

III THE SHIPOWNER & PROTECTION & INDEMNITY PERSPECTIVE

As will be appreciated, the extent of this paper is necessarily limited. Accordingly, in the interests of ensuring as complete a coverage as possible of the draft Admiralty Bill, this Section will in the main deal with those "maritime claims" which were not dealt with under Section II, since such claims are generally of greater interest to an owner and his insurer, than to a potential non-owning plaintiff, and compare the proposed jurisdiction to that under the present regime.

In addition, the Section contains some brief comments on other aspects of the Bill (some of which are dealt with in Section II) but emphasising the shipowner's view. These are set out in paragraph 4, under the heading "General Comments".

Before dealing with specific elements of the Bill, it is worth making two general points, which are of importance to the shipowner.

The first is that, although the proposed changes to Admiralty law might be considered far-reaching in the Australian context, by and large they merely bring Australian Admiralty jurisdiction into line with that already in force in many other countries, e.g. U.K., New Zealand, Singapore, South Africa. Obvious examples are the right to proceed against surrogate ships, the inclusion of claims arising out of charterparties, oil

pollution, damage to goods carried on ships etc. Accordingly, from the perspective of the shipowner trading his vessel internationally, (and his insurers) the changes envisaged are by no means revolutionary and indeed, probably more or less reflect what he would expect Admiralty law in Australia to be, having regard to Australia's legal heritage and development. The benefit which Australia has gained by delaying up-dating its Admiralty jurisdiction until now, has been the opportunity to carefully consider the development of Admiralty jurisdiction in other countries and the effect of International Conventions dealing with maritime matters and to adopt what has proved effective and successful and ignore unsuccessful or controversial concepts.

The second point is to emphasise the unique qualities of the "in rem" action. As has been pointed out, the proposed changes substantially increase the number of maritime claims, subject to Admiralty jurisdiction and thus, the availability to a plaintiff to proceed by way of in rem proceedings in respect of his claim.

Admiralty jurisdiction can presently be exercised both in personam and in rem and the proposed legislation preserves this position. Actions in personam in Admiralty proceed in most respects, in a similar manner to general Supreme Court actions. Thus, a plaintiff, in the case of a foreign shipowner defendant, will have to go to the trouble and expense of establishing

jurisdiction over the defendant by effecting service of proceedings on it abroad and generally will have no security for his claim, although he may be able to obtain a mareva injunction over any assets of the defendant which happen to be within the jurisdiction.

However, under the in rem procedure:-

- A. Jurisdiction is established over the res, be it a ship, cargo, freight or the proceeds of sale, by the mere fact that the res is within the territory, no matter where the cause of action arose.

It is certainly true that the court may, on application by the Defendant, stay in rem proceedings because of, for instance, a prior agreement to arbitrate, or the application of the forum non conveniens doctrine, but such decisions are not a denial of jurisdiction, but an exercise of it.

- B. The plaintiff may arrest the res and thereby obtain security for his claim.

Unlike the mareva injunction, which is discretionary, arrest attendant upon in rem proceedings, is available as of right. The plaintiff is therefore protected to the extent of the value of the res, from the defendant dissipating or

otherwise disposing of his assets prior to judgment, or where the defendant is foreign, having to enforce an Australian judgment overseas, particularly in countries with which Australia has no reciprocity of enforcement of judgments procedure. Normally of course the defendant will obtain the release of the res by providing security in an acceptable form, e.g. a P & I Club letter of undertaking.

Accordingly, so far as a defendant shipowner is concerned, if the draft Bill is enacted, there will be a greater possibility of his ship (or a surrogate ship) being the subject of in rem proceedings and thus arrest, if acceptable security is not provided, when in Australian territorial waters.

1. What is a Ship - Section 3(1)

By far the majority of in rem actions are commenced against ships. It is accordingly important from an owners point of view to know precisely what is meant by the word "ship". The draft Bill contains a definition of what constitutes a "ship" for the purposes of the proposed Act and specifies certain classes of vessels which are to be included and excluded from the definition. Those included are:-

- (a) a barge, lighter or other floating vessel;

- (b) a hovercraft;
- (c) an offshore industry mobile unit within the meaning of the Navigation Act, 1912 (this includes self-propelled rigs and, in respect of certain claims, non self-propelled rigs);
- (d) a vessel which has sunk or is stranded and the remains of such a vessel.

It does not include:-

- (a) a seaplane;
- (b) an inland waterways vessel;
- (c) a vessel under construction which has not been launched.

The most important class of excluded vessel is "inland waterways vessel" and this is defined to mean:-

"A vessel that is used or intended to be used wholly on inland waters".

The Bill also defines what is a foreign ship and that is:-

"A ship that is not registered and is not permitted to be registered under the Shipping Registration Act, 1981".

2. Proprietary Maritime Claims - Section 4(2)(a)-(d)

Those claims which are classified as "proprietary maritime claims" are set out in Section 4(2) of the Bill and as the name suggests, in the main relate to ownership of or an interest in a particular ship or other property.

Section 16, provides that a proceeding on such claims, concerning a ship or other property (which would seem to include claims relating to cargo and freight in the context of 4(2)(d) only) may be commenced as an action in rem against the particular ship or property. It is important to note that the right to proceed in rem in respect of such claims is limited to the particular res the subject of the claim, e.g. the ship itself, and does not extend to a surrogate ship. This is equally true of in rem proceedings commenced on a maritime lien or other charge, under Section 15(1), although it should be noted that those claims specified under Section 15(2) as giving rise to maritime liens are "general maritime claims" and thus there would be a right in respect of such claims to proceed against a surrogate ship.

Proprietary maritime claims, under the Act, are as follows:-

- (a) Possession of, title to or ownership of a ship or share in a ship.

Claims of this nature to a large extent are encompassed by existing Admiralty jurisdiction (Section 4 A.C.A. 1840 and Section 8 A.C.A. 1861). However, under present jurisdiction, claims in respect of title to or ownership of a ship or its proceeds are restricted to certain specified causes, being disputes re possession, salvage, damage, wages or bottomry. Further, there is no specific reference to a share in a ship.

As can be seen, the wording in the Bill is far more simple, and is similar to the wording found in other countries' legislation, e.g. The United Kingdom Supreme Court Act, 1981 (U.K. Act). Jurisdiction extends to all ships, whether foreign or not.

- (b) Claims between co-owners of a ship relating to the possession, ownership, operation or earnings of the ship.

So far as claims between co-owners are concerned, present Admiralty jurisdiction is almost precisely the same as that proposed with, however, the very important distinction that the claim must at present relate to an Australian registered ship. There is no such restriction in the proposed

legislation and, thus, actions could be brought in respect of any ship wherever registered.

- (c) Mortgage of a ship or of a share in a ship or its freight.

At the present time, there is jurisdiction in respect of mortgages on Australian registered ships, registered under the Shipping Registration Act, 1981. However, claims in respect of unregistered or equitable mortgages (whether of local or foreign ships) are only subject to Admiralty jurisdiction if the vessel or its proceeds are already under arrest.

Under the Bill, the restriction with respect to foreign mortgages which presently exists in Australia would be done away with. In other words, there would be Admiralty jurisdiction in respect of mortgages of all kinds, including those created under foreign law, irrespective of whether or not the ship was under arrest. It will be noted that the reference in the Bill is limited to "mortgages" and does not include any specific wording relating to an equivalent interest in a vessel, such as a "charge" which is not, as such, a mortgage. The ALRC took the view that the proposed wording:-

"Sufficiently suggests that functional equivalents (to mortgages) are not excluded".

However, it should be noted that whilst virtually all countries having Admiralty jurisdiction have a similar provision in respect of mortgages to that proposed, the relevant provision in all but a very few cases, also includes a reference to "charge".

- (d) A claim relating to the enforcement of a court judgment, including a foreign court, against a ship or other property in a proceeding in rem in the nature of a proceeding in Admiralty.

Under the Admiralty Court's present "inherent" Admiralty jurisdiction, (that is, jurisdiction which is not contained in any specific provision, but which is vested in the Court by virtue of its development or previous enactments) a foreign judgment, provided that it is an in rem judgment, or can be classified as such when that foreign jurisdiction does not have an in rem procedure per se, can be enforced by way of in rem proceedings in Australia.

The Bill extends such a right of enforcement to local in rem, as well as foreign in rem, judgments. (This is different to the position in the U.K., see Alletta [1974])

1LLR 40). It should be stressed that the right does not extend to in personam judgments in Admiralty, which preserves the present position.

Since reference has been made in this sub-section to the Admiralty Court's "inherent" jurisdiction, it is worth noting at this point, that the Bill does not contemplate including an appropriate "residual" or "sweep-up" provision which would catch any part of the inherent jurisdiction which the Admiralty Court presently enjoys, that is not covered by the specific heads of jurisdiction proposed in the Bill. It is intended that Admiralty jurisdiction will be limited to those matters set out in the Bill. Once again, this is different to the position in the U.K. where the U.K. Act contains a clause providing for the preservation of any other Admiralty jurisdiction, not specifically dealt with in the Act, which the High Court had, prior to the commencement of that Act (Section 20(1)(c)).

- (e) A claim for interest in respect of those claims referred to in (a), (b) and (c) above.

The present Admiralty Rules as to pre-judgment interest differ from the Common Law Rules as modified by Statute. By pre-judgment interest is meant payment of simple interest to

a plaintiff to compensate him for having been kept out of monies due to him. It is not clear whether, in certain Admiralty matters, the plaintiff is entitled as of right to interest, e.g. collisions, rather than the matter of interest being subject to the Court discretion. What does seem clear is that, subject to the exercise by the Court of its discretion in a particular case, interest can be awarded on judgments in respect of all claims the subject of Admiralty jurisdiction.

However, interest will only be awarded where there is a judgment for the plaintiff on a principal sum. There is nothing in present Admiralty jurisdiction or the Admiralty Rules which provides for the maintaining of an action for interest alone, independent of the underlying claim. Thus, where a plaintiff commences proceedings in Admiralty and at the last moment the defendant pays the principal sum due, but refuses to pay any interest on the principal, the court has no jurisdiction to entertain the claim for interest alone.

The new Bill contemplates such a claim and it specifically legislates for this, conferring jurisdiction in respect of a claim for pre-judgment interest, not only in respect of proprietary maritime claims, but also in respect of general maritime claims (Section 4(3)(v)).

3. General Maritime Claims - Section 4(3)(a) - (v)

Section 4(3) sets out those claims which fall within the definition of "general maritime claims". As is readily apparent from a brief examination of the Section, the class of claim it is proposed should now be the subject of Admiralty jurisdiction, is greatly extended in comparison with the present position.

A number of general maritime claims have been considered under Section II of this paper and accordingly, this Section in the main considers the more important of the remaining claims:-

A. Pollution - Section 4(3)(b).

"A claim in respect of the liability of owners of a ship arising under Part II and IV of the Protection of the Sea (Civil Liability) Act, 1981 or under a law of a State or Territory that makes provision as mentioned in sub-section 7(1) of that Act".

Australia has ratified the International Convention on Civil Liability for Oil Pollution Damage dated Brussels 29th November, 1969 (The Civil Liability Convention), by virtue of the Protection of the Sea (Civil Liability) Act, 1981 (Cth). Under the Civil Liability Convention, an owner of a ship is liable for

any pollution damage caused by oil escaping or discharged from his ship other than in the case of war, Act of God, intentional acts of third parties or negligence or a wrongful act on the part of a Government or any authority responsible for maintaining navigational aids. Further, a shipowner may avoid liability if he can prove that the damage was caused wholly or partially by the negligence or intentional act or omission of the party who suffered the damage.

An owner may limit his liability for pollution damage in accordance with Article V of the Convention, unless it was due to his actual fault or privity.

As would be expected, considering the age of the Admiralty Court Acts, present Admiralty jurisdiction does not expressly extend to oil pollution claims. However, it is arguable that such claims would fall within the ambit of Section 7, Admiralty Court Act (1861),

"Damage done by any ship"

and are therefore within the scope of present Admiralty jurisdiction.

The Bill puts the matter beyond argument and thus, by virtue of Section 4(3)(b), claims in respect of liability under Part II

(Liability and Limitation of Liability under the Convention) or IV (Recovery of Expenses of Minister) of the 1981 Act are general maritime claims and thus the subject of Admiralty jurisdiction.

Section 26 of the Bill provides that proceedings under the Act in respect of a claim specified in this Section shall only be brought in accordance with paragraphs 1 and 3 of Article IX of the Convention. That is, proceedings for compensation for pollution damage can only be brought in the Courts of the State where the damage occurred or preventative measures were taken and after a limitation fund has been constituted, the Courts of the State in which it is constituted shall have exclusive jurisdiction to apportion and distribute the fund.

B. Salvage - Section 4(3)(g)

"A claim relating to salvage (including life salvage and salvage of cargo or wreck found on land").

Although the present situation as regards Admiralty jurisdiction in relation to salvage claims is somewhat obscure due to various U.K. enactments, it seems fairly certain that it does extend to all claims whatsoever relating to salvage of property, e.g. ship, cargo, etc. However, so far as life salvage is concerned, although there appears to be jurisdiction in respect of life salvage from any Australian ship in any waters,

it seems to be limited in relation to foreign ships to services rendered in Australian waters.

The new Bill makes the position considerably clearer and confers Admiralty jurisdiction in respect of all claims relating to salvage, whether of property or life. Section 15(2) provides that a reference to maritime lien includes a claim for salvage.

It appears from the ARLC's comments that the words "relating to salvage" contained in the Section, were deliberately chosen to reflect the wording of Section 328 of the Navigation Act, 1912 (Cth.) and to ensure the jurisdiction is as broad as possible. The wording was evidently compared to that contained in the equivalent Section in the U.K. Act, which refers to claims in the "nature of salvage" (Section 20(2)(j)). On one view, the wording in the Bill does seem to be wider, catching claims which are peripheral to the salvage act itself. However, the claim must relate to "salvage" and therefore there must be an act which constitutes an act of salvage, before any claim will be subject to Admiralty jurisdiction. The U.K. wording appears to embrace a wider variety of claim in that the act itself it seems, need not appear to be one of pure salvage, but may only be akin to it.

It is also interesting to note that the U.K. Act also confers Admiralty jurisdiction on the salvage of aircraft. Under

that Act, there are a number of other claims relating to aircraft, which now fall within the scope of English Admiralty jurisdiction. The ALRC considered recommending that Australian Admiralty jurisdiction be extended in a similar manner, but decided against it.

What is not clear is whether the wording of the Section is wide enough to encompass the commencement of in rem proceedings for negligent salvage. It seems unlikely, although it is quite possible that there may be a right to proceed in rem under some other head of jurisdiction, e.g. "agreement for the use or hire of a ship". The ALRC considered it unnecessary to include a specific head of jurisdiction dealing with negligent salvage.

C. General Average - Section 4(3)(h)

"A claim in respect of general average".

Admiralty jurisdiction in Australia does not at present include claims for general average.

Under the Bill, claims for general average would fall within Admiralty jurisdiction. This again is in line with all overseas Admiralty legislation.

D. Towage & Pilotage - Section 4(3) (j) and (k)

"(j) A claim in respect of towage of a ship"

"(k) A claim in respect of pilotage of a ship"

Both claims for towage and pilotage are within the scope of present Admiralty jurisdiction and the new Act preserves this position.

The Bill again differs in its wording from the U.K. Act in that the latter, as in the case of salvage, refers to claims "in the nature of towage" (and pilotage). The wording of the U.K. Act in relation to claims of this kind seems to be broader than that proposed in the Bill, since the latter uses the phrase "in respect of".

E. Construction, Alteration, Repair or Equipping a Ship -
Section 4(3) (n) & (o)

"(n) A claim in respect of the construction of a ship
(including such a claim relating to a vessel before it
was launched)"

"(o) A claim in respect of the alteration, repair or
equipping of a ship".

By virtue of Section 4 of the ACA 1861, there is at present Admiralty jurisdiction in respect of claims for the building, equipping or repairing of any ship, provided, that the ship or its proceeds are already under arrest at the time when the action is commenced. This head of claim overlaps that relating to the provision of necessaries to a vessel, which is also the subject of present Admiralty jurisdiction.

Jurisdiction under the new Bill will be extended in relation to these claims, in that it does away with the necessity for the vessel to be already under arrest when the action is brought. (The ALRC have recommended that this requirement should not be retained in respect of any claim, which it is proposed be the subject of Admiralty jurisdiction. See paragraph 2(c) above). A claim under this paragraph will inevitably overlap with claims in respect of goods, materials or services, as set out in Sub-section (m).

F. Port and Harbour Dues etc. - Section 4(3)(p)

"A claim in respect of a liability for port, harbour, canal or like tolls, charges or dues or tolls of a like kind in relation to a ship".

Such claims do not fall within the ambit of present Admiralty jurisdiction.

Since there are a number of pieces of legislation which confer on port, harbour and public authorities, rights to detain vessels in respect of claims for charges and dues, conflicts could clearly arise where a vessel was already under detention and subsequently a claimant sought to arrest it through the offices of the Admiralty Marshall. From the English experience, it appears that mere possessory liens will be subordinate to the taking of any vessel into custody by the Admiralty Marshall by way of arrest.

However, it appears that the conflict has not been resolved in relation to statutory rights of detention. The ALRC take the view that the best solution would be to give the Admiralty Court power to override any statutory right of detention already exercised, subject to the claim the subject of the detention being given first priority after the Admiralty Marshall's expenses. In the event that the vessel is arrested prior to the exercise of a statutory right of detention, the power of detention should be excluded. This certainly seems to be the simplest and most sensible approach, and is embodied in Section 36(1) - (5) of the Bill.

G. Disbursements - Section 4(3)(r)

"A claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship".

Claims for disbursements (that is, all proper expenditure made in relation to the ship) paid by a master fall within present Admiralty jurisdiction and give rise to a maritime lien (created by statute).

By virtue of this sub-section and Section 15(1), the present position is preserved. However, as will be appreciated from the wording of the Sub-clause, jurisdiction is extended to embrace claims for disbursements made by a much wider class of person. This is a very sensible extension of the jurisdiction, since in modern times it will normally be a charterer or an owners agent, rather than a master, who will incur substantial disbursements on an owner's behalf and if there is jurisdiction for such a claim when made by a master, then there should also be when made by such other class of person. An additional point is that a charterer or agent will now be able to obtain security for his claim by way of arrest. This is obviously of great importance in relation to disbursements incurred on behalf of a foreign shipowner.

It should be noted that the concept of the maritime lien has not been extended to embrace disbursements incurred by those additional classes of persons referred to in the sub-section.

H. Wages - Section 4(3)(t)

"A claim by a master or a member of the crew of a ship for:-

- (i) wages; or
- (ii) 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 by operation of the law of a foreign country".

Present Admiralty jurisdiction embraces claims for masters and seamens wages, which give rise to maritime liens.

Such claims are preserved under the Bill but the wording of the relevant is considerably broader.

The reference to "seamen" is substituted by reference to "a member of the crew" and, in addition to wages, the section covers claims for any amounts due to a master or member of the crew from an employer. The latter is intended to cover benefits accruing to a master or member of the crew other than that which can be strictly regarded as wages, such as victualling allowances, holiday pay, side pay, pension fund contribution etc.

I. Arbitration - Section 4(3)(u)

Admiralty jurisdiction does not at present embrace claims relating to the enforcement of arbitration awards. However, Australia has acceded to the Convention on the Recognition of Foreign Arbitral Awards, 1958 by virtue of the Arbitration (Foreign Awards and Agreements) Act, 1974. Under this Act, a foreign arbitration Award may be enforced in Australia by an ordinary action in personam where the Award was made in a Convention country or a person seeking to enforce the Award is domiciled or ordinarily resident in Australia or in a Convention country, subject to the provisions of the Act.

By virtue of Section 4(3)(u) of the Bill, Admiralty jurisdiction is expressly extended to the enforcement of local or foreign Arbitration Awards made in respect of maritime claims as defined in the Bill. Thus, an action in rem can be commenced against the ship in question or a surrogate ship, provided that it is still owned by or demise chartered to the party liable under the Award at the time the in rem proceedings are commenced. It should be noted that the sub-section relates to the question of jurisdiction, not to whether the Award is enforceable in Australia under State/Commonwealth Law.

4. General Comments

A. Claims arising out of acts or omissions in the navigation or management of a ship - Section 4(3)(d).

The effect of this provision has, to a large extent, been covered under Section II of this paper. However, the following three points are made, with the shipowner in mind.

(i) Extent of the provision.

The Section is very widely drawn and will embrace claims made in contract, tort or bailment arising out of acts or omissions of specified parties in the navigation or management of a ship. Many such claims will fall within the ambit of other heads of claim specified in Section 4(3). It is not, as its closest equivalent in the U.K. Act, limited to claims for loss of life or personal injury.

As has been said, it appears from the ALRC's comments that the main rationale for including this provision is to confer Admiralty jurisdiction and thus the right to proceed in rem in respect of claims in tort, in particular claims for pure economic loss, where such claims can be maintained as a matter of substantive law. This is of some importance to shipowners, bearing in mind the present trend of Australian

law to allow, in certain circumstances, the recovery of damages for pure economic loss. (Caltex Oil (Australia) Pty. Limited v. The Dredge "Willemstad" (1976) 136 CLR 529).

The Australian approach has not been adopted by the English courts (The Mineral Transporter (1985) 2 AER 935), nor it seems in Canada or the United States.

(ii) Identity of Party

Sub-section d(i) and (ii) provide that the act or omission includes that of a "charterer" or "person in possession or control" of a ship. However, the act or omission must be in the navigation or management of the ship. It seems clear from the authorities that under a time charter (unless there is some express provision providing otherwise) the navigation and management of the ship (if the word management is used in the same way, see (iii) below) will remain the responsibility of the owner, or if the vessel is demise chartered, the demise charterer. Thus, the reference to "charterer" in this provision, is likely in almost all cases to only encompass a demise charterer, not a time charterer.

Equally, the reference in d(ii) to person in "possession or control" of the ship, is most unlikely to include a time

charterer, since he would certainly not have possession of the ship and the word "control" is likely to be interpreted strictly and limited to physical control of the ship. However, this Sub-section would include a claim against, for instance, a mortgagee in possession of the ship.

(iii) Navigation or Management

The meaning of these words in relation to a ship have been considered on any number of occasions in the context of disputes arising out of charterparties and contracts for carriage of goods by sea (normally contained in bills of lading). The meaning of "navigation" does not present any very real problems and is to a large extent self-explanatory.

"Management of a ship" can however be construed in a number of ways. In the context of charterparties it has been distinguished from the "employment" of the ship which, when it is time-chartered out, will be controlled by the time charterer. In relation to bill of lading, it has been held to relate to matters pertaining to the ship itself or some part of it, as distinct from persons or cargo which might be on board the vessel. It is likely that a similar approach would be adopted when interpreting the words as they appear

in this section. This view is supported by the inclusion of the specific operations referred to in d(iv) - (vi).

B. Charterparties - Section 4(3)(f)

Admiralty jurisdiction does not presently extend to claims arising out of charterparties.

By virtue of Section 4(3)(f), disputes between owners and their charterers arising out of demise, time or voyage charters will be subject to Admiralty jurisdiction. The majority of charterparties contain provisions providing for disputes between owners and charterers to be referred to arbitration, normally in London or New York. Accordingly, it might at first seem that there would be little opportunity for the exercise of this head of claim in respect of Admiralty jurisdiction in Australia, but see the comments on Section 29 of below.

C. Claims for Insurance Premiums - Section 4(3)(s)

This Section provides a notable extension of Admiralty jurisdiction. There is no equivalent in the U.K. Act. It will allow a P & I Club claiming in respect of "calls" be they initial, back or release calls, to proceed in rem against the ship covered or, of course, a surrogate vessel. However, the extent of its practical effect, other than to obtain security

(Section 29 below) may be limited, since the majority of P & I Club Rules provide for disputes between the Club and a member to be referred to arbitration.

There does not seem to be the same problem with claims for premiums by other insurers in respect of policies effected on a ship by its owner, e.g. a hull insurer.

D. Demise Charterer's Liability - Section 18

A great deal of discussion and many submissions were put to the ALRC as to whether the right to proceed in rem against a vessel should be extended to include the position where, in relation to a maritime claim, the relevant person (that is the person who would be liable on the claim in a proceeding commenced as an action in personam) was a time or demise charterer, rather than the owner of the vessel. As will be seen from this Section, it was decided at the end of the day that the right would be extended but only where the demise charterer was, at the time the cause of action arose, the owner or charterer (which term would, it is submitted, include a time or voyage charterer) or in possession or control of the ship and is at the time when the proceeding is commenced the demise charterer of the ship.

E. Security in Relation to Stayed or Dismissed Proceedings -
Section 29

This Section is of great importance to claimants or plaintiffs in foreign arbitration or court proceedings and is a notable extension of the discretionary rights of the Australian Courts, which it is proposed should be invested with Admiralty jurisdiction.

So far as maritime arbitration agreements are concerned, it is worth pointing out that an agreement between parties to refer maritime claims to arbitration cannot and does not extinguish any right to invoke Admiralty jurisdiction in respect of such claims. The right to proceed in Admiralty and the right to arbitrate co-exist. However, where parties have agreed to refer disputes/claims to arbitration, then a court may have a discretion as to whether to stay proceedings brought in breach of that agreement, in which case it may well be able to impose conditions on the stay or it may be that a stay is mandatory (as appears to be the case under Section 7(2)(b) of the Arbitration (Foreign Awards and Agreements) Act in respect of arbitration agreements as defined in Article II sub-article 1 of the Convention). It is interesting to note that, so far as the latter is concerned, although a stay appears to be mandatory, the court nevertheless has a discretion under the Act, to impose such conditions on the stay as it thinks fit.

A plaintiff will generally be most concerned to obtain security for his claim. By virtue of Section 29, where in rem proceedings are instituted in Australia and the court stays or dismisses those proceedings on the grounds that the claim concerned should be determined by local or foreign arbitration or by the court of a foreign country, it may nevertheless order that the stay be on condition that the res be retained by the court as security for any award or judgment made in the arbitration or by the foreign court. The Section further provides that the court may impose other conditions on the stay, including conditions relating to the institution or prosecution of the arbitration or foreign court proceedings and that security equivalent to the res (presumably meaning equivalent to the value of the res) be provided for satisfaction of the award or judgment.

Thus, where for instance a charterparty contains a London arbitration and the dispute under the charterparty relates to a claim which falls within Australian Admiralty jurisdiction, in rem proceedings can be instituted in Australia, irrespective of whether or not arbitration proceedings have been commenced in London and the court will have a discretion to require security to be provided in respect of those proceedings. It of course remains to be seen how the courts will exercise that discretion.

F. Corporate Veil

It is perhaps worth mentioning that the ALRC spent some time considering whether or not to include a provision in the proposed legislation, to extend the right to "lift the corporate veil" in respect of the exercise of Admiralty jurisdiction, bearing in mind the very common occurrence of "one ship" companies. Submissions were received from the maritime industry, both in support and against such an extension. There is overseas precedent under the South African Jurisdiction Regulation Act, 1983. However, it was decided that no special provision should be included and the lifting of the corporate veil should be determined by general Australian law.

G. Caveats - Admiralty Rules, Rule 6

The proposed Admiralty Rules provide for the filing of Caveats against the arrest of a vessel in a registry of the Federal Court. The Caveat will not however be filed unless the Admiralty Registrar is satisfied that the Caveator will in any proceeding of a kind specified in the Caveat that is commenced in rem against the ship:-

1. Enter an appearance; and
2. Pay into court or provide a bail bond in the amount claim or the amount specified in the Caveat.