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Frank Stuart Dethridge Memorial Address

AMBLING THROUGH HALF A CENTURY OF MARITIME PRACTICE IN AUSTRALIA

Ron Salter*

To say that I was surprised when first approached to deliver this year's Dethridge Address is something of an understatement. Even to say that I felt honoured does not adequately express my feelings. To follow in the footsteps of the eminent persons who have previously delivered this address is a humbling experience indeed.

While my memory is far from perfect, I certainly recall that in late 1974 or early 1975, I read with some interest in the (Victorian) *Law Institute Journal* of the formation of the Maritime Law Association of Australia. Indeed, as someone actively practising in the jurisdiction, I recall being slightly put out that my first knowledge of the existence of the Association emerged from the media. Nevertheless, overcoming my disappointment, I applied to join, and in May 1975 I attended the first meeting/conference of about a dozen members held in the Palm Lake Motor Inn in Melbourne, a venue whose only connection with maritime law was the fact that it overlooked Albert Park Lake! The meeting was presided over by Frank Dethridge, the Association's first president.

The first Dethridge memorial address, established after the untimely death of Frank Dethridge in 1976, was given in 1977 by the Honourable Sir Ninian Stephen, then a Justice of the High Court. I do not think that I can give a better description of the late Frank Dethridge than did Sir Ninian at the conclusion of his address, as quoted by His Honour Judge Tom Broadmore when delivering his Dethridge address in 2009:

He was a man learned in the law and with a great interest in and much experience of shipping law. Those members of the Victorian Bar fortunate enough to be briefed by him in shipping matters were the wiser for his counsel. His wisdom, kindness and moderation will long be remembered in the profession. He had developed to an exquisite degree that high art of the instructing solicitor, how to teach counsel what he does not know but needs to learn for the case in hand, while conveying the impression all the while that it is he, the instructing solicitor, who is collecting pearls of wisdom as they fall from counsel's lips.

In contemplating a subject for this year's address, I determined without too much difficulty that I was not sufficiently erudite to put myself in a position where my address might be compared in any way to previous addresses of various High Court, Federal Court, and State Supreme Court Chief Justices, or such well-regarded international jurists as Sir Michael Mustill (as he then was). I therefore concluded that I should indulge myself to some extent by taking you on a journey through my almost 50 years in the field of maritime law. While I imagine that the older members here today will recall with some affection 'the good old days', I would like to think that for the generations of practitioners who have grown up in the last few decades, at least some of what I have to say will be both new and interesting.

As an articled clerk, a young lawyer, and subsequently a partner in the Melbourne firm of Phillips, Fox & Masel, I was privileged to work under the watchful eye of the late Alec Masel, who was senior partner for almost half a century. AM, as he was fondly called, maintained quality control over the work of the firm by reading every morning all letters which had been sent out the previous day, and summoning to his office for a

* Consultant, DLA Piper, Melbourne.

chat the author of any letter which failed to meet with his absolute approval — as you might imagine, to be called to AM's office was a somewhat daunting experience!

Beginning his professional life as a general insurance lawyer, AM soon expanded his knowledge into the field of marine insurance, which in turn, took him into the wider area of maritime law. At the time when I first became involved, a fair portion of AM's practice involved the prosecution of cargo recovery litigation on behalf of subrogated insurers.

As an articled clerk, it was my lot to be despatched by AM to either the Supreme Court library or the Law Institute library to borrow and subsequently return learned text books on maritime law, such as Carver, Scrutton, and Temperley. Every now and again, when I arrived in AM's office bearing the precious item of learning, AM would sit me down and talk to me about the issue he was contemplating, and when I apparently showed some interest — whether real or feigned, I cannot recall — he would hand the text back to me, and ask me to research the relevant issue. Thus began my involvement with maritime law.

While it is difficult to now contemplate legal life without the presence of the Federal Court, that court did not exist in the sixties and early seventies. Rather, original jurisdiction in admiralty was exercised by the State Supreme Courts (as now) and the High Court of Australia.

From a practical perspective, it was AM's practice, when instigating legal proceedings against a foreign shipowner, to commence two actions in the High Court — a simple action in personam against the owner, and an action in rem against the offending ship. He would then communicate with the local agent for the ship and request the provision of security and the appointment of solicitors to accept service of the in personam proceeding, while at the same time, threatening to arrest the ship in the absence of co-operation. Often enough, this strategy was successful — particularly if the ship in question was in Australian waters or was scheduled to visit — but of course, that was not always the position. While the arrest option was on occasions taken up, this was rarely necessary when security was given and service of proceedings accepted.

On many occasions, however, when the ship in question was not to be seen, and no co-operation was forthcoming, the only remedy was to go ahead with the in personam proceeding with service out of the jurisdiction. Unlike the State Supreme Court, where a Master exercised power over interlocutory matters, an application in the High Court to serve out of the jurisdiction needed to be heard by a judge in chambers. Typically in the days when I was making these applications, the High Court judge on circuit in Melbourne would be the then Chief Justice, Sir Garfield Barwick. Even today, I find it remarkable that in order to process a simple application for service out of the jurisdiction, I would find myself sitting in the chambers of the most powerful judicial officer in the land. My awe at being in this position was overcome when on more than one occasion, Sir Garfield's phone would ring, and he would then engage in a discussion about next weekend's sailing while I sat opposite him in his chambers!

In refreshing my memory about these matters, I am reminded that, until the passing of the Admiralty Act 1988, the admiralty jurisdiction of the Australian courts was rather limited. While it certainly sounds very strange today, the position at that time was that the admiralty jurisdiction of the Australian courts was primarily governed by the *Colonial Courts of Admiralty Act 1890* (UK), which in turn applied the provisions of the *Admiralty Court Act 1840* (UK) and the *Admiralty Court Act 1861* (UK). Strange that this might seem, the situation was made even stranger by the fact that by 1956 at least, the Acts of 1840 and 1861 had been superseded in the United Kingdom by the *Administration of Justice Act 1956* (UK). Thus, from the time I began my working life in the legal profession until the commencement of the Admiralty Act 1988, we in Australia had to grapple with a decidedly outdated jurisdiction inherited from the British, while they in turn had moved on significantly. Perhaps this simply says something about the relative influence of interested parties in either country!

As an illustration of life under the previous regime, allow me to take you to a case in which, I am sad to relate, I acted for the losing plaintiff. Section 5 of the 1861 Act (which replicated to a large extent section 6 of the 1840 Act) gave the court jurisdiction 'over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs...', in consequence of which, I arrested the good ship *Lastrigoni* in Melbourne in pursuit of a claim by a bunker supplier for monies owing. True it was that the bunkers had been supplied to a time charterer rather than the owner, but as no lesser authority than Dr Lushington had held that claims which were capable of being pursued in rem were claims which should be treated as maritime liens, I thought that I was on

reasonable ground despite the existence of some authority to the contrary. However, the Honourable Justice Douglas Menzies acceded to an application by the owner to set aside the proceedings for want of jurisdiction,¹ the ship was released from arrest and sailed off into the wide blue yonder. While, to the best of my recollection, the ship was then arrested by another creditor at New Plymouth in New Zealand, and once again managed to engineer release, the adventure came to an end when my client re-arrested the ship in the Panama Canal Zone, where American jurisprudence decreed that the supply of necessaries, even to a time charterer, indeed created a maritime lien.

Of course, many of you will observe that the outcome of the *Lastrigoni* case would be the same today by reason of the definition of ‘relevant person’ in Section 3(2) of the 1988 Act, so that at least in the case of suppliers of goods and services, once dubbed necessaries, not much has changed. However, the passing of the 1988 Act represented a major reform to an antiquated system which, as described in the *Law Reform Commission Report No 33 on Civil Admiralty Jurisdiction* contained ‘many obscurities and uncertainties about the scope of the jurisdiction in Australia, even about its distribution among the various courts, and ... many unjustified limitations as to the subject matter of the jurisdiction.’

For the purpose of today’s address, and while acknowledging the absolutely excellent work done by the Commissioner in Charge of the reference, Professor James Crawford, and his team, I would like to recall that the report had its genesis in a previous report prepared by a joint committee of the Law Council of Australia and MLANZ completed in 1982. This committee, chaired by the Honourable Justice Howard Zelling of the Supreme Court of South Australia, a leading and consistent advocate of reform, comprised (to the best of my recollection) some nine or ten people, of whom three in Melbourne in turn comprised the working group. Those three were the late WE (Bill) Paterson QC, the late Bob Desmond and myself. While Paterson was often regarded as a ponderous man, my memory is that he was absolutely meticulous, highly industrious, and rather learned. I have said privately over the years that 90% of the work of the joint committee was undertaken by the working group, and that 90% of the work of the working group was undertaken by Bill Paterson, and I am now happy to say so publicly. While of course credit for the 1988 Act must go to Crawford, Zelling, and countless others, I believe that the role of Bill Paterson has been very much understated over the years.

In thinking about the changes which have occurred during my career, I am reminded that, not only did we operate under the *Colonial Courts of Admiralty Act* for far too long, but we operated under parts of the United Kingdom *Merchant Shipping Act 1894* well after those parts were no longer operative in the United Kingdom. In this context, I have in mind the subject of limitation of liability, which of course, is now governed in Australia by the *Limitation of Liability for Maritime Claims Act 1989* which in turn incorporates the 1976 *Convention on Limitation of Liability for Maritime Claims*. While in 1958, the United Kingdom enacted legislation giving effect to the 1957 *International Convention relating to the Limitation of Liability of Owners of Sea-going Ships*, no such step was taken in Australia for more than 30 years. It is now somewhat difficult to believe that it was not all that long ago that a shipowner in Australia was entitled to limit liability for cargo damage to 8 pounds sterling per ton and for personal injury etc to just 15 pounds sterling per ton.

To digress from discussion about maritime legislation, I now turn to mention what was formerly described as the container revolution. To those with less than 30 years’ practice under their belts, the expression ‘container revolution’ is no doubt meaningless, but it is interesting to reflect on the fact that when I began legal practice, general cargo was carried into and out of the country in conventional break-bulk vessels, the container trade not having arrived. The Hague Rules reigned supreme, even the Hague-Visby Rules were something for the future, and the carriage of cargo in a large box was not something that was contemplated as being the norm. Under the Hague Rules regime, ‘carriage of goods’ was defined as ‘covering the period from the time when the goods are loaded on to the time they are discharged from the ship’, so that argument often raged as to the precise time during either loading or discharge when risks were transferred. Fortunately, sufficient common sense prevailed to allow a broader interpretation of the Rules than that which depended on the cargo passing the ship’s rail, but to this day, I fondly recall often quoting in my letters of advice the observations of Devlin J (as he then was) in *Pyrene Co Ltd v Scindia Navigation Co Ltd*:² ‘Only the most enthusiastic lawyer could watch with satisfaction

¹ *Shell Oil Company v The Ship ‘Lastrigoni’* (1974) 131 CLR 1.

² [1954] 2 QB 402, 419.

the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail.'

Containerisation brought with it many technological changes, and many changes in the logistics of shipping. It also brought us wonderful arguments as to whether the container itself was the 'package' for limitation purposes, or whether the hundreds of cartons inside the container comprised the packages, even though the carrier did not have the opportunity of counting them. The liability of container terminal operators, their ability to rely on 'Himalaya' clauses in the carriers' bills of lading, the efficacy of circular indemnity clauses, and similar questions dominated the thinking of those of us dealing with these matters on a daily basis. As the law evolved, so we grappled with these problems, many of which are now only a distant memory. Thus, for instance, the modifications to Article 1 of the Amended Hague Rules to specify that, in effect, goods were in the charge of the carrier from the time of their arrival at the loading terminal until the time of their delivery to the consignee at the discharge terminal are the product of the container revolution.

As a Victorian, my personal experience has been heavily influenced by container shipping, but it would be remiss of me not to make reference to the massive changes which have taken place in the bulk shipping trade. Ports that didn't exist at all when my career began are now the major ports in the country in terms of throughput, and whether we are talking about iron ore from Western Australia or coal from Queensland and New South Wales, we are dealing with major technological changes and, of course, substantial investment in infrastructure. The extent of change in the manner in which the trade is conducted can be seen when one recalls that the catalyst for the superb *Ships of Shame* report led by the Honourable Peter Morris in 1992 was the number of total losses of bulk carriers en route from Australia to elsewhere, and that in consequence of that report, much action was taken worldwide to improve ship safety. While casualties such as the *Pasha Bulker*, the *Shen Neng No 1*, and more recently the *Rena* will no doubt occur in the future, it cannot be disputed that legislative and technological changes have made the entire industry — not just the bulk trades — safer and more efficient.

Moving on to another subject entirely, I would like now to say something about the arbitration in Australia and New Zealand of maritime disputes. While over the last couple of decades, there has been much wailing and gnashing of teeth about the small amount of maritime arbitration in this part of the world, and while various efforts have been made by MLAANZ and others (AMTAC in particular) to encourage industry participants to adopt arbitration in Australia or New Zealand as the default mode of dispute resolution, I imagine that we are all agreed that these efforts have not borne much fruit.

Interestingly, as I look back on my career, I now conclude — admittedly without any statistical data to back me up — that there was probably more happening in the maritime arbitration space in the sixties and the seventies than one would now imagine. For instance, in the days when the Australian Wheat Board exercised monopoly power over wheat exports, the *Austwheat* charter party form required arbitration in Australia at least of disputes arising in Australia. This form of charter party was not only the form required when the Board was a CIF seller of wheat, and therefore the charterer, but was also specified by the Board in FOB contracts, so that buyers were obliged to charter on *Austwheat* terms. The former Australian Barley Board adopted the same policy, so that from time to time, when disputes in this part of the world arose, there was a referral to arbitration. As the power of these institutions has waned and faded altogether, and as there has been less and less direct Australian involvement in shipping, so the reliance on arbitration in Australia of disputes has also faded.

In thinking about this subject for the purpose of this address, I was reminded of an arbitration which I handled in Melbourne during the latter part of the seventies for the Wheat Board. The case was hardly a momentous one in legal terms, but it involved what was then quite a substantial sum of money, and it certainly involved some angst for both parties.

The bulk carrier *Torm Gerd* was chartered by the Board to load a consignment of wheat at Geelong, and duly arrived at the port, having discharged a cargo of phosphate in Melbourne. She needed to undergo a cleanliness survey, and as the grain berths on the northern side of Corio Bay were occupied, the vessel berthed at Cunningham Pier across the bay so that she could undergo cleaning and pre-loading survey without delay. The ship having passed survey, notice of readiness having been given, and a berth about to become free at the grain facility, arrangements were put in place to shift the vessel to her load berth at 0900 on a Tuesday morning. At that time, the required pilot was on board, but somewhat sadly, only minutes before that time, members of the Seamen's Union decided at a stop work meeting to strike as from 0900, as a result of which, the tug which had been scheduled to take the vessel across the bay was not mobilised. Without recounting the tale in too much

detail, I can report that the strike lasted for over two months, so that the dispute between owners and charterers concerned a demurrage claim for some 62 days of delay.

Prior to the passing of the uniform commercial arbitration legislation in Australia in the mid-eighties, arbitration law provided for the option that arbitrators state their award in the form of a special case for the opinion of the court, and that is what happened in my case, where, incidentally, the arbitrators had found for the owner. As unsuccessful charterer, my client was more than happy for the arbitrators' conclusions to be tested, and so we pursued the special case before Mr Justice Beach in the Supreme Court of Victoria. To the relief of all on our side, His Honour answered the questions posed by the arbitrators in a manner which now required them to publish an award in my client's favour.

Because the special case procedure involved the judge answering questions, rather than giving a decision, no appeal was open to the owner from His Honour's answers. The arbitrators duly produced their award incorporating His Honour's answers, and the owner now applied to the Supreme Court to set aside the award for error of law on the face of the award, the error being the answers given by Mr Justice Beach. This application came on for hearing before Mr Justice Anderson, who quite wisely concluded that it would be inappropriate for him to deal with an application which was effectively an appeal from a decision of a fellow judge on the Supreme Court bench. He therefore referred the application to the Full Court, where, I am pleased to report, the award in favour of my client was upheld.³

At the time when the Full Court's decision was given, an unsuccessful party before that court had the option of seeking an appeal to the High Court, or — with leave — to the Privy Council. Never having previously been to the Privy Council, I have to confess that I was rather excited when the owner launched an application to the Full Court for leave to appeal to the Privy Council. Of course I was instructed to oppose this application, which I did with a heavy heart, and off we all went again to the Full Court on the leave to appeal application.

As best as I recall it, the hearing began one afternoon and was part heard overnight. Listening to the arguments of the owner's counsel, I was reasonably certain that leave would be granted, in which case, my client would be disappointed, and I would be delighted! However, it seems that overnight, my opponent had sought advice in London from a leading silk in that jurisdiction, who advised that on the substantive points, he felt that the Privy Council would agree with the views of the Supreme Court. To my everlasting chagrin, therefore, the application for leave to appeal was abandoned the following morning, thus ensuring a happy client and a very disappointed solicitor who had been packing his bags for a trip to London!

While I began my comments on maritime arbitration with the observation that the efforts in recent years to promote maritime arbitration in Australia had not borne much fruit, I think that this address nevertheless provides me with a platform to urge that we should maintain and re-double our efforts in this regard. While to my mind, there is essentially little likelihood of persuading say a Japanese owner and an Indian charterer to select Australia or New Zealand as a neutral venue for dispute resolution — at least in my lifetime — I continue to believe that our major exporters have sufficient commercial clout to propose arbitration in Australia in particular if sufficiently motivated to do so. With the recent major reforms in shipping legislation in Australia, about which we will hear something tomorrow, there is also a prospect of re-energisation of ship owning in this country, with a corresponding possibility of persuading those owners to give serious consideration to agreeing Australian arbitration as the dispute resolution mechanism of choice.

Marine insurance is a subject on which my maritime law practice was grounded, and my interest in that subject was further developed when, in 1972, I was offered a secondment in London with the well-known firm of Clyde & Co. While secondments of legal professionals at all levels are commonplace today, the concept, 40 years ago, that as a partner in my firm, I should spend several months on the other side of the world was innovative to say the least. Again, the impetus for this development was Alec Masel, whose friendship with the late Gordon Blacker, then senior partner at Clydes, paved the way for this experience, and whose wisdom and far-sightedness was a significant influence in my career.

³ *Dampskibsselskabet Torm A/S v Australian Wheat Board* [1981] VR 145.

I mention this background as an introduction to some brief commentary on efforts to reform the law relating to marine insurance in Australia. In this respect, most of you will be familiar with the work done during 2000-2001 by the Australian Law Reform Commission. The Attorney-General, having referred the subject to the Commission at the beginning of 2000, duly received a report some 15 or so months later. The Commissioner in charge of the reference was one of our well-regarded members, Ian Davis, and virtually every one of the 22 members of the Advisory Committee was associated with our organisation in one way or another. The Commission's Report No 91 of April 2001 is, in my opinion, a work of masterly scholarship, and deserves a far better fate than being left to gather dust in a Canberra pigeon hole.

One of the interesting aspects of this exercise was that, in the first few years of this century, after publication of the report, whenever I happened to discuss the subject with colleagues in the United Kingdom, I received something of a negative response. It was almost as if the British, as the creators of the original legislation in 1906, felt that it was not appropriate for anyone else to interfere with their proprietary right to manage the legislation. Yet, two or three years later, positive commentary began to emerge in the United Kingdom from academics and judges, so that it then appeared to be quite likely that reform along the lines advocated by our Law Reform Commission would actually take place in the United Kingdom, and that instead of leading, we would ultimately be following. That having been said, I must say that until very recently, the steam seemed to have gone out of the subject in the United Kingdom as well as in Australia, although it now appears that some limited changes have been proposed there. While I was not personally in favour of everything proposed by the Commission, I truly think that the lack of any action in Australia is a great pity.

As a postscript to this subject, I should mention that some years ago, I wrote to the then Attorney-General, the Honourable Philip Ruddock, enquiring as to the fate of the reform process. While I cannot now locate the reply I received, I recall that he wrote that departmental work was continuing, and indeed, that he referred me to a departmental officer, who in turn told me that she was in the midst of preparing a cabinet submission. In the absence of any further news, I guess that it must be a very long one!

This Dethridge Address is, I think, an appropriate place to for me to reflect briefly on the activities of this Association, which has played a very important role in my professional life, and, I believe, in the professional lives of many others. For those of us who have been around during most of the life of the Association, we recall fondly the incredible personal touch at our first conference venture in Hobart, when Graeme and Mary Thompson, parents of Melbourne silk and present day member, Michael Thompson SC, treated us all as family, with Graeme personally collecting delegates from the airport. We also fondly recall our various international ventures to Singapore, Maui, and more recently Oahu, and we still laugh when we recall certain people attempting to walk on water on the River Avon in Christchurch in the mid-eighties! We remember the earlier exploratory meetings between our then Australian Association and delegations of Kiwis, which led to the creation of our unique bi-national organisation. The Association has been instrumental in the formation of excellent commercial and personal relationships, and these have in turn been extremely helpful in assisting the smooth operation of professional practice.

On a more serious level, however, it is important to recall the role played by the Association in the development of maritime law, both domestically within our jurisdictions, and internationally, because at the end of the day, this is the principal *raison d'être* of the Association. Clearly we have honoured the objects of the Association, as expressed in its constitution, to advance reforms in the maritime law and to facilitate justice in its administration, to furnish a forum for the discussion and consideration of problems affecting the maritime law and its administration, and to act with foreign and other associations in efforts to bring about the unification of maritime and commercial law, maritime customs, usages and practices, and a greater harmony in shipping laws, regulations and practices of different nations. On the domestic side, this is an on-going process, with the Association not only making regular submissions to government on its own initiative, but responding to requests for input from government. On the international side, this is also an on-going process, fuelled by our involvement and active participation in the affairs of Comité Maritime International (CMI).

Membership of the CMI 'family' has been integral to the existence of MLAANZ from the beginning. For my part, I was not actively involved with CMI, until, as president of MLAANZ, I attended my first CMI conference in Paris in 1990. An opportunity then arose for a member of our Association to be elected to the CMI council, and in due course, I became the first Australian to serve a term on the council. Indeed, I managed to enjoy two terms, and was then succeeded by Stuart Hetherington, who has done great work during his stint, and who has risen to high office, which does credit not simply to him, but to all of us in this part of the world. The highlight

of my CMI involvement took place in 1994, when the CMI conference was held in Sydney. I'm still not certain that the Sydney conference produced a more entertaining day than we all had at the Paris conference when the excursion day took us all by TGV to Burgundy for a long very French lunch accompanied by the odd drop of wine, and an 'oompah-pah' band, whose members magically knew the music of *Waltzing Matilda* which was publicly and enthusiastically sung following announcement of the decision to hold the following conference in Sydney! On a more serious level, however, I should say that while CMI no longer has the role it served in the earlier part of the twentieth century as the sole repository of knowledge and experience in international maritime affairs, it continues to serve the international maritime world with distinction, now working in conjunction with the various well-funded inter-governmental bodies such as IMO and UNCITRAL. We can all be proud of the excellent work undertaken over the years by CMI with the able support of its constituent members, including MLAANZ.

One of the joys of being a maritime lawyer is that opportunities arise quite often to venture away from one's desk and from the courts to get one's hands dirty, so to speak. In this respect, I have very fond memories of being on the bridge of a 160,000 DWT Japanese bulk carrier when she was refloated from her position aground Courtenay Shoal, off Dampier, with the assistance of some 7 tugs, and I particularly recall the celebrations which followed in the pub in Dampier that evening. I remember chartering a big game fishing vessel in Cairns, and then clambering up and down the pilot's ladder on a casualty which had been brought to an anchorage off that port from her grounding position off Papua New Guinea, all the while hanging on tightly to my briefcase. On another occasion, while not having to venture very far from my office, I spent a couple of days in a wharf shed in Melbourne negotiating cargo salvage arrangements among hundreds if not thousands of cartons of blown cans of tomatoes. Again, I recall spending several days in Madang, in Papua New Guinea, dealing with the consequences of a fire at sea aboard a substantial tuna boat, which consequences included the hijacking by locals of a truck carrying spoilt tuna to a nearby tip!

No doubt, many of you will have similar, and perhaps more exciting, memories, but as I look back at my professional life, I treat these memories, together with the friendships I have made, in particular within MLAANZ, as having made the journey a very well worthwhile one. Much has changed over the years, but as the old saying goes, the more things change, the more they stay the same. Let me conclude by hoping that, as things change again in the years ahead, the foundations of our branch of legal practice will remain the same, and that our Association will go from strength to strength.