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Ship Arrest Seminar

Ship Arrest in Australia

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This paper is intended only to provide a summary of the subject matter covered. It does not purport to be comprehensive or to render legal advice. No reader should act on the basis of any matter contained in this paper without first obtaining specific legal advice.

About the Speaker

Peter McQueen joined the firm as a partner in 1999 with over 20 years experience. He specialises in transport law.

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- Maritime Law Association of Australia & New Zealand;
- International Trade & Business Committee, International Section, Law Council of Australia; and
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Peter is an accredited mediator and is admitted in NSW, Victoria, Western Australia, Papua New Guinea, England and Wales.

Contents

About the Speaker	iii
Introduction	3
Types of claims for which you can arrest	3
<i>Actions in rem</i>	3
Proprietary Maritime Claims	4
General Maritime Claims	5
Rights to proceed in Admiralty	8
Actions in rem are to be commenced under the Act – Section 14	8
Right to proceed in rem on maritime liens – Section 15	8
Right to proceed in rem on proprietary maritime claims – Section 16	9
Right to proceed in rem on owner's liabilities – Section 17	9
Right to proceed in rem on demise charterer's liabilities – Section 18	9
Sister/Associated ship arrest – Section 19	9
The "nexus" requirement of Section 19	10
Section 19 – "owner" includes beneficial owner	11
Section 19(a) – "charterer" includes voyage charterer	12
Procedural requirements	13
Commencing proceedings	13
Arrest of a ship	13
Caveats against arrest	15
Release of an arrested ship	16
Caveats against release	16
The functions of the Marshal	17
Security	18
Amount of Security	18
Disputes in relation to amount of security	19
Form of security	19
Recognising Liens (which law)	20
Recent Australasian Decisions on Liens	21
Priorities of Liens	22
Wrongful Arrest	23

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Introduction

The *Colonial Courts of Admiralty Act 1890* (Imp) was the principal source of civil jurisdiction in Admiralty in Australia until its repeal by the *Admiralty Act 1988* (Cth) ("the Act").

The Act, which came into operation on 1 January 1989 after extensive consideration in the Australian Law Reform Commission Report ("the ALRC report"), *Civil Admiralty Jurisdiction*,¹ created a comprehensive and uniform law governing the exercise of the Admiralty jurisdiction in Australian Courts.

The Act confers federal jurisdiction upon the Federal Court and State and Territory Courts in actions *in personam* on all maritime claims and claims in respect of damage to a ship. The Act also grants concurrent jurisdiction in actions *in rem* to the Federal Court and the State and Territory Supreme Courts.

Types of claims for which you can arrest

Actions in rem

An action *in rem* may be commenced against the *res*², in respect of:

- a proprietary maritime claim³.
- a maritime lien or other charge⁴.
- a general maritime claim where a "relevant person" is the owner of the *res* when the action is commenced and was the owner or charterer or was in possession and control of the *res* when the action arose⁵.
- a general maritime claim where a "relevant person" is the demise charterer of the ship when the action is commenced and was the owner or charterer or was in possession or control of the ship when the cause of action arose⁶.

¹ Australian Law Reform Commission, Report No. 33, *Civil Admiralty Jurisdiction* 1 January 1986

² An action *in rem* is an action against a "thing" (i.e. a ship, its freight or cargo). It has also been described as an act, proceeding or right available against the world at large, as opposed to an action *in personam*.

³ s.16

⁴ s.15

⁵ s.17

⁶ s.18

The Act defines a "relevant person" in relation to a maritime claim as a person who would be liable on the claim in a proceeding commenced as an action *in personam*.⁷

The Act distinguishes between proprietary and general maritime claims. While proceedings can be commenced *in rem* in respect of a claim relating to a maritime lien or a proprietary claim, the Admiralty jurisdiction cannot be invoked in respect of general maritime claims to allow an action *in rem* to be commenced without establishing the nexus between the "relevant person" and the ship.

In *CMC (Australia) Pty Ltd v The Ship Socofl Stream*⁸ the Federal Court, when considering a motion to strike out an action in rem, upheld the decision in *Shin Kobe Maru*⁹, that namely, where the Court's jurisdiction has been challenged on the grounds that the "relevant person" test has not been satisfied, there is an onus upon the plaintiff to prove the existence of the nexus on the balance of probabilities.

Proprietary Maritime Claims

The Act defines a proprietary maritime claim as:

- a claim relating to possession of a ship¹⁰; title to or ownership of a ship or a share in a ship¹¹; a mortgage of a ship or a share of a ship¹², and a mortgage of a ship's freight;¹³
- a claim between co-owners of a ship in respect of possession, ownership, operation or earnings of the ship;¹⁴
- a claim for the satisfaction or enforcement of a judgment given by a court (including foreign courts) against a ship or other property in a proceeding *in rem* in the nature of a proceeding in Admiralty;¹⁵ or
- a claim for interest in respect of any of the above claims¹⁶.

⁷ s.3

⁸ [1999] FCA 1419

⁹ *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404

¹⁰ s.4(2)(a)(i)

¹¹ s.4(2)(a)(ii)

¹² s.4(2)(a)(iii)

¹³ s.4(2)(a)(iv)

¹⁴ s.4(2)(b)

¹⁵ s.4(2)(c)

¹⁶ s.4(2)(d)

In *Caravelle Investments Ltd v Martaban Ltd*¹⁷ the Federal Court held that the words "relating to ... ownership" in section 4(2)(a) were drafted in much broader terms than the equivalent legislative provisions in the equivalent UK and Canadian legislation and should be interpreted expansively.

In *Shin Kobe Maru* the High Court held that a plaintiff's claim, which asserted the ownership rights of a party other than itself, was capable of being characterised as a proprietary claim within the meaning of section 4(2)(a) and (b) of the Act.

This case involved a claim for specific performance, seeking the transfer of ownership of a vessel into the ownership of another corporate entity pursuant to the terms of a joint venture agreement. The Court decided that the fact that the proceedings had been commenced as an action *in rem*, did not inhibit the Court's ability to grant relief by way of specific performance. Whilst the Act clearly spelt out the procedures for commencing an action *in rem*, the Act leaves open to the Court the range of remedies that it may declare.

General Maritime Claims

General maritime claims are defined in the Act as:

- a claim for damage done by a ship (whether by collision or otherwise)¹⁸;
- a claim in respect of the liability of the owner of the ship arising under Part II or IV of the Protection of the Sea (Civil Liability) Act 1981 (Cth) or under a law of a State or Territory that makes provision as mentioned in subsection 7(1) of that legislation¹⁹;
- a claim for loss of life, or personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship²⁰;
- a claim (including a claim for loss of life or personal injury) arising out of an act or omission of;
 - the owner or charterer of a ship²¹;
 - a person in possession or control of a ship²² or

¹⁷ [2000] Lloyd's Rep. 388

¹⁸ s.4(3)(a)

¹⁹ s.4(3)(b)

²⁰ s.4(3)(c)

²¹ s.4(3)(d)(i)

²² s.4(3)(d)(ii)

- a person for whose wrongful acts or omissions the owner, charterer or person in possession or control of a ship is liable²³,

being an act or omission in the navigation or management of the ship, including an act or omission in connection with:

- the loading of goods on to, or the unloading of goods from, the ship²⁴;
- the embarkation and disembarkation onto and from the ship²⁵;
- the carriage of goods or persons on the ship²⁶;
- a claim for loss of, or damage to, goods carried by a ship²⁷;
- a claim arising out of an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise²⁸
- a claim relating to salvage including life salvage and salvage of cargo or wreck found on land²⁹;
- a claim in respect of general average³⁰;
- a claim in respect of towage of a ship³¹;
- a claim in respect of pilotage of a ship³²;
- a claim in respect of goods, materials or services (including stevedoring and lighterage services) supplied or to be supplied to a ship for its operation or maintenance³³;
- a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched)³⁴;

²³ s.4(3)(d)(iii)

²⁴ s.4(3)(d)(iv)

²⁵ s.4(3)(d)(v)

²⁶ s.4(3)(d)(vi)

²⁷ s.4(3)(e)

²⁸ s.4(3)(f)

²⁹ s.4(3)(g)

³⁰ s.4(3)(h)

³¹ s.4(3)(j)

³² s.4(3)(k)

³³ s.4(3)(m)

³⁴ s.4(3)(n)

- a claim in respect of the alteration, repair or equipping of a ship³⁵;
- a claim in respect of a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of a similar kind, in relation to a ship³⁶;
- a claim in respect of a levy in relation to a ship, including a shipping levy imposed by the *Protection of the Sea (Shipping Levy) Act 1981* (Cth), being a levy in relation to which a power to detain the ship is conferred by a law in force in Australia or in a part of Australia³⁷;
- a claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship³⁸;
- a claim for an insurance premium, or for a mutual insurance call, in relation to a ship³⁹;
- a claim by a master, or a member of the crew, of a ship for wages⁴⁰; or an amount that a person, as employer, is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including the operation of the law of a foreign country⁴¹;
- a claim for the enforcement of, or a claim arising out of, an arbitral award (including a foreign award within the meaning of the *International Arbitration Act 1974* (Cth) (previously known as the *Arbitration (Foreign Awards and Agreements) Act 1974*) made in respect of a proprietary maritime claim or a claim referred to in one of the preceding paragraphs⁴²;
- a claim for interest in respect of a claim referred to in one of the preceding paragraphs⁴³.

In *Port of Geelong Authority v The Ship "Bass Reefer"*⁴⁴ the Federal Court noted that the words "in respect of" and "in relation to" were used in section 4(3) of the Act are words of extension and should be interpreted expansively, but are not to embrace relationships of a remote or tenuous kind.

³⁵ s.4(3)(o)

³⁶ s.4(3)(p)

³⁷ s.4(3)(q)

³⁸ s.4(3)(r)

³⁹ s.4(3)(s)

⁴⁰ s.4(3)(t)(i)

⁴¹ s.4(3)(t)(ii)

⁴² s.4(3)(u)

⁴³ s.4(3)(w)

⁴⁴ (1992) 37 FCR 374

Claims for advances of money were held by the Federal Court in "*Skulptor Konenkov*" case⁴⁵ to come within the terms of section 4(3)(m).

In *Banwell v the Ship "The Sydney Sunset"* (formerly "*The Lubs*") the Court held that monies paid in relation to slippage, renovations and repairs, registration and insurance of the vessel constituted a general maritime claim under section 4(3) of the Act⁴⁶.

Rights to proceed in Admiralty

Actions in rem are to be commenced under the Act – Section 14

In a matter of Admiralty or maritime jurisdiction, a proceeding shall not be commenced as an action in rem against a ship or other property except as provided by the Act⁴⁷.

Right to proceed in rem on maritime liens – Section 15

The Act recognises the existence of maritime liens, but does little to define their substance, leaving the characteristics of the maritime lien to be defined by earlier statutory enactment and judicial refinement.

A proceeding on a maritime lien or other charge in respect of a ship or other property subject to the lien or charge may be commenced as an action in rem against the ship or property⁴⁸.

The four types of claim recognised as being capable of giving rise to a maritime lien under the Act:

- salvage
- claims for damage done by a ship;
- seaman's wages;
- master's wages and disbursements;

independently give rise to statutory rights of action *in rem* under section 15(2) of the Act.

⁴⁵ *Opal Maritime Agencies Pty Ltd v The Proceed of Sale of the Vessel MV "Skulptor Konenkov"* (2000) 98 FCR 519

⁴⁶ [2001] FCA 210. Specifically, s.4(3)(m), s.4(3)(n), s.4(3)(o) & s.4(3)(s).

⁴⁷ s.14

⁴⁸ s.15(1)

Right to proceed in rem on proprietary maritime claims – Section 16

A proceeding on a proprietary maritime claim concerning a ship or other property may be commenced as an action in rem against the ship or property⁴⁹.

Right to proceed in rem on owner's liabilities – Section 17

Where in relation to a general maritime claim concerning a ship or other property, a relevant person:

- (a) was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property⁵⁰; and
- (b) is, when the proceeding is commenced, the owner of the ship or property⁵¹;

a proceeding on the claim may be commenced as an action in rem against the ship or property.

Right to proceed in rem on demise charterer's liabilities – Section 18

Where, in relation to a maritime claim concerning a ship, a relevant person:

- (a) was, when the cause of action arose, the owner or charterer, or in possession or control, of the ship⁵²; and
- (b) is, when the proceeding is commenced, a demise charterer of the ship⁵³;

a proceeding on the claim may be commenced as an action in rem against the ship.

Sister/Associated ship arrest – Section 19

The ability to arrest a sister ship was introduced for the first time in Australia pursuant to Section 19 of the Act. As opposed to referring to a "sister"⁵⁴ or an "associated" ship, the Act utilises the term "surrogate" ship. The definition of a "surrogate" ship can be found at Section 3(6) of the Act.

⁴⁹ s. 16

⁵⁰ s.17(a)

⁵¹ s.17(b)

⁵² s.18(a)

⁵³ s.18(b)

⁵⁴ Paragraph 205 of the ALRC report refers to the use of the expression "sister ship" as erroneous and confusing as there is "no reason to demand any direct nexus between the wrongdoing and surrogate ships".

Section 3(6) provides that:

For the purposes of this Act where:

- (a) a proceeding on a maritime claim may be commenced against a ship under a provision of this Act (other than section 19); and*
- (b) under section 19, a proceeding on the claim may be commenced against some other ship;*

the other ship is, in relation to the claim, a surrogate ship.

Section 19 enables an arrest to take place against some other ship (i.e. a surrogate ship) if:

- (a) a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first-mentioned ship⁵⁵; and*
- (b) that person is, when the proceeding is commenced, the owner of the second-mentioned ship⁵⁶.*

The right to proceed against a surrogate ship only arises in relation to general maritime claims⁵⁷ and does not extend to proprietary maritime claims⁵⁸.

The "nexus" requirement of Section 19

Section 19 of the Act requires the relevant person⁵⁹ firstly, to have been the owner or charterer of, or in possession or control of, the first-mentioned ship when the cause of action arose and secondly, to be the owner of the vessel sought to be arrested at the time when proceedings are commenced.

The Federal Court in the case of *Vilona v The Ship Alnilam*⁶⁰ recently reiterated the requirement for there to be a nexus between Sections 19(a) and (b) of the Act to effectively proceed against a surrogate ship. In this case the plaintiff, pursuant to Section 4(2)(a) of the Act, issued a writ in rem against the ship "Alnilam" (initially) as surrogate

⁵⁵ s.19(a)

⁵⁶ s.19(b)

⁵⁷ See s.4(3)

⁵⁸ See s.4(2). Also see *Malaysia Shipyard and Engineering v The Iron Shortland* (1995) 59 FCR535 at 546

⁵⁹ See s.3

⁶⁰ [2001] FCA 411

for a claim for ownership of three vessels. "Alnilam" was owned by Fiesta Shipping Ltd ("Fiesta").

Apart from reiterating that Section 19 did not extend to proprietary maritime claims, the Court held that although Fiesta was the owner of "Alnilam" when proceedings were commenced, there was no reason to suspect, nor any evidence to establish that, Fiesta was the "owner or charterer of, or in possession or control of, the first mentioned ship". The "first mentioned ship" being the three vessels alleged to be the subject of the plaintiff's claim and of which the "Alnilam" was said to be a surrogate.

The Court stated that even if Section 19 was applicable, the "nexus required by s19(a) has not been established, nor is there any basis for assuming that it could be established". The "Alnilam" was released from arrest.

Section 19 – "owner" includes beneficial owner

In the case of *Malaysia Shipyard and Engineering Sdn Bhd v "Iron Shortland" as surrogate for the ship "Newcastle Pride"*⁶¹ ("Iron Shortland") the Federal Court held that in Section 19 of the Act, owner means or includes a beneficial owner as well as a registered owner. Despite this finding, the "Iron Shortland" was ordered to be released from arrest as the plaintiff was unable to adduce sufficient evidence to identify the beneficial owner of the "Iron Shortland" and therefore failed to satisfy Section 19(b) of the Act⁶².

The inability of a plaintiff to adduce sufficient evidence to identify the beneficial owner as claimed, was again recently seen in the case of *Kent v SS "Maria Luisa" as surrogate for the vessels "Monika" and Boston Bay* ("Maria Luisa")⁶³ which applied the findings of the Federal Court in the "Iron Shortland".

In this case, the plaintiff commenced proceedings by filing a writ in rem against the fishing vessel "Maria Luisa" and specified Australian Fishing Enterprises Pty Limited ("AFE") as the relevant person. A summary of the relevant facts of this case is as follows:

- The plaintiff was employed as a diver and deckhand on the tuna fishing vessels "Monika" and "Boston Bay" and contended that the vessels were owned by AFE.
- The plaintiff was suing for personal injuries sustained while employed on those vessels.
- Everdene Pty Limited ("Everdene") was the registered owner of the arrested vessel, the "Maria Luisa" and the plaintiff claimed AFE was the vessel's beneficial owner.

⁶¹ (1995) 59 FCR 535

⁶² For a comprehensive summary of this case see the article written by James Allsop S.C. (as he then was) titled "Beneficial Ownership of Ships and Arrest", Papers from the 27th Annual General Meeting and Conference of the Maritime Law Association of Australia and New Zealand, 5-9 August 2000, Queenstown, New Zealand.

⁶³ [2002] FCA 1207

- Everdene was a wholly owned subsidiary of AFE.
- Everdene sought a dismissal of the proceedings. One of the bases for this application was the fact that AFE was not the owner of the "Maria Luisa".
- Everdene admitted that AFR was the charterer of "Monika" and "Boston Bay" at the relevant time.
- Everdene and AFE claimed to have entered into an oral demise charter and contended that a demise charter did not convey beneficial ownership.
- Everdene contended that, although it was a wholly-owned subsidiary of AFE, that of itself, did not establish that AFE beneficially owned "Maria Luisa".

Everdene submitted the following propositions of law that were accepted by the Court:

- In the absence of other evidence, the registered owner will also be taken to be the "beneficial owner" ("Iron Shortland").
- It is clear from the context of the references to "real" or "true" owner in the "Iron Shortland" that it was intended that these be synonymous with the description of "beneficial." That is, an owner in equity.
- The fact that Everdene was a wholly owned subsidiary of AFE cannot of itself establish in AFE beneficial ownership of any asset owned by Everdene. In absence of a sham or fraud the Court cannot lift the corporate veil.
- A person is not a "beneficial owner" merely by being in possession as operator and manager or under a demise charter.

The Court held that the plaintiff had failed to show that AFE was the owner in equity of "Maria Luisa" for the purpose of Section 19(b) of the Act and dismissed the proceedings.

Although the decision of the "Iron Shortland" may be seen to have considerably expanded a claimant's ability to successfully proceed under the Act to arrest ships for the purposes of obtaining security, as has been shown above, a claimant may face real difficulties in successfully identifying the real "beneficial owner".

Section 19(a) – "charterer" includes voyage charterer

In the case of *Laemthong International Lines Co Ltd as owners of the Ship "Laemthong Pride" v BPS Shipping Ltd*⁶⁴ the High Court of Australia held that as the Act had chosen to refer expressly to "demise charterer" in s 18 (b) but to charterer generally in s 19, the conclusion was inevitable that s 19 was not intended to be limited to demise charterers and would therefore include voyage charterers as well.

⁶⁴ (1997) 190 CLR 181

Procedural requirements

The general procedure for the operation of the Act is set out in the *Admiralty Rules 1988* (Cth) ("the Rules"). The Rules on their own do not provide a comprehensive code and are required to be read in conjunction with the Rules of the particular Court, in which the proceedings have been commenced.

Commencing proceedings

Under the Act, an action *in rem* is commenced by filing a writ in the Court and paying the relevant fees. Details of the procedure to be followed and the forms to be used are set out in the Rules.

The Rules provide that an action *in personam* is not to be commenced by the same initiating process as the process initiating an action *in rem*⁶⁵.

Where the proceedings are an action *in rem* against a ship or other property on the ship, the Rules provide that service is effected by securely affixing a sealed copy of the writ to a mast or some other conspicuous part of the ship⁶⁶.

Where the action *in rem* is against property that is not at the time of service on board the ship, the writ may be served by securely fixing a sealed copy of it to the property or to a package or container containing the property.⁶⁷ The Rules also provide for service where it is not possible to gain access to the ship or property,⁶⁸ or where the action *in rem* is against the proceeds of the sale of the ship or property that has been paid into the Court⁶⁹. There can be no substituted service in an action *in rem*.⁷⁰

Where commencing an action *in personam*, a sealed copy of the application must be served in the usual way, in accordance with the Federal Court Rules.

Arrest of a ship

As soon as an action *in rem* is commenced by writ, the Court may issue an arrest warrant upon receiving an application in respect of the ship or property concerned supported by

⁶⁵ Rule 18

⁶⁶ Rule 30(1)

⁶⁷ Rule 30(2)

⁶⁸ Rule 30(3)

⁶⁹ Rule 31

⁷⁰ Rule 34

affidavit.⁷¹ An application of this kind constitutes an undertaking to the Court to pay on demand the fees and expenses incurred by the Marshal in carrying out the arrest.⁷²

Rule 41 provides that;

Liability for Marshal's fees and expenses

An application for an arrest warrant constitutes an undertaking to the court to pay to the Marshal, on demand, an amount equal to the amount of the fees and expenses of the Marshal in relation to the arrest.

An arrest warrant is executed in the same way as a writ is served and may be executed at the same time as the writ is served, or at some later time.⁷³

It is open to an applicant for a warrant to request that the warrant not be executed. It is also possible for a person who has an interest in the *res*, that is the subject of a warrant, to make application to the Court seeking:

- to have the warrant discharged;
- that the warrant not be executed at all; or
- that the warrant not to be executed within a specified time.

The ship or property the subject of a warrant is under arrest from the time the warrant is executed and remains under arrest until the ship or property is lawfully released from arrest or sold by Court order. To remove the ship or property that is under arrest without the Court's leave constitutes a contempt of Court.

The Court has a broad discretion to make orders at any stage of the proceedings in relation to the preservation, management or control of a ship or property⁷⁴, including the loading and unloading of cargo, that is under arrest. In this respect reference is made to the recent case of *News Maritime Co Ltd v "Hyundai Cosmos"*⁷⁵ in which the Federal Court was requested by the defendant to vary the terms of arrest of the "Hyundai Cosmos" so as to enable the "Hyundai Cosmos" to load coal at the Gladstone berth and to then move to the waiting anchorage whereupon it was said the arrest would continue. The application was opposed by the plaintiff and was not supported by the Marshal.

In finding that there was not sufficient evidence to support the defendant's application, the Court held the following:

⁷¹ Rule 39

⁷² Rule 41

⁷³ Rule 43(2)

⁷⁴ Rule 50

⁷⁵ [2002] FCA 1164

- (i) While there is no doubt that the Court has power in an appropriate case to make an order permitting movement of the vessel and the loading of cargo onto an arrested vessel, the matter is one of discretion for the Court, having regard to all relevant circumstances.
- (ii) To permit movement of the vessel to enable loading of a large cargo of coal would unnecessarily complicate the administration of the custody of the vessel.
- (iii) If loading were permitted, problems could arise should it become necessary to offload the cargo in order to carry out a possible sale of the vessel.
- (iv) There could also be complications in relation to liability for any incidents occurring during the on-loading of cargo and also in relation to contracts entered into in connection with the remaining cargo.

Any party to the proceedings or the Marshal may apply to the Court at any time for directions with respect to the ship or property.

In *Owners of the Motor Vessel Iran Amanat v KMP Coastal Oil Pte Ltd*,⁷⁶ in considering an interlocutory challenge to its Admiralty jurisdiction which sought to prevent the arrest of the defendant's ship, the High Court held that a court must assume the facts supporting the claim to be as alleged by the plaintiff and must confine its attention to the task of characterising whether the claim on the assumed facts falls within the heads of jurisdiction outlined in the Act.

In this respect, *The Iran Amanat* has brought Admiralty practice in Australia into line with established practice in the United Kingdom. The High Court has tipped the tactical balance in favour of a plaintiff seeking to enforce its claim in the Admiralty jurisdiction. This tactical advantage enjoyed by the plaintiff meant that in *The Iran Amanat*, a foreign entity was successful in arresting the defendant's ship, without being required to provide security for the defendant's costs nor show that there was any substance to their claim.

Caveats against arrest

A party wishing to prevent the arrest of a ship or property may cause a caveat against the issue of a warrant for arrest to be filed in the registry of the Federal Court.⁷⁷ The caveat constitutes an undertaking by the person lodging the caveat to enter an appearance in any action that may be commenced against the ship or other property specified in the caveat and to provide security.⁷⁸

⁷⁶ (1999) 196 CLR 130

⁷⁷ Rule 8(1)

⁷⁸ *Ibid*

Where a caveat has been lodged, a plaintiff commencing an action against the property that is subject to the caveat, must serve the originating process on the caveator.⁷⁹ The caveator may protect the caveat by paying into Court an amount equal to the amount specified in the caveat or the amount claimed (whichever is the lesser amount) or cause a bail bond to be entered into that amount within three days, unless otherwise agreed between the plaintiff and the caveator.⁸⁰

The register of caveats against arrest can be searched at any registry of the Federal Court.⁸¹

Release of an arrested ship

A ship or property may be released from arrest where:

- the party who obtained the arrest consents in writing to the release⁸²; or
- the Court orders release on just terms⁸³, or where the proceeding is discontinued or dismissed⁸⁴; or
- the required amount is paid into the Court⁸⁵ or a bail bond in the required amount is filed in the Court⁸⁶.

The ship or property will only be released if satisfactory arrangements have been made for the payment of the Marshal's costs and other fees and expenses incurred in connection with its custody while under arrest.

Caveats against release

A caveat against release may be filed in the Court by which the arrest warrant was issued. Where a caveat against release is in force, the person who lodged the caveat must be given a copy of any application to the Court for an order to release the ship or property under arrest. Where a caveat against release has been filed, the Registrar is not able to order the release of the ship or property without an order of the Court. The

⁷⁹ Rule 32

⁸⁰ Rule 9

⁸¹ Rule 14

⁸² Rule 51(3)

⁸³ Rule 52(3)

⁸⁴ Rule 51(4)(b)

⁸⁵ Rule 51(1)(a)

⁸⁶ Rule 51(1)(b)

caveat may be wholly or partly set aside by the Court⁸⁷ or the caveator may withdraw the caveat by filing an appropriate form with the registry.⁸⁸

Caveats against release are also kept in the Federal Court registry⁸⁹ and the registries of other relevant Courts.⁹⁰

The functions of the Marshal

The Federal Court and the State and Territory Supreme Courts have Marshals in each jurisdiction.

The functions and obligations of the Marshal are set out in the Rules. They include:

- serving initiating process and executing arrest warrants;
- retaining safe custody of and preservation of ships or property under arrest;
- arranging for the release of a ship or property pursuant to an order by the Court or a registrar;
- arranging for the valuation and sale of a ship or property pursuant to an order by the Court;
- filing a return of sale, and an account of sale and documents in support of the account for taxation;
- paying the proceeds of the sale or property into the Court;
- filing copies of notices concerning an application for a determination of the order of priority of claims against the ship or property, or the proceeds of the sale of such ship or property.

*In Dick v The Ship Percy and Jean*⁹¹, the Tasmanian Supreme Court considered what orders should appropriately be made by the Court in directing the Marshal. The Court states three basic principles as self evident when considering what directions to the Marshal are appropriate, namely:-

- (i) Steps should be taken to preserve the plaintiff's security and ensure that it is not diminished.

⁸⁷ Rule 11

⁸⁸ Rule 13

⁸⁹ Rule 14(1)

⁹⁰ Rule 14(2)

⁹¹ [2000] TAS SC 140

- (ii) It is generally not appropriate to spend so much money that the arrested ship is placed in a better position than before it was arrested, unless the expenditure is necessary for the purpose of selling the ship.
- (iii) The Marshal is not expected to maintain the ship in the state that it was in prior to arrest as some degree of deterioration will be unavoidable.⁹²

On 14 August 2002, a Memorandum of Understanding was entered into between the Maritime Safety Authority ("AMSA") and the Chief Justice of the Federal Court.

The Memorandum describes the role of the Marshal and of AMSA, identifies for the Marshal those operations that contain inherent safety considerations, sets out arrangements for the provision of advice on issues relating to the safety of a ship in the Marshal's custody and provides an agreed channel of communication between AMSA staff and the Marshal during an arrest and when the ship or other property is retained in custody.

Security

As the ALRC report notes, a plaintiff may commence an action *in rem* even when there is no reason to believe that the defendant is insolvent, will not enter an appearance and/or satisfy the claim. In short, proceedings *in rem* can be commenced simply to obtain security.

In reality, apart from enabling a plaintiff to successfully commence proceedings against an elusive defendant (i.e. to compel an appearance), the other main purpose of arresting a vessel is to obtain security for a claim, whether it be in the form of the proceeds of sale of a ship, moneys paid into Court, a bail bond or a protection & indemnity club's letter of undertaking.

Amount of Security

Arresting a ship inevitably imposes a considerable cost upon the shipowner and places considerable pressure upon the shipowner to expeditiously settle the claim. The security which a party is entitled to claim is an amount equal to their "reasonably arguable best case", including interest and their costs of the action. Security exceeding the value of the property to be arrested cannot be sought and if there is a dispute over the appropriate amount of security, an application can be made to the Court.

⁹² *Ibid*

Disputes in relation to amount of security

Section 34 of the Act, amongst other things, allows the Courts to deal with the situation where the plaintiff has effected a justifiable arrest but then acts unreasonably and without cause in demanding excessive security from the defendant in order to delay or prevent the release of the ship.

Section 34 provides that:

- (1) *Where, in relation to a proceeding commenced under this Act:*
 - (a) *a party unreasonably and without good cause:*
 - (i) *demands excessive security in relation to the proceedings; or.....*

the party or person is liable in damages to a party to the proceeding, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result.
- (2) *The jurisdiction of a Court in which a proceeding was commenced under this Act extends to determining a claim arising under subsection (1) in relation to the proceeding.*

In *Freshpac Machinery Pty Ltd v Ship "Joana Bonita"*⁹³, the Federal Court considered the Court's power to intervene in respect of the issue of sufficiency of security provided by the defendant.

In considering the Court's jurisdiction to intervene, the Court quoted Brandon J in *The "Polo II"*.⁹⁴

The power of the Court to control security ... was derived from the inherent jurisdiction of the Court to prevent any abuse of the process of the Court, or the use of the Court procedure in an oppressive way".

In finding on the facts of that case that the plaintiff's demand for excessive security amounted to an "abuse of process", the Court clarified this position in respect of excessive demands for security.

Form of security

The type of security provided to secure the release of a vessel or other property can take the form of a bail bond, moneys paid into Court or a P & I Club letter of undertaking.

⁹³ (1994) ALR 683

⁹⁴ [1977] 2 Lloyd's Rep 115, at 119

Although Part VII of the Rules sets out the procedure for the filing of a bail bond, it is now quite rare for bail bonds to be utilised, as parties to proceedings are more commonly agreeing on letters of undertakings or for moneys to be paid into Court.

In *Owners of the ship "Carina" v Owners or demise charterers of the ship "MSC Samia"*⁹⁵ the Federal Court was required to decide whether a plaintiff's insistence that an undertaking proffered by the defendants be amended to contain certain terms, brought the plaintiff's conduct within the scope of section 34.

The Court held that the power to insist that a ship shall remain under arrest unless security of a certain amount is given must not be exercised oppressively, and if it is exercised oppressively then the Court can and should interfere to prevent conduct of that kind. It was further held that the Court must make sure that the plaintiff is not left without sufficient security to cover his reasonably best arguable case.

It was also held that the amount of security and the terms upon which such security is provided is a matter for agreement between the parties. In this regard, the Court noted the observations in the ALRC report namely: "*private security arrangements should continue to remain a matter for the parties except to the extent that excessive demands give rise to a right to damages*" and concluded that only where it is evident that there has been an abuse of process or clearly oppressive conduct, such as the insistence upon manifestly unreasonable terms, is it appropriate for the Court to intervene.

The Court pointed to the availability of the payment into Court and bail bond options outlined in the Act as the most appropriate path of recourse for a party seeking release from arrest, who cannot agree with the plaintiff upon the amount and terms of the security to be provided.

On the facts of the case, the Court held that the insistence of the plaintiff to include certain terms in the undertaking provided by the defendant was not "manifestly unreasonable or untenable" and therefore did not amount to oppressive conduct nor an abuse of the Court process.

Recognising Liens (which law)

The ALRC report recognised that there was uncertainty in respect of whether an Australian Court should recognise a maritime lien that has been created under foreign law, as if that maritime lien had been created under Australian law, even though such a lien does not exist under Australian law.

The ALRC report referred to the Privy Council's decision of *Bankers Trust International Ltd v Todd Shipyards Corp; "The Halcyon Isle"*⁹⁶ and confirmed that in this decision, so far as

⁹⁵ (1997) 78 FCR 404

⁹⁶ [1981] AC 221

the law of Singapore was concerned, the answer was "no". However, it recognised that this was a bare majority judgment and that the position in other common law countries was different. Particularly, it was noted that in Canada and South Africa, the Courts had recognised the validity of foreign maritime liens.

Although the dominant view expressed in the ALRC report was to adopt the Canadian and South African approach, the ALRC stated that it thought it was a matter best left to a formal international agreement or to the Courts.

It should be noted that after the ALRC report was released the Appellate Division of the Supreme Court of South Africa and the Federal Court of Appeal in Canada chose to follow the majority decision in *The Halcyon Isle*.

Recent Australasian Decisions on Liens

In *Morlines Maritime Agency Limited v Proceeds of Sale of the "Ship Skulptor Vuchetich"*⁹⁷ Transamerica Leasing Inc ("Transamerica") was a claimant to the proceeds of sale of the ship Skulptor Vuchetich. Transamerica claimed a maritime lien under its container lease agreement with the vessel's owners. In the event that monies became outstanding under the agreement, a clause in the agreement gave Transamerica an express maritime lien against vessels owned, chartered or operated by the owners, and provided that Transamerica may execute its maritime lien on vessels owned or operated by the owners by appropriate process in any Court of any country having general admiralty and maritime jurisdiction. Alternatively, Transamerica argued that it had a general maritime claim.

The Federal Court confirmed that Transamerica did not have a maritime lien or a general maritime claim recognised by Australian law. The Court referred to other jurisdictions which had followed the majority in *The Halcyon Isle*, namely New Zealand, South Africa and Canada. In addition to the criticisms of the approach by a number of commentators the Court chose to follow the majority judgment in *The Halcyon Isle* and denied Transamerica's claim.

In a relatively recent New Zealand High Court case of *Fournier v Ship "Margaret Z"*⁹⁸ three crew members of the "Margaret Z" claimed damages for personal injuries sustained while carrying out their duties as crew members of the ship.

Meanwhile, the mortgagee of the vessel arrested a sister ships in Guam. There was an agreement between the parties that allowed the vessel to continue fishing and to provide the catch to a cannery in American Samoa, which would finance the continued fishing, subject to certain protections to the mortgagee. The Guam Court ordered that "except for liens for crew wages, no liens shall be created against the vessel as a result of expenses incurred in any trip."

⁹⁷ [1997] FCA 432

⁹⁸ [1999] 3 NZLR 576

Once it was released from arrest, the vessel did not continue fishing, but sailed to New Zealand. On 6 May 1996 the Guam Court gave leave for the mortgagee to exercise its rights, and on 10 May 1996 the ship was arrested at Whangarei at the instigation of the master and crew claiming wages.

The New Zealand High Court referred to *The Halcyon Isle* (at page 115) and stated:

"The general principle is that matters of procedure are governed by the lex fori (the Halcyon principle). The principle extends to the classification of maritime liens, and in turn priorities between competing claims. Each competing claim is determined by reference to the events on which the claim was founded, giving it the priority to which it would be entitled under the lex fori if those events had occurred within the territorial jurisdiction of the distributing Court. To hold otherwise would require a complicated partial renvoi to ascertain in respect of each foreign claim the legal consequences of the events giving rise to a claim before attempting to reconcile the results affording priority under the lex fori. It would also require expert evidence as to the foreign law affecting each claim. The Halcyon principle has the advantage of consistency in the priority of treatment of all claims under the same system of law as well as pragmatic advantages in simplicity, speed and cost. The principle is applicable in New Zealand."

Priorities of Liens

The issue of priority arises due to the fact that often the quantum of the claims against the res exceed the value of the property sold.

The Act has not, except in relation to surrogate ships⁹⁹, made any provision for the order of priorities for maritime liens or maritime claims. This task has been left for the determination of the particular court at the place where it is exercising Admiralty jurisdiction.

Section 35 provides that:

(1) *Where:*

(a) proceeding in respect of a general maritime claim concerning a ship has been commenced under this Act against a surrogate ship; or

(b) in relation to a proceeding commenced under this Act concerning a ship, a surrogate ship has been arrested;

the order in which general maritime claims against both the ships shall be paid out of the proceeds of the sale of the surrogate ship shall be determined as if all the claims were general maritime claims against the surrogate ship.

⁹⁹ s.35

- (2) *Subsection (1) applies notwithstanding any other law, including a law of a State or Territory.*

Rule 73 sets out the means by which a successful claimant, who has obtained a Judgment in its favour, can apply to the Court for determination of the order of priorities of claims against the ship or property.

Rule 73 provides that:

Applications to determine priorities

73. (1) Where a ship or other property has been arrested in a proceeding, a person who has obtained a judgment in a court (including a judgment in a court of a foreign country) against the ship or property, being a judgment that is enforceable in a court of Australia, may apply to the court for determination of the order of priority of claims against the ship or property.
- (2) The court may, on the application, order that notice of the application in accordance with Form 28, specifying the period within which claims may be notified, be given or published as the court directs.
- (3) The determination shall not be made until after the end of the period specified in the notice.
- (4) The Marshal shall file a copy of the relevant part of each publication in which the notice appeared.

Wrongful Arrest

Section 34 provides that:

- (1) *Where, in relation to a proceeding commenced under this Act:*
- (a) *a party unreasonably and without good cause:*
- (i) *demands excessive security in relation to the proceedings; or*
- (ii) *obtains the arrest of a ship or other property under this Act; or*
- (b) *a party or other person unreasonably and without good cause fails to give a consent required under this Act for the release from arrest of a ship or other property;*

the party or person is liable in damages to a party to the proceeding, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result.

(2) *The jurisdiction of a Court in which a proceeding was commenced under this Act extends to determining a claim arising under subsection (1) in relation to the proceeding.*

Section 34 of the Act, which has already been touched on earlier in this paper in relation to "demands for excessive security", empowers the Court to (amongst other things) award damages to a party who has an interest in the ship or property who has suffered loss or damage as a direct result of a vessel being unjustifiably arrested.

The relevant part of the section applies where an arresting party has acted "*unreasonably and without good cause*"¹⁰⁰. Prior to the enactment of the Act, the Admiralty Court could only award damages for an unjustified arrest where there had been evidence of bad faith or gross negligence. The Act has therefore created a more extensive liability for unjustifiable arrest and is considerably more favourable to owners and operators of ships.

It should not be forgotten (as previously mentioned) that in order to obtain an arrest warrant, a plaintiff is required to file an affidavit setting out the basis of the action¹⁰¹ and by filing an application with the Court, the plaintiff is deemed to have undertaken to the Court to pay the Marshal's fees and expenses in relation to the arrest.¹⁰² In being required to, firstly, file an affidavit in support of the claim and, secondly, give an undertaking to the Court, the occasions in which a plaintiff (with competent legal advice) will be found to have acted unreasonably and without good cause should be quite limited.

¹⁰⁰ s34(1)(a)

¹⁰¹ Rule 39(2)

¹⁰² Rule 41

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