The F S Dethridge Memorial Address 1999

ADMIRALTY JURISDICTION AND THE PROTECTION OF SEAFARERS

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INTRODUCTION

Some 25 years ago I had the pleasure, both professional and personal, of being briefed by the late Frank Dethridge. The case was in the industrial jurisdiction, but it had many of the characteristics that give maritime law its special attractions. It concerned a claim for a hard lying allowance by the crew of an oil tanker, the *MV Mobil Australis*, who alleged that their sleep was disturbed by the noisy cavitation of the vessel's pumps during discharging operations at night. To my considerable delight I found that the case involved, as well as some interesting questions of law, inspections at sea, ascents of the vessel's accommodation ladder, the smell of salt air, the sounds of the ship's machinery, and much more besides. Whilst somewhat removed from maritime liens and the ancient jurisdiction of the Admirals, the case was a memorable introduction to that general area of the law and to its themes, and not least, of course, because the instructing solicitor was Frank Dethridge himself. He was, as all agreed, an outstanding maritime lawyer, and it is a particular honour to deliver the Address established in his memory.

The topic of this year's F S Dethridge Memorial Address – *Admiralty Jurisdiction and the Protection of Seafarers* – has a practical significance that was demonstrated to the public at large in Melbourne not so long ago by the widely reported problems

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encountered by the Vladivostok-based officers and crew of the *Ionian Mariner*.[1] That vessel lay under arrest in Port Phillip Bay for some seven months in 1995 prior to her judicial sale. The officers and crew, most of whom remained on board, were not paid during the period of the arrest, and indeed had not received any pay at all for some months prior to the arrest. Their situation attracted considerable public attention, and the steps taken for their relief included an order by Ryan J that provision be made, as part of the costs of the arrest, for the expenditure of modest sums for outings ashore and other entertainment. In due course, the outstanding wages were paid to the crew, having been secured by a maritime lien and later still, one of the outstanding issues in the case was resolved by reference to the case law of the High Court of Admiralty in England in the days of sail.

I mention *The Ionian Mariner* at the outset to illustrate the point that even now, in the late 20th century, examples can be found of the type of problem out of which, over centuries, the rich jurisprudence of the law relating to seafarers has evolved. As well as having modern relevance, that jurisprudence is a subject of great interest because, as I shall endeavour to show, the particular problems faced by seafarers and their just solution have been integral to the development of admiralty jurisdiction and jurisprudence as a whole.

THE SOURCE OF ADMIRALTY LAW'S PROTECTION OF SEAFARERS

Introduction

The deepest roots of Anglo-Australian admiralty law are obscure, but appear to lie in a strange mix of ancient sea-codes, customary laws and decisions of local English port and marine courts.[2] Less obscure is the source of the law's protection and so-called "favouritism" of seafarers, which lies in the equitable jurisprudence of the High Court of Admiralty.

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[1] *United States Trust Company of New York* v *Master and Crew of the Ship "Ionian Mariner"* (1997) 77 FCR 563 (Full Court of the Federal Court of Australia), allowing an appeal from *Marinis Ship Suppliers (Pty) Ltd* v *The Ship "Ionian Mariner"*, Federal Court of Australia, 17 June 1996, Ryan J.

[2] D J Cremean *Admiralty Jurisdiction: Law and Practice in Australia* (Federation Press, Annandale, 1997) 1.

The Equitable Jurisprudence of the High Court of Admiralty

The High Court of Admiralty, created by Edward III in the 1340s following England's victory in the battle of Sluys, was the first specialist admiralty tribunal.[3] The Court was governed by the King's Admiral who, with his deputy judges, was authorised to decide causes according to the maritime law.[4] That broad authority was confirmed by the King in Council in 1361 as meaning that felonies, trespasses and injuries occurring on the sea should be tried by the Admiralty Court under the law maritime, and not by the King's Bench under common law.[5]

Despite a relatively clear mandate, the High Court of Admiralty trespassed upon the civil realm of the English common law courts almost immediately after its creation. This led to a heated conflict between the Admirals and the common law judges, and to repeated complaints of excess of jurisdiction against the former. Those complaints led to the enactment of statutes in 1389[6] and 1391[7] limiting the Admirals' jurisdiction to matters arising on the seas and beyond the realm.[8] By the Act of 1391 the Admiralty Court was declared:

> [to] have no manner of cognizance, power nor jurisdiction [in respect] ... of all manner of contracts, pleas and quarrels, and all other things arising within the bodies of the counties, as well as by land as by water and also of wreck of the sea.

During the Tudor period, these legislative restrictions on the authority of the Admirals were undermined by Crown patents issued by the King in Council, which purported to confer jurisdiction on the Admirals over all contracts made beyond the sea (or in England for performance beyond the sea), and over all other matters occurring on the rivers in the realm from the first

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3 See L H Laing "Historic Origins of Admiralty Jurisdiction in England" (1946) 45 Michigan LR 163, 165.
4 C W O'Hare, "Admiralty Jurisdiction (Part 1)" (1979) 6 Monash LR 91.
5 Id, 91-92.
6 13 Ric II, st 1, c 5.
7 15 Ric II, c 3.
8 13 Ric II, st 1, c 5; 15 Ric II, c 3.

bridges to the sea.[9] Relying on the jurisdiction conferred by these patents, the Admiralty Court again exceeded its statutory jurisdiction, inflaming the common law courts and, this time, its litigants.

By the 16th century the common law had devised its own solution to the Admirals' encroachment on their jurisdiction in the form of the writ of prohibition, which was granted by the Court of the King's Bench to restrain proceedings in the Admiralty Court. Use of the writ of prohibition reached its peak during the time of Sir Edward Coke who, being particularly jealous of the Admiralty Court's intrusion into the area of civil contracts, used the procedure to limit the Admirals' jurisdiction to wrongs committed, and contracts executed, on the high seas.[10] This limitation was achieved by ordering the transfer of all other matters at the request of any defendant over which it could exercise its jurisdiction in personam.[11] The effect was to deprive the Admiralty Court of its initiating process, and to compel its reliance on the arrest of ship and cargo to secure jurisdiction.[12]

The conflict between the Admiralty Court and the common law courts continued through the 16th and 17th centuries, with the Admiralty Court's authority waxing and waning accordingly. The Admiralty Court never, however, recovered the position it had enjoyed in the Tudor period, and by the 18th century its jurisdiction was quite severely confined.[13]

It is perhaps not surprising that the long-standing "jurisdictional" conflict between the English common law courts and the High Court of Admiralty proved ultimately to be about more than mere jurisdiction and, by the 19th century, had come to reflect a much deeper tension over competing legal principles and methodologies. Whilst the common law courts applied general common law doctrines in the relatively strict and formalistic manner of the common law tradition, the High Court of Admiralty, as a court of equity, was concerned with the

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9 O'Hare, supra n 4, 94.

10 A Browne *A Compendious View of the Civil Law, and of the Law of the Admiralty* (Butterworth & Cooke, London, 1802) vol 2, 85.

11 D R Thomas, *Maritime Liens* (Stevens & Sons, London, 1980) 9.

12 Hare, supra n 4, 95.

13 D A Butler and W D Duncan *Maritime Law in Australia* (Legal Books, Redfern, 1992) 1.

unconscionable use of legal rights. That concern led it to look beyond the common law for signs of unconscionable dealings or conduct, and to be aware of the vulnerability to such conduct of the parties appearing before it.[14] The emphasis of the Court on conscience was unaffected by the rise of precedent as the methodological foundation of equity in the 18th and 19th centuries.[15] During that time, and particularly during the first half of the 19th century, the Admiralty Court displayed a singular sympathy for the seafarer as a result of its awareness of "the harshness of his working environment, the great power imbalance between him and the shipowners, the relentless drive of commerce as then practiced, and the ignorance, injudiciousness and imprudence of the common mariner".[16] Seafarers were perceived as relatively powerless figures in need of protection against conscious or subconscious abuse or, in the words of Lord Stowell, as:[17]

> [M]en, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection, even against themselves.

Descriptions of this kind appear quite frequently in decisions of the Admiralty Court in the early 1800s; particularly those of Lord Stowell, under whose guidance the Court's practice of assessing the equity of the common law courts' approach to admiralty matters, and recognising a need for special protection for seafarers, reached its zenith.[18]

It may be asked how it was that the Admiralty Court was able to develop a civil admiralty jurisprudence to rival that of the common law courts during the 18th and 19th centuries when, as has been noted, its jurisdiction had by that stage been severely

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14 See generally G D Pont and D Chalmers *Equity and Trusts in Australia and New Zealand* (LBC, North Ryde, 1996) 3.

15 See generally id, 4.

16 Thomas, supra n 11, 168.

17 *The Minerva* (1825) 1 Hagg 347, 355; 166 ER 123, 126-127.

18 See, eg, *The Juliana* (1822) 2 Dods 504; 165 ER 1560; *The Countess of Harcourt* (1824) 1 Hagg 248; 166 ER 88; *The George Home* (1825) 1 Hagg 370; 166 ER 132.

restricted. The answer is that during that period the Admiralty Court did manage to wrest some exceptions from the areas of jurisdiction that were blocked by the common law courts' writs of prohibition, principal amongst which were in the area of seafarers' wages. Indeed, by the beginning of the 18th century it was a settled principle of the common law that writs of prohibition would not be granted in cases of seafarers' wages.[19] It was therefore in those cases that the Admiralty Court developed its own admiralty jurisprudence which, unsurprisingly, was a jurisprudence cognisant of the problems of seafarers and protective of them as a class.

There was one restriction on the Admiralty Court's jurisdiction to determine seafarers' wages claims which should be mentioned here, and that was that the claims had to arise under an "ordinary" – as distinct from a "special" or "extraordinary" – contract. An ordinary contract was "a hiring on the usual terms made by word and writing only and not by deed"[20] or, expressed differently, a contract that contained only the usual terms relating to the amount of wages to be paid and the voyage for which the seafarer was required. The inclusion in a contract of any additional term not pertaining to these matters would make the contract "special", thereby depriving the Admiralty Court of the power to determine a wages claim arising under it.[21] This distinction between ordinary and special contracts caused considerable hardship to seafarers, as it prevented them from seeking equitable intervention in the vast majority of wages disputes.[22]

One of the most notable examples of the Admiralty Court's practice of assessing the equity of the common law courts' approach to admiralty matters, and of demanding special protection for seafarers, is *The Minerva*.[23] The case involved a claim for subtraction of seafarers' wages on account of the

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[19] *Opy* v *Child* (1693) 1 Salk 31; 91 ER 33; *Campion* v *Nicholas* (1720) 1 Str 405; 93 ER 597; *Cossart* v *Lawdley* (1688) 3 Mod Rep 244; 87 ER 159; *The Mariner's Case* (1725) 8 Mod Rep 379; 88 ER 269.

[20] *Howe* v *Nappier* (1766) 4 Burr 1944; 98 ER 13.

[21] See, eg, *The Mona* (1840) 1 W Rob 137; 166 ER 524; *The British Trade* [1924] P 104; *The Harriet* (1861) Lush 285; 167 ER 123; *The Sydney Cove* (1815) 2 Dods 11; 165 ER 1399.

[22] See Thomas, supra n 11, 171.

[23] Supra n 17.

seafarers having allegedly deserted their ship mid-voyage. The voyage for which the seafarers were contracted was described in their written agreement as being "from London to New South Wales and India, or elsewhere, and to return to a port in Europe", with the words "or elsewhere" having been hand-written in the margin of the otherwise printed agreement. The central issue was whether this description of the voyage as including "or elsewhere" was enforceable against the seafarers. The outcome depended in turn on the Court's construction of legislation that prohibited masters and seafarers from proceeding to sea without having executed a written agreement specifying the seafarers' wages and voyage, and that deemed such agreements to be "conclusive and binding on all Parties, for and during the Time or Times so agreed or contracted for, to all Intents and Purposes, any Custom or Usage to the contrary in any wise notwithstanding".[24] And so the question for determination was whether the description of the seafarers' voyage was indeed "binding and conclusive". Lord Stowell held that it was not, on the basis that to hold otherwise would cause injustice to the sailor. In his Lordship's words:[25]

> [Seafarers], who are the favourites of the law, on account of their imbecility, and placed particularly under its protection, may be made the victims of their own ignorance and simplicity. To such men, no such response can be made, as *that* which is irresistibly made in other cases of contract – it is your own contract, you have signed it with your eyes open; for they want both organs of sight for reading, and organs of discernment for judging. To those who are acquainted with this Court, it can be no secret how deeply some of these men are affected with surprise and concern, when they find that they have ever executed any engagement drawing after it consequences so disastrous.
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> If the law which applies, undoubtedly, the words "conclusive and binding," to the two covenants therein specifically described, as the necessary contents of the mariners' contract, is moreover to be extended to all the special engagements which their employers may interpose in that contract, it may appear to found a strong demand for the interposition of a court of equity, for the regulated protection of that class of individuals against the danger of such undue advantage being taken of them. Such is the known rule of the Admiralty Court, founded on its equitable nature and constitution, and I know not that it has ever been interrupted in this mode of considering these special contracts.

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24 2 Geo 2 c 36 (1729), s 2.
25 Supra n 17, 358; 127-128.

Before passing from this well-known passage, I would comment that the "imbecility" to which Lord Stowell refers is not evident from the reported facts of the case, which show the seafarers as men of great dignity and restraint. Having sailed from England to New South Wales with convicts, then to South America and back in search (unsuccessfully) of a return cargo – avoiding only New Zealand on account of the reputed propensities of the inhabitants (Lord Stowell was careful not to make a finding on the point) – the sailors, after suffering repeated indignities at the hands of the master, finally left the ship to make their complaint to the local authorities.[26] The facts of *The Minerva* are worthy of close attention, since they reveal the reality with which Lord Stowell and other judges in admiralty – and ultimately the legislature – were concerned. The case is also of interest for the various alternative grounds upon which the Court found in favour of the seafarers.

The following rationalisation of *The Minerva* decision was given in the 1847 edition of *Pritchard's Admiralty Digest*:[27]

> The Court of Admiralty has at all times asserted its right as a Court of Equity, to examine whether the clauses of ship's [sic] articles were reasonable, and as such binding on the mariners; but in the Courts of Law stricter principles of interpretation obtained, and the ignorance and improvidence of seamen, and their inability to appreciate the meaning and effect of a long multifarious instrument, led to the frequent scandal of cases of great cruelty and injustice.

The Minerva is by no means an isolated example of the Admiralty Court's protection of seafarers against the unjust application of general common law principles during the 19th century.[28] As, however, Pritchard's rationalisation of that decision indicates, support for a separate admiralty jurisprudence that protected seafarers was by no means limited to the Admiralty Court and, by the mid-1800s, was widespread.

In an age of reform, it is not surprising that legislative action

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26 Supra n 17, 365-366; 130.

27 At 218 n 4.

28 See, in this regard, *Appleby* v *Dods* (1807) 8 East 300; 103 ER 356; *Jesse* v *Roy* (1834) 1 Cr M & R 316; 149 ER 1101; *Cutter* v *Powell* (1795) 6 TR 320; 101 ER 573; *Hillyard* v *Mount* (1828) 3 Car & P 93; 172 ER 338.

was taken to protect seafarers soon after *The Minerva* was decided. That action achieved two main reforms which are of importance in the development of modern law. The first reform[29] conferred on the High Court of Admiralty a broad equitable jurisdiction over a wide range of civil admiralty matters, and declared it to be a court of record with powers of a superior common law court, taking admiralty jurisdiction away from the common law courts.[30] As part of this jurisdictional reform Parliament also abolished the distinction between special and ordinary contracts,[31] ensuring the Admirals' jurisdiction over all claims concerning seafarers' employment "whatever the nature of the contract or the terms of service".[32] The Legislature's second achievement was to introduce a very detailed regulatory scheme governing most aspects of a sailor's employment and life at sea.[33] The importance of this scheme was described by MacLachlan in the following terms.[34]

> That which no judge could do, has been accomplished by the Legislature, which has declared what shall be the general purport and main stipulations of certain agreements, and that any stipulation not in accordance therewith shall be illegal and void. There is here a general principle confined by a special application, which excludes the general community, and protects a class of men who have too often been the victims of cruel and designing iniquity.

By enlarging the Admiralty Court's jurisdiction and introducing a range of principles that afforded special protection to seafarers, the Legislature – in addition to doing what "no judge could do" – confirmed Lord Stowell's assertion in *The Minerva* that "[mariners] are the favourites of the law ... and placed particularly under its protection".[35]

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29 Admiralty Court Act 1861 (UK).

30 Section 10 of the Admiralty Court Act 1861 (UK) provided: "The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise ...".

31 Ibid.

32 Thomas, supra n 11, 173.

33 Merchant Shipping Act 1894 (UK).

34 D MacLachlan *A Treatise on the Law of Merchant Shipping* (5 ed, Sweet & Maxwell, London, 1911) 234.

35 Supra n 17, 358; 127.

Seafarers as the Favourites of the Law

The position of seafarers as "the favourites of the law" is reflected in the principles relating to seafarers' contracts of employment, and to seafarers' liens for wages, as they had come to exist at the end of the 19th century.

Seafarers' contracts of employment:

In 1894 the principles governing seafarers' contracts of employment were consolidated in the last of the series of legislative reforms to which I have referred, in the Merchant Shipping Act 1894 (UK) ("MSA").

Under that Act, a written agreement was required between the owner or master of a ship and each seafarer and apprentice carried on that ship to sea.[36] The agreement had to be in a form prescribed by statute[37] and witnessed by an authorised shipping officer, usually a superintendent.[38] The superintendent was also responsible for explaining the agreement to the seafarer/apprentice and for witnessing its execution.[39] A legible copy of the agreement was required to be posted at all times in a publicly accessible part of the ship by the master.[40]

An agreement between a shipowner or master and seafarer could be rescinded by any Court before which a dispute in connection with the agreement was brought if, having regard to all the circumstances, the Court thought it just to do so.[41] In addition, a seafarer could prove the contents of an agreement, or otherwise support his case, before any Court without producing the agreement or giving notice to produce it.[42]

Any amendment to a sailor's employment contract that was not proved by the written attestation of some public functionary or

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36 MSA, ss 113, 114.
37 MSA, s 114.
38 MSA, s 115.
39 Ibid.
40 MSA, s 120.
41 MSA, s 168.
42 MSA, s 123.

two "respectable" British merchants was inoperative.[43] The result was that the common law best evidence rule with respect to written instruments did not apply, and that the common law principle of freedom of contract was limited in its application to seafarers.[44] It is interesting to note that, whilst this provision merely entrenched the effect achieved by the equity exercised by the Court of Admiralty in respect of amended contracts between seafarers and shipowners, it was thought to be necessary in order "to save the prior interposition of the superintendent from being afterwards rendered illusory and worthless."[45]

An agreement not in writing, or not in the authorised form, was nevertheless binding and provable in favour of the seafarer, but inadmissible in evidence for the owner or master against him.[46]

As to the content of seafarers' agreements, certain provisions were required to be included, including provisions that described:[47] the nature and duration of the voyage; the number and description of the crew; the hours of work; the role of the seafarer; the wages of the seafarer; the scale of provisions to be furnished to each seafarer; and any regulations as to conduct on board. The description of the nature and duration of the voyage had to be definite, and any deviation from the specified voyage was not binding on the sailor.[48] The number and description of crew enabled the seafarer to judge whether manning of the ship was sufficient, and any decrease in that number would release him from the agreement.[49] The hours of work indicated the time from which wages were to count, so that if the seafarer worked longer hours he became entitled to an increase in wages.[50] The wages fixed the sailor's position, so that if he in fact filled a more senior position his wages would increase.[51]

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43 MSA, s 122.
44 MacLachlan, supra n 34, 223.
45 Ibid.
46 Ibid. See *Re The Great Eastern SS Co* (1885) 53 LT 594, and MSA, s 720.
47 MSA, s 114.
48 *The Minerva*, supra n 17, 362-363; 129; *The Elizabeth* (1819) 2 Dods 403; 165 ER 1527.
49 *Hartley* v *Ponsonby* (1857) 7 E & B 872; 119 ER 1471.
50 MSA, s 155.
51 *Hanson* v *Royden* (1867) LR 3 CP 47; *The Providence* (1825) 1 Hagg 391; 166 ER 139.

An agreement between a seafarer and shipowner or master could contain additional provisions, but a seafarer could not forfeit his lien on the ship, or be deprived of any remedy for the recovery of his wages to which, in the absence of the agreement, he would be entitled, or abandon his right to wages in case of the loss of the ship.[52] A provision attempting to do so would be void.[53]

The shipowner had a common law duty to stock the ship with water and provisions of proper description and in sufficient quantity for the use of the crew.[54] Full specification of the description and quantity of such provisions in the sailor's employment contract was now also required,[55] and the shipowner or master was obliged to furnish the seafarer with the means of weighing and measuring the provisions when served out.[56] Any shortfall in the provisions entitled the seafarer to compensation, as did the provision of articles that were of a poor quality or unfit for use.[57] Compensation of this nature was recoverable under legislation as wages[58] to the value of the deficiency or inferiority of the relevant provisions.[59] In addition, this right to compensation did not displace seafarers' common law rights for damages for any injury sustained as a result of the owner or master's negligent conduct in respect of provisions.[60]

A similar statutory duty was created with respect to the provision of medicines and anti-scorbutics to seafarers, and to the supply thereof on proper occasions to the crew.[61] In ships with more than 100 persons on board a duly qualified medical practitioner was usually required to be carried.[62]

All medicines, surgical and medical advice, and attendance given to a master or seafarer whilst on board his ship, were to be at the expense of the owner.[63] With respect to other matters of

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52 MSA, s 156.
53 Ibid.
54 *The Castilia* (1822) 1 Hagg 59; 166 ER 22.
55 MSA, s 114.
56 MSA, s 201.
57 MSA, s 199.
58 Ibid.
59 *The Madonna D'Idra* (1811) 1 Dods 37, 40; 165 ER 1224, 1225.
60 MacLachlan, supra n 34, 269.
61 Ibid. See MSA, s 200.
62 MSA, s 209.
63 MSA, s 34.

health, seafarers had a right to a specified amount of space in the place appropriated to them on board, and that place was to be "kept free from encroachments, to be protected from sea and weather and from effluvium, and in all other respects securely constructed and well lighted and ventilated".[64] The shipowner or master was liable to pay a penalty for breach of these provisions.[65] Legislation also imposed an implied term in the contract of service of seafarers that all reasonable means would be used to make and keep the ship seaworthy for the voyage.[66]

The discharge of seafarers was as well regulated under the MSA as their engagement. A seafarer could only be discharged and have his wages settled in the presence of an authorised witness, again usually a superintendent.[67] Upon his discharge both the seafarer and the shipowner or master was required to execute a mutual release which was to be witnessed and attested by the superintendent.[68] The release was conclusive upon all the parties to it against any demand arising out of the relevant voyage or engagement,[69] and even equity would not relieve against it in the absence of fraud or some serious mistake.[70] Disputes arising under the release could be submitted to the superintendent for arbitration, whose award was binding and conclusive.[71]

The provisions governing seafarers' wages were equally explicit. I will deal here only with a couple of these. Any purported assignment or sale of a seafarer's wages before they were earned was not binding.[72] In contrast to the common law position, where wages were generally due and payable as soon as earned,[73] seafarers were required to be paid at the time of their discharge or within two days after termination of their agreement.[74] A shipowner or master who failed to pay a seafarer's wages on time was liable to pay wages until the time of the final settlement of the

64 MacLachlan, supra n 34, 272-273. See MSA, s 210.
65 MSA, s 210.
66 Ibid.
67 MSA, ss 127, 131.
68 MSA, s 136.
69 Ibid.
70 *Pritt* v *Clay* (1843) 6 Beav 503; 49 ER 920.
71 MSA, s 137.
72 MSA, s 163.
73 MacLachlan, supra n 34, 236.
74 MSA, s 135.

wages claim.[75] The principle that a seafarer's right to wages was governed by the maxim "freight is the mother of wages" was also abolished, with the result that the right to wages was no longer dependent on the earnings of the ship's freight.[76]

The maritime lien for seafarers' wages:

I spoke earlier about the long-standing conflict between the Admiralty Court and the common law courts over civil admiralty jurisdiction in England, and of the limited role played by the Admiralty Court after the 16th century as a result of the widespread use of the writ of prohibition. The effect of such use – which, as I noted, blocked attempts by the Admiralty Court to exercise its jurisdiction in personam – was to compel the Admirals' reliance on the arrest of ship and cargo to secure jurisdiction. This approach has been seen by some as having given rise to the modern maritime lien, which remains today as the primary example of the law's favouritism and protection of seafarers.

The authoritative definition of the modern maritime lien remains that articulated in 1851 by the Privy Council in *The Bold Buccleugh*,[77] as follows:[78]

> ... a maritime lien is well defined ... to mean a claim or privilege upon a thing to be carried into effect by legal process; ... that process to be a proceeding in rem ... . This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached.

Whilst the modern maritime lien was not fully established until the mid-19th century, the priority of seafarers' claims for wages over other claims was recognised by the ancient sea codes, including the *Consulat de la Mer*: "*car le matelot doit etre paye quand meme il ne reteroit qu'un clou pour le payer*".[79] Decisions of the

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75 MSA, s 134.

76 MSA, s 157.

77 (1851) 7 Moo PC 267; 13 ER 884.

78 Id, 285; 890-891 (Sir John Jervis).

79 *Consulat de la Mer*, Pardessus' Collection, vol II, 129, quoted in Thomas, supra n 11, 175.

English High Court of Admiralty from the 18th century also expressly recognised the existence of the lien, as an unequivocal privilege of the seafarer arising out of his service to the ship, and enforceable against the ship.[80] This view of the lien as arising from the seafarer's service to the ship – as distinct from his contract of employment – gave the lien the character of a remedy in rem. The significance of this was two-fold. First, the Admiralty Court was able to hear seafarers' claims for wages without threat of prohibition which, as I have said, operated solely in respect of actions in personam. Thus the lien enabled the Admiralty Court to consolidate its early jurisdiction over claims for seafarers' wages,[81] which would otherwise have been blocked by the common law courts. The second (and related) significance of the Court's view of the lien as arising from the seafarer's service to the ship, was that it enabled the Court to assert that the lien existed independently of the personal liability of the shipowner, so that a seafarer would have a claim over his wages, enforceable against the ship, despite the absence of any claim in personam against the shipowner.[82] It can thus be seen that the immunity of the arrest jurisdiction from the writs of prohibition was used by the Admiralty Court "not only as a shield to repel any further encroachment by the common law courts but also as a platform on which to develop [its] future jurisprudence".[83] As has been described by Thomas, it was within this framework that the maritime lien was "gradually developed and ultimately unfurled into its contemporary form by the Privy Council in *The Bold Buccleugh*".[84]

The nature of the lien as a remedy for seafarers in actions for unpaid wages meant that the Admiralty Court's jurisdiction over liens was co-extensive with its jurisdiction to hear claims for wages. It follows that before the legislative reforms of the 19th century, the wages lien of the seafarer was confined to the classes of cases over which the Admiralty Court had jurisdiction; namely, cases involving wages earned on board the ship under an ordinary contract.

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80 *Wells* v *Osman* (1704) 2 Ld Raym 1044; 92 ER 193.
81 Thomas, supra n 11, 176.
82 Ibid.
83 Id, 9.
84 Ibid.

The legislative reforms of the 19th century did not themselves make express reference to the wages lien. Nor did they codify the principles to be applied in determining the priority of that lien. As I have said, however, they did abolish the distinction between ordinary and special contracts, thereby enlarging the Admiralty Court's jurisdiction to determine wages claims and, with it, the scope of the wages lien. As a result of such expansion a seafarer could, at the end of the 19th century, recover his wages either by suit against the shipowner or master personally, or by process against the ship in any court having Admiralty jurisdiction for the enforcement of the wages lien.[85]

Where the ship was already in arrest at the suit of other creditors, the seafarer could enter his claim for wages against the ship and could not be ordered by the Court to proceed against the owner or masters personally (even if the fund in court was insufficient for those other claimants who did not have recourse to any other person).[86] Nor could he be denied his right to proceed in rem in another court.[87]

With respect to the priority of a wages claim, precedent from the 19th century ranked the seafarer's lien *after*:[88]

- the lien for damage done by the ship, even where the wages were earned before the collision;
- the lien for salvage services rendered to the ship, even where the wages were earned before the salvage services were rendered; and
- the possessory lien of a shipwright for work done to the ship before the wages had been earned;

but *before*:[89]

85 MacLachlan, supra n 34, 258.
86 Id, 259.
87 Ibid.
88 Ibid.
89 Ibid.

- the lien attached to the ship by virtue of a bottomry bond given prior to the voyage on which the relevant wages were earned (but compare this with a bond given after that voyage);
- the master's lien for wages;
- the claim of a mortgagee upon the ship;
- claims for necessaries or towage or similar claims that could have been enforced in rem but that did not confer a maritime lien; and
- the possessory lien of a shipwright for work done to the ship after the wages had been earned.

The seafarer also had a right to have the ship's freight paid into the Admiralty Court to answer any deficiency of the fund arising from the sale of the ship.[90] Finally, and as I have mentioned, any agreement by the seafarer to forego his lien for wages was void.[91]

SEAFARERS AND THE MODERN LAW

The history of admiralty law to the end of the 19th century shows that issues concerning seafarers' rights had a far reaching effect on the development of admiralty jurisdiction and jurisprudence.

By the end of the 19th century, English law gave protection to seafarers both in their employment relationships and as creditors for unpaid wages. Although the protection then afforded was, in important respects, founded on legislation, the creative decisions of the judges of the Admiralty Court had been enormously influential. During the 20th century by contrast (and shifting the focus now to Australia), the employment rights of seafarers have been determined largely through political and industrial processes – through legislation and through industrial awards and agreements within a framework established by legislation. Courts exercising admiralty jurisdiction in areas that are potentially protective of seafarers have been almost exclusively concerned with the maritime lien. In this area, however, the law on either side of the Tasman has not stood still. Here, as in England, it has

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[90] Id, 260-261.

[91] Ibid. And see MSA, s 156.

continued to develop. I return to judge-made law, but before doing so I should make brief reference to legislation-based employment rights, again focusing on Australia.

Australian seafarers and legislation-based employment rights

As I have noted, seafarers' employment rights were governed, at the end of the 19th century, by the MSA, which contained a very detailed regulatory code governing most aspects of the seafarers' employment and life at sea. That code, contained in Part II of the Act, applied mainly to ships registered in the United Kingdom and their crew. The same provisions were introduced for Australian owned and registered ships by the Navigation Act 1912 (Cth), an Act which in relevant respects did not come into operation until 1921, some 10 years after its enactment.

The new concept of workers compensation was introduced for the benefit of Australian seafarers by another piece of Commonwealth legislation of this era, the Seamen's Compensation Act 1911 (Cth). This Act gave rights to compensation to seafarers which were then already available to workers on land. The Seamen's Compensation Act 1911 (Cth) was eventually replaced by the Seafarers Rehabilitation and Compensation Act 1992 (Cth).

It is well beyond the scope of this Address to consider collectivism and the rise of trade unions as organisations concerned with the protection of seafarers. To do so would be to embark upon a lengthy historical journey, which Frank Dethridge himself would have illuminated with his learning. The journey would cover such matters as the creation of the Seamen's Union of Australia in 1872[92] – the first maritime union in the world – the Maritime Strike of 1890 and the effect of those and related developments upon the industrial and political history of Australia. As a general topic, the rights of seafarers is of very wide scope.

I also leave out of consideration the extent and content of industrial awards protecting the interests of seafarers.

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[92] For a history of the Seamen's Union of Australia, see B Fitzpatrick & R J Cahill *The Seamen's Union of Australia, 1872-1972: A History* (Seamen's Union of Australia, Sydney, 1981).

Before departing from legislation-based rights, however, I should note that the Navigation Act 1912 (Cth) has been the subject of a wide-ranging review which resulted last year in the introduction of the Navigation Amendment (Employment of Seafarers) Bill 1998 (Cth). This Bill provides for the repeal of many of the provisions replicated from the MSA concerning the employment of seafarers. As explained in the Explanatory Memorandum to the Bill:

> The Government's prime objective is to update the Act to bring it into line with practices that are relevant to the operation of a modern and efficient shipping industry. This is being achieved through a two-stage review of the Act. Stage 1, which is to be implemented through the Navigation Amendment (Employment of Seafarers) Bill 1998, is aimed at removing the employment-related provisions in the Act that are inconsistent with the [Workplace Relations] Act and the concept of company employment. Stage 2 will involve a comprehensive rewrite of the Act to make it a more efficient regulatory tool.

The Explanatory Memorandum identifies other objectives of the Stage 1 amendments as being to:

- remove outdated and inappropriate legislative requirements;
- as far as practicable, bring legislation applying to seafarers into line with that applying to employees in other industries; and
- reduce costs of administering and complying with legislation.

The Bill does not provide for the repeal or other amendment of s 83(2) of the Navigation Act 1912 (Cth) (dealing with liens for wages) and it is to this topic and the role of the courts that I now return.

The Development of the Maritime Lien for Wages

The scope of the wages lien depends on the scope of the court's jurisdiction to determine claims for wages and the scope of the definition of "wages" itself. The relationship between the scope of the lien and the definition of "wages" follows logically from the nature of the lien as a remedy for unpaid wages. The relationship between the scope of the lien and the court's jurisdiction to

determine wages claims, on the other hand, follows from the historical right of claimants to invoke that jurisdiction by a proceeding in rem. The existence of such rights has always been presumed by the courts to reflect a legislative intention that the wages jurisdiction and the wages lien be coterminous.

As I have discussed, the legislative amendments of the 19th century did not refer expressly to the wages lien, but nonetheless enlarged its scope by enlarging the scope of the Admiralty Court's jurisdiction to determine wages claims. This was achieved by abolishing the historical distinction between ordinary and special contracts, which gave the Admiralty Court jurisdiction over all seafarers' claims for unpaid wages, regardless of the nature of the contract or the terms of service under which those claims arose. By express provision in both the Admiralty Act of 1861 and the MSA, that jurisdiction could be invoked by a proceeding in rem.

Under the Navigation Act 1912 (Cth), the Supreme Courts of the States were invested with federal jurisdiction over all (Australian) seafarers' claims for wages "earned ... on board the ship", whether under a special contract or otherwise,[93] and that jurisdiction could be invoked by a proceeding in personam or in rem. The restriction of the Courts' jurisdiction to wages "earned on board the ship" was copied from the English legislation of the 19th century but, whilst potentially severe, the restriction was always interpreted broadly by the courts as including wages for services relating to the duties and responsibilities of a seafarer, even if performed away from the ship. Thus in *The Arosa Star*,[94] it was held by the Supreme Court of Bermuda that "wages earned on board the ship" included, for the purposes of the 1861 Admiralty Act, wages earned during periods of vacation and sick leave.

The restriction of the jurisdiction of Australian courts to claims for wages "earned on board the ship" has now been abolished by the Admiralty Act 1988 (Cth) as, indeed, has the link between wages jurisdiction and wages liens generally. Thus, by express provision of that Act, any proceeding on a maritime lien – including a lien for seafarers' wages – can be commenced in

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93 Section 91(1).

94 [1959] 2 Lloyd's Rep 396.

rem.[95] The scope of the wages lien in Australia accordingly now depends primarily upon the content given to the concept of "wages" itself.

The term "wages" has never been comprehensively defined by English or Australian legislation. Under both the MSA and the Navigation Act 1912 (Cth), "wages" is defined as including "emoluments".[96] No such definition is given in the 1988 Admiralty Act.

Despite this, "wages" has, almost without exception, been interpreted very broadly by the courts. Thus the English courts in the early 20th century construed it as including "whatever [the seafarer] could be fairly said to have earned by his services"[97] or, in the words of Sir Francis Jeune, "not only what a master gets as a wage, but what he obtains in the course of his service as recompense for the execution of his duty".[98] Over the years these definitions have been relied on to bring within the category of "wages" many of the benefits and allowances that are conferred under, or by reference to, seafarers' contracts of employment.[99] As described by Thomas, in a passage adopted by the Australian Law Reform Commission in its 1986 report *Civil Admiralty Jurisdiction*,[100] such benefits and allowances include: conditional payments; victualling allowances provided for under the contract of employment; profit sharing payments; vacational pay, sick pay and overtime payments; employee and employer pension fund contributions; national health insurance contributions, social benefit contributions; provident fund contributions; income tax; trade union dues; legal expenses; and even compensatory damages.

As we approach the very end of the 20th century, with the benefits of unprecedented advances in transport and communication and with the development of a global economy, the question may be asked whether the concern of courts of admiralty for the protection of seafarers (relevantly here through the maritime lien for wages) is still soundly based, particularly

95 Section 15.
96 MSA, s 742; Navigation Act 1912 (Cth), s 6(1).
97 *The British Trade*, supra n 21, 108–109 (Sir Henry Duke).
98 *The Elmville (No 2)* [1904] P 422, 428.
99 Thomas, supra n 11, 184.
100 At 121.

since we would no longer attribute to seafarers the characteristics attributed to them by judges 200 years ago. Some very recent cases in Australia, New Zealand and England, most of them decided within the last few months, provide answers to this question.

For one thing, recent cases show that seafarers are still the victims of the financial collapse of those to whom they should look for payment of their wages. The cases also show that seafarers still face the hazard of unforeseen discharge, without pay, in foreign ports. There are problems associated particularly with the use of flags of convenience. These have been the subject of inquiry in Australia by the House of Representatives Standing Committee on Communications, Transport and Microeconomic Form, and in a recent report (August 1998) focusing on the issue of crew welfare, the Committee expressed great concern about the treatment of seafarers. Announcing the report, the Chair of the Committee, Mr Paul Neville MP said:[101]

> Members of the committee are appalled by the callous treatment of some seafarers. We heard reports of physical, mental and sexual abuse, as well as financial exploitation and inadequate accommodation. There should be no tolerance of such a culture of fear and intimidation.
>
> The abuse and neglect of seafarers constitute both a violation of human rights and a serious risk factor for ship safety. While these are partly commercially driven, they ultimately derive from a fundamental lack of respect for human life, and are facilitated by a legal framework that can allow perpetrators to hide behind corporate veils or skip through jurisdictional cracks.

Soon afterwards, in April 1999, the International Transport Workers' Federation ("ITF") released its report *Abandoned Seafarers: An Abdication of Responsibility*. It drew attention to the problems of the same nature. It reported that from July 1995 to the end of 1998 the ITF had received notification of 199 separate cases where seafarers have been abandoned – cases where a shipowner deserted the crew and the vessel, paying neither wages the crew were owed nor ensuring that there was adequate fuel,

[101] Media Release, 26 August 1998, "Ship safe: Report released into the inquiry into the Australian Maritime Safety Authority Annual Report 1996-97".

food or other essential provisions for crew survival. The cases were said to have involved over 3,500 individual seafarers but, because the figures were based only on ITF records, they were also said to represent only a small part of the true picture.

The ITF report also says that the nature of the shipping industry has changed considerably. Fifty years ago it was dominated by the fleets of a few leading maritime countries and at that time, the report contends, those working at sea were the nationals of the countries where the ships were registered. This ensured a degree of protection for the seafarers concerned as they were, in the main, governed by the laws of their country of domicile and to a large extent supported by strong trade unions. In short, there was an effective system of flag control. Today, the shipping industry, according to ITF figures, is dominated by flags of convenience and as a consequence the majority of seafarers are not domiciled in the country of the flag of the vessel and are living and working in a jurisdiction to which they have no direct connection.

The problems revealed by some of the modern cases parallel those of the past. In *Udovenko* v *A O Karelrybflot*,[102] for example, Young J described the situation on the facts before him as "not entirely dissimilar to that in *The Madonna D'Idra*,[103] a decision of Sir William Scott nearly 200 years earlier.

Against this background it is hardly surprising that the courts have thought it appropriate to continue to affirm the general policy of admiralty law with respect to seafarers, whilst at the same time placing aspects of that policy upon an explicitly modern jurisprudential foundation.

In this regard the recent decision of Fisher J in *Mobil Oil New Zealand Ltd* v *The ship "Rangiora" (No 2)*,[104] is particularly instructive. The principle issue for decision in that case was whether redundancy payments contractually due to ratings employed on the vessels *Rangiora, Ranginui* and *Takitimu* were protected by a maritime wages lien over the proceeds of their sale. In the course of reasoning to the conclusion that redundancy

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[102] High Court of New Zealand, Christchurch, AD 90/98, 24 May 1999, Young J.

[103] Supra n 59.

[104] [2000] 1 NZLR 82.

payments were "wages", Fisher J asked whether those payments could qualify for a wages lien as a matter of principle. Noting that one of the early explanations for the lien could no longer be recognised consequent upon its extension to emoluments that did *not* represent a return for services actually performed, and that the lien extended to services that "in the normal circumstances would be" rendered for the benefit of the ship but which, for one reason or another, were not in fact rendered, Fisher J observed:[105]

> There are now more convincing rationales for the modern wages lien. One is the need to protect individual employees against an imbalance of power when negotiating employment packages with major commercial entities. The latter have better opportunity to protect themselves through proprietorship or security. There is nothing new about this as a relevant consideration. Earlier judicial attitudes emphasised the relative ignorance of seafarers compared with the acumen of owners and other creditors... . While such descriptions do less than justice to the modern seafarer, the lien is still explainable in part by the power imbalance compared with the ship owners and major commercial creditors.

In response to the argument that since 1822 (the year in which *The Juliana*[106] was decided) seafarers had made progress through collective bargaining at national international levels, Fisher J noted that collective bargaining usually addressed the terms of employment rather than security for payment, and he drew attention to the limitations (under New Zealand law) of the protection given to seafarers as preferential creditors in any event. His conclusion was that the desirability of protecting seafarers' emoluments through wages liens was as strong now as it ever was. To that consideration he added the public and private interest in attracting seafarers to crew on vessels. Thus Fisher J concluded that the modern rationale for the wages lien supported inclusion of any form of payment which had been promised in return for the seafarers' agreement to work on the ship, as well as damages for breaching that promise. As a matter of principle, therefore, it could be expected that redundancy compensation would fall within the lien.

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[105] Id, 86-87.
[106] Supra n 18.

Likewise in *Bremer Landesbank Kreditanskalt Oldenburg* v *The Ship "Turakina"*,[107] the Full Court of the Federal Court of Australia (Beaumont, Moore and Merkel JJ) observed that "the underlying premise of disparity of bargaining power as a basis for the benevolent approach [of admiralty] remains valid".[108]

So too, in another very recent case, the applicability of old principles to modern conditions was affirmed. In *The "Ever Success"*,[109] the master and members of crew who remained on board after their vessel had been arrested, hoping that they would be repatriated but not being able to afford to pay for their own repatriation, claimed a maritime lien for their wages. Clarke J held that there was no basis upon which it could properly be held in the circumstances that they had acted unreasonably in remaining on-board. It was submitted that the crew in this situation – a crew remaining on board hoping that they would be repatriated – did not deserve sympathy and that in these days crews do not require the same protection as they were historically afforded by the court. Clarke J's response was as follows:[110]

> Mr Jacobs submits that conditions are very different today. It is of course true that conditions are indeed very different. As was pointed out by Sir Newnham Worley, C.J. in *The Arosa Star*, the Admiralty Court must adapt to changing circumstances, but in my judgement, even in these times, the Court should be astute to look after the interests of seamen. The facts of this case show that they are vulnerable. How, for example, were the plaintiffs to get home if no-one assisted them?

At the appellate level too, the recent decision of the English Court of Appeal in *The "Tiriddu"*[111] shows that the old principles of admiralty law protective of seafarer's wages are still considered to have relevance and force. In that case the Cuban crew of a Maltese owned vessel sought to maintain a maritime lien over the proceeds of sale in priority to the mortgage of a bank. It was argued on behalf of the bank that the contractual arrangements for the payment of the crew's wages by way of allotment had the effect of barring the crew's rights by the operation of the old

107 (1999) 161 ALR 587.
108 Id, 594.
109 [1999] 1 Lloyd's Rep 824.
110 Id, 835.
111 [1999] 2 Lloyd's Rep 401.

common law rule that a party to a contract cannot recover by way of judgment in debt a sum which it has been agreed will be paid to a third party. The argument failed. After a survey of the cases, including *The Minerva*[112] and *The Juliana*,[113] Brooke LJ (with whom the other members of the court agreed) looked to the substance of the matter. The payments in question, he held, had never lost their character as wages. It would be, his Lordship said, "deplorable, given the history of the maritime lien, if a third party bank was able to maintain a priority to the crew in relation to unpaid wages simply because the crew had given instructions that an allotted part of their wages, which they did not need on board ship, should be sent home."[114]

In a number of these and other modern cases we also see the development of old principles to deal with the continuing problem of sustenance and repatriation of abandoned crews. Here, guiding principles of what is fair and reasonable in all the circumstances can be derived from the old cases, such as *The Elizabeth*,[115] and applied today as, for example, in *The Ionian Mariner*.[116]

In yet another respect, modern admiralty law continues to protect seafarers, and that is in the procedures of courts exercising jurisdiction in Admiralty. As Young J pointed out in *Udovenko* v *Karelrybflot*[117] this is not new; he cited an example from the early 19th century in which the court sought to adapt its procedures to allow justice to be done. Young J did the same in the case before him. Here again the particular difficulties facing seafarers discharged in a foreign port are recognised by the courts. A recognition of these difficulties can be seen, for example, in the orders made during *The Ionian Mariner* litigation both at first instance and on appeal, and in the judgment of Tamberlin J in *Patrick Stevedores No 2 Pty Ltd* v *The Turakina*.[118] On an appeal against an order made by Tamberlin J in that case that the costs of an only partially successful application by the master

[112] Supra n 17.
[113] Supra n 18.
[114] Supra n 111, 408.
[115] Supra n 48.
[116] (1997) 77 FCR 563, 590, 592.
[117] Supra n 102.
[118] (1998) 154 ALR 666.

and crew be paid out of the proceeds of the sale of the vessel the Full Court of the Federal Court rejected an argument that Tamberlin J had been wrong to take into account the benevolent approach of a court of admiralty towards seafarers discharged in a foreign port.

CONCLUSION

It can thus be seen that the special concern for seafarers and their protection, which has been a formative characteristic of admiralty jurisdiction and jurisprudence over the centuries, continues in Australia and New Zealand (as it does in England as well) to this day. It does so principally in, and in connection with, the area of the maritime lien for wages but the same approach can be seen in the way in which courts exercising admiralty jurisdiction have regard to the problems of seafarers when considering matters of practice and procedure. The concern of admiralty courts for seafarers remains not because of slavish adherence to old precedents but because they have been shown to remain centrally relevant – note that I say relevant, not decisive – in the quest for justice according to law in the modern age. It was the quest for justice, for substance over form, for flexibility over rigidity, for the redress of inequality of position and for what was fair and reasonable in all the circumstances that were the hallmarks of admiralty jurisdiction in its protection of the interests of seafarers. They remain ideals for the wider application of the law.