers, *The Nationality of Ships* (1967).

89 (2005) 143 FCR 43, 79-80.

90 For a discussion of the case and related cases, see P Myburgh, 'Arresting the Right Ship: Procedural Theory, the *In Personam* Link and Conflict of Laws' in M Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honour of*

Another example is the weight to be given to a master's view about the conduct of a ship when a passenger or cargo owner seeks an order requiring the master to do something about the affairs of the ship. The overriding of the master's judgment would be a serious matter.[91] The master is in charge of a ship, not a bus.

Thus, when the courts come to their task of ascertaining and declaring the law under the authority given by the grant of power in s 76(iii), it should be recognised that they are dealing with a branch of the general law (or for the purposes of s 80 of the *Judiciary Act*, the common law in and of Australia) which concerns itself with maritime affairs and which has its roots in the maritime affairs and commerce of nations.

B *The Existence of Legislative Power Over the Subject of Admiralty and Maritime Law*

The next issue discussed above in the United States context is whether the Commonwealth Parliament has authority to legislate for substantive Admiralty and maritime law.

In his work on the Constitution published in 1910,[92] Sir William Harrison Moore, after describing the implication of Congressional power found by the United States Supreme Court in the admiralty and maritime jurisdiction grant, expressed the view that a similar implication would be drawn in Australia.[93]

Shortly after the publication of Professor Harrison Moore's work, the High Court was given the opportunity of dealing with the question.

In *Owners of SS Kalibia v Wilson*[94] there was a challenge to the ability of the Commonwealth Parliament to provide for seamen's compensation beyond a foundation based on interstate and overseas trade and commerce. The Commonwealth sought to justify the legislation[95] on two bases. First, s 98 of the Constitution[96] was said to widen s 51(i)[97]. Secondly, the Supreme Court's view of the role of Article III section 2 and the implication to be drawn from it and the

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Robert Force (2005) 283. As to the relationship of the local law, the law of the flag state and international law, see *Re Maritime Union of Australia; Ex parte CSL Pacific shipping Inc* (2003) 214 CLR 397.

91 As to the authority of the master see *Halsbury's Laws of Australia*, vol 17, [270-1165]; *Boyce v Bayliffe* (1807) 1 Camp 58; '*Lima*' (1837) 166 ER 434; *King v Franklin* (1858) 1 F & F 360; *Aldworth v Stewart* [1866] 4 F & F 957; *Hook v Cunard Steam Ship Co Ltd* [1953] 1 All ER 1021; T T Bucknill and J Langley, *Abbott's Law of Merchant Ships and Seaman* (13th ed, 1892) 211.

92 Moore, *The Constitution of Australia* (1910).

93 Ibid 562:

> [I]t is not likely that the Commonwealth power in respect to the modes and instruments of navigation will be more restricted than the power of Congress. The great practical difficulty of drawing a geographical line in matters of navigation and shipping, together with the importance of establishing a single authority thereon, would be strong reason for concluding that the whole matter belongs to the Federal Legislature. (Footnotes omitted.)

94 (1910) 11 CLR 689.

95 *Seamen's Compensation Act 1909* (Cth).

96 'The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.'

97 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
(i) trade and commerce with other countries, and among the States;'

Constitution as a whole were said to be directly applicable, citing Professor Harrison Moore and United States authority.

Both arguments appeared to have their merits. In all earlier drafts of the Constitution before Melbourne in 1898, the phrase 'shipping and navigation' had appeared as a placitum of s 51. Its removal by the drafting committee in Melbourne and placement in s 98 and the ascribing of a relationship with s 51(i) was not accompanied in the debates by any recognition of a change of effect. The relationship between s 98 and s 51(i) could easily be seen as accommodated in a manner reflected by how the reach of the admiralty and maritime grant in Article III section 2 had developed by the late 19th century. Though the commerce power had been replaced by the admiralty grant as the source of power for admiralty and maritime legislation, a residual relationship between the two can be seen in the enunciation of the extent of the admiralty grant. The great modern scholars, Gilmore and Black, have described the reach of the admiralty grant (leaving aside the non-tidal issue) as follows:[98]

> [I]t extends to all waters, … which are in fact navigable in interstate or foreign water commerce, whether or not the particular body of water is wholly within a state and whether or not the occurrence or transaction that is the subject matter of the suit is confined to one state.

One can see in this expression of the matter the residual role of the commerce power in the identification of the *water* as capable of carrying interstate or overseas sea trade, not the *ship* engaged in such trade. This was the accepted United States approach by 1900 to the residual relationship between the commerce power and the admiralty and maritime grant. The same could be easily accommodated in the relationship between ss 98 and 51(i).

Likewise, the argument based on s 76(iii) had strong and clear Supreme Court authority, (to which I have referred) for the use of which there was a clear foundation. Counsel for the Commonwealth began his argument with a reference to *D'Emden v Pedder*[99] in which Griffith CJ, in delivering the judgment of the Court had said:

> We think that, sitting here, we are entitled to assume – what, after all, is a fact of public notoriety – that some, if not all, of the framers of the Constitution were familiar, not only with the Constitution of the United States, but with that of the Canadian Dominion and those of the British colonies. *When, therefore*, under these circumstances, *we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation*.

A good start, one would have thought.

Both arguments were, however, rejected. The second (that favoured by Professor Harrison More) was rejected by Griffith CJ as 'untenable' without further

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[98] Gilmore and Black, above n 19, 31-2; and see *The 'Daniel Ball'*, 77 US 557 (1870); *Ex parte Boyer*, 109 US 629 (1884); and *The 'Robert W Parsons'*, 191 US 17 (1903).

[99] (1904) 1 CLR 91 at 113 (emphasis added).

discussion. The other justices were slightly less dismissive, but almost as unilluminating. Importantly, however, the reasoning of both Barton J and Isaacs J can be seen to be founded on Australia's subordinate colonial status, and its lack of independent sovereignty. Quite simply, the over-riding power for shipping, navigation and maritime law was Imperial. Embedded within the judgments was a premise of the vital importance of the subject to the Empire and Imperial power. As such, that power was, therefore, for the Imperial Parliament, not the Commonwealth Parliament.

The issue was revisited in 1921 in *Newcastle & Hunter River Steamship Co v Attorney-General (Cth)*[100] without any different result. In *R v Turner; Exparte Marine Board of Hobart*,[101] Higgins J noted that the views of Griffiths CJ, Barton J and Isaacs J on the reach of s 76(iii) in *The 'Kalibia'* were *obiter*.

The legacy of *The 'Kalibia'* is the view that the Commonwealth Parliament had power to deal with the judicial jurisdiction of admiralty and maritime law ('its interpretation and enforcement') but that it did not have power to alter admiralty and maritime law, other than by reliance on other heads of power in s 51, most notably trade and commerce and external affairs.[102]

As I said earlier, the grant in s 76(iii) is not merely procedural. It authorises courts and judges in the exercise of the judicial power of the Commonwealth to ascertain and declare the Admiralty and maritime law of Australia as part of the common law of Australia. Section 76(iii) recognises implicitly and directly the existence of substantive law of the same character. The question is, in such a vital sphere of the nation's affairs, whether the text and structure of the Constitution is to be continued to be construed as denying to the Commonwealth Parliament the ability to legislate on the substantive branch of the common law of Australia which the Constitution, in terms, contemplates may be administered by federal judges, exclusively, if the Parliament so desires.

In *The 'Shin Kobe Maru'* Gummow J, raised doubts about the continuing legitimacy of *The 'Kalibia'*.[103]

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[100] (1921) 29 CLR 357.

[101] (1927) 39 CLR 411, 447-8

[102] However, as Zelling pointed out in the 1981 Dethridge Memorial Address ((1982) 56 *Australian Law Journal* 101 at 106) one can see Dixon J in *Nagrint v The Ship 'Regis'* (1939) 61 CLR 688 at 696 linking s 76(iii) and s 51(xxxix) in a context of supporting a law of the Parliament about substantive law.

[103] He said in (1991) 32 FCR 78 at 86-7 the following:

> It therefore is apparent from a reading of s 6 of the Act that, putting to one side the effect of s 34, the Parliament has respected the view of three members of the High Court in Owners of the SS 'Kalibia' v Wilson (1910) 11 CLR 689, per Griffith CJ (at 699), per Barton J (at 703-704), per Isaacs J (at 715). This was that s 76(iii) of the Constitution does not imply a power in the Parliament to legislate substantively as to Admiralty and maritime law generally. However, it may be observed that Barton J rested his decision on the ground that, unlike the United States, Australia was not then a 'separated nation of independent sovereignty in its relation to the United Kingdom' and that Griffith CJ merely said the contrary argument was 'quite untenable'. That Barton J's reasoning no longer represented the modern constitutional position was made apparent, even before the coming of the Australia Act 1986 (Cth), by the decision in *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351. Further, in *R v Turner; Ex parte Marine Board of Hobart* (1927) 39 CLR 411 at 447-448, Higgins J treated as having been expressed obiter the views of Griffith CJ, Barton J and Isaacs J that s 76(iii) did not authorise the Parliament to make laws over a greater area of waters than it could make by virtue of the commerce power.

It is not appropriate that I express a concluded view on this issue. *The 'Kalibia'* is High Court authority. Whether or not this aspect of the decision was *obiter*, it is a view that has, to a degree, shaped the approach of the legislature to maritime legislation. However, it is neither controversial nor inappropriate to identify the following considerations attending the approach to the construction and interpretation of the Constitution that might lead to the arguments rejected in *The 'Kalibia'* being viewed in a different light.

Australia is a fully independent nation state. An implication of a limitation on Commonwealth authority on a subject of vital national interest by reference to Australia's past subordinate colonial status is now not appropriate.[104] The Constitution is a document for a living organic political compact. The 'changeful necessities' referred to by Alfred Deakin in his second reading speech on the Judiciary Bill in 1902[105] include the march of domestic and world affairs and the emergence of Australia as a nation state. This emergence of Australia as a nation state has led the High Court to recognise the concept of nationhood certainly as a factor in interpreting provisions of the Constitution, and even as an independent source of power.[106]

Also, the extent of utilisation of the incidental power (express and implied) is more fully developed now than it was in 1910. Notions of 'imperative necessity' used by Barton J in *The 'Kalibia'* are unlikely to be determinative today.[107] It is to be noted that the express recognition of the role of the 'necessary and proper clause'

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[104] *Kirmani v Captain Cook Cruise Pty Ltd* (No 1) (1985) 159 CLR 351, 379.

[105] Alfred Deakin:

> [T]he nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary ... It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.

Conroy:

> But we cannot read into the Constitution something which is not there.

Alfred Deakin:

> Perfectly true. Yet if he takes the doctrine of implied powers as developed by the Supreme Court of the United States, I will undertake to say that the ablest of its earliest lawyers – even Hamilton or Madison – could not have discovered the faintest evidence of the existence of a power which now authorises many of the greatest operations of its government, and which has been of incalculable advantage to the United States. Why? Because the law, when in the hands of men like Marshall or those trained in his school, or of the great jurists of the mother country, becomes no longer a dead weight. Its script is read with the full intelligence of the time, and interpreted in accordance with the needs of time. That task, of course, can be undertaken only by men of profound ability and long training. It is to secure such men that we desire the establishment of a High Court in Australia.

[106] See generally L Zines, *The High Court and the Constitution* (4th ed, 1977) 297 ff; *Victoria v Commonwealth* (1975) 134 CLR 338; *Davis v Commonwealth* (1988) 166 CLR 79; *NSW v Commonwealth* (1975) 135 CLR 337 ('*Seas and Submerged Lands Case*').

[107] See generally *Cunliffe v Commonwealth* (1993) 182 CLR 272; *Davis v Commonwealth* (1988) 166 CLR 79.

(the United States equivalent of the incidental power) did not find its way clearly into the relevant American jurisprudence until after 1910.

Also, in other contexts, the High Court has clearly found the distinction between procedure and substance elusive and unhelpful.[108]

IV FUTURE DIRECTIONS OF AUSTRALIAN ADMIRALTY AND MARITIME LAW

The consequences of the limitation on Commonwealth power are not merely historical. They shape the framework of the whole of Admiralty and maritime law of this country.

The inconvenience of a functional and geographic division based on interstate and overseas trade and commerce governing Commonwealth maritime law is plain. The complexity of the operation of the *Navigation Act* and State and Territory marine legislation, the marine pollution legislation of the various polities, and the interlocking and overlapping authority of different polities in this field are all significant transactional and structural costs of maritime activity. The Constitutional settlement reached after the *Seas and Submerged Lands Act Case* plays its own part in this complexity. That was an arrangement been polities upon which, obviously, I make no comment, other than to say that complexity of political responsibility and governing authority is always a transactional cost in commercial life.

Let me focus briefly on Admiralty practice. We have a well-drafted and balanced *Admiralty Act*, founded substantially on the procedural theory of the *in rem* action. That is that the action *in rem* is only a procedural device to bring the owner to the jurisdiction, rather than an action against the ship personified as the wrongdoer. In the development of the jurisprudence concerning the operation of the Act a number of issues have arisen that need to be addressed. The most pressing, it seems to many, is the requirement upon the arresting party to prove (on a final basis) the ownership of the ship in question by the putatively liable party. This can be a burdensome and complex task. For instance, in *The 'Maria Luisa'*[109] the Full Court of the Federal Court held that a party who owned all the relevant units in a unit trust of which a company in which it owned all the shares was the trustee, was not the owner of the ship which was the only trust property. The conclusion rested on a finely detailed analysis of the law of property, equity and trusts.

Further difficulty, and at times artificiality, is brought about by the strict approach in this country to recognition of the corporate form. Many countries, which may have a similar approach in terms of their written law, administer it more robustly to look through corporate structures to find those whose real economic interests are present. International shipping is replete with the use of corporate structures to quarantine assets from claims. International shipping is remarkable (as has always been the case) for the difficulty often faced in identifying with absolute legal precision the nature and extent of ownership and responsibility for shipping activity; although, the self-contained nature of the ship and the clarity of its activity and enterprise are uniquely able to be related to the liability incurred in relation to its operation. It might be said that rules of responsibility and marshalling of assets to meet legitimate claims should more closely reflect these considerations.

These issues might be addressed by a broader approach based, perhaps, on wider conceptions of ownership more suited to the realities of the conduct of maritime affairs, or perhaps on a notion of effective commercial control, or perhaps

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[108] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 542-44, [97]-[100].
[109] (2003) 130 FCR 1, 12.

on an expanded notion of the maritime lien for acts which have benefited the ship or those who profit from her operation. This would be a matter of policy. Yet such changes might be seen to create substantive liens and go beyond the framework provided for by *The 'Kalibia'*. The issue would be: Are such changes matters of procedure or are they matters of substantive law?

Similar doubts might attend a statute more comprehensively providing for maritime liens and their priorities.

Similar doubts might attend a statute which permitted *in rem* action against someone who was registered as owner on an international ship register, even if another person owned the vessel beneficially.[110]

All these might be debated as policy. All might be seen by some as mechanisms to defeat or forestall the efforts of shipowners seeking to put their ships beyond the reach of creditors. No doubt shipowners would see things differently. Nevertheless, such policy debates should not be put to one side, or subverted, because of doubts created by an old, and questionable, High Court authority.

There are other issues which could now be addressed about the working of the *Admiralty Act* after almost 20 years' operation. Likewise, it would be unfortunate if a comprehensive review of that legislation and the best approach for Australia's interests in this area were undermined or weakened by *The 'Kalibia'*.

Taking a somewhat broader perspective for a moment, there is a pressing need to reform the structure of dispute resolution, including maritime dispute resolution, in this country. That is not to criticise the legal profession or the courts or arbitrators in Australia. The legal profession, the courts and arbitrators in this country rank among the best in the world (a state of affairs generally taken for granted, if even appreciated, by the public, the press and governments). However, the complexity of the federal structure and the division and overlapping authorities in the administration of justice are deep structural impediments to the simple and coherent delivery of judicial and arbitral dispute resolution in Australia, in particular for international disputes. Without intending the slightest criticism of the legal correctness of the judgments, or of the justices, of the High Court in *Wakim*,[111] the destruction by that case of a nascent national legal system established by the exercise of the common sense of all governments of the Federation in the 1980s is a matter both of profound regret and of national importance. Any lawyer who has experienced the deep resentment and frustration of a client (in particular a foreign client) paying good money to have our federal legal system explained to him or her and to have the privilege of seeing jurisdictional arguments debated in front of him or her realises the importance of this issue. Given a choice, and all things being equal, parties will not willingly submit themselves to a jurisdictionally complex legal system. Simplicity in dispute resolution is not always possible. But complexity, or the risk of it, is to be avoided, if it can be. Legal structures for court and arbitral systems should be simple and easily able to be understood by the party who contemplates using them, at least through the assistance of a moderately well-trained lawyer. I doubt if that can be said of Australia. Without reform (which will probably have to be constitutional) despite the quality of our universities, practitioners, judges and arbitrators, we face the risk of insignificance over time as a centre for international dispute resolution in this region. This applies to maritime dispute resolution as well as all other subject areas.

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[110] See generally *The 'Cape Moreton'* (2005) 143 FCR 43 where there was a sale that was *bona fide* between arm's length parties.

[111] *R v Wakim; Ex parte McNally* (1999) 198 CLR 511.

The future direction of Australian Admiralty and maritime law also requires practitioners, scholars, judges, arbitrators, governments, shipowning interests, cargo interests, unions, insurers, brokers, seafarers, pilots and all who work in the maritime industry to recognise Australia's vital interest in maritime matters. I see the task, being the elevation of maritime affairs and maritime law in this country to a place conformable with their importance, as one which requires unflagging energy and enthusiasm of those with an interest in the subject of the kind exhibited by the man whom we remember and honour tonight, our friend and colleague Richard Cooper. Recognition of the importance of scholarship, of the relationship between the world of practical affairs and the law, and of the need for greater exchange between lawyers and the seafaring community will assist in building a body of trust and mutual respect amongst those in the maritime community. This is necessary to see this country provide the intellectual and skill base for the maintenance and development of Australia's place as a maritime nation, a great trading nation and an internationally recognised repository of maritime skill, including legal skill in the 21st century.

Central to this task is a recognition of the rich, diverse and international sources of our maritime law and the need for a vital and recognisably national approach to the subject.

Brisbane,
6 September 2006.