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COMPARATIVE MARITIME LAW PROCEDURES AND
CHANGES TO ADMIRALTY LAW:
A NEW ZEALAND PERSPECTIVE

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Introduction

When speakers from two nations as close as Australia and New Zealand are participating in a session discussing comparative maritime law procedures and proposed changes to Admiralty law at a conference session for a body as strong as the Maritime Law Association of Australia and New Zealand, it comes as no surprise that the conference papers largely spring from common sources.

It also comes as no surprise that some of those sources also deal with similar procedural topics derived from other maritime nations such as Canada.

Thus, one of the sources underlying Justice Brian Tamberlin's paper on, "*Maritime Law Procedures and Federal Court Initiatives*" was one of the papers presented at MLAANZ's 2000 conference, that by the late Justice Richard Cooper of the Federal Court of Australia, on the "*Review of the Admiralty Rules in Australia and New Zealand*".

For my part, one of the sources on which I have relied is the companion paper on the same topic, but from a New Zealand viewpoint, presented at the same conference by Mr Tom Broadmore, then a New Zealand barrister and now a District Court Judge.

As is appropriate, this is a topic which recurs at MLAANZ conferences: Judge Broadmore noted that his paper, in its turn, had as one of its bases Associate Professor Paul Myburgh's 1995 MLAANZ conference paper on "*Harmonisation of New Zealand and Australian Maritime Law*", and Justice Tamberlin also invokes companion papers given at the 2002 MLAANZ conference by Justice Don Ryan and me on Trans-Tasman differences in Marshall/Registrar practice relating to ship arrests in our two countries.

New Zealand Admiralty Rules and Changes Since 1998

Judge Broadmore's 2000 paper noted that New Zealand had updated its Admiralty Rules only as recently as 1 February 1998.¹ Our current Rules, Part 14 of the New Zealand High Court Rules, are themselves an updated version of New Zealand's Admiralty Rules 1975² with some elaboration. Our Rules are what might be termed a fairly traditional set of rules covering normal Admiralty topics such as form and content of Admiralty proceedings, arrests, security, sales of arrested property, priority of claims, limitation and other procedural matters. There have been only a few changes to Part 14 over the eight years since its promulgation.

Such amendments as there have been – including the District Courts' Admiralty Rules – have been overseen by an informal sub-committee of the New Zealand Rules Committee comprising a member of the Rules Committee and Judges and MLAANZ members with a particular interest in the area.

¹ By High Court Amendment Rules 1997 (SR 1997/350) R 16 – [\[http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes\]](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)
The High Court Rules can be found under "Statutes", "Judicature Act 1908", and "Schedule 2".
² SR 1975/85.

In New Zealand the District Court has civil jurisdiction in claims up to \$200,000. Under its former name of the Magistrates Court, it had a set of Admiralty rules, which came into force on 1 August 1976, dealing principally with collision cases.³ Those rules were supplanted by Part 6D of the District Courts' Rules 1992 with effect from 1 February 2005 by incorporating all the other District Courts' rules of practice and procedure other than requiring Preliminary Acts in collision cases and also providing for limitation actions and ship inspections.⁴

To his 2000 paper, Judge Broadmore attached two appendices listing aspects of the New Zealand Rules not then reflected in the Australian Rules and vice versa. An updated version appears as an Appendix to this paper.

Leaving the provisions of the Australian Rules for which there is no New Zealand counterpart for others to comment upon, there have been three amendments of some substance to the New Zealand Rules in the eight years since their most recent promulgation.

First, as Judge Broadmore noted in his Appendix, R 772 provided, in 1998, for the service of proceedings on freight as well as on ships' cargo or other property on board. The Rule references to freight were deleted from 1 February 2003. The original reference to "freight" was probably anomalous and given the breadth of the balance of the Rule, revocation of the express reference to "freight" both produces harmony with the Australian Rules and rescinds a provision for service of *in rem* proceedings which was probably superfluous.

Secondly, and of some importance, R 776(4)(a)(vi) was added as from 1 February 2003. It requires the affidavit supporting an application for a warrant of arrest to include "any other relevant information known to the applicant at the time the application is made." It was inserted at the suggestion of the informal subcommittee to ensure that affidavits supporting applications for

³ Magistrates' Court Admiralty Rules 19976 SR 1976/195.

⁴ District Court Amendment Rules 9No.2) 2004, R 10, SR 2004/467. The Rules are R 461ZZM-R 461ZZT.

arrest contain all the information the applicant has, thus enabling the Court to assess the lawfulness of the arrest more adequately, both at the time the arrest is sought and on any application for the arrest to be declared unlawful. As this audience will be aware, traditionally affidavits supporting applications for arrests have often been economical in detail, because of the haste with which they are often prepared and the paucity of information available from arresting parties, often overseas. This change, however, at least means arresting parties must give the Court and the ship as much information as they have. That should not provide much of an additional handicap to those parties. It is, after all, no more than is required of an applicant for any other *ex parte* order. It is noteworthy that as Justice Tamberlin's paper observes, moves are apparently afoot to make similar amendments in Australia.

The other amendments since 1998 have been largely procedural but have gone some way towards freeing-up the New Zealand procedure. For instance, interveners claiming an interest in a vessel the subject of an *in rem* proceeding no longer need seek the leave of the Court to participate but only need to "file papers appropriate to the proceeding and serve those papers on every other party" under the new R 783(2).

Similarly, the procedural requirements for applications for directions concerning property under arrest have been modified so that the Registrar or any party to an *in rem* action may apply for such direction simply by giving notice to all other parties (R 776A).

Arrest Practice

Trans-Tasman differences in arrest procedures were discussed in the 2002 papers earlier mentioned.

Dealing first with indemnities and undertakings to Registrar/Marshall, R 776(4)(b) of the High Court Rules requires applications for a warrant of arrest to be supported by an "indemnity to the Registrar" in Form 73 and security to

the Registrar's satisfaction for fees expenses and harbour dues. Sub-rule 5 gives the Registrar power to require additional security from time to time.

Form 73 is addressed to the Registrar not the High Court and extends the Registrar's indemnity to "any liability arising out of or incidental to any act lawfully done by you" in executing the warrant of arrest. That provision was apparently intended to protect the Registrar against all actions involved in the lawful execution of a warrant not covered by the first limb of the indemnity. However, it is to be noted that the indemnity to the Registrar only extends to include expenses arising out of or incidental to the execution of the warrant as long as those actions are lawful and connected in some way with the execution as opposed to the arrest. That limitation has proved little handicap in practice because of the liberal interpretation accorded by the New Zealand courts to actions by the Registrar connected with the execution in some way.⁵

As the 2002 paper noted, the Court has a wide discretion as to the orders it may make under the Registrar's indemnity. Recovery has been permitted not just for traditional items such as wages and repatriation costs but have also included the Marshall's/Registrar's legal costs, insurance premiums, security for the ship and even dental, medical, physio and pre-natal costs incurred in long arrests.

One of the differences in practice, however, was that the R 776(4)(b) indemnity is in New Zealand to the Registrar, not to the Court, unlike what was then the position in Australia and England. It was noted that:

"... the elevation in Australia of the arrest warrant application into an undertaking to the Court is believed to lead to an understandable reluctance of Australian practitioners to become involved in such applications".

The 2002 paper also noted that, at that stage, the wording of the Australian undertaking differed from that required in New Zealand in that it was "in relation to the arrest" rather than "in the execution of the arrest", a wider wording and one including costs incurred whilst the vessel remained under

arrest.⁶ It now appears from Justice Brian Tamberlin's paper that amendments are close to promulgation in Australia to liberalise the practice in that regard.

In 2002 it was shown that the cost of arresting vessels in New Zealand was considerable cheaper than in Australia, largely because in New Zealand Registrars do not charge for the very considerable amount of time even short arrests can consume. Long arrests require continuing management over lengthy periods. But the only fees paid in New Zealand are an application fee on the warrant of arrest and commission for appraisal and sale, and these come nowhere near compensating the Registrar for the large amount of time spent on each arrest.

Although the Registrar in New Zealand routinely demands security before issuing the warrant for arrest, and calls for additional security at regular intervals thereafter, the amount of security provided, even in short arrests, can vastly exceed the costs to the Ministry of Justice for providing the service. Thus, in New Zealand, the taxpayer meets much of the cost of providing the service to the Maritime trade of the arrest and the management of ships.

Thus, though what actually happens in arrests and management is broadly similar on both sides of the Tasman, because the Australian Marshall charges the arresting party for the time spent on the file and insures to protect the Commonwealth and themselves, arrests are markedly more expensive in Australia than New Zealand.

Justice Brian Tamberlin's paper shows that steps are being taken in that regard but there still remains opposition to the spending of public money on the provision of a necessary service to the shipping trade.

Proposals for reform in New Zealand

⁵ *Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme"* [1997] 2 NZLR 110, *De Nationale Investerings Bank NV The Ship "Queeny Margareth"* (1997) 11 PRNZ 454, 457, *Wallace & Cooper Engineering (Lyttelton) Ltd v Orlovka* (1999) 14 PRNZ 213, 218, 220.

⁶ *Patrick Stevedores No.2 Pty Ltd v The Ship "Turakina"*; *Waitemata Stevedoring Services Ltd v The Ship "Rangitata" & Anor* (unreported) Tamberlin J [1998] 244 FCA 13 March 1998.

At the instigation of the New Zealand arm of MLAANZ, New Zealand's leading Admiralty academic, Associate Professor Paul Myburgh, in February 2004, produced what he described as a "modest" proposal to extend New Zealand's Admiralty jurisdiction.

His recommendations included :

- a) That claims for marine insurance premiums and P & I club calls should be enforceable by action *in rem* in New Zealand, as is understood to be the position in Australia, Canada and other jurisdictions.
- b) Extending the jurisdiction of the New Zealand courts to give necessary power they now lack relating to the enforcement or satisfaction of foreign or local maritime arbitration awards or Admiralty judgments *in rem* or *in personam*, again as is understood to be the position as in Australia and other jurisdictions.
- c) Perhaps most controversially, to replace the existing sister ship provisions in the Admiralty Act 1973 with an "associated ship" regime broadly based on the United Kingdom's proposal to the UNCTAB/IMO Committee on the 1999 Arrest Convention. That last, would significantly increase New Zealand's sister ship jurisdiction but not as far as in the South African Associated Ship legislation. In today's world, what is proposed should arguably be seen as an appropriate commercial extension to the Admiralty jurisdiction of any country. Currently, both our jurisdictions follow a traditional and fairly conservative approach to the sister ship arrest jurisdiction. That may be appropriate, since not all countries would wish to adopt the much more wide-ranging – and often controversial – exercise of that jurisdiction such as that sanctioned in South African law. But surely there must be a strong case for both our countries to consider enacting an "associated ship" régime similar to that

mentioned and there would appear to be significant advantages in both Australia and New Zealand collaboratively considering extending their sister ship provisions in similar ways. An organisation such as MLAANZ in both countries is ideally suited to pursuing this aim.

The proposal has been extensively considered by MLAANZ members in New Zealand. However, progress has been slow and the proposal is not yet ready for submission to the Ministry of Transport in our country.

Anti-Suit Injunctions

In the 2005 Dethridge Memorial address “*Anti-Suit Injunctions: Damp Squid or Another Shot in the Maritime Locker?*” : *Reflections on Turner v Grovit*⁷ it was remarked how embedded and uncontroversial was the anti-suit injunction jurisdiction (and its anti-anti-suit injunction counterpart) in Australia by comparison with New Zealand. Whilst Australian cases were numerous, the jurisdiction had only been invoked on one occasion in New Zealand. It was suggested that Maritime lawyers on both sides of the Tasman, particularly those in New Zealand, should see the anti-suit injunction jurisdiction as “Another Shot in the Maritime Locker”.

The jurisdiction continues to languish in New Zealand. As far as can be ascertained, no attempts to invoke the anti-suit injunction jurisdiction in the Admiralty arena have been commenced in New Zealand in the year since delivery of that address.

In Australia, however, both the anti-suit injunction jurisdiction and the anti-anti-suit jurisdiction appear to continue to generate litigation. Commenting on the recent decision in *Pan Australia Shipping Pty Ltd v The Ship “Comandate”*, contributors to the latest issue of the ANZ Mar LJ describe the anti-anti-suit injunction as graphically as the “fight” by Australian Courts to protect rights created under Australian legislation extra-territorially.⁸

⁷ (2006) 20 ANZ Mar LJ 4.

⁸ Wilmshurst & Lay Case Summary *Pan Australia Shipping Pty Ltd v The Ship “Comandate”* [2006] FCA 881 (unreported), Rares J, 22 June 2006; (2006) 20 ANZ Mar LJ 61.

It appears, therefore, that this is an area of Admiralty jurisdiction where practice in Australia far outstrips that in New Zealand.

Specialisation

An aspect of Justice Tamberlin's paper on which I wish to comment is the section on specialisation.

Specialisation on the part of Federal Court Judges, in the way he mentions, almost inarguably results in the more efficient despatch of Admiralty cases by Judges who are skilled, experienced and up-to-date in the area.

Nobody could cavil at Justice Tamberlin's comments on the need for Courts constantly to review their procedures to improve administrative efficiency and adjudication and minimize delay. Litigation can be the last, the most coercive – and, often, the costliest – form of dispute resolution. As he says, that particularly applies in the maritime area where time is so costly and international comparisons in performance so available. Courts' failures lead litigants to opt for other forms of dispute resolution. That risks, in the long run, downgrading the place of courts in the constitutional arrangements of all civilized nations.

As he demonstrates, one of the Australian responses has been specialisation in Judges with expertise in maritime matters and their involvement in Admiralty cases. The administrative means discussed in Justice Tamberlin's paper are admirable.

By contrast, apart from a few High Court Judges in Auckland who are specially appointed to preside in the Auckland-based national Commercial List, any form of judicial specialisation in the High Court of New Zealand is not permissible. The High Court is New Zealand's court of record exercising all general and inherent jurisdiction. All Judges are regarded as capable of undertaking any case that comes before it. Specialisation by Judges is regarded as inimical to that aim. Given the arguments collected by Justice Tamberlin in favour of specialisation and the benefits of the programme he describes, that may be a matter for regret.

Proposed Rule Changes

Justice Tamberlin's paper extensively reviews proposed Rule changes for his court in the Admiralty area.

For the reasons mentioned earlier, New Zealand is arguably in advance of Australia in the way its Rules already provide for a few of the alterations which Australia is apparently about to adopt.

But it must be said that the Federal Court is to be commended for its pro-active stance in a number of areas, particularly the International Ships and Port Facilities Security Code. There are moves in New Zealand in a number of these areas, particularly security, but they do not greatly involve the profession and do not involve Judges.

Judicial Education

One may confess to a considerable degree of envy to hear of the programme of continuing Judicial Education in Australia in the Maritime and Admiralty areas.

The New Zealand Law Society, various District Law Societies and the Institute of Judicial Studies run vigorous continuing education programmes in New Zealand for practitioners and Judges respectively. But there is nothing in the Maritime and Admiralty area, perhaps because the volume of such work in New Zealand and the number of practitioners specialising in it are comparatively modest.

However, as with MLAANZ in Australia, MLAANZ in New Zealand has recently organised tours aimed at expanding the understanding and experience of MLAANZ's members on practical aspects of their work. The tours have included ship visits to car carriers, a tour of the international air cargo terminal at Auckland International Airport, including inspection of a Boeing 747 freighter and invitations by Maritime New Zealand for MLAANZ's members to participate in discussion groups on maritime topics.

Conclusion

There remain some areas where New Zealand Admiralty law and practice is arguably ahead of that in Australia. But Justice Tamberlin's paper shows that Australia is both aware of the situation and is taking steps, not just to catch up but to surpass New Zealand. And in many areas Australia is already well ahead of us. It will be interesting to hear how Canada compares.

An organisation such as MLAANZ, particularly its New Zealand section, might do well to ensure its full participation and support in initiatives in the area.

APPENDIX 1

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

1. R 766 provides for the general practices of the Court to apply except as modified (unamended).
2. R 769 permits actions both *in personam* and *in rem* (unamended).
3. R 772 provided for service of proceedings on freight.

The three references to freight in the original R 772 were deleted from 1 February 2003 and R 772(5) was amended from the same date to provide that in an action *in rem* service is not required if the solicitors for a “person interested” in the defendant undertake to accept service or enter an appearance or give security.⁹

4. R 773 provides for appearances, including conditional appearances. (R 773(6))

R 773(14) was revoked from 1 July 2002.¹⁰ R 773(11) also provides the details to be furnished in appearances to include the name and capacity of the party filing the appearance and the Port of Registry of the vessel. The Rule says these details are to be *prima facie* evidence of those matters.

5. Of some importance, R 776(4)(a)(vi) was added as from 1 February 2003.¹¹ It requires the affidavit supporting an application for a warrant of arrest to include “any other relevant information known to the applicant at the time the application is made”. It was inserted at the suggestion of the informal subcommittee to ensure that affidavits supporting applications for arrest contain all the information the applicant has, thus enabling the Court to assess the lawfulness of the arrest more

⁹ By High Court Amendment Rules (No.2) 2002, (SR 2002/410), R 15(1) (2).

¹⁰ By High Court Amendment Rules (No.2) 2002 (SR 2002/132) R 13 from 1 July 2002. It formerly required the Christmas vacation to be disregarded in calculating the time for filing an appearance.

¹¹ By High Court Amendment Rules (No.2) 2002 (SR 2002/410) R 16.

adequately, both at the time the arrest is sought and on any application for the arrest to be declared unlawful.

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

R 776(12) provides for the issue of warrants of arrest in emergency situations. (unamended)

R 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. (unamended)

6. R 776A was added as from 1 February 2003.¹² It gives the Registrar or parties to an action *in rem* power to apply to the Court for directions concerning property under arrest, including its removal, and requires the applicant to give notice of the application to all parties unless the Court orders otherwise.

7. R 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. (unamended)

8. R 779 was more detailed in relation to caveats against release and payment; and, unlike the Australian Rules, in 2000 expressly provided for caveats against payment.

R 779(1) was substituted from 1 February 2003¹³ by revoking the necessity for the Registrar to enter a caveat against release or payment out of Court of money in Court in the Register.

That provision now appears in a new R 779(1A) and the new R 779(1B) requires caveators to serve copies of the caveat on every party to the action.

R 779(5) was revoked as from the same date.¹⁴

9. R 783 provided for interveners, so all parties claiming an interest in a vessel the subject of a proceeding *in rem* could advance that interest in the same action.

¹² By High Court Amendment Rules (No.2) 2002 (SR 2002/410) R 17.

¹³ By High Court Amendment Rules (No.2) 2002 (SR 2002/410) R 18(1).

¹⁴ By High Court Amendment Rules (No.2) 2002 (SR 2002/410) R 20.

The whole of R 783 was substituted from 1 February 2003¹⁵ by deleting the necessity for interveners to proceed only with the leave of the Court, sought *ex parte*, supported by an affidavit showing their interest and requiring them to enter an appearance in the action. The new R 783(2) simply says that “an intervener must file papers appropriate to the proceeding and serve those papers on every other party.”

¹⁵ High Court Amendment Rules (No.2) 2002 (SR 2002/419) R 20.