An International Maritime Dispute Resolution Centre[1]

Justice Neil McKerracher[2]

I sincerely thank the organisers for the invitation to speak today.

My discussion this afternoon is directed towards a plan which the Court has been developing for some months. The Court wishes now to embark upon further collaboration with members of the profession, allied professions and industry.

First, some context. Australia has over 10% of the world's sea trade by volume[3]. Australia is highly dependent on international maritime trade and always has been. It is the means of transporting much of our primary production in the form of agricultural, mineral, oil and LNG exports and in return receiving products manufactured overseas by our partners in trade. A massive number of international agreements support this activity. Further, both here and overseas the commercial relationships are underpinned by conventions and specific documentation expressly tailored for maritime trade.

Because Australia is geographically remote, sea trade is essential to our economy. Over 98% of Australia's trade by volume is carried by sea. Exports still drive the Australian economy even in quieter times. Thousands of individual ships call into Australian ports every year. Bulk carriers account for over half of the ships that visit Australia and about 45% of the port visits, with half of the world's fleet of cape size bulk carriers calling in Australian ports when the commodities exports are running at their peak. Container ships are

[1] Paper delivered at the 42nd Conference of MLAANZ in Perth, 17 September 2015
[2] Judge of the Federal Court of Australia (**FCA**)
[3] Australian Maritime Safety Authority annual reports

also very active, as well as general cargo vessels, oil tankers and vehicle carriers.

Within the Indo-Pacific region, the Minister for Defence noted in May this year that the single most significant trend in the world today is the continued shift of strategic and economic power to the Indo-Pacific region, the security and prosperity of which is vital to Australia's own security and prosperity. By 2050 almost half of the world's economic output is expected to come from the Indo-Pacific with the region being home to four of the world's top 10 economies.

These are truly exciting times to be involved with the maritime industry. An industry which cries out for efficient reasonably priced dispute resolution mechanisms. Against that backdrop, the remarks this afternoon will briefly review recent maritime jurisprudence in this Court, then the development of future plans, including the new National Court Framework (**NCF**) and its effect on maritime dispute resolution. I will then turn to discuss plans for the future, plans which are still evolving. They depend, for their success, on the community with whom the Court interacts, embracing the concepts that we seek to develop.

FEDERAL COURT OF AUSTRALIA – A MARITIME COURT

In at least the last 15 years, the quantity of international maritime trade into and out of Australia has given rise to much interest and activity in maritime law in the Federal Court. Some internationally significant decisions have emerged, on some occasions by Full Courts being swiftly assembled to exercise original jurisdiction and others by Full Courts on appeal. The time allotted today does not permit anything approaching a detailed exploration of them, but it would be remiss in speaking about future plans to ignore some significant past highlights, particularly in the interpretation of our relatively young *Admiralty*

Act 1988 (Cth) (**Act**). It is interesting in conducting that review that the State of Western Australia, in which this conference is presently being held, has become an increasing source of the exciting work in this area. The volume of trade from the two key ports in this State would suggest that that will remain the position.

A brief review of some of the cases in the last decade or so is a salient reminder of the challenges met in this vibrant area of the law in Australia. I will mention a few chronologically -

The 'Cape Moreton'[4] **and *The 'Maria Luisa'***[5]

The Full Court in both ***The 'Cape Moreton'*** and ***The 'Maria Luisa'*** grappled with the concepts of ship ownership and made clear that ownership for the purpose of s 17(b) and s 19(b) of the Act was ownership in a true proprietary sense. So in *The 'Cape Moreton'* this was classified as not extending to a party who remained on an international register but which had in fact sold the vessel.

Comandate Marine Corp v Pan Australia Shipping[6]

In The '*Cape Moreton'* a conclusion could be reached without confronting the views of the House of Lords expressed in 1998 in *The 'Indian Grace'*. It became necessary, however, to do so in ***Comandate Marine Corp v Pan Australia Shipping***. In *The 'Indian Grace'* the House of Lords had concluded that the notion of the *in rem* claim as distinct from *in personam* claim was a fiction which had outlived its usefulness. The House of Lords, in effect, equated the *in rem* claim with the *in personam* claim. A majority of the Full Court in *Comandate* refused to follow the House of Lords' decision in *The 'Indian Grace'*

[4] *Tisand Pty Ltd v Cape Moreton (a ship)* (2005) 143 FCR 43
[5] *Kent v SS "Maria Luisa"* (2003) 130 FCR 1 and *Kent v Vessel "Maria Luisa"* (2003) 130 FCR 12)
[6] [2006] FCAFC 192

and said that it was not the law of Australia and expressed the view, it must be said quite firmly, that it was wrong.

In ***The 'Global Peace'***[7]and importantly for the operation of the Act the Court made the point that it is not merely a *proceeding in which there is a claim for a lien* that gives the Court jurisdiction, but there must be "a proceeding *on a maritime lien*" giving rise to a claim *in rem* under the Act in this case a general maritime claim as described *inter alia* under s 4(3) (a) of the Act for damage done to a ship.

In '***Genco Leader***'[8] and ***The 'F V Taruman'***[9] the Full Court looked at the question of the separate arrest of bunkers under s 17 of the Act.

In ***The 'Boomerang I'***[10], it was held that the meaning of the word "owner" in s 19(b) did not include demise charterer. Special leave was refused.

In ***Strong Wise Ltd v Esso Australia Resources Pty Ltd***[11], limitation questions were dealt with. In December 2008, the "APL Sydney", whilst anchored in Port Phillip Bay, dragged her anchor and ruptured a submarine gas pipeline jointly owned by Esso and BHP. There was a consequential loss of gas and closure of onshore manufacturing plants for some three months.

It was held that the jurisdiction under s 25 of the Act (read together with s 22 of the *Federal Court of Australia Act 1976* (Cth)) is plenary. It is not therefore limited to making one order for one limitation fund. Rather, the power will extend to granting all the relief under the Limitation Convention to which the controversy between the parties gives rise.

---

[7] *Elbe Shipping SA v The Ship "Global Peace"* (2006) 154 FCR 439

[8] *Metall Und Rohstoff Shipping v the Owners of Bunkers on Board the ship MV "Genco Leader"* [2005] FCAFC 162.

[9] *Scandinavian Bunkering AS v The Bunkers on Board The Ship FV "Taruman"* (2006) 231 ALR 605

[10] *Comandate Marine Corp v The Ship "Boomerang I"* (2006) 151 FCR 403

[11] (2010) 185 FCR 149

Hako cases

More recently, the *Hako* appeals dealing with four West Australian arrests clarified an important issue relating to charterparties. (In *Ships* (*"Hako Endeavour", "Hako Excel", "Hako Esteem" and "Hako Fortress" v Programmed Total Marine Services Pty Ltd*[12]), the Full Court reaffirmed the principle in the *Socofl Stream* and resolved what some thought was a difference of authority by holding that the terms of the charterparty will determine whether taking actual re-possession is necessary to terminate a charter.

In ***Daebo Shipping Co Ltd v The Ship Go Star***[13], the Full Court reviewed the law regarding shipowner's liens, particularly the breadth of the term 'sub-freights'.

In the ***BULK Peace***[14](last year) the plaintiff initiated the arrest of the cape size *Bulk Peace* in Western Australia on a Tuesday.

The Full Court, on Saturday of the same week in Sydney, after hearing impressive argument, ordered the release of the ship, as the plaintiff had not proven ownership of *Bulk Peace* under section 19 of the Act. To establish "beneficial ownership a party must do more than merely assert a high degree of control by the party alleged to be beneficial owner. The right to sell the ship in question and keep the proceeds are elements that must be proven". This decision added to the body of work on the concept of control developed in several FCA decisions, including in *Gem of Safaga*.

[12] *Ships "Hako Endeavour", "Hako Excel", "Hako Esteem" and "Hako Fortress" v Programmed Total Marine Services Pty Ltd* [2013] FCAFC 21
[13] [2012] FCAFC 156
[14] *Shagang Shipping Co Ltd v Ship 'BULK PEACE' as surrogate for the Ship 'DONG-A ASTREA'* (2014) 314 ALR 230

The Ship CHOU SHAN[15]

The *CHOU SHAN* concerned the arrest in the north of WA of the *MV CHOU SHAN* in relation to claims arising from a collision in China involving the ship. The Full Court dismissed an appeal by the arresting party which sought to set aside orders staying its proceedings. The collision had occurred in China's exclusive economic zone and Australian jurisdiction had been seized upon by the arresting party through the mechanism of arrest at a time when a variety of liability proceedings were pending in China, where the owners of the arrested vessel had also applied to establish a limitation fund.

The Full Court held that the Australian test required a different approach to the issue of any juridical advantage (namely, obtaining a larger security for release) than that provided for in English law. The question was whether Australia was a *clearly inappropriate forum* and in considering that question, juridical advantage might be one only factor to consider. The risk of inconsistent verdicts was a greater factor in this instance.

In ***Yu v STX Pan Ocean Co Ltd***[16] and ***Kim v Daebo***[17] in 2013 both grappled with the important and complex questions of the interaction of the *UNCITRAL Model Law of Cross Border Insolvency and Maritime Law*.

In *Virtu Fast Ferries*[18] this year Virtu filed a writ *in rem* to obtain security for a claim against Austal, a West Australian shipbuilder in relation to a ferry constructed at the shipyard, and delivered in 2010. It was alleged that a patrol boat being built for the Commonwealth was a surrogate ship for the ferry.

[15] *CMA CGM SA v Ship 'Chou Shan'* (2014) 224 FCR 384
[16] *Yu v STX Pan Ocean Co Ltd (South Korea), in the matter of STX Pan Ocean Co Ltd (receivers appointed in South Korea)* [2013] FCA 680
[17] *Kim v Daebo International Shipping Co Ltd* [2015] FCA 684
[18] *Virtu Fast Ferries Ltd v The Ship "Cape Leveque"* [2015] FCAFC 58

As at filing, the patrol boat was about 95% complete and close to being delivered to the Commonwealth.

Austal applied for orders that the writ *in rem* was invalid. The Commonwealth also intervened in support.

The Full Court upheld the dismissal of the writ *in rem* noting that a ship under construction that has not been launched is not a 'ship' for the purposes of s 19(a) of the Act. Another cause of action pleaded, which was said to arise between launch and delivery of the ferry and which was based on implied terms of the construction contract was rejected as being not reasonably arguable.

In ***Sam Hawke***[19], delivered last Friday and relating to an arrest in Albany, Western Australia, the Court departed from the Privy Council decision in the *Halcyon Isle* on the enforceability of foreign maritime liens.

In the time available today, this is but a lightning excursion of some of the fascinating maritime law developments.

Without wishing to embarrass them I must stress that behind many of these decisions were the Chief Justice James Allsop AO and Justice Rares, each of whom takes a place most comfortably on the world stage of maritime judges.

SOME RECENT DEVELOPMENTS

To move to the second topic, there have also been ground breaking substantive and procedural changes in the last year or so designed to reflect and implement the new NCF. The design phase of the NCF commenced in August 2014 and continued through until May this year.

[19] *Reiter Petroleum Inc v The Ship "Sam Hawk"* [2015] FCA 1005

As part of the design, a National Practice Areas (**NPA**)[20] pilot program was introduced for commercial and corporations matters throughout the country. One of the themes underpinning the NCF is the central coordination of the Court's work so there is, as much as possible, a consistency of practice and consistency of approach by appropriately experienced and skilled judges.

All judges have been assigned to one or more of the NPA specialist groups, as members and possibly national or registry coordinators of those NPAs. Work in the NPA category is allocated to judges in the expectation that the creation of the NCF will enable them to deliver service in areas of strong expertise so that practitioners can anticipate when raising a matter in a particular area that there will be reasonable consistency in approach together with the skill and expertise able to most efficiently, expeditiously and inexpensively resolve a dispute.

Between May and August this year there was an allocation nationwide of all judge related matters. Through this period there has also been, under the coordination of the national and registry coordinators of each of those Areas, Practice Notes (**PNs**) dedicated to those particular NPAs.

There has been a central Practice Note (**CPN**), being a core guiding practice document applicable to all NPAs. This has been developed in consultation with the National and Registry NPA coordinating judges, with drafts being distributed to judges for consideration and input. A copy of the draft CPN is available today.

The specific NPA PNs developed for each NPA, in turn, hang off the CPN, with some degree of overlap, but with special adjustment for the particular NPA

[20] For a description of the NPAs, see http://www.fedcourt.gov.au/law-and-practice/national-court-framework/description-of-npas

concerned. Again, that has been developed in consultation with all judges in each NPA. The draft Admiralty PN is also available here today. It introduces certain new elements, particularly in areas of pleading (or not pleading), discovery and evidence.

The important communication, technical and Registry support underlying all this has been developed and enhanced through the same period of time. In particular, the Electronic Court Filing (**ECF**)[21] system has been developed to enhance and improve upon eLodgment.

In using ECF, the parties select an NPA and, if applicable, (not in admiralty) a sub-area for their filing. The National Operations Registrar (**NOR**) finalises the NPA and sub-area allocation, the filing party is notified of the actioning of the matter and then all ECF files are categorised within NPAs.

On a day-to-day basis, there are NCF allocations and other reports developed, including reports for national allocations; NPA judgments published in various areas; a judges' docket report as well as judges' calendars of commitments all designed to achieve, cumulatively, the most efficient handling of the Court's business.

Where does this fit in with maritime law?

To some extent, to those of you who have practised within admiralty in the last seven or eight years in the FCA, the matters I have described may seem unsurprising. Particularly in the area of maritime law, innovative steps (by the standards of any court in the world) have already been implemented.

[21] Prizes have been won by the Court for the ECF implementation for:

- May 2015: Inaugural National Archives Award for Digital Excellence
- August 2015: Records Management ACT branch Rob Barnett Award for 2015
- August 2015: RIMPA Awards - Innovation and Business Benefit categories – 2 prizes

For example, there is and has been for over 7 years, a dedicated admiralty website on the Court's webpage. It is replete with a vast array of materials necessary for smooth operation of an admiralty practice in the FCA and goes beyond simply Australian law. It has an ongoing updated record of a range of recent international decisions as well. This information is essential in the international domain of maritime work. Additionally, in the admiralty area there have been user groups operating in a number of cities on a regular basis, over and above specialist conferences such as the MLAANZ Conference we are enjoying today and tomorrow.

From a functional perspective, the efficiency of the ship arrest process in the FCA is one of which we are particularly conscious. Through a series of mechanisms, including memoranda of understanding with customs and other bodies and constant monitoring, the Court has been able to develop swift mechanisms for achieving both ship arrests and expediting ship releases. Arrests are obviously highly important issues when at times assets worth significant sums are being tied up and lying idle.

Regular workshops are conducted within the Court to facilitate detailed knowledge by our judges, registrars and marshals of their rights, obligations and duties in acting in relation to arrests. The judges also meet in workshops to present papers on topics of current interest.

Two of the underlying practical but ground breaking initiatives are electronic. The Court's ECF system is now substantially in use around Australia. This is not the occasion to discuss that facility in any detail, but you will no doubt be familiar with the benefits of a purely electronic file of documents. Amongst the many benefits at the Court's end are immediate access to Court files and documents on it by different authorised people within the Court at the same

time, the elimination of risks of lost or incomplete paper files and reduction in ongoing storage and archiving costs in terms of access during a hearing. The consumer saves shoe-leather, time and paper and gains a searchable record from his or her desk. The ECF project, which is now, as I say, well under way, is, in turn, leading to the Court's proposed eTrial project.

Secondly under the eTrial proposals, not only can court documents be filed electronically, but a wide range of evidence will be dealt with electronically during the actual trial process. This will replicate many of the ECF benefits but also enable access to evidence during the course of a trial from anywhere within Australia, but importantly, for international disputes (or even disputes involving international witnesses) such access should be available anywhere in the world using internet facilities. That leads me to the next topic.

WHAT COULD THE FUTURE HOLD?

The discussion so far has related to conventional litigation. We all know that the world of commercial dispute resolution is not confined to the conventional courtroom, nor is it simply national in content.

The work of the Federal Court is already highly international in character, much of it pertaining to Australia's commitment to international treaty obligations.

The important changes to the Federal Court's organisation under the NCF will enable, in effect, the creation of a national commercial court, an international maritime court, a national intellectual property court and a national tax court. The emphasis on these adjectives in the case of a maritime court is international.

It is a widely acknowledged feature of current commercial dispute resolution that a variety of mechanisms are deployed. Commercial arbitration,

international and domestic, maritime or other, is one such mechanism. A message which has been consistently conveyed by speakers from this Court is that in a modern and effective legal system, alternative dispute mechanisms, such as arbitration, do not compete as such with litigation. To the contrary, an effective commercial or maritime court, sensitive to the needs and benefits of alternate dispute resolution, such as arbitration, is an essential mechanism to ensure the effectiveness of arbitration as a tool.

The quality and legal culture of the Court, which is the seat of any arbitration, is critical. Australia has an impressive record in this regard[22].

There is no reason why the Court should not provide a broader maritime dispute resolution service. There is no reason why the Court should not provide a mechanism within Australia to expeditiously and inexpensively resolve *in personam* maritime claims with or without an Australian component. Many of these are now resolved outside of Australia. The Court can provide the judicial and administrative experience as well as the internationally leading electronic infrastructure.

In order for these objectives to be met, it will be necessary for the Court to work in harmony with Australian maritime stakeholders. The profession and the stakeholders with whom the Court partners will need to take ownership of new facilities and mechanisms which might maximise dispute resolution.

[22] See *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533; *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* (2013) 277 ALR 415, *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161, *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535, and *Eopply New Energy Technology Co Ltd v EP Solar Pty Ltd* [2013] FCA 356 per Foster J; and *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 468 per Allsop CJ, Besanko and Middleton JJ

The Court will seek to enter into memoranda of understanding with Australia maritime stakeholders to put in place procedures whereby the Court could then call upon respective members of those organisations for assistance as:

- referees;
- assessors;
- arbitrators;
- expert witnesses; and
- consultants etc

The Court would then seek to encourage parties involved in maritime contracting at any level to adopt a new broad dispute resolution clause in their international maritime contracts. These would give the parties a cascading list of options to be facilitated through and by the FCA, but with actual conventional litigation being the last resort only. Drafts of such clauses have already been prepared!

There are many important stakeholders in this process, such as many represented here today. We have identified and hope to approach you and others to gauge and hopefully capture your interest in the Court's plans.

There is another important aspect to this proposal. It is this. The scheme proposed will present a single unified national solution, nationally resourced. The world of electronics has broken down distance barriers, but a further objective is to ensure that there is a unified and un-fragmented national approach to this dynamic area of law and commerce. Such an approach will present the most effective outcome.

CONCLUSION

There is a real art to modern efficient dispute resolution.

The combination of the knowledge and experience of the FCA as a leading maritime court, taken with its world class program in modern, effective and adaptable dispute resolution can offer a benefit for the Australian and international community for rapid dispute resolution. While this would be conducted under the auspices or, at least, organised by of the FCA, it would aim for ADR, embracing the skills and very substantial expertise, both within the profession and the industry at large.

Just as Australia has been a world leader in abandoning archaic methods of commercial dispute resolution within courts in favour of more efficient, expeditious and less expensive outcomes, there is no reason Australian courts should not extend the benefit of that experience to a more general and adaptable general dispute resolution system.

There is no particularly obvious reason why Australian participants in this industry should need to have their disputes determined overseas.

This is not a goal that can be achieved over night and, indeed, shaping the direction of the program is one of the most important aspects of it. We look forward to sharing that journey with you.