THE REVIEW OF THE ADMIRALITY RULES IN AUSTRALIA AND NEW ZEALAND

NEW ZEALAND –
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Introduction

1. My purpose is to review the New Zealand Admiralty Rules 1975 in the light of experience and the Australian Rules, first, to see whether any changes are called for, and secondly, to see what problems there might be in developing substantively identical rules in both jurisdictions.

2. As to the latter topic, Paul Myburgh presented a thoughtful and learned paper to this Association at its 1995 conference in Wellington. His theme was "Harmonisation of New Zealand and Australian Maritime laws". He struck a cautious note, "Harmonisation", he observed, was a humpty-dumpty word, meaning what governments, politicians or academics chose it to mean.

3. Replication of laws does not of itself amount to harmonisation in any useful sense. Not only are identically-worded statutes influenced by their context – which might include New Zealand's accident compensation scheme or Treaty of Waitangi jurisprudence – but their adoption might actually serve to divide rather than harmonise: see the largely identical ship registration statutes of Australia and New Zealand, which "draw down the shutters and compel the citizens of each country to register their ships in their own jurisdiction".

4. But with all his warnings, Mr Myburgh was happy to identify admiralty jurisdiction and procedure (along with pilotage and marine insurance) as "relatively uncontroversial areas of ... maritime law" which could usefully be harmonised and modernised.

5. Thus I am fortified to consider the development of substantively identical procedures governing the conduct of cases in the admiralty jurisdiction of the courts of New Zealand and Australia.

Background to admiralty procedure

6. It is sufficient for present purposes merely to note briefly the common heritage of admiralty procedure in the two countries. Admiralty jurisdiction was given to the superior courts in the various Australian colonies and New Zealand by the Vice Admiralty Courts Act 1863 (Imp.). The source of jurisdiction before then is murky, but the murk is equally deep on both sides of the Tasman, and of an identical quality. Procedural rules were made in 1883 under the 1863 Act.

The jurisdiction was elaborated in the Colonial Courts of Admiralty Act 1890 (Imp.), and the 1883 rules continued.

7. The historical background is analysed for New Zealand in the Report on Admiralty Jurisdiction presented in 1972 by a Special Law Reform Committee under the chairmanship of Justice Beattie; and for Australia in the scholarly report of the Australian Law Reform Commission of 1986 on Civil Admiralty Jurisdiction.

8. The outcome of these two reports was the Admiralty Act 1973 (NZ), the Admiralty Act 1988 (Cth), the Admiralty Rules 1975 (NZ) and the Admiralty Rules 1989 (Cth). (The New Zealand rules have now been incorporated into the High Court Rules.) Given the common heritage, it is hardly surprising that the substance of these instruments is strongly congruent.

9. For all practical purposes the extent of Admiralty jurisdiction in both countries is the same. However there is an important difference in the right to proceed *in rem* against surrogate (sister) ships: in Australia, by section 19 of the Admiralty Act 1988, the person liable on the plaintiff's claim must be the owner of the vessel sued *in rem*; in New Zealand, by section 5 of the Admiralty Act 1973, a vessel demise chartered to, as well as owned by, the person liable may also be sued *in rem*.

To harmonise or not to harmonise

10. Harmonisation is not a necessary end goal of this exercise. It is desirable that each country should review its own rules from time to time. It is logical that each should look to the other – and beyond – for ideas for improvement.

11. But the exercise need go no further than that if there is discomfort at taking the final step.

Differences in the respective rules

12. In an appendix, I have listed:

- Aspects of the New Zealand rules not reflected in the Australian rules;
- Aspects of the Australian rules not reflected in the New Zealand rules.

13. The "substantive" differences, if I may so term them, are few. Most of those I have identified are little more than matters of drafting. But I will say a little about the substantive differences.

(a) Marshal

In Australia, warrants of arrest are executed and ships kept in the custody of the Marshal, an official of the Court who is separate from the Registrar. In New Zealand the two roles are combined in the office of Registrar – probably because, in the general jurisdiction of the court, the Registrar is also the Sheriff.

(b) In rem and personam

In New Zealand, it is permissible and common to commence an admiralty action which is a combined action *in rem* and *in personam.* In Australia the intending plaintiff must make a choice. It is fortunately beyond the scope of a paper on the Rules to debate the implications for New Zealand of *The "Indian Grace"*.

(c) Solicitor's personal undertaking

Solicitors are not required to furnish a personal indemnity to the Registrar for costs and expenses associated with the arrest and custody of vessels under arrest.

(d) Mode of sale

If a sale is ordered, the Registrar may under rule 784 conduct it by public auction or private contract. The Australian rule 70 provides solely for public auction unless otherwise directed by the Court.

(e) Caveats against release

Under rule 779, a person may prevent the release of money in court representing the proceeds of sale of a vessel, as well as the release of a vessel under arrest, by filing a caveat against release. The Australian rule 10 is limited to vessels or other property. The Australian Form 4 contains a note to the effect that a caveator may also refer to the proceeds of sale, but this does not appear sanctioned by the rule.

(f) Security

The Australian rule 54 requires security to be given by bail bond in the prescribed form, whereas the New Zealand rules and the practices of the court are more flexible. (Or perhaps our lawyers are more friendly.)

(g) Interveners

New Zealand rule 783 provides expressly for interveners. There is no equivalent in the Australian rules.

14. Additionally and importantly, the style of the two sets of rules differs markedly. With great respect to those responsible for the original drafting of the New Zealand rules, I consider the Australian rules to follow a more logical order, and to be expressed in clearer and simpler language.

Problems identified in New Zealand cases

(a) Insurance of vessel under arrest

15. Following the collapse of ABC Containerlines and the arrest in Auckland of the *Cornelis Verolme* Williams J made a consent order which authorised the Registrar to effect insurance of the vessel. He later held that the Registrar was entitled to be indemnified for the cost of this insurance by the arresting party. See *The "Cornelis Verolme"* (1996) 9 PRNZ 409.

16. It is of course necessary to identify the interests being protected. Is the insurance solely for the benefit of the Registrar, or of all persons (including the owners) who have an actual or contingent interest in the vessel? It is clear that the Registrar is exposed to liabilities in respect of his custody of vessels under arrest. He should either be insured or be protected by statute against such liabilities. It is less clear whether the Registrar should be expected to look after the interests of others.

17. It is in the interests of no-one that this important matter should be left to be dealt with by *ad hoc* arrangements made in circumstances of urgency. I consider that a new rule or practice note should deal with the question of insurance, like other matters relating to the custody of vessels under arrest.

18. Having identified the interests to be protected, it is possible that the Registrar could negotiate a standing arrangement with a P & I Club and hull insurer for cover for liabilities and losses on a "port risks" basis. Such cover would automatically incept for any particular vessel at the date and time of the execution of a warrant of arrest. The necessary extent of the cover in the light of other insurance, and the premium, would be calculated at leisure and be paid under the indemnity or any other agreed alternative mechanism.

19. Alternatively the rules might expressly provide that the Registrar would neither arrange any insurance nor have any liability whatsoever in respect of arrested vessels.

(b) Service on cargo

20. Rule 772 provides for modes of service on ship, cargo, freight or other property.

21. In *Sembawang Salvage Pte Ltd* v *Shell Todd Oil Services* [1993] 2 NZLR 97, a question arose as to the validity of service of a writ *in rem* against a major structural element of an offshore platform. The structure had been carried as cargo on a barge when circumstances arose giving rise to a claim for salvage; but by the time service was effected it had been lowered into position outside the territorial sea of New Zealand and had been incorporated into the platform. Hillyer J held that service was valid: the claim was to enforce a maritime lien which continued to subsist; and by virtue of section 7 of the Continental Shelf Act 1964 the platform was deemed to be situated in New Zealand.

22. It seems to me that there must come a time when the lien will cease to exist by reason of the incorporation of the subject matter into further elaborated goods. Would a salvage lien over bales of wool continue to subsist over the carpets or garments into which the wool was woven? Service of a salvage writ *in rem* on the end product raises interesting possibilities.

(c) Sales pendente lite

23. Such sales have been ordered in a number of cases, including *Bank of Nakhodka* v *The Ship "Abruka"* (1997) 10 PRNZ 326.

24. Whilst the principles governing such sales are clear enough, it is arguable that ships are permitted to remain under arrest for periods which are far too long and therefore costly. I consider there would be some benefit in providing for automatic sale after the expiry of, say, three months from the date of arrest unless cause were shown to the contrary. After three months it should be clear that the owners are not in a position to post security or otherwise deal with the claim.

(d) Vessels under arrest

25. It is this aspect which, as in Australia, has caused most controversy. The issues are the powers of the Registrar and his source of funding.

(i) Powers of Registrar

26. Nowhere in the New Zealand rules are there provisions setting out the powers of the Registrar in relation to vessels under arrest. Compare the detailed provisions of rules 47-50 of the Australian rules.

27. But it is implicit from rule 776, and explicit in Form 75 (Notice of Arrest) that an arrested vessel is in the custody of the Registrar. Further, rule 779(5) permits the Registrar or any party to an action *in rem* to apply to the Court for directions concerning property under arrest; rule 780 establishes a process for the discharge of cargo both where the ship is under arrest and the cargo is not, and vice versa; and rule 795 permits the Registrar to apply to the Court for orders to assist him in the performance or exercise of his functions.

28. Under these powers, Registrars have been able to obtain authority to take appropriate measures to look after the ship and crew.

29. I note that there is a practice in Singapore whereby the Sheriff applies for a standard "omnibus" order under which he has authority to take appropriate measures to preserve the ship, its machinery and equipment, to move the vessel within port limits, and to supply victuals, fuel and water to the crew. (See Toh Kian Sing, *Admiralty Law and Practice*, p. 188.)

30. In my opinion there is much to be said for the idea of developing a similar standard order for use in New Zealand. There appears to be jurisdiction for such an order under rules 779(5), 780 and 795. The content of a standard order would require debate, but in addition to the matters apparently dealt with in Singapore I would suggest consideration of:

- Discharge, or measures for the protection of, cargo;
- Insurance;
- Maintenance of class.

31. There has been debate both in Australia and New Zealand as to whether the Registrar should be directly involved in maintaining the custody of ships under arrest. The former Registrar of the Auckland Registry of the High Court considered that he frequently had more ships under his control than any shipowner or operator based in New Zealand; and the Registrar in Christchurch has had the responsibility for the custody over lengthy periods of time of the *Offi Gloria* and the infamous "Five Ohs" – the *Orlovka*, *Om*,

Olennino, *Osha* and *Ognevka*. Arising out of his role, the Registrar has had to make difficult decisions often in circumstances of some rancour.

32. It is hardly necessary to point out that ship management has not previously been regarded as a core activity of the High Court.

33. In some jurisdictions – notably the United States – it seems that the Court delegates the task of ship management to professionals in that field. I note also that in Australia the Marshal is not required to be an officer of the Court.

34. I consider that an arrangement of that kind should be considered. The appointment of a professional ship manager as custodian of arrested vessels on behalf of the Court could be included in the standard directions discussed earlier.

(ii) Payment of shipkeeping costs

35. At present there is no doubt but that these costs are payable by the arresting party, and that the Registrar is entitled to security from the arresting party for them. See rule 776(4)(b) and (5), and the judgment of Williams J in *The "Cornelis Verolme"* (1996) 9 PRNZ 409. Equally, there is no doubt but that, on a sale of the vessel, the costs are retained by the Registrar as a first charge on the proceeds, and refunded to the arresting party with interest. Further, the arresting party is entitled to its solicitor and client costs (again with interest) incurred in producing and preserving the fund for the benefit of creditors in priority to all other creditors except the Registrar. See *Mobil Oil New Zealand Limited* v *The Ship "Rangiora"* (2000) 13 PRNZ 563.

36. Moreover, as is clear from *Mobil*, the arresting party is entitled to these sums even if it does not succeed in recovering any part of its claim. This may be the case either if it fails at trial, or if its priority is such that it is unable to participate in the fund.

37. So that, although the comfort to an arresting party may be only lukewarm, the issue is in most cases only one of funding the Registrar pending sale of the vessel and repayment of the amounts advanced.

38. But, all this is provided that *someone* succeeds with a claim so as to establish a claim on the fund. And, of course, that the fund is at least large enough to meet the costs.

39. I am aware that the quantum of costs claimed by the Marshal in Australia has been the subject of hot debate. Similar issues do not appear to have arisen in

New Zealand, possibly because the Registrars most often involved have made a point of maintaining open contact with the solicitors for the arresting party.

40. If the arresting party is the only claimant, and fails at trial, then it will get nothing back.

41. In the intermediate situation where a ship is arrested, but after some delay security is given and the ship sails, I assume that any moneys advanced to the Registrar would be treated as costs in the cause, to be dealt with on final resolution of the litigation. In that kind of situation, there is likely to be only one claimant.

(iii) No personal liability of solicitors

42. Unlike the position in Australia, solicitors give no personal undertaking to the Registrar to pay custodial expenses. The form of indemnity obliges the arresting party to pay.

43. The consequences of a failure to pay are not explicit. Under rule 778(2) the arresting party may withdraw the warrant of arrest before an appearance is entered. After that however, the only avenue open appears to be by application to the Court under rule 778(4) – but it is not clear whether the arresting party is a "party interested in the property under arrest". If the arresting party simply does nothing it appears that in England at least the Marshal can apply to have the ship released : see *The "Italy II"* [1987] 2 Lloyd's Rep 162. The arresting party would be liable for custodial expenses up until the time of the release.

(iv) Is there a better way?

44. Since moneys expended by the Registrar are a first charge on the vessel, and bear interest, it is arguable that the Consolidated Fund might just as well advance moneys to the Registrar. The advance would be better secured than, say, student loans.

45. But that would work only in the insolvency situation, where it is highly probable that the vessel will be sold or that the mortgagee will procure its release from arrest. And even then, I suspect it is unlikely that the Crown would accept that it had a role in financing private litigation.

46. The recent initiatives of insurance companies in financing creditors' litigation against errant company directors might also be extended into this analogous area.

47. But subject to that possibility I consider that the arresting party is going to continue to face the prospect of financing the custody of the ship and is going to have to take that possibility into account in deciding whether to arrest. At least, as a result of the agreeable number of insolvency-related claims in recent years, we all know the rules.

(e) Security

48. As in most jurisdictions, security is usually given informally by way of Club letter. Where it is necessary to refer to the rules, the topic is rather confusingly dealt with in two places – rules 778(4) and (5), and rule 781.

49. Power to release an arrested vessel rests initially with the Registrar under rule 778(5). He has discretion to order a release if the amount claimed is paid into court, or if security for the claim is given to his satisfaction. A form of bail bond is provided. (Compare rule 16 of the High Court Rules, dealing with giving security generally, where the Registrar has a wide discretion.) In my experience where security is offered under this rule the Registrar refers the security to the solicitors for the arresting party for their views. The question may be referred to the judge if it cannot be resolved through negotiation.

50. An arresting party can protect itself against hasty action by the Registrar by filing a caveat against release. (By contrast, Australian rules 54-56 expressly provide that notice of the proposed terms of bail is to be given to the arresting party, who may object. This seems a sensible provision.)

51. If the question of security ends up with the court, rule 778(4) gives the Court wide discretion to issue a release of a vessel from arrest; and rule 781 gives similarly wide discretion as to the amount and form of any security.

52. As a result, ever since *The "Pacific Charger"* in 1981, the Courts have adopted a pragmatic approach to questions of release and security. A good example is *Sea Tow Limited* v *The Ship "Katsuei Maru No 8"* (8.5.96, Auckland AD 736, Salmon J). The case arose out of a collision; so the owners of the vessel were *prima facie* entitled to limit their liability. But the plaintiffs sought security for the full amount of their claim, on the basis that they would demonstrate recklessness under section 85(2) of the Maritime Transport Act 1994.

53. The court ordered release of the vessel on the basis of a guarantee from a Japanese mutual, Gyosen Hoken Chuokai, for the limitation fund, but including an undertaking to increase the amount of the guarantee if subsequently ordered to do so.

(f) Sale

54. Rule 784 governs the sale of arrested property, including sales before judgment (*pendente lite*). The Court has wide discretion to order a sale with or without appraisement and either by public auction or private contract.

55. I am aware of two cases where disputes arose over the sale process. In the first, *All Weather Investments Limited* v *Sealord Charters Limited* (1997) 10 PRNZ 320, a creditor was dissatisfied at the price achieved by the Registrar and sought to have the sale set aside. The Court of Appeal held that there was a binding contract between the Registrar and the purchaser, and that the creditor had no standing to seek a declaration as to the validity of a contract to which it was not a party.

56. In the second, *Mobil Oil New Zealand Limited* v *The Ship "Rangiora"* (Auckland AD877, 881, 882, judgment 21.08.98, Giles J), creditors were concerned at the expertise of the broker appointed by the Registrar. The Court accepted that the Registrar had not sufficiently consulted the parties (as previously ordered) before making the appointment. The appointment was set aside and the question remitted to the Registrar for further consideration.

57. Both of these cases illustrate the problems which can sometimes arise when much is left to the discretion of the Registrar. However I do not favour any tightening up of the rules. Rather I consider that there should be a practice note developed containing standard directions to the Registrar as to the sale, and including standard forms of advertisement or tender, contract, and bill of sale – with, of course, liberty to apply if some different approach seemed called for.

Matters not dealt with in either rules

(a) Crew claims

58. The position of stranded crew members has not been dealt with satisfactorily in either country.

59. In Australia, plaintiff crew members are excused under rule 76 from giving security for costs; but they or their solicitor remain liable for the costs and

expenses of the Marshal in maintaining custody of their vessel after arrest. In New Zealand, their position is not addressed at all.

60. If, in an insolvency situation, crew members stand back and wait for someone else to arrest a vessel, all will be well. But frequently the crew are in dispute with the owners about their wages, and are the only claimants. Equally frequently the International Transport Workers Federation will be supporting them, and will be able to meet demands for costs and expenses. But the rules should not be drafted on that basis.

61. The position of crew members is often fragile. But the fact is that their claims when qualifying for a maritime lien have priority over most other claims. Moreover the Registrar's costs and expenses have the first priority. In those circumstances, I consider that there is a case for arguing that the court should have the power to order that, say, the Minister of Transport should meet such costs and expenses when the crew are the arresting party. The Minister can usually expect to recover such costs, with interest, when the matter is resolved.

(b) Movement of vessels under arrest

62. Both jurisdictions have encountered difficulty when it is in the interests of innocent third parties that a vessel under arrest should be permitted to sail from port to port.

63. In New Zealand, the high water mark was reached when a passenger vessel laden with wealthy foreign tourists was arrested near the start of a week-long cruise. The innocent charterer was threatened with the loss of a painfully-earned reputation; the tourists with the prospect of a wasted and expensive trip to New Zealand to embark on the cruise. Fortunately the judge was persuaded that he had jurisdiction to authorise the Registrar to permit the cruise to continue; but that jurisdiction is shadowy at best. See *Marine Expeditions Inc* v *The Ship "Akademik Shuleykin"* (3.3.95, Wellington AD 294, Gallen J).

64. Orders have also been made authorising vessels to go fishing.

65. I consider that there should be an express rule giving the court discretion to permit port to port transits or other activities where appropriate. It is of course essential that proper safeguards are put in place to ensure that the vessel will remain available within the jurisdiction with its value unimpaired as security for the plaintiff's claim.

What can we borrow from the Australians?

66. The answer is, I think, not much of substance. But the more detailed provisions of the Australian rules concerning custody of vessels under arrest are worthy of study in relation to possible amendments to New Zealand rules and practices in that area.

67. There are a number of matters of detail identified in the appendix where a redraft of the New Zealand rules might adopt the Australian model. The provisions in rule 51 (valuation of vessels in salvage cases) and rule 56 (objections to bail) seem useful.

68. As to what the Australians might borrow from us, I leave it to them to judge.

Is there a case for amending our own rules?

69. Yes, I believe so.

70. First, I think they need to be redrafted in a style more consistent with the rest of the High Court Rules. The Australian style is also a good model.

71. Secondly, the substantive matters I have touched on in this paper should be addressed:

- Whether there should be any arrangement for hull and P & I cover for vessels under arrest;
- Whether there is a point at which a maritime lien over cargo ceases to exist, so that service of a writ *in rem* can no longer be effected;
- Whether there should be provision for automatic sales *pendente lite* after the expiry of a specified period;
- Whether there should be a practice note, or a standard "omnibus" order, governing the Registrar's custody of vessels under arrest, and what any such provision should contain;
- Whether there should be a new rule setting out a basis for permitting an arrested vessel to continue to trade or operate whilst under arrest;
- Whether the burden of meeting the Registrar's custodial costs and expenses should remain with the arresting party;

- Whether crew members arresting vessels in wages claims should be required to meet the Registrar's custodial costs and expenses;

- Whether there should be a practice note setting out the procedures to be followed in the judicial sale of an arrested vessel and standard precedents for the documents required

72. Finally, amendments to take account of the less significant matters raised should also be considered.

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APPENDIX 1

ASPECTS OF THE NEW ZEALAND RULES NOT REFLECTED IN THE AUSTRALIAN RULES

1. Rule 777 provides for all caveats against arrest to be filed in one Registry, called the Central Registry. (This Registry is located at the Wellington Registry of the High Court.)

2. Rule 766 provides for the general practices of the Court to apply except as modified.

3. Rule 779 is more detailed in relation to caveats against release and payment; and, unlike the Australian Rules, expressly provides for caveats against payment.

4. Rule 769 permits actions both *in personam* and *in rem*.

5. Rule 773 provides for conditional appearances.

6. Rule 773 also provides for the details to be furnished in appearances as to the name and capacity of the party filing the appearance and the Port of Registry of the vessel to be *prima facie* evidence of those matters.

7. Rule 783 provides for interveners, so that all parties claiming an interest in a vessel the subject of a proceeding *in rem* may advance that interest in the same action.

8. Rule 772 provides for service of proceedings on freight.

9. Rule 776(15) provides for the Registrar to give notice of the arrest of property by serving a notice in the prescribed form on any person as well as affixing it on a conspicuous part of the property arrested. Thus owners or other persons thought to have an interest in a vessel may receive official notification of the circumstances.

10. Rule 776(11) contains express provisions concerning contempt of Court in relation to the movement of vessels under arrest.

11. Rule 776(12) provides for the issue of warrants of arrest in emergency situations.

APPENDIX 2

ASPECTS OF THE AUSTRALIAN RULES NOT REFLECTED IN THE NEW ZEALAND RULES

1. Rule 4 provides for the appointment of a Marshal, who need not be an officer of the Court.

2. Rule 7(4) (which deals with caveats against arrest) provides that a caveator may satisfy the undertaking to give bail by providing an undertaking from a P & I Club. This is the only explicit reference to Clubs in either the Australian or the New Zealand rules.

3. The combined effect of rules 41 and 75 and form 12 is that solicitors are personally liable for the Marshal's fees and expenses in relation to an arrested vessel.

4. The provisions in rules 47-50 concerning the custody of ships under arrest are more detailed than New Zealand equivalents.

5. Rule 51 requires that a vessel should be valued before its release when it has been arrested in a salvage case.

6. Rule 56 provides a procedure for an arresting party to object to bail offered by a person interested in an arrested vessel.

7. Rule 76 provides that, where the Master or a member of the crew of a ship is a plaintiff in a proceeding, they are not to be required to give security for costs.