

# Sailing Beyond Jurisdiction Whilst Under Arrest: *AG Neptune* [2022] FCA 522 and *AG Neptune (No 2)* [2022] FCA 533

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## 1. Introduction

On 8 May 2022, the Federal Court of Australia handed down its judgment in *Viva Energy Australia Pty Ltd v MT AG Neptune* [2022] FCA 522 (the ‘First Hearing’). The case primarily concerned an application made pursuant to rule 50 of the *Admiralty Rules 1988* (Cth) for the *AG Neptune*, a vessel arrested pursuant to an *in-rem* action proceeding, to sail to a different port for bunkering.

Rule 50 provides that:

The court may, at any stage of a proceeding, make appropriate orders with respect to the preservation, management or control of a ship or other property that is under arrest in the proceeding.

On 10 May 2022, the Court issued a second judgment in *Viva Energy Australia Pty Ltd v MT AG Neptune (No 2)* [2022] FCA 533 (the ‘Second Hearing’), amending its orders issued in the First Hearing. The Second Hearing concerned the interpretation of section 22 of the *Admiralty Act 1988* (Cth) (the ‘Act’) and the ability for an arrested vessel to leave jurisdiction whilst moving pursuant to a rule 50 order.

Section 22 provides that:

- (1) Subject to subsection (4):
  - (a) initiating process in a proceeding commenced as an action in rem in the Federal Court may be served on a ship or other property; and
  - (b) a ship or other property may be arrested in such a proceeding; at any place within Australia, including a place within the limits of the territorial sea of Australia.
- (2) Subject to subsection (4), initiating process in a proceeding commenced as an action in rem in a court of a State or a Territory may be served on a ship or other property:
  - (a) if, at a time when the process was effective for service, the ship or property was within the locality within which the court may exercise jurisdiction – at any place within Australia, including a place within the limits of the territorial sea of Australia; or
  - (b) in any case – at any place within the State or Territory, including a place within the limits of the territorial sea of Australia that is adjacent to the State or Territory.
- (3) Subject to subsection (4), in a proceeding commenced as an action in rem in a court of a State or Territory, a ship or other property may be arrested at any place within Australia, including a place within the limits of the territorial sea of Australia.
- (4) Where the arrest of a foreign ship, or of cargo on board a foreign ship, would be inconsistent with a right of innocent passage that is being exercised by the ship, this Act does not authorise the service of process on the ship or the arrest of the ship or cargo.

## 2. Facts

### 2.1 The Arrival in Newcastle

On 10 April 2022, the Liberian-flagged crude oil tanker *AG Neptune* arrived at Newcastle, Australia. The ship was owned by OCM Maritime Flyer LLC, a Singaporean company, and demise chartered to *AG Neptune Ltd* (collectively, the ‘Owners’).

The *AG Neptune* had sailed from Kaohsiung, Taiwan, to Newcastle, stopping enroute in the Philippines for a crew change. Prior to the ship’s departure from Kaohsiung, 62,000 metric tonnes of diesel (the ‘Cargo’) was loaded for delivery to Viva Energy Australia Pty Ltd (‘Viva Energy’) in Newcastle. The Cargo was valued at approximately US\$52.4 million.

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Shortly after the ship's arrival in Newcastle, Viva Energy inspected the Cargo and reported that all of the diesel carried onboard was contaminated by seawater. The contamination-related damage was estimated at US\$41 million.

In response, Viva Energy commenced an action *in rem* against the Owners and applied for the *AG Neptune*'s arrest.

## 2.2 The Arrest

On 3 May 2022, the *AG Neptune* was arrested off the coast of Newcastle by the Australian Border Force. For several days after its arrest, the vessel stayed adrift near the Port of Newcastle.

On 7 May 2022, an inspection conducted onboard the *AG Neptune* revealed that the ship was running low on fuel and required immediate bunkering. The inspection report estimated the remaining fuel to last for no more than twenty-four hours, after which the vessel would lose power and become a dead ship.

## 2.3 The Move to Gladstone

The *AG Neptune*, as described by Justice Stewart, 'is a large, specialised and unwieldy vessel'.<sup>2</sup> It is 244 metres in length and has a gross tonnage of 57,221 tonnes. Given its size, the ports at which the *AG Neptune* could take bunkers are limited, and the Port of Newcastle had no suitable options. Several alternative locations for bunkering identified by the Owners included Gladstone, Brisbane, Botany Bay, Port Jackson, and Port Phillip Bay.

The Owners proposed Gladstone as the most suitable port and applied for orders permitting the *AG Neptune* to sail to Gladstone whilst under arrest for immediate bunkering and further inspection. This gave rise to the First Hearing.

In the First Hearing, the Master advised the Court that the vessel could sail to Gladstone without leaving Australian territorial waters. This soon proved to be untrue, as several navigational hazards were identified enroute to Gladstone – namely in the Breaksea Spit and Great Barrier Reef areas – which required the vessel to temporarily leave Australian territorial waters. As such, the Owners made an urgent application for an amendment of the orders issued in the First Hearing to account for this deviation. This gave rise to the Second Hearing.

## 3. The Court's Decisions

Justice Stewart, as the sole judge of the Court, permitted both applications.

In the First Hearing, the Court gave orders for the *AG Neptune* to sail to Gladstone 'without deviation' and under the condition that the vessel shall, at all times during its voyage, remain within Australian territorial waters.<sup>3</sup>

In the Second Hearing, the Court gave amended orders permitting the vessel to temporarily leave Australian territorial waters at certain points during its voyage, to such an extent that 'safe navigation may in the Master's judgement reasonably require'.<sup>4</sup>

### 3.1 The First Issue: Vessel Sailing When Under Arrest?

In the First Hearing, the Owners made an application pursuant to rule 50 of the *Admiralty Rules 1988* (Cth) for orders permitting the *AG Neptune* to sail to Gladstone for bunkering whilst under arrest.

In interpreting the courts' powers under r 50, Stewart J reviewed the existing case law and divided the jurisprudence of r 50 into two categories: permitting an arrested vessel to sail to continue trading; and permitting an arrested vessel to sail to ensure its safety.

For the first category, Stewart J referred to *Iron Shortland*,<sup>5</sup> in which a vessel arrested at Port Hedland was permitted to sail some three thousand nautical miles to Port Kembla and engage in trade – namely unloading

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<sup>2</sup> *AG Neptune* [2022] FCA 522, [2].

<sup>3</sup> *AG Neptune* [2022] FCA 522.

<sup>4</sup> *AG Neptune (No 2)* [2022] FCA 533.

<sup>5</sup> *Iron Shortland* (1995) 59 FCR 535.

105,000 tonnes of iron ore.<sup>6</sup> The reasoning behind this decision was twofold: firstly, to ensure that the charterer would be capable of providing security for the vessel (i.e., protecting the financial interests of the parties involved), and secondly, to prevent a ‘grave shortage of iron ore’ at Port Kembla (i.e., public interest).<sup>7</sup> Stewart J then looked at *Martha II* and *Boomerang I*,<sup>8</sup> in which the arrested vessels were allowed to sail to different ports and discharge cargo, in order to protect the financial interest of cargo owners and make the judicial sale of the vessel easier.<sup>9</sup>

For the second category, Stewart J referred to *Samsun Veritas*.<sup>10</sup> In that case, the vessel was arrested at Port Hedland and carried 140,000 tonnes of iron ore. Due to adverse tidal conditions at Port Hedland, there was a serious risk of the vessel running aground, causing significant financial losses for the shipowner and cargo owner, as well as safety hazards for other ships at Port Hedland. Upon application, the vessel was permitted to sail to Port Dampier to seek alternative anchorage.

Based on these cases, Stewart J noted the broadness of r 50 and the courts’ preference for factors such as practicality, convenience, and costs.<sup>11</sup> His Honour also made note of the courts’ emphasis on protecting the ‘public interest’ and the ‘safety of the vessel’ when exercising its r 50 powers.<sup>12</sup>

Applying this multifactor consideration to the present case, Stewart J made four key observations.

Firstly, there was a real maritime danger of the *AG Neptune* losing power and becoming stranded in the open sea.<sup>13</sup> This presents a navigational hazard for vessels passing by and, coupled with the inflammable cargo onboard, a safety hazard for the ship and the crew.

Secondly, in order to stay adrift after its diesel fuel depletes, the ship would need to burn heavy fuel oil, which is not permitted under MARPOL<sup>14</sup> and would raise environmental concerns.<sup>15</sup>

Thirdly, Stewart J was satisfied that Gladstone was the most desirable port for bunkering, considering the availability of bunkers and the convenience of anchoring without any port charges at Gladstone.<sup>16</sup> Further, His Honour was satisfied that the cost of taking bunkers at Gladstone – which is significantly more than the other options (i.e., approximately US\$500,000 to fully re-fuel the ship) – would not adversely affect the plaintiffs, as the Owners agreed to pay such costs at first instance.<sup>17</sup>

Lastly, His Honour was satisfied that there was no need for the vessel to leave jurisdiction at any point in the journey and that there was minimal risk of it escaping jurisdiction,<sup>18</sup> especially given the fact that the vessel was heavily loaded with cargo and in dire need of refuelling.<sup>19</sup>

Based on these factors, the Court issued orders allowing the *AG Neptune* to sail to Gladstone, whilst remaining within Australian jurisdiction at all times.

### 3.2 The Second Issue: Arrested Vessel Sailing Beyond Jurisdiction?

In the Second Hearing, the Owners applied for amended orders permitting the vessel to temporarily leave Australian territorial waters enroute to Gladstone – for approximately two hours – due to navigational hazards.

In addressing this issue, Stewart J made two important observations on the status of arrested vessels under section 22. Firstly, His Honour held that s 22 does not require an arrested vessel to remain within Australian jurisdiction at all times after the arrest.<sup>20</sup> Secondly, there is nothing in s 22 or the Act which suggests that an arrest is

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<sup>6</sup> *AG Neptune* [2022] FCA 522, [22].

<sup>7</sup> *Ibid* [26].

<sup>8</sup> *Martha II* [1996] FCA 136; *Boomerang I* [2006] FCA 859.

<sup>9</sup> *AG Neptune* [2022] FCA 522, [23]-[25], [30].

<sup>10</sup> *Samsun Veritas* [2008] FCA 1546.

<sup>11</sup> *AG Neptune* [2022] FCA 522, [32].

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid* [34].

<sup>14</sup> *Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973*, opened for signature 17 February 1978, 1340 UNTS 61 (entered into force 2 October 1983).

<sup>15</sup> *AG Neptune* [2022] FCA 522, [34].

<sup>16</sup> *Ibid* [14].

<sup>17</sup> *Ibid* [35].

<sup>18</sup> *Ibid* [36], [39].

<sup>19</sup> *Ibid* [35].

<sup>20</sup> *AG Neptune (No 2)* [2022] FCA 533, [7].

automatically invalidated upon the relevant vessel leaving Australian jurisdiction.<sup>21</sup> To this end, His Honour was satisfied that permitting the *AG Neptune* to temporarily exit Australian territorial waters whilst travelling pursuant to court orders would not invalidate its arrest.

Nevertheless, Stewart J acknowledged the general proposition that the arrest of a vessel may be ‘jeopardised’ if the ship was permitted to leave the territorial waters,<sup>22</sup> particularly in circumstances where the vessel permanently escapes jurisdiction or retrospectively challenges its arrest after leaving.

However, Stewart J qualified this concern by noting that the demise charterer had undertaken to sail to Gladstone without deviation or any attempts to escape and challenge the validity of the ship’s arrest.<sup>23</sup> Further, the shipowner agreed not to issue any contradictory orders to the charterer or the Master during the ship’s voyage to Gladstone.<sup>24</sup> Lastly, His Honour was satisfied with the cooperative attitude of the Master and his transparency in dealing with the Marshall, which was also testament to the character and attitude of the Owners.<sup>25</sup>

Given the above considerations and the existence of genuine navigational concerns in the voyage, the Court made orders permitting the vessel to temporarily leave Australian jurisdiction whilst sailing under arrest.

#### 4. Commentary

The significance of the two *AG Neptune* judgments is twofold.

Firstly, Stewart J’s decision in the First Hearing clarifies the scope and application of rule 50 of the *Admiralty Rules 1988* (Cth). It reconciles the existing case law concerning r 50, which, to date, are mostly unpublished<sup>26</sup> and provide no uniform approach. In doing so, Stewart J drew the clear distinction in the courts’ approach to permitting an arrested vessel to move for the purpose of trading and to move for the purpose of protecting the ship and the public interest.

The Owners in this case did not apply for an order to allow the vessel to continue trading, so this legal principle was not reviewed in depth. On the movement of an arrested vessel for safety, Stewart J’s reasoning shows the emphasis placed by the court on several key factors. Of paramount importance are the prevention of maritime hazards (involving property and persons), the public interest (including the financial interest of cargo owners), and the risk of the vessel escaping jurisdiction.

Secondly, Stewart J’s reasoning in the Second Hearing provides a useful development to the law concerning the movement and jurisdictional constraints of arrested vessels. His Honour offered a more liberal interpretation of section 22 – in that an arrested vessel is not required to remain within Australian jurisdiction at all times. This is contrasted with the narrower approach taken by the UK courts,<sup>27</sup> and suggests that remaining within jurisdiction is not an absolute pre-condition to receiving permission to sail under r 50.

One significant factor in Stewart J’s decision to permit the *AG Neptune* to sail temporarily beyond Australian jurisdiction whilst under arrest was the Owners’ decision to make an unconditional appearance on behalf of the vessel for the *in-rem* proceeding. This essentially provided a “safety net” for the plaintiffs and sets the present case apart with earlier decisions, such as *Socofl Stream*,<sup>28</sup> where the court denied an application to sail under arrest due to a high risk of the vessel absconding and the shipowner’s refusal to appear before the court.<sup>29</sup>

However, this case certainly does not allude to the courts’ “readiness” to simply permit any arrested vessel to leave Australian jurisdiction for the purpose of moving whilst under arrest. As the jurisprudence shows, there are varying considerations that play into r 50 applications and orders. Nonetheless, this decision provides clarity to the courts’ approach in exercising its r 50 powers and shows a potential willingness from the courts to adopt a more flexible interpretation of s 22.

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid* [11].

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid* [13].

<sup>26</sup> *AG Neptune* [2022] FCA 522, [21].

<sup>27</sup> See, for example, *The Bazias 3* [1993] 1 Lloyd’s Rep 101.

<sup>28</sup> *Socofl Stream* [1999] FCA 42.

<sup>29</sup> *AG Neptune* [2022] FCA 522, [29].