Opening Address: MLAANZ Conference 1994, *Leura NSW*

*The Hon. Mr. Justice K.J. Camithers**

There are three factors which bring us together today — the sea, ships and the law. The sea (according to Conrad) recognises only the irresponsible consciousness of power. Do you recall his words?

> The sea — this truth must be confessed — has no generosity. No display of manly qualities — courage, hardihood, endurance, faithfulness — has ever been known to touch its irresponsible consciousness of power.

Be that as it may, when, from earliest times, man embarked upon the carriage of goods across the sea it became necessary to regulate this carriage by rules of law. The sea may not have been prepared to recognise the laws of man, but mankind had no option but to devise his own principles of law. Indeed, from earliest times man asserted that the law was the ruler of the sea. Thus, it is recorded in Justinian's Digest that when an application for relief was made by a mar plundered after shipwreck to Marcus Antonius, the famed Roman Governor in the first century AD, Antonius replied:

> I am indeed lord of the world but the Law is lord of the sea.

Admiraltv Division. Supreme Court of New South Wales

And this attitude finds expression in the word 'Admiralty', which derives from the Arabic expression 'amir — al — bahr', meaning ruler of the sea.

This is a pious expression because neither man nor the law can rule the sea. At most, we can make laws to regulate the uses to which we put the sea and the damage which it occasions, or which we occasion to it. For most of us here today the application of those laws has become our life's work.

As we meet here today we can look back upon the expansive history of the maritime law whose beginnings are shrouded in antiquity. The first identifiable maritime code is that of the island of Rhodes dating back to 900 B.C., and declared by the Roman Emperors to be binding on the world at large.

We then pass to the Digest of Justinian of the first century A.D. — then to the Mediterranean sea codes — the Tablets of Amalfi of the 12th century and the Consulate of the Sea of Barcelona of the 15th century. These two codes, like other sea codes of the time, purported not so much to enact law for any territory as to state what was conceived already to be the custom of the sea.

The laws of Oleron, a collection of customs of the sea compiled in the 12th century at Oleron, an island off the west coast of France, have always been regarded as the nucleus of the maritime laws of England, and hence, more recently, the United States and Australia.

We observe in this evolutionary process that the loss of uniformity in the maritime law began with the late Renaissance and accelerated with the rise of nationalism in the 17th century, which witnessed the adoption, for example, of the Maritime Code of Christian XI of Sweden and the Marine Ordinances of Louis XIV of France. By this Code and these Ordinances established customs of the sea, revised to suit the times, were made part of the national law.

There are two important observations we can make from an historical analysis of the maritime law. Firstly, there is both the antiquity and the universality of the maritime law. We are fortunate beneficiaries of principles of law which have been refined over centuries. The Australian *Admiralty Act* 1988, for example, is an

outstanding legislative achievement drawing much from the long evolutionary process of the maritime law. We have noticed how originally maritime law principles were promulgated on a universal basis and it was not until much later, due to the rise of nationalism, that states promulgated their own laws. In more recent times there has developed, in my view, the need for a trend back to universality because of the rapidity with which goods can now be carried across the sea and the instantaneous oral and documentary communication which is available from one end of the earth to the other. It is particularly unfortunate I think, in these circumstances, that there are still notable diversions between, say, English (and generally Australian) law and American and Canadian law in relation to the construction of such important International Conventions as the Hague Rules or the amended Hague Rules. Some countries seem to pay no heed to the judgments of the courts of other states when their courts construe these Conventions. This is unfortunate and we should strive for international consistency of the principles of maritime law, particularly insofar as International Conventions are concerned.

Secondly, the history of maritime law demonstrates an ability (almost a genius) to adapt to changing industry and commercial practices. Perhaps the most dramatic example here is the ability oi the law to have coped with containerisation. Fresh challenges have arisen, the most significant in this regard being the increasing availability of electronic data interchange. In this regard the technocrats have provided us with the technical facility, and it is the obligation of the maritime law to accommodate these technological innovations.

It is not only the maritime industry and law which are undergoing changes. Many other important changes are taking place in oui society. These changes should attract the interest of all intelligent and concerned Australians. Monumental changes are being mooted foi our Constitution. Changes are being proposed for the recruitment oi judges and the constitution of the judiciary which could well pull judicial independence under threat. Changes have been wrought

and further changes are proposed for the legal profession. In the context of these developments it is desirable that maritime lawyers do not become too parochial and confined to their own field of expertise — fascinating as it may be — but apply their talents and learning to the broader issues.

In a recent perceptive critique of the Sackville 'Access to Justice Report', Susan Crennan Q.C., President of the Victorian Bar Council, said:

> The conclusion cannot be avoided that the debate about access to justice has imperceptibly changed into a debate about who should control the legal system, including the courts and the judiciary.

Both the judiciary and the legal profession must remain independent to provide the bulwark between the weak and the strong; which is their traditional role.

For a lawyer in general, and a maritime lawyer in particular, this is an exciting time. Many relevant changes are occurring both on the national and the international scene. The increasing complexity oi maritime law and the frequency of disputes are straining the capacity of both the legal and arbitral systems to cope.

Thus right across the globe, disputants are looking to mediation as an alternative method of dispute resolution. There is a distinct risk that arbitration will become guilty of the vices which it was designed to avoid — expense, delay and complexity. Doubts are now being raised as to the viability of the adversarial system; is it a luxury litigants can no longer afford? Is the Continental inquisitorial system the answer? Or is the answer somewhere between the two? It has even been suggested that the administration of justice in commercial matters should be completely privatised. The argument here is thai a judge who is paid by the parties to resolve their dispute will be motivated to provide a better service than a judge who is paid a stipend by the State and who receives no specific remuneration from the parties.

Mediation has a role to play but how big a role? One difficulty with mediation is that it provides no precedents. One precedent (e.g

the *Eurymedori)* may resolve countless disputes in the future and establish a satisfactory commercial practice. And, of course, not every dispute is capable of mediation. Not every commercial sword can be beaten into a ploughshare.

For a number of reasons the judicial systems of most countries have become overburdened with criminal cases and those concerning the rights of individuals. There seems to be an increasing lack of confidence by the citizen in the Executive and a therefore greater reliance upon the Judiciary. Thus those concerned with maritime law will find it more and more difficult to obtain the requisite amount of judicial time to resolve their disputes. Alternative methods of dispute resolution become, therefore, a challenge to all concerned with the maritime law. It is pleasing to note, in this context, the initiative taken by MLAANZ to set up a panel of maritime arbitrators under the umbrella of the Association.

The forthcoming CMI Conference represents a great milestone in the history of MLAANZ. What now of the future? I recall that when in the seventies the Maritime Law Association of Australia, as it then was, brought our New Zealand cousins into the fold, I proposed, unsuccessfully, that we should identify ourselves with the Pacific and closer Asian regions. Of course, much has changed since then. Australia now more clearly recognises the importance of its relationship with that region. This provides an exciting challenge for MLAANZ. We should be ready to share our experience and expertise in the maritime law field with our counterparts in the region. As MLAANZ has the established infrastructure it is not a difficult matter to invite the participation of our neighbours in the work which we perform. I would hope that we can look forward to MLAANZ developing into a regional maritime law Association. li this involves a change of name, so be it.

The organisers of this, the 21st Annual Conference of the Association, have prepared for you a veritable smorgasbord of intellectual and social delights. The high standards of the Frank Stewart Detheridge Address have been maintained by the distinguished presence here today of Mr Justice Sheller who will provide you, 1

have no doubt, with a memorable analysis of a complex and fascinating topic. He will be followed by other talented speakers ol valuable expertise in their field, and the groundwork will be laid foi the CMI Conference.

The distinguished philosopher Professor Joseph Campbell has said that the secret of a successful life is for each person to find his or her own bliss. "Follow Your Bliss" is his message after a lifetime of research. All of us here today have, I know, found our own bliss in the study and practice of maritime law, or in the industry which it serves. In that regard we are all exceptionally fortunate

May I thank you all and formally declare this Conference open.