The Admiralty Act 1988 Reviewed

Stephen Thompson
Middletons Lawyers

STEPHEN THOMPSON
Partner, Middletons Lawyers

Stephen has provided legal advice to the transport industry for 17 years, advising clients on negotiations and drafting of contracts, carriage of goods by sea, air and land, ship arrest and Admiralty, salvage, and regulatory issues, including Trade Practices Act advice.

Stephen has been involved in a number of significant Australian maritime cases, including the "Goldan Falcon", the "Gabriella", the collapses of the Baltic Shipping Company and South Pacific Shipping, and a number of other casualties. He is Managing Partner of Middletons' Sydney office, a board member of the Maritime Law Association of Australia and New Zealand, and for several years he has been a member of the Shipping Australia Limited's Maritime Liability Committee.

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Introduction

Nearly 14 years have passed since the commencement, on 1 January 1989, of the Admiralty Act 1988 (the "Act").

It has been thought timely by the organisers of this conference to review the Act. In approaching this task, I have not attempted any form of detailed assessment of the body of case law which has been developed under the Act.

Rather, this paper will attempt to:

(a) set the Act in its historical context;

(b) review the policy objectives which underpinned the Act and review whether those policy objectives remain valid today;

(c) assess the utilisation of the remedies available under the Act;

(d) review briefly the judgments of the High Court of Australia concerning the Act;

(e) examine options for reform, particularly in the context of the 1999 Arrest Convention;

(f) examine the merits of working towards trans-Tasman uniformity of admiralty legislation;

(g) note the adoption of a Memorandum of Understanding between AMSA and the Federal Court of Australia.

In concluding, an assessment will be made of the extent to which the Act has met, and is likely to continue meeting, the stated policy objectives which led to its enactment.

Historical Perspective

As is well known, the Act was enacted by the Commonwealth Parliament in substantially the same terms as the Draft Admiralty Bill 1986, which formed part of Appendix A to Report No. 33, Civil Admiralty Jurisdiction ("ALRC 33"), published by the Australian Law Reform Commission ("ALRC") in 1986.

As the authors of ALRC 33 pointed out[1], there had been a number of overseas developments in the area of admiralty jurisdiction in the post-war period, including the 1952 Brussels Convention on Arrest of Seagoing Ships and domestic legislative developments in the United Kingdom (1956,1981), Canada (1970), New Zealand (1973) and South Africa (1983).

The authors then noted[2]:

> "Further development of admiralty jurisdiction along these lines in Australia was prevented by the Colonial Courts of Admiralty Act 1890 (UK), a paramount force statute applying to Australia and limiting admiralty jurisdiction to matters within the admiralty jurisdiction in England in 1890".

[1] ALRC 33, p xv

[2] ALRC 33, p xv

This position was plainly untenable, leading to the then acting Attorney General in November 1982 referring to the ALRC the question of admiralty jurisdiction in Australia. In his second reading speech on 24 March 1988, the Honorable Lionel Bowen, Deputy Prime Minister and Attorney General said:

> "The Report is a comprehensive analysis of admiralty jurisdiction and the government, in seeking reactions to the Report, found widespread support for early implementation of the recommendations contained in it. I commend the Commission for its report which has been widely praised".

The Policy Objectives – A Shipper Nation

In evaluating the case for reform of this area of the law, the ALRC concluded[3]:

> ". . . Australia has distinct interests in admiralty and maritime jurisdiction, in view of its position as a country of shippers rather than ship owners, and as a country dependent on foreign shipping for much of its import and export trade. . . . There is a strong interest in providing effective local remedies for persons dealing with ships, whether as importers, ship suppliers, crew members or otherwise. But other factors counteract this, to some degree at least. Excessive regard to the interest of plaintiffs may carry the risk that Australia will be unattractive to foreign shipping, and that freight rates will be adversely affected. Australian admiralty jurisdiction needs to remain within generally acceptable limits, to ensure recognition of judgments and judicial sales in admiralty and to maintain the position of admiralty as an exceptional and special jurisdiction. . . . An appropriate balance can be struck in various ways and at various levels. For example, a broad admiralty jurisdiction is desirable, but the interest of ship owners and financiers may be sufficiently met through procedural means (including guarantees against vexatious arrest, and machinery for providing alternative forms of security). Finally, it is in the interest of all that admiralty jurisdiction be stated in clear, precise and readily accessible form".

Those policy considerations were also reflected in the Minister's second reading speech.

It is interesting to note that these sentiments were repeated, in a slightly different context, five years later. In the second reading speech in respect of the Carriage of Goods by Sea Bill 1991, the Hon M C Tate, Minister for Justice and Consumer Affairs, provided Parliament with a summary of the relative approaches to cargo liability regulation of the Hague-Visby Rules and the Hamburg Rules. Pointing out that the Hamburg Rules had not then come into force internationally, the Minister went on to say:

> "Nevertheless, the Government does recognize the argument of greater equity of the Hamburg Rules and the potential benefits for shippers that may accrue from a general international acceptance of the Hamburg Rules. Australia remains essentially a shipper nation and the Bill provides for the eventual replacement of the Hague-Visby-SDR regime with the Hamburg Rules".

Utilization

Limited statistics are available on the number of actions brought in Australian courts.

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[3] ALRC 33, para 96

Since 1992-3 the Federal Court of Australia has kept statistics on admiralty matters filed in the registry. More recently, those statistics have included matters remaining current from year to year. A table of these figures is attached.

The 2001 Annual Report of the Federal Court of Australia reported that:

> "During the reporting year the Court's Admiralty Marshal made 15 arrests (including one vessel that was arrested twice). Two vessels remain under arrest as at 30 June 2001. One vessel was sold pursuant to an order of the Court made in the previous report year. The MV "Beadon" is currently the subject of a judicial sale."[4]

Similar statistics and reports appear not to be readily available from the state Supreme Courts.

No courts appear to keep consistent and reliable statistics on the number of ship arrests effected by the registry each year, nor is information available concerning the duration of arrests.

One measure of the efficiency of the arrest machinery under the Act may be the speed with which an arrested vessel is either released from arrest or disposed of by way of judicial sale. Lengthy periods of arrest are costly, both in terms of the direct holding costs of insurance, crew, wharf age/port dues, provisions, diesel, etc, as well as the drain on court resources and the inevitable legal costs associated with monitoring a lengthy arrest.

For all of these reasons, I submit that there would be merit in evaluating the cost of collecting statistics on a national basis, as to the frequency of ship arrest, the duration of arrest and the circumstances of disposal (whether release in return for alternative security, release because of proceedings being dismissed, or disposal by judicial sale).

High Court Consideration

Since its commencement, there have only been three decisions of the High Court of Australia specifically dealing with provisions of the Act.

The first was the "*Shin Kobe Maru*"[5], which examined the scope of the jurisdiction in respect of "Proprietary Maritime Claims" under section 4(2) of the Act.

Next came the "*Laemthong Pride*"[6], which dealt with the surrogate ship arrest provision in section 19 of the Act.

Section 19 is in the following terms:

> "A proceeding on a general maritime claim concerning a ship may be commenced as an action in ream against some other ship if:
>
> (a) a relevant person in relation to the claim was, when the cause of action arose, the owner of charterer of, or in position or control of, the first mentioned ship; and

[4] Federal Court of Australia, 2001 Annual Report, p16

[5] Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc (1994) 181 CLR 404

[6] Laemthong International Lines Co Limited as Owners of the ship "Laemthong Pride" v BPS Shipping Limited (1997) 190 CLR 181

(b) that person is, when the proceeding is commenced, the owner of the second mentioned ship."

The High Court confirmed that the term "charterer" in section 19(a) included a voyage charterer, and was not limited (as the appellant had argued) to a demise charterer.

Finally, in 1989, the High Court handed down its decision in the "*Iran Amanat*"[7]. Section 3(1) of the Act provides that a "relevant person" in relation to a maritime claim is "a person who would be liable on the claim in a proceeding commenced as an action in personam".

The primary judge had ordered the release of the "Iran Amanat", which had been arrested in Victoria as a surrogate ship, on the ground of want of jurisdiction. The Full Court of the Federal Court, and subsequently the High Court, held that the primary judge had asked himself the wrong question. The question which the primary judge had asked himself meant that he treated the definition of "relevant person" in section 3 of the Act as though the words "would be liable" meant "is liable" and accordingly decided, at an interlocutory hearing, the ultimate issue in the case, being whether the owners were liable to pay for fuel supplied to the two sister ships of the arrested vessel.

Interestingly, in each of these cases the High Court made reference to the Draft Admiralty Bill 1986 in ALRC 33, to the rationale of the ALRC in structuring the draft bill in the way it did, to the equivalent provisions in legislation from other jurisdictions and, where applicable, to case law from other jurisdictions. These passages in each of the three cases underscore not only the enduring significance of ALRC 33 as a tool in the construction of the Act, but also the importance placed by the High Court in having regard to legislation and judicial decisions from other jurisdictions when determining admiralty matters.

There have of course been a large number of decisions in the Federal Court and the State Supreme Courts, which occupy important places in the body of case law concerning the Act. It is not possible within the scope of this paper to engage in a review of those cases.

The 1999 Arrest Convention and Options for Reform

Since enactment, the Act has not been the subject of any substantive amendment[8].

At a Diplomatic Conference held at the Palais des Nations in Geneva between 1 and 12 March 1999, a new International Convention on the Arrest of Ships was adopted. The Convention will enter into force when ten states ratify it.

As at the date of writing, the 1999 Arrest Convention has been ratified or acceded to by four countries, being Bulgaria, Estonia, Latvia and Spain. A further five countries have signed the Convention, but have not moved to ratify or to accede to it. Those countries are Denmark, Equador, Finland, Norway and Pakistan.

Enquiries made with the Commonwealth Attorney General's office indicate that while the question as to whether Australia should ratify the 1999 Arrest Convention is under consideration, it is not a matter of great urgency and there is not a great demand for adoption, in light of the generally favorable view of the Act, and the apparent lack of interest by any of our major trading partners.

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[7] Owners of the motor vessel "Iran Amanat" v KMP Coastal Oil Pte (1999) 196 CLR 130

[8] The only amendment has been in 2001, when the definition in section 3(1) of "Limitation Convention" was amended to reflect the amendment of the 1976 Limitation Convention by the 1996 protocol.

During 2001, a working party from this Association evaluated the 1999 Arrest Convention. Although no overall conclusions were expressed, there were relatively few aspects of the Convention which were perceived to represent desirable advances on the Act.

The working party did, however, identify several areas in which the Act could be improved, by adoption of provisions similar to those appearing in the 1999 Arrest Convention.

To recap briefly, some of the areas in which potential reform was identified include:

(a) The head of "general maritime claim" in subsection 4(3)(t) of the Admiralty Act, in relation to "a claim by a Master, or a member of a crew, of a ship for wages" and other remuneration. The potential area for reform would be an amendment to deal with the Full Court of the Federal Court's decision in the "*Ionian Mariner*"[9] in the context of monies due under collective wage agreements to which the crew are not themselves parties (the parties being the ship owner and their crew's trade union);

(b) Add a head of "general maritime claim" to include claims in relation to commissions, brokerages or agency fees payable in respect of a ship;

(c) The addition, as a head of "general maritime claim" of disputes arising out of a contract for the sale of the ship;

(d) The inclusion of express provisions authorizing a court to permit an arrested ship to continue trading, to enable courts to break deadlocks in relation to the matters of security, a provision for an appearance under protest to contest jurisdiction or for other purposes, and other procedural issues dealt with relating to the release of a ship from arrest, as set out in Article 4 of the 1999 Arrest Convention.

The most controversial (at least from an Australian point of view) provisions in the 1999 Arrest Convention were those giving power to a court to order an arresting party to lodge counter security, and the liability of the arresting party for "wrongful or unjustified" arrest (as in Article 6 of the 1999 Arrest Convention) or arrest "unreasonably and without good cause" (s.34 of the Admiralty Act).

As the MLAANZ working group concluded:

> "At paragraph 245 of its report, the ALRC compared arrest and Mareva injunction remedies and specifically referred to the undertaking which a plaintiff is required to give when applying for an injunction. Without exposing its reasoning, the ALRC did not recommend security for arrest.
>
> Closely linked to the issue for security is the test for when damages may be claimed from an arresting party for what may be generically described as "wrongful arrest". Unfortunately, there have been no decisions in Australia under s.34 as to what constitutes an arrest which has been "unreasonable and without good cause". The absence of decisions on this section after thirteen years may suggest that, as a matter of practice, allegations of wrongful arrest do not often arise. This, in turn, may suggest that there is not a compelling need to alter the status quo in respect of security for the test for wrongful arrest."

In summary, therefore, while the 1999 Arrest Convention has identified some areas which may appropriately be the subject of amendment to the Act, there does not appear to be a case for wholesale replacement of the existing regime with the 1999 Arrest Convention.

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[9] 149 ALR 200

Towards trans-Tasman Uniformity?

To the writer's knowledge, there has not been undertaken since enactment of the Admiralty Act, a detailed comparison with the Admiralty Act 1973 (NZ).

As is the position in Australia, it appears that there is no great clamor in New Zealand for wholesale reform in respect of Admiralty jurisdiction, either by adoption of the 1999 Arrest Convention, or by development of domestic recommendations for change.

There are from time to time those both within this Association and in the general community who propose substantially increased levels of uniformity of legislation in respect of shipping matters (among others) between Australia and New Zealand. Before proceeding down the harmonisation path, however, it would be as well to assess the potential benefits to both countries and their trading communities which would arise out of the process of harmonising the two sets of legislation, relative to the resources which would be required to implement and monitor harmonisation.

It is likely that this Association would play a role in any such review.

AMSA/Federal Court Memorandum of Understanding

Upon arrest, the subject vessel is in the possession of the Admiralty Marshal. As such, there is an intersection between the powers and obligations of the Marshal (an officer of the Court) and the interests of the Australian Maritime Safety Authority ("AMSA") as the "watchdog" of shipping safety in Australia.

On 14 August 2002, a Memorandum of Understanding was signed by the Hon Michael Black AC, Chief Justice of the Federal Court of Australia and Dr Kenneth Moss, Chairman of AMSA.

The MOU recites information concerning the two bodies, identifies activities undertaken by the Marshal which can raise safety and pollution issues and then sets out the respective commitments of AMSA and the Court to provide mutual assistance.

Similar Memoranda of Understanding may in future be signed by the Federal Court with the various states and territories.

AMSA and the Federal Court are to be congratulated on this initiative which will hopefully streamline aspects of ship detention, at least insofar as powers under the Admiralty Act are being exercised by the Federal Court as opposed to the state and territory Supreme Courts.

The Rules

The Admiralty Rules (the "Rules") contain much of the day-to-day machinery by which admiralty jurisdiction is exercised.

Anecdotally, it would appear that a reasonable proportion of first instance case law has been occupied in resolving differences of opinion concerning the operation of the Rules.

From time to time, particularly in the midst of the larger arrest cases, perceived inadequacies or anomalies in the Rules are identified either by the Court or practitioners, and proposals for reform are articulated.

The Rules have been amended on four occasions since they were first enacted[10].

On 11 November 19999 the Federal Court coordinated an open forum "for the purpose of ventilating suggestions and raising matters which the profession and industry see of importance and relevance to the exercise of the court's jurisdiction in shipping matters". There had in prior years been other, less formal, discussions between the Court and practitioners concerning options for improvement of the Rules.

These have been most welcome forums for dialogue between the users and administrators of Admiralty jurisdiction. Experience has, however, shown that initiatives such as the forum just referred to occur only intermittently, interspersed with long periods of inactivity.

It is submitted that the processes for identification of reform opportunities or requirements, and the analysis and implementation of reform proposals could be improved by:

(a) a more structured approach to dialogue and development of reform options, with set timelines for tangible outcomes from meetings such as the 1999 forum;

(b) greater involvement of practitioners; and

(c) a more transparent process of deliberations.

Summary and Conclusion

After nearly 14 years, the Act has survived without substantial amendment, and has been the subject of only limited High Court consideration.

This rather uncontroversial history is perhaps not surprising given the Act's pedigree in the form of the ALRC 33, and the preceding reviews referred to in it.

Areas of potential amendment of the Act have been identified, and review of the Rules is ongoing.

It is submitted that the further streamlining of both the Act and the Rules would be enhanced by the collecting of statistics as outlined above, to enable evaluation of inefficiencies in the process of arrest. Further, greater participation by practitioners, and greater transparency of process, would enhance the continued refinement of the Rules, and hopefully an accompanying continuous improvement in he administration of Admiralty jurisdiction in Australia.

Stephen Thompson
Partner
Middletons

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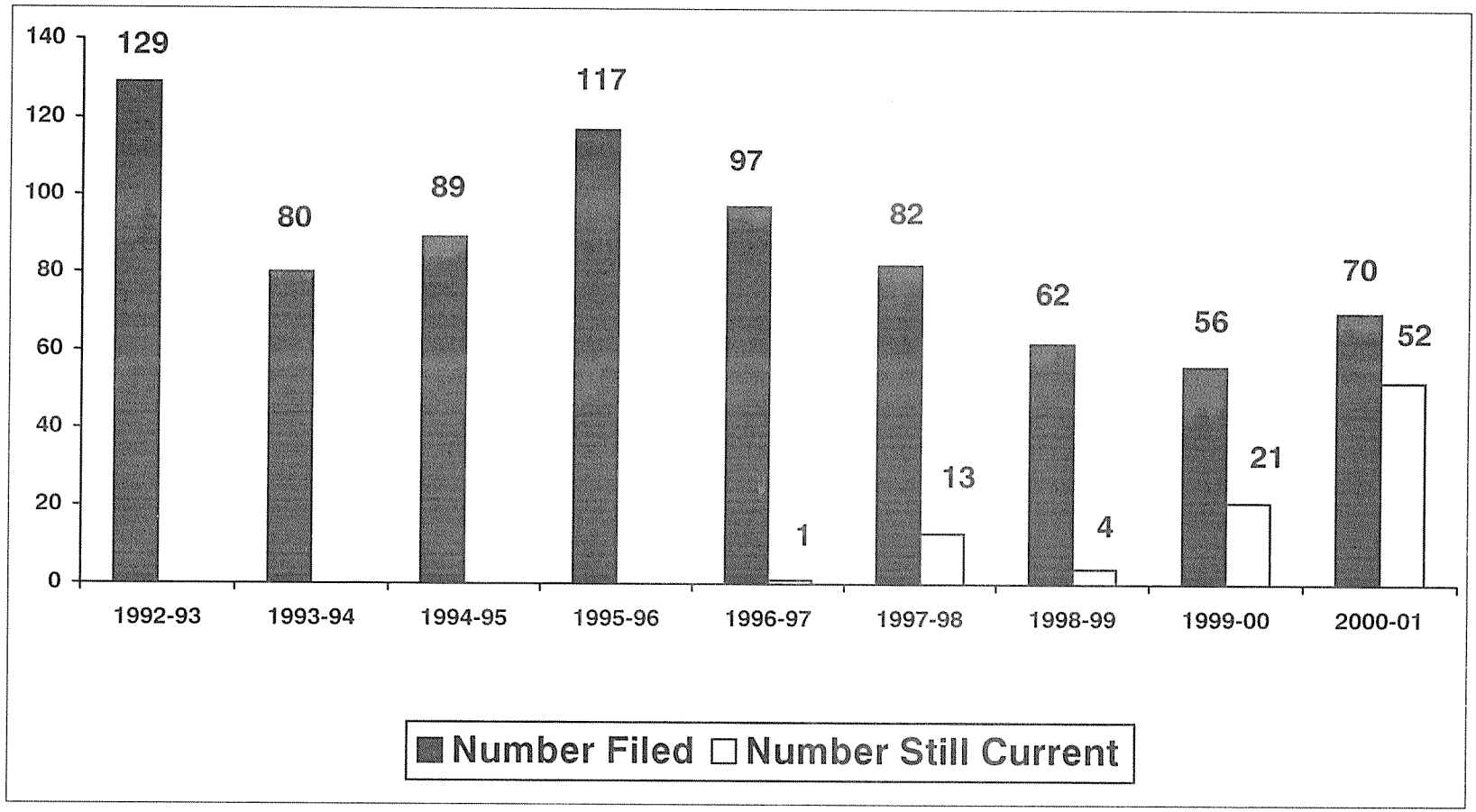
[10] In 1990 (No. 392), 1993 (No. 327), 1996 (No. 215) and 2002 (No. 109)

Admiralty Act matters filed and current
1992-93 to 2000-01



A total of 94 Admiralty Act matters remain current as at 30 June 2001. The age of these are shown in the graph above. There are 3 matters still current relating to periods before 1996-97.

Source: Federal Court of Australia – Annual Report 2000-2001