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Frank Stuart Dethridge Memorial Address

### NOT A LAND GIRT BY BEACH AND THE IMPORTANCE OF SEEING MARITIME LAW AS THE LAW OF AN ACTIVITY

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It is a great honour to be asked to deliver this address in memory of a great and influential maritime lawyer, and on a second occasion. I thank the Association for the invitation and the honour.

In 2006, I spoke about international commercial law, maritime law and dispute resolution and the place of Australia and New Zealand in the Asia Pacific region in coming years. I will touch on some parts of what I then said. I wish to emphasise some themes which bear reinforcement because of their importance, in particular to the administration of justice, both curial and arbitral, and to the coherent development of maritime law.

The enjoyment of being here in this room is that I will feel your understanding of what I am seeking to say. That so many Australian lawyers, including judges, would find this discussion esoteric or antiquarian, when in fact it is human and practically real and important to the nation, is the living testament to the consequences of the failure to appreciate the significance of the Admiralty and maritime grant in s 76(iii). For so many Australians, including Australian Governments and judges, it is as if we are not a land girt by sea, but a land girt by beach. But we are not. We are girt by sea. Hence, part of the title to this address.

Initially, I had intended today to deal in detail with Australia's constitutional structure and its impediments to a coherent and cohesive body of national maritime law. I have written and spoken a number of times about the similarity, indeed the almost identity, of the words of section 76(iii) of the *Australian Constitution* and the relevant part of article III section 2 of the *United States Constitution*.<sup>1</sup> The subject is fascinating. I will limit myself to a few comments as a preface to my subject today.

Full appreciation of the divergent courses of United States and Australian authority from almost identical words in the two Constitutions, and any hope of a future High Court rectifying the position require a recognition of the historical differences between the two federations: the United States, the new federal Republic, self-aware of its independence wrenched from the hands of a great Imperial power, aware, as an Atlantic-facing maritime power, of the constitutional, national and international importance of maritime law as something distinct and apart from the common law, and, as the 19<sup>th</sup> and 20<sup>th</sup> centuries progressed, alive to the need for coherent national regulation of the great inland trading waterways of the American continent; Australia, a new federal compact of subordinated quasi-colonial status, not independent, with maritime affairs being the domain of the superior Imperial world maritime behemoth until the physical and financial catastrophes of the two World Wars and decolonisation thereafter.

By 1911, there was a clear body of United States Supreme Court jurisprudence which stated that, although article I had not enumerated Admiralty and maritime law as a subject upon which Congress was empowered to legislate, that power must exist in Congress if article III section 2 gave Federal Judges and the Supreme Court authority to hear such cases and to develop and shape the general maritime law of the United States in so doing. The anticipation<sup>2</sup> that such clear United States authority would be followed<sup>3</sup> was the basis for early maritime legislation

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<sup>1</sup> Richard Cooper Lecture, 6 September 2006; FS Dethridge Memorial Address, 28 September 2006; William Tetley Lecture, 2009; 'Maritime Law—The Nature and Importance of its International Character' (2009–2010) 34 *Tulane Maritime Law Journal* 555 (also published in (2010) 84 *Australian Law Journal* 681; 'The Influence of the United State on Admiralty Law in Australia' (Speech, USMLA and MLAANZ Fall Meeting 2–7 December 2011. See also *Samson Maritime Pty Ltd v Aucote* (2014) 229 FCR 125, 136 [29] (Full Court).

<sup>2</sup> See Harrison Moore, *The Constitution of the Commonwealth of Australia* (Legal Books, first published 1910, 1997) 562.

<sup>3</sup> *D'Emden v Pedder* (1904) 1 CLR 91, 113.

not limited by the terms of sections 51(i) and 98. This basis was rejected in *The Kalibia*<sup>4</sup> with a casual, almost contemptuous, brutality stiffened by deference, indeed expressed subservience, to Imperial authority over the subject matter of maritime law.<sup>5</sup> Since Australia has become an independent nation state, no serious attempt has been made to challenge *The Kalibia*, notwithstanding the clearest of hints by Gummow J in his commanding judgment at first instance in *The Shin Kobe Maru*<sup>6</sup> and the passing of the Australia Acts.

The limits of reliance upon sections 51(i) and 98 as the basis for a coherent maritime legislative regime are well-known,<sup>7</sup> though with external affairs, the corporations power and other powers a palimpsest has been created. The opportunity of coherent national authority over maritime law beyond the low watermark given in 1975 by the *Seas and Submerged Lands Act Case*<sup>8</sup> died with the Commonwealth giving back the coastal waters to three miles to the states.<sup>9</sup>

The consequences of this approach to the *Constitution* were not limited to the technical reach of national power. It has affected how Admiralty and maritime law has been and is conceived and appreciated in Australia, compared to the United States. In the United States, maritime law was entwined with Admiralty and maritime jurisdiction as a constitutional conception. Its coherence and separate character were thus recognised as undeniable and assured. In Australia, no such appreciation of the relationship between jurisdiction and a body of law exists, in large part because of a lack of appreciation of the distinctiveness and separate coherence of maritime law that I will discuss today.

I will discuss the nature of maritime law, why it is different, and why it is so important to the administration of justice in this field to recognise its difference and its historical and contemporary sources: not merely as a matter of legal history, but as part of the coherent and stable development of the law and of the Australian legal system in this field.

The *Admiralty Act 1988* (Cth) was the product of a truly remarkable Law Reform Commission report. Amongst its other achievements, it placed Admiralty and maritime jurisdiction firmly within the cradle of federal jurisdiction and the grant of Commonwealth (viz national) Parliamentary authority in s 76(iii). This is its proper place: the jurisdiction of the nation and of national Courts. The importance of this foundation is that it placed it within the power of Parliament to create a national shipping court. Australia had been served well by state supreme courts before 1988 in administering the less than simple colonial Admiralty jurisdiction. The skill of state Judges saw the profession bring its work to the supreme courts even after 1988.

With the move of Sheppard J to the Federal Court, the disruption from the dissolution of the Soviet Union and economic difficulties in the 1990s in the shipping industry, the often intense work of arrests came to the Federal Court under his experienced hand. Upon his departure, however, Judges with little or no experience in the field of maritime law and shipping had to be trained up. This was not always an easy experience, for bench or bar.

When I arrived at the Federal Court in May 2001, I was aware of the growing dissatisfaction within the profession at the patchiness of specialised maritime and shipping knowledge and experience in the Court and the diffuse spread of the limited volume of work intentionally randomly, amongst dockets of judges around the country. There were some deeply experienced maritime lawyers, most especially the late Richard Cooper: a master of maritime law. But, as I came to learn, the work was diffusely spread among Judges, preventing development of judicial experience even in those (not all) with an interest in the subject. Too often, difficult cases of arrest or carriage of goods or charterparties would fall to Judges who would sometimes ask: What is so special about maritime law that permits arrest? Or what is the difference between a voyage charter and a time charter? Patience, at times, wore thin.

There was a very strong feeling in the Court in the early years of this century that every Judge of the Court had some judicial right to hear cases in all aspects of the Court's jurisdiction. As a junior Judge I never subscribed to this theory. It is a sentiment that has not died out. It is wrong. There is no personal right to hear cases. It is a duty to serve.

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<sup>4</sup> *SS Kalibia v Wilson* (1910) 11 CLR 689.

<sup>5</sup> See S Derrington and M White, *Australian Maritime Law* (Federation Press, 4<sup>th</sup> ed, 2020) 30–1.

<sup>6</sup> (1991) 32 FCR 78, 86–7.

<sup>7</sup> Australian Law Reform Commission, *Civil Admiralty Jurisdiction*, (Report no 33, 23 November 1986) 49–50.

<sup>8</sup> *New South Wales v Commonwealth* (1975) 135 CLR 337.

<sup>9</sup> See M White, *Australian Off-Shore Laws* (Federation Press, 2009).

In late 2003 or early 2004, leading members of the Admiralty profession in Sydney took matters into their own hands. They formed a delegation to Chief Justice Spigelman. They explained to him that the Federal Court was not dealing with the jurisdiction in a satisfactory way. They asked him to give the profession two Admiralty Judges, so designated. They said that they did not care what experience in Admiralty matters those judges had at the moment. They, the profession, would train them through the experience of the cases to be filed in the Supreme Court.

The profession had not wanted much: just consistent treatment by a small cohort of judges to manage the not large volume of work, judges who could display, with confidence, their skill over, and knowledge of, a special branch of the law, so necessary in the light of the fact that the subject, often in urgent interlocutory applications, was the seaborne commerce of the nation involving ships and cargo sometimes worth tens or hundreds of millions of dollars.

To say that Chief Justice Spigelman was pleased would be a significant understatement. When I next saw him, he looked like the cat that had swallowed the cream, as well he might. A formal announcement with the profession was made by the new Admiralty Judges—Justices Palmer and Nicholas—of the new arrangements, and of the reasons for them. Thereafter, work, at least in the New South Wales District Registry, flowed into the Supreme Court, at least for a time. Some of us on the Court, saw this (as it was) as a deep and public humiliation of a national superior court which could have been, and should have been, Australia's National Shipping Court.

This humiliation spurred Justice Cooper and I to draft a National Admiralty Arrangement whereby *any* shipping or shipping related matter (including, for example, employment law, seafarers' compensation and judicial review proceedings) would be heard by a group of thirteen designated Admiralty and maritime Judges and the Chief Justice: at first instance and on appeal. There were to be at least two Judges in each Registry so that an arrest anywhere around the country could always be managed by a local Judge, though there were to be four in Sydney and three in Melbourne because of the somewhat greater volume of the work in those Registries. This draft arrangement was put to the Chief Justice who agreed to put it to the Judges at the next Judges' meeting. Tragically, before that occurred, Justice Cooper passed away. The suggested new arrangement however was approved at the next Judges' Meeting in early 2005.

A shipping website was set up and intensive maritime and shipping education which had been begun the previous year continued. This education was of Judges, Registrars and Marshals with the particular assistance of (then) Professor Derrington and Professor Edgar Gold, a former master mariner on the Zim Line and a Queen's Counsel from Canada, Captain Mike Bozier and Captain Ken Ross. Marshals' workshops were reinvigorated, and the Marshal's Handbook was brought up to date and developed. Memoranda of understanding were entered into with port and maritime authorities around the country.

The Court by mid to late 2005 had become a true National Shipping Court with developing skill, expertise and enthusiasm from Registrars, Marshals and Judges.

The work returned to the Court.

It is the Judges' and the profession's responsibility to ensure that such a national structure remains in existence. Never again should the profession be required to abandon the Court because it is not meeting the needs of the shipping community and the Australian people. The Admiralty and maritime Judges of the Court and the profession should remember this history.

A national maritime court, preferably nestled in a court of broader jurisdiction, such as the Federal Court, to avoid isolation and sterility, is important, and it is necessary. It is not a piece of vanity. But why is it necessary? It is not just a question of good or convenient judicial administration. It is necessary because such a court deals with the lifeblood of world trade: seaborne commerce by reference to a body of law, distinct from the general terrene law, with its sources in international and maritime activity.

This country, with its continental size and vast coastline from the Pacific to the Indian Oceans, from the Tropics, Asia and Melanesia to the expanses of the Southern Ocean that lead to Antarctica, with its vast maritime task of maritime safety and surveillance and of the transport of exported commodities, has the capacity to be the home of maritime legal expertise and dispute resolution and it is important to its ultimate well-being that it becomes so.

A national maritime court is also necessary because **maritime law is a distinct branch of the law** rooted in maritime and international activity. It is not, at root and in source, the law of a place or a society. It is the law of

maritime activity and of seafaring commerce. The great Professor Wigmore in his beautiful work *A Panorama of the World's Legal Systems*<sup>10</sup> placed it as one of sixteen legal systems in the world. This is not antiquarian fancy; it is legal reality. Wigmore recognised that maritime law was not the law of a place or of a people—from shared communal existence, shaped by place and climate, in which there will be commonalities with, and differences from, other national laws that are studied by the comparative lawyer. Ultimately, laws of societies grow from the roots of the group and of the place. Comparative law can be seen as linking these different trees growing from the earth of separate peoples and places. Maritime law is quite different. It is the law of maritime activity and of the humans who engage in it across the world. The metaphor of its manifestation in national law is the rising of the national spring from the common underlying stream of principle below.

Let us pause here for a moment. What do I mean by a **distinct branch of the law**? I will begin my explanation and exploration by a diversion which will give you an appropriate frame of reference for thinking.

In 1970, the Parliament of New South Wales legislated for Judicature Act reform, bringing together the separate Equity and Common Law Courts into the Supreme Court.<sup>11</sup> Whether it has been the intellectual power of the authors of Australia's leading text on Equity, or the quality of the High Court's Equity jurisprudence in the Mason High Court, or deeper societal reasons in the development of the law, in Australia, equitable doctrines and principles have remained vibrantly independent from the common law including in commercial law, their growth rudely strong to meet contemporaneous social and commercial problems.

When Lord Diplock, speaking in 1978 for a bench of Law Lords with not one Chancery lawyer in *United Scientific Holdings Ltd v Burnley Borough Council* ('*United Scientific*'),<sup>12</sup> declared the effect of the 1873 Act to have 'fused' the substantive and adjectival law of Common Law and Equity, a vigorous debate began, involving the repudiation of this as a form of legal heresy. The trenchancy of the views in *Meagher, Gummow and Lehane* (of whatever edition) are well-known. Heresy, wherever it occurred, was exposed without mercy.

I do not wish to enter the fray of that campaign. But it is beyond question that Equity has survived and lives **as a branch of the law**, auxiliary to, concurrent with and at times exclusive of the common law. It has different roots, different informing themes and a different manner of application;<sup>13</sup> yet, of course, it is part of and intertwined with the whole Australian general law, or, depending on the context in the use of the expression,<sup>14</sup> part of the one common law (that is general or judge-made law) in and of Australia. Just so with maritime law.

Why do I refer to Lord Diplock in *United Scientific* in 1978 and the Fusion Fallacy debates? Because, immediately after declaring the fusion of the substantive and adjectival law of Common Law and Equity, Lord Diplock continued, '[a]s well as those [substantive and adjectival laws] administered by Courts of Admiralty, Probate and Matrimonial Causes.'<sup>15</sup> The defence of Equity, is the defence of Admiralty and maritime law.

In fact, six years earlier, in *The Tojo Maru*,<sup>16</sup> Lord Diplock, in an earlier battle in his war with Lord Denning, had sought to stamp out, as antiquarian, the separateness of maritime law, and arguably its sources.

I do not wish to begin a second front of the Fusion Fallacy Wars; nor is this the place to essay the full significance of these views of Lord Diplock in *The Tojo Maru* and *United Scientific* on English maritime law, though the potential for harm can be seen in *The Indian Grace*<sup>17</sup> and its astonishing abandonment of over a century of Admiralty principle. I do, however, wish to challenge the legitimacy of any approach to the development of maritime legal doctrine which fails to accord maritime law a degree of particularity and separate coherence drawn principally from its maritime sources and its international or transnational and maritime character. The proper recognition of maritime law's international and maritime sources and character, influenced by international principle, practice, organisational authority (public and private), and conventions, by marine factors, by the civil law, and by equity and fair treatment affects: the framing of national law, the formulation of legal doctrine, the framing and interpretation of international conventions, the regulation and administration of maritime affairs, and the resolution of maritime disputes.

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<sup>10</sup> JH Wigmore, *A Panorama of the World's Legal System* (St Paul West Publishing, 1928) vols 1–3.

<sup>11</sup> See *Supreme Court Act 1970* (NSW); *Law Reform (Law and Equity) Act 1972* (NSW). See generally *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (any ed) ch 2.

<sup>12</sup> [1978] AC 904 ('*United Scientific*').

<sup>13</sup> See *The Juliana* (1822) 2 Dods 504, 522; 165 ER 1560, 1567, discussed in *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 118–9 and in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 268 [271] (Allsop CJ).

<sup>14</sup> Such as in s 80 of the *Judiciary Act 1903* (Cth).

<sup>15</sup> *United Scientific* (n 12) 925.

<sup>16</sup> [No 2] [1972] AC 242 ('*The Tojo Maru*').

<sup>17</sup> [No 2] [1998] AC 878 ('*The Indian Grace*').

Perhaps it is best to begin with what maritime law is not, at least now. It is not a supra-national legal system or body of law binding on nation states. That was made clear in England by Lord Diplock in *The Tojo Maru* and in Australia by a High Court led by Gleeson CJ in *Blunden v Commonwealth* ('*Blunden*').<sup>18</sup> I will return to both cases later. Both stand for the proposition, fully articulated (though in a more nuanced way) by the United States Supreme Court in the 19<sup>th</sup> and 20<sup>th</sup> centuries<sup>19</sup> that there is no supra-national binding maritime law. But that is not the end of the matter, nor is it the present point. It is important in Australia to appreciate that *Blunden* does not, however, stand for the proposition that maritime law is not **a distinct branch of the law** with its sources in a separate internationally recognised body of maritime principles rooted in common activity of merchants and seafarers over centuries informed by custom, convention, equity and fairness.

A little history is necessary, not to amuse the antiquarian streak in those who have it, but to remind us of the sources of this law we practise. Maitland, the most brilliant of English legal historians, said of legal history, '[t]oday we study the day before yesterday, in order that yesterday may not paralyse today, and that today may not paralyse tomorrow.'<sup>20</sup>

Wigmore, in his *Panorama*, and others have referred to the binding customs and laws governing maritime and trading activity from the Egyptians, the Rhodians, the Greeks and Romans, the Codes of the City States of Amalfi, of Venice and of Genoa, the Laws of Oleron, The Black Book of the Admiralty and the Wisby and Hansa Sea Laws. All were expressed as the customs and laws of the sea, not of princes. There was a consistency, even unity, in evolution as a distinct and continuous body of maritime law.<sup>21</sup>

Lord Mansfield in the 18<sup>th</sup> century referred to maritime law as not the law of a particular country but the general law of nations.<sup>22</sup> One of the great judicial architects of the New Republic of the United States, Chief Justice John Marshall, in 1828 explained the adoption by the *United States Constitution* of the (living) general maritime law.<sup>23</sup> This view was reinforced throughout the 19<sup>th</sup> and 20<sup>th</sup> centuries in the US Supreme Court in cases such as *The Lottawanna*<sup>24</sup> in 1874 and *Lauritzen v Larsen*<sup>25</sup> in 1953, and in the Circuit Courts of Appeals in the 1980s and 1990s in such cases as *Schiffahrtsgesellschaft Leonhardt v A Bottacchi SA de Navigacion*<sup>26</sup> and *RMS Titanic Inc v Haver*.<sup>27</sup>

The English jurists of the Admiralty Court often referred to the general maritime law.<sup>28</sup> That this was a discussion about the separateness or distinctiveness of maritime principles and sources, not the existence of a separate supra-national binding law, was made clear by Mr Justice Willes speaking for the Court in 1865 in *Lloyd v Guibert*.<sup>29</sup> I do not wish to repeat what I have said on other occasions,<sup>30</sup> except to say that it is essential to appreciate that maritime law, as part of the general law, has its own sources and springs for development and that it is not necessarily tied to the principles determined by the common law for non-maritime contexts and problems.<sup>31</sup>

Some examples will suffice for present purposes.

In 1959, in *Kermarec v Compagnie General Transatlantique*<sup>32</sup> the United States Supreme Court refused to apply existing common law rules of occupier's liability in respect of a visitor to a ship. A ship owner had a duty to exercise reasonable care for all on board.

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<sup>18</sup> *Blunden v Commonwealth* (2003) 218 CLR 330 ('*Blunden*').

<sup>19</sup> *The Lottawanna*, 88 US 558 (1874); *Southern Pacific v Jensen*, 244 US 205 (1917). For other cases see the *Tulane Maritime Law Journal* article above (n 1) 559–61.

<sup>20</sup> FW Maitland, 'A Survey of a Century' in ed HAL Fisher, *The Collected Papers of Frederic William Maitland* (Cambridge University Press) vol 3, 438–9.

<sup>21</sup> Wigmore (n 10) vol 3, 902–6.

<sup>22</sup> *Luke v Lyde* (1759) 2 Burr 882, 887; 97 ER 614, 617.

<sup>23</sup> *American Insurance Co v 356 Bales of Cotton*, 26 US 511, 545–6 (1828).

<sup>24</sup> 88 US 558 (1874).

<sup>25</sup> 345 US 571, 581–2 (1953).

<sup>26</sup> 773 F 2d 1528, 1531–2 (11<sup>th</sup> Cir, 1985).

<sup>27</sup> 171 F 3d 943, 960–4 (4<sup>th</sup> Cir, 1999).

<sup>28</sup> See the cases discussed in the *Tulane Maritime Law Journal* article above (n 1).

<sup>29</sup> (1865) 6 B & S 100, 134, 136; 122 ER 1134, 1146–7.

<sup>30</sup> See the articles above (n 1).

<sup>31</sup> *The Sam Hawk* (2016) 246 FCR 337, 361 [84] (Allsop CJ and Edelman J).

<sup>32</sup> 358 US 625, 630–2 (1959).

In 2009, the New South Wales Court of Appeal in *CSL Australia v Formosa*<sup>33</sup> used *Kermarec* and other cases to elucidate the content of the duty of care (a legal question) in a maritime or shipping context:<sup>34</sup>

[A] working commercial ship such as *Iron Chieftain* is not merely an inanimate structure ... a ship is a chattel, but is not any ordinary chattel. It is a working technical and commercial enterprise which is engaged in activity that has inherent danger to those on board, to the environment and to her surroundings. It is comprised of various interconnected bodies of machinery, operated by different people, some crew and some from on-shore when berthed. Safety, both for those working on board and others (along with the welfare of the environment) is a constant and underlying maritime theme ...<sup>35</sup>

In 1946, in *The Tolten*<sup>36</sup> Scott LJ in deciding upon the scope of English Admiralty *in rem* jurisdiction in an allision case, by reference to what he saw as the general maritime law, rejected the application of the usual non-maritime rule of private international law that only the relevant foreign court of the situs of the land (the damaged wharf structure) had authority to deal with questions of foreign land and of the tort of damage to the foreign land. The English court hearing the *in rem* suit could do so.

Similarly, in 2005, in *The Cape Morton*<sup>37</sup> the Full Court of the Federal Court refused to apply the non-maritime rule of private international law that the law to govern the legal incidents of a sale transaction of a chattel was that of the situs of the chattel at the time of sale. The maritime considerations attending the registration, flagging and working of ships militated in favour of the law of the flag governing the assignment of property in, and title to, the ship.

The authority of the master on board a ship is also governed by particularly maritime considerations.<sup>38</sup> The master is in charge of a ship, not a bus.

The maritime lien is a unique and separate creature of the maritime law.<sup>39</sup> It is a part of a worldwide maritime security regime built on (variously) the operative arrest conventions, the action *in rem*, the statutory maritime lien, the remedy of attachment, the maritime lien proper arising from maritime activity (though varying in scope in different jurisdictions) all supported by prompt and efficient insurance for claims by P&I Clubs, by which regime maritime creditors gain access to maritime assets outside insolvency,<sup>40</sup> turning the water of unsecured maritime claims into the wine of security of payment from maritime assets.

The weakening, indeed potential undermining, of the efficacy of the English law-derived version of this regime based on a limited variety of the maritime lien and the duality of the *in rem* action built on the procedural theory by the decision in *The Indian Grace* epitomises, perhaps, the grave dangers of the decoupling of contemporary maritime law from its maritime roots and from an understanding of the practical operation of maritime commerce.

Salvage is another example. The principles of salvage developed as a distinct and coherent body of law common to all seafaring countries, albeit with differences in approach to reward and assistance and of the place of the success of the assistance, which differences were settled by the 1910 Convention.<sup>41</sup> Salvage is perhaps the epitome of the separate coherence of maritime law drawn from marine considerations and international principle. The differences between countries before 1910 involved, but were not limited by, the legal conception of the bargain and contract law. They contained elements closely related to and reflecting conceptions of restitution and unjust enrichment but were not governed by them. The right to a salvage award springs from ancient maritime principle of justice and public maritime policy. Story called it a mixture of private rights and public policy. It is not explained by common law principles of contract or quasi-contract, or restitution or unjust enrichment, or dictated by notions of payment for work done or services performed, although none of these notions is foreign to it. It was a *sui generis* right springing from maritime law as a reward for work or success which encompasses many considerations, including risk, danger, skill, the value of any saving and the expenditure involved, and public policy. This history tells us that the modern sources of principle are not, and should not be taken as, the law of

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<sup>33</sup> (2009) 235 FLR 273.

<sup>34</sup> See *ibid*, especially 287 [64]–[65].

<sup>35</sup> *Ibid* 287 [64].

<sup>36</sup> [1946] P 135.

<sup>37</sup> (2005) 43 FCR 43, 79–80 [142]–[148].

<sup>38</sup> See the cases referred to in footnote 89 from the USMLA speech referred to above (n 1).

<sup>39</sup> See *The Sam Hawk* (n 31) 352 [48].

<sup>40</sup> *Ibid* 351–63 [39]–[92]. See DJ Atard et al, *The IMLI Manual of International Maritime Law* (Oxford University Press, 2016) vol 2, ch 6.

<sup>41</sup> *Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea*, opened for signature 23 September 1910 (entered into force 1 March 1913).

contract or the law of unjust enrichment as applied generally in non-maritime contexts. To do so would be to deny, as antiquarian, salvage's international and maritime sources and so risk a lack of coherence of modern maritime law with its origins and risk making salvage law dependent upon parochially national non-maritime jurisprudence in some taxonomy of abstraction forming the elements of a cause of action for unjust enrichment or the demands of general contract law. This does not involve reverting two or three centuries to a separate Admiralty Court and an entirely separate maritime law: far from it. It is to suggest that coherent doctrinal development of maritime law as part of the general law requires the recognition of its international or transnational and maritime sources, related to, but distinct from, the other great sources of the legal fabric: common law, equity, statute, and civilian codes.

Let me now come to *The Tojo Maru*. This was a salvage case. *Tojo Maru* was by today's standards a small tanker (25,104 gt, 43,695 dwt, 692ft loa and 95ft in beam). She was three years old at the time of the events in 1965. She was laden with 267,639 barrels of crude oil. Just after loading at Mena al Ahmadi in Kuwait, she collided with another vessel causing extensive damage to a fuel tank. The engine room was flooded. The professional salvors had two of their tugs on salvage station in the Persian Gulf. After acceptance of their services a party of eight including a chief diver, Mr Vis, with gear, were sent from Holland. The salvage plan was to stop leaks from the fuel tank into the engine room, pump out the engine room, construct a steel patch over the wound on the side of the vessel to make her watertight, discharge the cargo and tow the vessel to a repair port. After the cargo was pumped off, the plan was to put the various tanks adjacent to the gash and the necessary patch to the side plating into ballast because she was not (after the oil was taken off) free of gas. Then, with water behind, the patch could be attached. The chief diver, however, negligently and contrary to orders, used a bolt gun to attach the patch before ballasting was effected. This caused explosions within the ship and substantial damage.

The question was whether the negligence of the salvors was a factor only to go in reduction or elimination of any reward, notwithstanding that benefit was given in the salvage overall; or whether the salvors obtained a reward, but were required to set off against it a responsibility for negligence based on the imposition of a duty of care for the damage caused in a form of cross claim. The issues were complicated by the operation of the relevant limitation of liability provisions should the salvors be independently liable for the consequence of the negligent salvage works.

At first instance, Wilmer LJ sitting as a Judge in Admiralty, allowed the shipowner's counter claim which exceeded the assessed remuneration and permitted the salvors to limit their liability, but only to the outstanding balance.

Ultimately, the House of Lords, in overturning the Court of Appeal and upholding Wilmer LJ's orders, said that, by reference to Admiralty cases, the salvors were subject to a duty of care and were open to be found independently liable. The Court of Appeal had analysed those cases differently, to deny a duty of care. It is not that analysis of principle in the Admiralty cases upon which I wish to dwell. Rather, it is the approach to maritime law as a body of law upon which I wish to make some remarks.

In the argument in the Court of Appeal<sup>42</sup> Mr Ackner QC for the salvors strongly pressed the distinction and separateness of maritime law, referring to *The Gaetano and Maria*<sup>43</sup> and other cases and submitted that it is not the common law that was applicable. Michael Kerr QC for shipowners stressed the change brought about by the 1873 *Judicature Act*.

Lord Denning distinguished the common law from maritime law, which he called (perhaps with an unwise flourish) 'the maritime law of the world'. For which phrase he cited *The Gaetano and Maria*. It is important to understand the passage cited from the judgment of Brett LJ in that case, which was:

Now the first question raised on the argument before us was what is the law which is administered in an English Court of Admiralty, whether it is English law, or whether it is that which is called the common maritime law, which is not the law of England alone, but the law of all maritime countries. About that question I have not the smallest doubt. Every Court of Admiralty is a Court of the country in which it sits and to which it belongs. The law which is administered in the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of a country, but it is the law which the English Court of Admiralty either by act of Parliament or by reiterated decisions and traditions and principles has adopted as the English maritime law; and about that I cannot conceive that there is any doubt. ... this case must be determined by the general maritime law as administered in England—that is in other words by the English maritime law.<sup>44</sup>

<sup>42</sup> [No 2] [1970] P 21.

<sup>43</sup> (1882) 7 PD 137.

<sup>44</sup> Ibid 143.

Thus Lord Denning, notwithstanding the flourish of expression later pounced upon by Lord Diplock, was clearly identifying the international *source* of *English* maritime law, being a separate body of principle from the common law, though both being part of English law. Lord Denning said '[w]e should, therefore, eschew our common law notions and seek for the principles of maritime law.'<sup>45</sup> By this he was saying that English maritime law (drawn from maritime and international sources) rather than the common law was to be examined. He was not saying that there was an international maritime law as a super-imposed law superior to the law of England. Lord Denning then referred to the liberal encouragement of salvors. He concluded that while the conduct of the salvors could reduce their reward, they were not liable on a duty of care at common law. He said, 'that long line of cases represents the maritime law of England and of the world on this subject'.<sup>46</sup> Again, in refuting some contrary cases, he said, '[t]he Court of Appeal [in other cases] had their eyes too firmly fixed on the English common law; whereas they should have regard to the English maritime law, which is quite different.'<sup>47</sup>

Lord Justice Salmon likewise referred<sup>48</sup> to the maritime law, saying 'I agree with the Master of the Rolls that maritime law differs in many striking respects from the common law and that we must not allow ourselves to be influenced by the latter.' Lord Justice Karminski agreed with Lord Denning.

Off to the House of Lords. Mr Darling QC with Mr Evans for the salvors (in submissions that would have passed muster in *Meagher, Gummow and Lehane*) put that the *Judicature Act* wrought changes to procedure only, not substantive law, and that the maritime law of England applied, which may not be the same as the common law.

An international maritime law binding of its own force was never argued.

Lord Reid accepted the existence of the maritime law of England. He disagreed with the Court of Appeal as to what the cases in Admiralty said that was. He said, '[t]he maritime law of England has a long history. It differed in many respects from the common law...'<sup>49</sup> Neither Lord Morris nor Viscount Dilhorne expressed a view about the separateness of maritime law, though both reached their view by analysing the Admiralty cases to like effect as Lord Reid's analysis. Lord Pearson said that the case was covered by the common law of contract 'unless excluded by some special Admiralty rule'.<sup>50</sup> He agreed with the analysis of the other law Lords that there was no such rule in Admiralty.

It is Lord Diplock's speech that is of greater significance for present purposes. It could perhaps be put to one side as the *obiter* of the junior Law Lord, were it not for his Lordship's stature, for the use of part of his speech in *Blunden* and for his Lordship's leading role in *United Scientific* six years later. Lord Diplock commenced his speech with a passage that attacked the basis of the existence of maritime law as a separate supra-imposed system of law, saying:

What has been suggested, however, is that the 'proper law' of the contract is not the internal municipal law of England but the 'maritime law of the world'. This contention gains some support from a passage in the judgment of Lord Denning MR ... Outside the special field of 'prize' in times of hostilities there is no 'maritime law of the world' as distinct from the internal municipal laws of its constituent sovereign states, that is capable of giving rise to rights or liabilities enforceable in English courts. Because of the nature of its subject matter and its historic derivation from sources common to many maritime nations, the internal municipal laws of different states relating to what happens on the seas may show greater similarity to one another than is to be found in laws relating to what happens upon land. But the fact that the consequences of applying to the same facts the internal municipal laws of different sovereign states would be to give rise to similar legal rights and liabilities should not mislead us into supposing that those rights to liabilities are derived from a 'maritime law of the world' and not from the internal municipal law of a particular sovereign state.<sup>51</sup>

It needs to be said at the outset that the above was to misrepresent what Lord Denning had said. Lord Denning's reference to *The Gaetano and Maria* could not have been clearer: there was a separate (English) Admiralty rule drawn from international and maritime sources. He did not say, and it was not put to the Court of Appeal in

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<sup>45</sup> *The Tojo Maru* [No 2] [1970] P 21, 62.

<sup>46</sup> *Ibid* 64.

<sup>47</sup> *Ibid* 65.

<sup>48</sup> *Ibid* 71.

<sup>49</sup> *The Tojo Maru* (n 16) 267.

<sup>50</sup> *Ibid* 289.

<sup>51</sup> *Ibid* 290–1.



argument, that there was a supra-national binding international maritime law. However, Lord Diplock then went on to direct himself to the more subtle point as to whether the English maritime law was, or can be conceived of as, a branch of English law. He continued in the second passage:

The reference by Lord Denning MR to ‘the maritime law of the world’ cannot, I think, have been intended to do more than to point in vivid fashion to the distinction between the law which before 1875 had been administered in the Court of Admiralty and that which had been administered in the courts of common law (and equity). The reference was followed by citation of a sentence from a passage in the judgment of Brett LJ in *The Gaetano and Maria* which was directed to repudiating the notion that the Court of Admiralty applied ‘the law of all maritime countries’.

It is this supposed continuing dichotomy between two rival systems of law said to be still applicable in the Supreme Court of Judicature which underlies the ratio decidendi of all the judgments of the Court of Appeal. It has, in my view, led to error. It is well to remind ourselves in this as in any branch of the law that prior to the Judicature Act of 1875 [sic 1873] the development of what then became a comprehensive system of English law administered by one High Court of general jurisdiction had been accomplished by separate courts of common law, of Chancery, or Admiralty and ecclesiastical courts.<sup>52</sup>

In these last two paragraphs Lord Diplock directed himself to the separate coherence of maritime law. Implicit in these statements and explicit six years later in *United Scientific*<sup>53</sup> is the absorption of English maritime law (and Equity) into the common law. One consequence of these words of Lord Diplock is that a rejection, or at least a tendency to rejection, can be seen of the international sources of English maritime law as a separate body of law coherently interrelating with and drawing from other parts of English law, but also drawing life from international and maritime sources. That was a profound statement if made. There can be no doubt that the Judicature Acts merged procedure and created one body of Courts. But those Courts then administered in their Divisions the English general law drawn from the streams of equity, common law, and maritime law. Those laws no longer were administered by separate judicial institutions. At times in the coherent judicial development of doctrine, they drew upon each other for life and growth. But the bodies of law coming from intellectually several sources and fulfilling several purposes maintained their coherence in development. That coherence in development sprang from an understanding by practitioners and Judges of the sources of Equity, of the sources of common law, and of the sources of maritime law.

The strength of those sources was no better stated than by Justice Jackson in *Lauritzen v Larsen*<sup>54</sup> in the United States Supreme Court in 1953 in a case about the proper construction of the *Jones Act* and whether or not it applied to a foreign seafarer on board a foreign ship injured while the ship was in New York harbour, whose relationship with the ship and shipowner was entirely framed by articles of employment the proper law of which was the same nationality as the flag of the ship and his citizenship. Justice Jackson said:

But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence, courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but by acceptance from common consent of civilised communities of rules designed to foster amicable and workable commercial relations.

International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own. Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of the contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority.<sup>55</sup>

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<sup>52</sup> Ibid 291 (citations omitted).

<sup>53</sup> [1978] AC 904, 924–5.

<sup>54</sup> 345 US 571 (1953).

<sup>55</sup> Ibid 581–2.

If I may say, with the utmost respect, it was the misrepresentation of what Lord Denning said, the false brutality of the asserted consequences of the 1873 *Supreme Court of Judicature Act* (later further enunciated in *United Scientific*), and the unsubtle failure to recognise the nuanced importance of the continuing vitality of separate streams of law from separate historical and contemporary roots continuing in a stream of contemporary law that makes the speech of Lord Diplock in *The Tojo Maru* so damaging. It is to be recognised that no other Law Lord took that view. In particular, not the great Lord Reid. Today is not the occasion to assess any damage to English maritime law that was sustained long-term by this. But the risks of these views can be seen by two examples: the shallow justification for the result (a result that was more than defensible) reached by the majority led by Lord Diplock in *The Halcyon Isle*<sup>56</sup> and the deeply problematic decision in *The Indian Grace*. Neither Lord Diplock (for the majority) in *The Halcyon Isle* nor Lord Steyn (speaking for the House of Lords) in *The Indian Grace* engaged with the place of the maritime lien in its narrow form recognised under English law (and its derivatives in so many other countries) in a maritime security regime founded on the procedural theory designed for its very functioning upon the dual nature of the *in rem* action built on the (very helpful and necessary fiction) of the action against the ship and the accompanying statutory lien, being distinct from the action *in personam*. Each complemented the other and to introduce foreign liens into the English regime or to abandon the useful fiction of the *in rem* action against the ship would upset and disturb the efficacy and stable operation and priorities of the regime which underpinned the provision of credit in shipping on a daily basis.<sup>57</sup>

Well, what of Australia? *Blunden* concerned the deadly disaster of the collision between HMAS *Voyager* and HMAS *Melbourne* on 10 February 1964. In an introductory passage dealing with the reach of the common law below the low watermark the (strong) plurality (Gleeson CJ, Gummow, Hayne and Heydon JJ) stated the following:

That body of common law includes what sometimes has been called the general principles of maritime law or the maritime law of the world. The point was explained, with particular reference to England, by Lord Diplock in *The Tojo Maru*.<sup>58</sup>

Their Honours then cited the first passage from Lord Diplock set out above commencing, '[o]utside the special field of "prize"' to 'and not from the internal municipal law of a particular sovereign state.' This was the relatively unobjectionable part of Lord Diplock's judgment where his Lordship (raising a straw man by the misstatement of Lord Denning's reasoning) said that there was no independent superimposed law upon sovereign states. So much can be accepted.

The importance of this passage in *Blunden* for Australia is that it did not cite the more radical statements of Lord Diplock in the second passage above that contained the notion of fusion more clearly enunciated six years later in *United Scientific*, and, even more importantly, nestled in footnote 39, which referred to the first (unobjectionable) passage of Lord Diplock from *The Tojo Maru*, was a reference to the United States Supreme Court decision of *Moragne v States Marine Lines Inc*.<sup>59</sup> This reference is no accident, one would have thought, since Justice Gummow was in this plurality. Justice Gummow (one of the authors of *Meagher, Gummow and Lehane*) had written the scholarly first instance decision in *The Shin Kobe Maru*<sup>60</sup> which reflected a deep familiarity with United States maritime law and the intertwined relationship between Admiralty and maritime jurisdiction and law at the heart of article III section 2. This footnote can be seen to give approval only to the first part of Lord Diplock's speech in *The Tojo Maru*, and also to give approval to what was said in *Moragne v States Marine Lines Inc* at the pages to which reference was made. From these references, especially the latter, the judgment in *Blunden* is not a rejection, but a clear recognition and acceptance, of the separate sources and stream and international character of maritime law, by the specific adoption of the pages from *Moragne v States Marine Lines Inc* which included the following:

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<sup>56</sup> [1981] AC 221.

<sup>57</sup> See generally the discussion of *The Indian Grace* in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2016) 157 FCR 45 and the discussion in *The Sam Hawk* leading to the same result as in *The Halcyon Isle*, but founded on an exposition of maritime law principles without the false distraction of the simplistic substance/procedure distinction in respect of the maritime conception of the lien carrying unique and sui generis features of substance AND procedure at its heart. I recognise that other views than expressed by the majority in *The Sam Hawk* are available: see the views of Rares J in dissent on this point. The point for today is a different one. It should be noted, however, that the use of the phrase 'the general maritime law' has not died out in England. Mr Justice Brandon in *The Unique Mariner [No 2]* [1979] 1 Lloyd's Rep 37 used the phrase in his illuminating discussion in that case.

<sup>58</sup> *Blunden* (n 18) 337 [13].

<sup>59</sup> 398 US 375, 386–8 (1970).

<sup>60</sup> (1991) 32 FCR 78.

Maritime law had always, in this country as in England, been a thing apart from the common law. It was to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages. These factors suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common law rule, criticised as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea.<sup>61</sup>

This does not reflect a super-imposed external force on a domestic legal system. It recognises the distinctiveness and the international and maritime sources of maritime law and its distinctiveness, when necessary, through the history of maritime law and through the contemporary necessities of maritime life and commerce.

Not to be able to see this reflects a stunted view of law governed only by terrene circumstances; a view that all law is of a place, both in its sovereign character and in its source and nature.

For millennia, shipping has connected different peoples across the international community. It continues to do so. Virtually every aspect of shipping has a transnational and multi-jurisdictional character, from the ownership, financing, insurance, management, operation and crewing of the ship, to the ownership, carriage and sale of cargo, and to the constant international movement of the vessel. Whilst modern sea carriage and modern maritime commerce have great technical complexity, the problems that they throw up have changed little over time: danger at sea, the risk of the venture, collision, cargo damage, general average, the duty to assist, salvage, the commercial mechanics to limit risk, to provide for credit, and the tendency to exploit the weakness of seafarers. Maritime law and the law of maritime commerce is shaped by such forces. This coherence of a different body of sources of law brings forth the demand for the legal system (national and a-national, curial and arbitral) to accommodate the demands of the subject: first, a recognition of this separate coherence bound to international and maritime sources and activity; secondly, a recognition of the need to be familiar with maritime activity; thirdly, a recognition of the potential for different doctrinal development of maritime from non-maritime law, not because of antiquarian separation, but from the practical demands of maritime activity and commerce in the present.

As the number of maritime disputes resolved in arbitral and judicial centres around the world grows, the importance of the survival of the recognition of the international character of maritime law grows. English law and the law of legal systems derived from it has and have a unique place in the resolution of international maritime disputes. This is so because of factors that include the clarity and open adaptability of English common law (in the sense of the general law). It is of the greatest importance that these strengths continue by the development of doctrine through the sources that produced such clarity and adaptability.

Maritime law should not be viewed as antiquarian, but as vibrantly contemporaneous. It should not be viewed as just a part of a fabric of national law drawing its principles only from domestic sources of constituent conception such as contracts and unjust enrichment. It should be viewed as the national manifestation of a common heritage of principle drawing its content from such maritime and international sources as are appropriate to maintain its place as part of the regulation of rights and duties for international sea-borne activity and commerce reflecting, where possible, common principle. As such it should aim, as Justice Jackson said in *Lauritzen v Larsen*, for stability and order through considerations of comity, reciprocity and connection with common interests, and as Scott LJ said in *The Tolten*, for uniformity or harmony of sea law throughout the world as important for the welfare of maritime commerce.

To deny maritime law's international and maritime character as a branch of the law and its international and maritime sources (historical and contemporary) in the development of its principle, is ultimately to deprive it of the source of its coherence and to make provincial what is international, and non-marine what is marine, to the long-term detriment of those whose law it is.

Therefore, for the future of shipping, not only should it be recognised that is both convenient and necessary for judges skilled and versed in maritime law to hear maritime cases, but also that it is both convenient and necessary to appreciate the distinctiveness of the character and sources of maritime law that may lead to the separate and distinct development of rules for maritime relations conformable with the coherent development of legal principle.

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<sup>61</sup> *Moragne v States Marine Lines Inc*, 398 US 375, 397–8 (1970) (citations omitted).