

BRITISH CIVIL ADMIRALTY JURISDICTION IN AUSTRALIA: 1788–1988

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1. Introduction

Australia had a unique legal and administrative relationship with the United Kingdom since British settlement in 1778. Until the passage of the *Australia Acts 1986* (Cth) and (UK), Australia had continuing constitutional ties with the United Kingdom, notably through the application of British legislation in Australia.¹ Admiralty, particularly in relation to merchant shipping through the *Merchant Shipping Act 1894* (Imp), was one field in which uniformity and preservation of imperial control was considered important. Before the passage of the *Admiralty Act 1988* (Cth), civil admiralty jurisdiction in Australia was governed by a complex interaction of British legislation with courts in Australia. This led to obscurities about which courts were invested with admiralty jurisdiction, limitations to that jurisdiction, and uncertainties in how British legislation applied to local circumstances. The Australian Law Reform Commission noted the need for reform of this position.² Their *Civil Admiralty Jurisdiction* Report led to enactment of the *Admiralty Act 1988* (Cth).³ This article traces the application of British legislation on civil admiralty jurisdiction in Australia before the enactment of the *Admiralty Act 1988* (Cth). What is revealed is an evolution from a reliance upon British courts and legislation, in the heyday of British merchant shipping, to a uniform and independent application of civil admiralty jurisdiction in Australia.

One rejoinder should be immediately addressed. Although civil admiralty jurisdiction conferred by British enactments is of no present application after enactment of the *Admiralty Act 1988* (Cth),⁴ there are at least five reasons why that history is of relevance today. First, the *Admiralty Act 1988* (Cth) did not disregard existing heads of admiralty jurisdiction conferred by British legislation before the passage of that Act. Instead, the Australian Law Reform Commission's *Civil Admiralty Jurisdiction* Report set out various heads of existing admiralty jurisdiction 'at present scattered through a number of 19th century Imperial Acts', with the aim to 'extend *existing* heads [of civil admiralty jurisdiction], and (where necessary) to add new heads to bring admiralty jurisdiction into line with Australian interests and requirements'.⁵ Secondly, when construing the *Admiralty Act 1988* (Cth), the permissible context against which that Act may be construed includes 'the existing state of the law [before the passage of the Act] and the mischief which, by legitimate means ... one may discern the statute was intended to remedy'.⁶ This context may be particularly helpful in discerning any extension of admiralty jurisdiction under the *Admiralty Act 1988* (Cth) and the bounds of that extension.⁷ Thirdly, whilst the conferral of jurisdiction '[o]f Admiralty and maritime jurisdiction' in s 76(iii) of the Constitution may sometimes be elusive, that jurisdiction appears to at least extend to (but is still wider than) that admiralty jurisdiction conferred by British legislation in Australia as at federation.⁸ Fourthly, an appreciation of the simplicity and coherence of the *Admiralty Act 1988* (Cth) may be gained from an understanding of the uncertainties and complexities of admiralty jurisdiction before the passage of that Act. Finally, whilst the *Admiralty Act 1988* (Cth) provides a code for the circumstances in which a claim in rem may be brought in admiralty,⁹ the concepts and principles in that Act were not enacted in a vacuum. As Windeyer J said in a different context:

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¹ *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 379–80 (Mason J).

² See Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (Report No 33, December 1986) (Summary).

³ See generally *ibid*.

⁴ See *Admiralty Act 1988* (Cth) Pt 6. Some British enactments relating to admiralty, notably that in relation to prize under the *Naval Prize Act 1864* (Imp), were not repealed: see Australian Law Reform Commission, *Criminal Admiralty Jurisdiction and Prize* (Report No 48, 1990) xvi.

⁵ Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (Report No 33, December 1986) [145] (emphasis added). This Report may, in certain circumstances, be construed when interpreting the *Admiralty Act 1988* (Cth): *Acts Interpretation Act 1901* (Cth) s 15AB(2)(b).

⁶ See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

⁷ See, eg, *FNP Catalano Nominees Pty Ltd v The Ship 'FV Comet'* (2000) 155 FLR 115, [16]–[22] (Wheeler J).

⁸ See *John Sharp & Sons Ltd v The Ship Katherine Mackall* (1924) 34 CLR 420, 428 (Isaacs J); *McIlwraith McEacharn Ltd v Shell Co of Australia* (1945) 70 CLR 175, 208–9 (Dixon J); *China Ocean Shipping Co v State of South Australia* (1979) 145 CLR 172, 204 (Gibbs J); *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404, 424.

⁹ *Admiralty Act 1988* (Cth) s 14.

... we cannot interpret its general provisions concerning such basic principles as if they were written on a *tabula rasa*, with all that used to be there removed and forgotten. Rather is ch. iv of the Code written on a palimpsest, with the old writing still discernible behind.¹⁰

This article traces the application of British admiralty jurisdiction first through Courts of Vice Admiralty in Australia. It then describes the conferral of admiralty jurisdiction through the *Colonial Courts of Admiralty Act 1890* (Imp) ('*Colonial Act*'). Finally, it discusses the transition to the *Admiralty Act 1988* (Cth) forming the foundation for admiralty jurisdiction in Australia today.

2. Vice Admiralty Courts

Courts of Vice Admiralty derived their authority from the Lords Commissioners of the Admiralty.¹¹ In practice, a judge of a superior court of a dominion was made a judge of the Vice Admiralty Court.¹² The judge held that office by a direct commission by the Lords Commissioners of the Admiralty¹³ or through a surrogate or deputy appointment by a Governor under the terms of the Governor's Commission as Vice Admiral.¹⁴ The Court was imperial. Jurisdiction was vested in a judge personally and not in any institution.¹⁵

On 12 April 1787, King George III issued letters patent which authorised the Lord Commissioners of Admiralty¹⁶

to constitute and appoint a Vice-Admiral and also a Judge and other Officers requisite for a Court of Vice-Admiralty, within the Territory called New South Wales in like manner as Vice-Admirals Judges and other proper officers of such Courts have been constituted ... in places where they have been usually heretofore appointed.

Separate commissions issued under seal of the High Court of Admiralty on 30 April 1787 appointed Governor Phillip as Vice-Admiral and Robert Ross as Judge in Vice-Admiralty.¹⁷ Robert Ross was relevantly granted 'full power to take cognizance of and proceed in all causes civil and maritime and in ... offences or suspected offences [and] crimes'.¹⁸ This jurisdiction spanned 'all matters generally cognizable by Admiralty courts' but did not include prize.¹⁹ Jurisdiction in prize was eventually conferred in 1812, when the Lord Commissioners issued warrants and other documents authorising Ellis Bent, New South Wales' then Judge-Advocate and the Judge in Vice Admiralty, to proceed to the trial and condemnation of captured vessels in prize.²⁰ Whilst records of a commission to hear matters of prize have only been located from 1812, prize sittings in the Vice Admiralty Court of New South Wales have been recorded as occurring as early as May 1799.²¹ The Vice Admiralty Court's jurisdiction in prize was quickly recanted on 31 July 1813, with prize matters in England waning at that time with the end of the Napoleonic Wars.²²

¹⁰ *Vallance v The Queen* (1961) 108 CLR 56, 76.

¹¹ See, eg, Sir Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Clarendon Press, 1902) 33.

¹² *The Yuri Maru and The Woron* [1927] AC 906, 912 (Lord Merrivale) quoting Sir Henry Jenkyns (n 11) 33.

¹³ *Ibid.*

¹⁴ For example, John Hunter, Governor of New South Wales and Vice Admiral, appointed Major Joseph Foveaux as Judge of the Vice-Admiralty Court 'by virtue of the powers and authorities delegated and vested in [Hunter] as Vice-Admiral, Commissary, and Deputy of the said Court of Vice-Admiralty to depute or surrogate in [Hunter's] place one or more Deputy or Deputies as often as [Hunter] shall think fit': see Commission for Major Foveaux as Judge in Vice-Admiralty, 10 August 1798, reproduced in *Historical Records of Australia* (Library Committee of the Commonwealth of Australia, 1922) series IV, vol I, 29. Ellis Bent was also appointed as Deputy Judge and President of the Court by Governor Macquarie: see Alex C Castles, *An Australian Legal History* (The Law Book Company Ltd, 1982) 118.

¹⁵ *The Yuri Maru and The Woron* [1927] AC 906, 912 (Lord Merrivale). See also *Burns v Corbett* (2018) 265 CLR 304, [227] (Edelman J) quoting Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 799.

¹⁶ See JM Bennett, *A History of the Supreme Court of New South Wales* (The Law Book Co Ltd, 1974) 153.

¹⁷ *Ibid.*

¹⁸ Letters Patent Granted to Robert Ross Esquire to be Judge of Vice Admiralty Court of the Territory Called New South Wales reproduced in JM Bennett (n 16) 238.

¹⁹ Bennett (n 16) 154. Prize may be described as the legality of the seizure by naval forces of private property of a maritime nature belonging to an enemy national or enemy ships: Australian Law Reform Commission Report No 48 (n 4) [142]. Broadly speaking, the High Court of Admiralty's jurisdiction in prize involves principles of public international law, whereas the Court's instance jurisdiction involves an exercise of private international law: see *The Halley* (1867) LR 2 AE 3, 5–6 (Sir Robert Phillimore).

²⁰ Bennett (n 16) 155; Alex C Castles, *An Australian Legal History* (The Law Book Company Ltd, 1982) 119–20.

²¹ Bennett (n 16) 155. See also Castles (n 20) 120.

²² Bennett (n 16) 156 fn 32. Indeed, from Lord Stowell's appointment to the High Court of Admiralty in 1798 'the volume of Prize causes accruing to the Admiralty Court from the naval warfare in which Britain was at the time engaged gave the Judge more business than at any

There were some misunderstandings about who was commissioned with the jurisdiction to hear proceedings in the Vice Admiralty Court. John Wylde, who was New South Wales' final Judge-Advocate, for example, reported that he was not aware 'under what authority the [Vice Admiralty Court] itself has been established'.²³ There were also some frustrations expressed that the Vice Admiralty court did not have jurisdiction to hear crimes committed on the high seas.²⁴ However, letters patent had earlier been issued on 5 May 1787 to appoint commissioners (under a separate tribunal to the Vice Admiralty Court) under the *Piracy Act 1698* (UK) (11 Will. III c. 7) to deal with cases of piracy, robbery and felony on the high seas.²⁵ Such confusion, however, led to a conferral of a broad criminal jurisdiction for offences committed upon the seas on the newly established New South Wales Supreme Court.²⁶ Whilst that jurisdiction was concurrent with the criminal jurisdiction of the Vice Admiralty Court, 'it came to be accepted that the criminal branch of the Vice-Admiralty Court had become the sole province of the Supreme Court'.²⁷

The *Vice Admiralty Act of 1832* (2 Will. IV, c. 51) enabled the King, with the advice of the Privy Council, to make and ordain rules and regulations regarding the practice in Vice Admiralty Courts in British possessions abroad, as well as the establishment of fees to be taken by the judges, officers and practitioners of that Court. The Act was prefaced with the intention of 'obviate[ing] Doubts' as to the jurisdiction of the Vice Admiralty Courts abroad. To that end, section 6 of that Act invested that Court with jurisdiction in suits for seamen's wages, pilotage, bottomry, damage to a ship by collision, breach of Regulations and Instructions relating to the King's Service at sea, salvage, and droits of admiralty.

The nineteenth century brought great legislative extensions of admiralty jurisdiction to the High Court of Admiralty in England. These extensions in England, however, had no effect on Vice Admiralty Courts abroad.²⁸ Instead, the extension of the jurisdiction and powers of Vice Admiralty Courts occurred through separate imperial enactments.

The *Vice Admiralty Courts Act 1863* (Imp) (26 & 27 Vict. C. 24) was another enactment applicable to Vice Admiralty Courts in Britain's possessions, including Australia. The Act provided *ex officio* appointments of a Vice Admiral (being the Governor of the colony), the Judge of the Vice Admiralty Court (being the Chief Justice or principal Judicial Officer of the colony), and the Office of the Registrar or Marshal (a person appointed by a Judge of the Vice Admiralty Court with the approval of the Governor) in circumstances where those positions became vacant. The provision of *ex officio* appointments helped remedy the 'frequent[] ... difficulties which have been found to exist in the appointment of Officers to the Vice-Admiralty Courts in the British Colonies and Settlements'.²⁹ It also resolved a bizarre obliviousness of who was conferred jurisdiction to comprise the Vice Admiralty Court.³⁰ For example, Frances Forbes did not initially hold a commission as the Judge of the Vice Admiralty Court upon his arrival as the first Chief Justice of the New South Wales Supreme Court. An admiralty dispute arose concerning *The Almorah*, a vessel alleged to have breached the East India Company's monopoly on trade in tea.³¹ There was perplexity about whether anyone could hear the dispute.³² Governor Brisbane, however, had jurisdiction to preside over the Vice Admiralty Court, or

previous time in the Court's history': FL Wiswall Jr, *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge University Press, 1970) 20. By contrast, his successor, Sir Christopher Robinson, did not hear any Prize causes during his tenure on the Court: at 37.

²³ Letter from Deputy Judge-Advocate Wylde to J T Bigge, 16 July 1821 reproduced in *Historical Records of Australia* (Library Committee of the Commonwealth of Australia, 1922) series IV, vol I, 353, 371.

²⁴ John Bigge, *Report of the Commissioner of Inquiry on the Judicial Establishments of New South Wales and Van Diemen's Land* (Report, 21 February 1823) 58; Letter from Deputy Judge-Advocate Bent to Earl Bathurst, 14 October 1814, reproduced in *Historical Records of Australia* (Library Committee of the Commonwealth of Australia, 1922) series IV, vol I, 100, 103-4.

²⁵ Letters Patent Constituting the Vice-Admiralty Court, 5 May 1787, reproduced in *Historical Records of Australia* (Library Committee of the Commonwealth of Australia, 1922) series IV, vol I, 13.

²⁶ See *New South Wales Act 1823* (UK) s 3; *Australian Courts Act 1828* (UK).

²⁷ Bennett (n 16) 158.

²⁸ See *Rajah of Cochin* (1859) Swa Adm 473, 475 (Dr Lushington); *The Australia* (1859) 13 Moo PC 132, 160 (Dr Lushington).

²⁹ Despatch from Newcastle to Gipps, 30 June 1863.

³⁰ See Bennett (n 16) 159.

³¹ See Letter from Sir Frances Forbes to Robert Wilmot-Horton, 24 March 1825 reproduced in JM Bennett (ed) *Some Papers of Sir Frances Forbes* (New South Wales Parliamentary Library, 1998) 60.

³² See, eg, Letter from Mr James Stephen Jr to Under Secretary Hay, 15 October 1825, reproduced in *Historical Records of Australia* (Library Committee of the Commonwealth of Australia, 1922) vol 4, series IV, vol I, 624, 625-6.

alternatively appoint Forbes as a Deputy Judge of the Court.³³ Neither occurred. A separate commission was eventually issued to Forbes as the Judge of the Vice Admiralty Court.³⁴

The jurisdiction conferred by the *Vice Admiralty Act of 1832* (Imp) was extended by section 10 of the *Vice Admiralty Courts Act 1863* (Imp) to claims for master's wages and disbursements, salvage of life or goods, towage, claims in respect of any mortgage where the ship had been sold by a decree of the Court, claims between shipowners of any ship registered in the possession of the Court regarding the ownership, possession, employment or earnings of the ship, claims for necessities supplied, and claims in respect of building, equipping or repairing within any British possession of any ship where no owner or part owner was domiciled within the possession at the time the work was conducted.

Section 13 of the Act clarified that the jurisdiction of the Vice Admiralty Courts, except where expressly confined by the Act, could extend to actions which arose within or beyond the territorial limits of the possession. It also permitted the British Crown to establish, by Order in Council, rules regarding the practice observed in Vice Admiralty Courts. These were implemented through a series of Orders in Council until the enactment of the *Vice Admiralty Courts Act 1863* (Imp). Section 22 of the Act also provided that appeals from a Vice Admiralty Court lay to the Queen in Council (in effect, the Judicial Committee of the Privy Council). This overturned the previous practice of appeals lying from Vice Admiralty Courts (in its instance jurisdiction) to the High Court of Admiralty in England, and subsequently to the Court of Delegates.³⁵

There was some frustration regarding the inability to appoint Deputy Judges who could hear disputes in the Vice Admiralty Court in different parts of the same colony.³⁶ The *Vice-Admiralty Courts Act Amendment Act 1867* (Imp) (30 & 31 Vict C. 45) cured this by permitting the appointment of Deputy Judges who could exercise the same judicial power of the principal Judge in Vice Admiralty. That Act also provided a power to establish Vice Admiralty Courts in British possessions even if they had acquired legislative powers independent from Britain.

The continued operation of Vice Admiralty Courts, with separate Judges (at least in office), officers, procedures and fees to that of the domestic colonial courts, and with some jurisdiction which was concurrent with that of the civil jurisdiction of colonial courts, found disfavour in British possessions and colonies.³⁷ The *Colonial Act*, which took effect on 1 July 1891, abolished the Vice Admiralty Courts in favour of a regime discussed in further detail in the next part. However, the Act did not abolish certain Vice Admiralty Courts outlined in Schedule 1 of the Act, which included those in New South Wales and Victoria (among other colonies) which had objected to the introduction of the legislation.³⁸ However, s 16(1)(a) of the *Colonial Act* provided that that Act could subsequently apply to the remaining Vice Admiralty Courts through an Order in Council. An Order in Council was issued on 4 May 1911 and the Act came into force in New South Wales and Victoria on 1st July 1911.³⁹ Thus ended the use of the Imperial Vice Admiralty Courts in Australia.

3. Colonial Courts Act 1890 (IMP)

The *Colonial Act* abolished Vice Admiralty Courts in favour of the establishment of Colonial Courts of Admiralty. In contrast to Vice Admiralty Courts, Colonial Courts of Admiralty were not Imperial courts.⁴⁰ Rather, the *Colonial Act* invested certain domestic courts with the jurisdiction and powers over Admiralty causes possessed by the Admiralty

³³ See Bennett (n 16) 159.

³⁴ Commission for F Forbes as Judge in Vice-Admiralty, reproduced in *Historical Records of Australia* (Library Committee of the Commonwealth of Australia, 1922) series IV, vol I, 635.

³⁵ See, eg, *The Fabius* (1800) 2 C Rob 245, 246. Appeals from Vice Admiralty Courts in its prize jurisdiction lay directly to the Privy Council: see, eg, Select Committee on Admiralty Courts, *Report from the Select Committee on Admiralty Courts with the Minutes of Evidence* (House of Commons Paper No 670, Session 1833) 21 [106] (Sir John Nicholl).

³⁶ Despatch from Buckingham to Young, 31 August 1867, reproduced in *Despatches from the Secretary of State* [4/1356].

³⁷ H Jenkyns and A Gray, *Colonial Courts of Admiralty Bill Memorandum*, 20 February 1885, reproduced in DP O'Connell and Ann Riordan (eds) *Opinions on Imperial Constitutional Law* (The Law Book Company Ltd, 1971) 234.

³⁸ HJ Wrixon, *Crown Law Office Opinion*, 8 April 1886, reproduced in DP O'Connell and Ann Riordan (eds) *Opinions on Imperial Constitutional Law* (The Law Book Company Ltd, 1971) 243.

³⁹ See New South Wales, *New South Wales Government Gazette*, No 81, 21 June 1911, 3366.

⁴⁰ See *McIlwraith McEacharn Ltd v Shell Co of Australia* (1945) 70 CLR 175, 191 (Latham CJ), 197 (Starke J); *Asiatic Steam Navigation Co Ltd v The Commonwealth* (1956) 96 CLR 397, 402 (Taylor J).

Division of the High Court in England.⁴¹ The Colonial Act was also the principal source of admiralty jurisdiction conferred by British legislation.⁴² A discussion of the admiralty jurisdiction conferred by the *Colonial Act* will be discussed under three headings: (i) which courts were Colonial Courts of Admiralty; (ii) the extent of the admiralty jurisdiction conferred by the *Colonial Act*; and (iii) what effect federation had on the operation of the *Colonial Act*.

3.1. Courts Which Were Colonial Courts of Admiralty

Section 2(1) of the *Colonial Act* provided for the establishment of Colonial Courts of Admiralty in a British possession through either of two means. First, the legislature of the British possession could declare (under s 3(a) of the *Colonial Act*) that a court in a British possession of unlimited civil jurisdiction (whether of original or appellate jurisdiction) was a Colonial Court of Admiralty. Alternatively, and where no such declaration was in force, the *Colonial Act* invested the admiralty jurisdiction conferred by the Act in every domestic court with original unlimited civil jurisdiction. Section 3(b) of the Act also permitted the legislature of the British possession to invest the admiralty jurisdiction conferred under the Act upon an inferior court. These limbs will be discussed in turn.

3.1.1. Declaration that a Court was a Colonial Court of Admiralty

Section 3 of the *Judiciary Act 1914* (Cth) inserted a new s 30A into the *Judiciary Act 1903* (Cth). Section 30A provided:

The High Court [of Australia] is hereby declared to be a Colonial Court of Admiralty within the meaning of the Imperial Act known as the *Colonial Courts of Admiralty Act, 1890*.

Read with s 2(1) of the *Colonial Act*, this provision had the effect that the High Court of Australia was the only court in Australia which was a Colonial Court of Admiralty; State and Territory Supreme Courts were not also be Colonial Courts of Admiralty, since it was only the High Court of Australia which was declared a Colonial Court of Admiralty.⁴³ This caused inconvenience for those seeking to bring their claims in admiralty.⁴⁴ The declaration was later said to bring about uniformity and prevent ‘confusion’ through the exercise of admiralty jurisdiction in various State Supreme Courts.⁴⁵

There was some uncertainty about whether the *Judiciary Act 1914* (Cth) was enacted in accordance with s 60 of the Commonwealth Constitution. That provision requires that a proposed law which is reserved for the monarch’s pleasure shall not have force unless and until the Governor-General makes known by speech or message to each of the Houses of Parliament, or by Proclamation, that the law has received the monarch’s assent, and requires that communication to occur within two years from the day on which the proposed law is presented to the Governor-General for the monarch’s assent. Section 4 of the *Colonial Act* required that a law made in pursuance of the *Colonial Act* (such as a declaration under s 3(a)) be reserved for the signification of the monarch’s pleasure.⁴⁶ The Commonwealth Governor-General assented to the bill on 29th October 1914, but the King only gave royal assent on 7 September 1916.

In *The Katherine Mackall*, Isaacs J held that the *Judiciary Act 1914* (Cth) was invalid as it was a law reserved for the King’s pleasure and the only public declaration by the Governor General of the King’s assent occurred in a Commonwealth Government Gazette published on 16 November 1916 which reproduced a copy of an Order of

⁴¹ *Colonial Courts Act 1890* (Imp) (53 & 54 Vic c 27) s 2(2). See also *McIlwraith McEacharn Ltd v Shell Co of Australia* (1945) 70 CLR 175, 206–7 (Dixon J).

⁴² The *Colonial Act* was not the only source of admiralty jurisdiction conferred by British legislation applicable within the dominions. Others included claims for limitation of liability under the *Merchant Shipping Act 1894* (Imp), in matters of prize and slave trade under the *Prize Courts Act 1894* (Imp) and *Slave Trade Act 1873* (Imp), and in relation to naval discipline under the *Naval Discipline Act 1866* (Imp). The conferral of jurisdiction under these British enactments is outside the scope of this article.

⁴³ *McIlwraith McEacharn Ltd v Shell Co of Australia* (1945) 70 CLR 175, 189 (Latham CJ, McTiernan J agreeing); *McArthur v Williams* (1936) 55 CLR 324, 359 (Dixon, Evatt and McTiernan JJ); *Lewmarine Pty Ltd v The Ship ‘Kaptayanni’* [1974] VR 465, 467 (Pape J).

⁴⁴ When legislation was introduced to remove the declaration, it was said that its abrogation would enable ‘the judicial system to operate more expeditiously’: Commonwealth, *Parliamentary Debates*, House of Representatives, 7 September 1939, 163 (Blackburn). See also at 162 (William Morris Hughes) (‘the exercise of concurrent jurisdiction by the State courts will not militate against the efficient and speedy procedure desirable’).

⁴⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 September 1939, 162 (William Morris Hughes).

⁴⁶ This requirement in the *Colonial Act* was later repealed by *Statute of Westminster 1931* (Imp) s 6.

Council dated 7 September 1916 recording the King's assent to the bill.⁴⁷ That communication was not a speech or message to the Houses of Parliament, or a Proclamation, and was beyond the two years requirement given the bill's assent on 29 October 1914. Starke J, however, was of the view that the Governor-General assented to the law in the King's name on 29 October 1914, and did not reserve it for the King's pleasure, such that s 60 did not apply.⁴⁸ Isaacs J's conclusion is more compelling. Section 4 of the *Colonial Act* did not empower the Commonwealth Governor General to assent to an enactment in the monarch's name.⁴⁹ Section 15 of the *Colonial Act* required legislation made under the *Colonial Act* to comply with domestic legislative authority, which would have included the requirement in s 60 of the Constitution. Since the *Judiciary Act 1914* (Cth) had been 'transmitted for the signification of His Majesty's pleasure',⁵⁰ compliance with s 60 of the Constitution was required. Since the remaining Justices expressed no view on this issue,⁵¹ the validity of the declaration in s 30A of the *Judiciary Act 1914* (Cth) remained an unresolved question. Section 30A was subject to curial comment about its need for reform,⁵² and Crown Law officers were also of the view that the *Judiciary Act 1914* (Cth) was invalid for non-compliance with s 60.⁵³ If the section was valid, then the High Court was the only Colonial Court of Admiralty. If it was invalid, then State Supreme Courts were also Colonial Courts of Admiralty, being courts of unlimited original civil jurisdiction.

The declaration in s 30A of the *Judiciary Act 1914* (Cth) was eventually repealed by the *Judiciary Act 1939* (Cth). The Commonwealth Attorney-General, in introducing the bill, doubted whether s 30A was valid.⁵⁴ Beyond removing doubts about the validity of the former provision, this repeal had two effects. First, the repeal made State and Territory Supreme Courts (as well as potentially other courts) Colonial Courts of Admiralty, which is discussed in the next section. This was a desired change.⁵⁵ And secondly, it was an acknowledgement by Commonwealth Parliament that the British regime conferring admiralty jurisdiction under the *Colonial Act* was to continue.⁵⁶ That is important because by that time Commonwealth Parliament had ample power to invest federal jurisdiction in the High Court of Australia and state courts, under s 76(iii) of the Commonwealth Constitution (permitting Commonwealth Parliament to confer original jurisdiction in any matter '[o]f Admiralty and maritime jurisdiction'),⁵⁷ or under s 76(ii) (permitting Commonwealth Parliament to confer original jurisdiction in any matters '[a]rising under any laws made by Parliament');⁵⁸ it was also at a time when the *Statute of Westminster 1931* (Imp) had been enacted in the United Kingdom (albeit not yet enacted in Australia) which, upon its enactment, would empower the Commonwealth Parliament to abrogate the *Colonial Act* if it chose to do so.⁵⁹

3.1.2. Courts of Original Unlimited Civil Jurisdiction Being Colonial Courts of Admiralty

In the absence of a declaration by the legislature that a court was a Colonial Court of Admiralty, s 2(1) of the *Colonial Act* provided that every Court in a British possession of original and unlimited civil jurisdiction was a Colonial Court of Admiralty. Before federation, each of the State Supreme Courts was a Colonial Court of Admiralty, since each were courts of original jurisdiction with unlimited civil jurisdiction.⁶⁰ After federation, one issue was whether 'British

⁴⁷ *John Sharp & Sons Ltd v The Ship Katherine Mackall* (1924) 34 CLR 420, 430–1.

⁴⁸ *Ibid* 433.

⁴⁹ *Ibid* 429–30 (Isaacs J).

⁵⁰ See *ibid* 431.

⁵¹ See *ibid* 426 (Knox CJ and Gavan Duffy J, Rich J agreeing).

⁵² See *McArthur v Williams* (1936) 55 CLR 324, 340 (Latham CJ), 359–60 (Dixon, Evatt and McTiernan JJ); *Union Steamship Co of New Zealand v The Ship 'Caradale'* (1937) 56 CLR 277, 279–80; *Nagrind v The Ship 'Regis'* (1939) 61 CLR 688, 691 (Dixon J). See also *Royal Commission on the Constitution of the Commonwealth* (Report, 1927) 784–5 (Owen Dixon KC).

⁵³ Crown Office Law Officers' Opinion No 187, vol 7, 10 July 1915 reproduced in D P O'Connell and Ann Riordan (eds) *Opinions on Imperial Constitutional Law* (The Law Book Company Ltd, 1971) 245.

⁵⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 September 1939, 162 (William Morris Hughes).

⁵⁵ See above fn 44.

⁵⁶ See *China Ocean Shipping Co v State of South Australia* (1979) 145 CLR 172, 213 (Stephen J). See also Castles (n 20) 418.

⁵⁷ Indeed, this jurisdiction was conferred on the High Court of Australia in 1914 by the then *Judiciary Act 1903* (Cth) s 30(b) as inserted by *Judiciary Act 1914* (Cth) s 2. This jurisdiction, however, did not displace that admiralty jurisdiction conferred under the *Colonial Court of Admiralty Act 1890* (Imp). This conferral of jurisdiction was eventually repealed by the *Judiciary Act 1939* (Cth) s 2(b). State courts were also vested with federal jurisdiction under s 76(iii) of the Constitution through *Judiciary Act 1939* (Cth) s 39(2).

⁵⁸ Commonwealth Parliament has wide power to legislate with respect to international and interstate trade, navigation and shipping, and various other matters relating to admiralty: see *Commonwealth Constitution* ss 51(i), 51(vii), 51(viii), 51(x), 51(xiv), 51 (xxxix), 98. See also *John Sharp & Sons Ltd v The Ship Katherine Mackall* (1924) 34 CLR 420, 428 (Isaacs J); *Empire Shipping Co Inc v Owners of Ship 'Shin Kobe Maru'* (1991) 32 FCR 78, 103 (Gummow J).

⁵⁹ See *Statute of Westminster 1931* (Imp) s 2(2).

⁶⁰ See *Townsville Harbour Board v Scottish Shire Line Ltd* (1914) 18 CLR 306, 323 (Isaacs J).

possession' in s 2(1) of the *Colonial Act* was a reference to the Commonwealth or the States. Since federation occurred after the passage of the *Colonial Act*, one concern was whether the *Colonial Act* could apply to courts (such as the High Court of Australia) which came into existence after the passage of that Act.⁶¹ 'British possession' was undefined in the *Colonial Act*. But it was defined in s 18(2) of the *Interpretation Act 1889* (UK) (52 & 53 Vict. C 63), which relevantly applied to the *Colonial Act* 'unless the contrary intention appear[ed]'. That provision provided:

The expression 'British possession' shall mean any part of Her Majesty's dominions exclusive of the United Kingdom, and where parts of such dominions are under both a central and local legislature, all parts under the central legislature shall, for the purpose of this definition, be deemed to be one British possession.

In *John Sharp & Sons Ltd v The Ship Katherine Mackall*,⁶² the High Court of Australia held that the Commonwealth of Australia was the British possession referred to in s 2(1) of the *Colonial Act*. Apart from perhaps two suggestions to the contrary,⁶³ the result of this decision did not mean that the State and Territory Supreme Courts were not also Colonial Courts of Admiralty under s 2(1); they were still Colonial Courts of Admiralty.⁶⁴ That was because, even though the British possession referred to in s 2(1) was the Commonwealth of Australia, the State and Territory Supreme Courts were still courts of unlimited jurisdiction in a British possession (*scil* the Commonwealth) under s 2(1). Before 29 October 1914 and again from 23 November 1939 (when the declaration under s 30A of the then *Judiciary Act 1903* (Cth) was enacted and repealed respectively), the Colonial Courts of Admiralty included the Supreme Court of each Territory and State (but not until 1 July 1911 for the Supreme Courts of New South Wales and Victoria), and the High Court of Australia from its establishment in 1903.⁶⁵

These courts were at least where admiralty disputes were brought in practice. But the terms of s 2(1) of the *Colonial Act* made '[e]very Court of law in a British possession ... which ... has therein original unlimited civil jurisdiction' a Colonial Court of Admiralty. Section 15 defined '[u]nlimited civil jurisdiction' as 'civil jurisdiction unlimited as to the value of the subject-matter at issue, or as to the amount that may be claimed or recovered'. Bruce McPherson (later McPherson JA) has pointed out that one unintended consequence of the rather broad terms of s 2(1) was that the Federal Court of Australia, upon its establishment in 1976, was also a Colonial Court of Admiralty.⁶⁶ The original jurisdiction of the Federal Court of Australia comprised that jurisdiction conferred by Commonwealth legislation,⁶⁷ and Commonwealth legislation conferred jurisdiction on that Court in certain subject matters for claims of unlimited amount. Following the same reasoning, many courts within Australia could also have inadvertently been Colonial Courts of Admiralty.⁶⁸

3.1.3. Inferior Courts Exercising Admiralty Jurisdiction

Section 3(b) of the *Colonial Act* permitted the legislature of a British possession to:

Confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit. Provided that any such Colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty.

⁶¹ *John Sharp & Sons Ltd v The Ship Katherine Mackall* (1924) 34 CLR 420, 421–2 (submission of Latham KC), 431–2 (Isaacs J). Latham CJ (McTiernan J agreeing) in *McIlwraith McEacharn Ltd v Shell Co of Australia Ltd* (1945) 70 CLR 175, 192 rejected the submission that Colonial Courts of Admiralty were limited to those courts existing at the time the *Colonial Act* was passed.

⁶² (1924) 34 CLR 420.

⁶³ Latham CJ in *McArthur v Williams* (1936) 55 CLR 324, 340–1 said that 'the result of this decision [in *The Katherine Mackall*] is to leave in doubt the jurisdiction in admiralty of State courts' and suggested 'legislative action' to remedy this. Similarly, in *McIlwraith McEacharn Ltd v Shell Co of Australia* (1945) 70 CLR 175, Starke J said at 198: '[t]he States did not lose their character of British possessions because in a federal union they are also deemed to be one British possession'. See also *In Re McKelvey* (1906) VLR 304, 309–10 (Holroyd ACJ).

⁶⁴ See *McIlwraith McEacharn Ltd v Shell Co of Australia* (1945) 70 CLR 175, 190 (Latham CJ, McTiernan J agreeing), 197–8 (Starke J), 204–5 (Dixon J), 216 (Williams J); *McArthur v Williams* (1936) 55 CLR 324, 359 (Dixon JJ, Evatt and McTiernan JJ); *Dalgety & Co Ltd v Aitchison; The Rose Pearl* (1957) 2 FLR 219, 224 (Kriewaldt J); *The Loretta v Bubb* (1970) 18 FLR 141, 142 (Neville J); *Thomasson v The Vessel Fox Lady II of Hamburg* (1988) 99 FLR 14, 17 (French J).

⁶⁵ *Lewmarine Pty Ltd v The Ship 'Kaptayanni'* [1974] VR 465, 467–8 (Pape J).

⁶⁶ See Bruce McPherson, 'Admiralty jurisdiction and the Federal Court' (1981) 55 *Australian Law Journal* 71. See also Justice Zelling, 'Constitutional problems of admiralty jurisdiction' (1984) 58 *Australian Law Journal* 8, 10.

⁶⁷ *Federal Court of Australia Act 1976* (Cth) s 19(1). See also Commonwealth Constitution ss 76(ii), 77(i).

⁶⁸ See Australian Law Reform Commission Report No 33 (n 2) [25].

The only exercise of this power was the conferral of a limited grant of admiralty jurisdiction upon the Local Court at Broome.⁶⁹ Section 2 of the *Broome Local Court Admiralty Jurisdiction Act 1917* (WA) invested the Local Court with ‘the like admiralty jurisdiction as is possessed by the Supreme Court’ in claims for seamen’s wages and claims for master’s wages and disbursements. Section 3 limited that jurisdiction to cases in which the claimed amount was below £100 and the ship against which the claim is brought was below 150 tons.

The decision in *The Katherine Mackall* that the British possession referred to in the *Colonial Act* was the Commonwealth of Australia meant that the Western Australian legislature had no power to invest the Local Court with a form of limited admiralty jurisdiction.⁷⁰ Section 107 of the Constitution would not appear to remedy this position for reasons Ying has identified and which will not be repeated here.⁷¹ Hence the validity of the *Broome Local Court Admiralty Jurisdiction Act 1917* (WA) was questionable, although its validity was never formally challenged.⁷²

3.2. Extent of the Admiralty Jurisdiction Conferred by the Colonial Act

Under s 2(2) of the *Colonial Act*, the jurisdiction conferred on a Colonial Court of Admiralty was ‘over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise’. In *The Yuri Maru and The Woron*,⁷³ the Judicial Committee of the Privy Council held that the jurisdiction conferred by this provision was the admiralty jurisdiction of the High Court of Justice in England as it existed when the Act was passed in 1890, but did not include subsequent conferrals of admiralty jurisdiction on that Court.⁷⁴ That interpretation was followed in Australia.⁷⁵ Whilst s 3(a) of the *Colonial Act* permitted the legislature of the British possession to ‘provide for the exercise by [Colonial Courts of Admiralty] of its jurisdiction under [the *Colonial Act*], and limit territorially, or otherwise, the extent of such jurisdiction’, the terms of that provision itself did not permit the colonial legislature to *extend* the admiralty jurisdiction of the Court.⁷⁶

A separate question was whether the admiralty jurisdiction under the *Colonial Act* could be extended by subsequent domestic enactments. The *Colonial Act* did not expressly prohibit this (nor did it expressly permit it).⁷⁷ But even accepting such extension was permitted,⁷⁸ it seems that any such legislation, at least until enactment of the *Statute of Westminster 1931* (Imp) in Australia, would have been repugnant to the *Colonial Act* and void under the *Colonial Laws Validity Act 1865* (Imp).⁷⁹ This would have been so notwithstanding the fact that Commonwealth Parliament could invest the High Court of Australia and State courts with jurisdiction in matters ‘[o]f admiralty and maritime jurisdiction’ under ss 76(iii) and 77(iii) of the Commonwealth Constitution.⁸⁰ This point is moot as, other than the

⁶⁹ See *ibid* [28].

⁷⁰ See CA Ying, ‘Colonial and Federal Admiralty Jurisdiction’ (1981) 12(3) *Federal Law Review* 236, 253–4; Australian Law Reform Commission Report No 33 (n 2) [34].

⁷¹ Ying (n 70) 253–4.

⁷² When the Australian Law Reform Commission was preparing their *Civil Admiralty Jurisdiction* Report it was reported that this jurisdiction had not been exercised for some time: see Australian Law Reform Commission Report No 33 (n 2) [28].

⁷³ [1927] AC 906.

⁷⁴ *Ibid* 915–6. See also *The Camosun* [1909] AC 597, 608 (Lord Gorell).

⁷⁵ *Nagrint v The Ship ‘Regis’* (1939) 61 CLR 688, 692 (Dixon J); *Union Steamship Company of New Zealand Ltd v Ferguson* (1969) 119 CLR 191, 198 (Windeyer J), 207 (Barwick CJ), 211 (Owen J, Kitto J agreeing); *McIlwraith McEacharn Ltd v Shell Co of Australia* (1945) 70 CLR 175, 188 (Latham CJ, McTiernan J and Williams J agreeing), 197 (Starke J), 208 (Dixon J, Williams J agreeing); *Asiatic Navigation Co Ltd v The Commonwealth* (1956) 96 CLR 397, 402 (Taylor J); *F Kanematsu & Co Ltd v The Shahzada* (1956) 96 CLR 477, 483–4 (Taylor J); *Union Steamship Co of New Zealand Ltd v Ferguson* (1969) 119 CLR 191, 198 (Windeyer J).

⁷⁶ See Charles J Burchell, ‘Canadian Admiralty Jurisdiction and Shipping Laws’ (1929) 45(July) *Law Quarterly Review* 370, 372–3.

⁷⁷ Lord Merrivale in *The Yuri Maru and The Woron* [1927] AC 906 suggested at 916 that any extension of admiralty jurisdiction to Colonial Courts of Admiralty after 1890 was ‘left for independent legislative determination’. This was a regrettable statement, since it was unclear whether ‘independent legislative determination’ was a reference to British or colonial legislation. It led some to pronounce that this dictum empowered colonial legislatures to extend admiralty jurisdiction beyond that applicable under the *Colonial Act*: see Berriedale Keith, ‘Notes on Imperial Constitutional Law’ (1927) 9(4) *Journal of Comparative Legislation* 241, 253–4; Notes (1928) 44(January) *Law Quarterly Review* 1, 7; Notes (1928) 44(October) *Law Quarterly Review* 401, 423–4.

⁷⁸ The better view appears to be that only British (and not dominion) legislation could have extended admiralty jurisdiction beyond that conferred by the *Colonial Act*, at least before the passage of the *Statute of Westminster 1931* (Imp): see Notes (1928) 44(October) *Law Quarterly Review* 401, 422–3; Herbert A Smith, ‘Admiralty Jurisdiction in the Dominions’ (1925) 41(October) *Law Quarterly Review* 423, 424; BJ McGrath, ‘Admiralty jurisdiction and the Statute of Westminster’ (1932) 6 *Australian Law Journal* 215, 216.

⁷⁹ See Burchell (n 76) 373; FR Scott, ‘Admiralty Jurisdiction and Colonial Courts’ (1928) 6(10) *Canadian Bar Review* 779, 781–3.

⁸⁰ The *Colonial Laws Validity Act 1865* (Imp) continued to apply in Australia notwithstanding federation: see *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 181 (Barwick CJ), 194 (Gibbs J), 207–214 (Stephen J), 240 (Aickin J).

brief legislative conferral of ‘admiralty and maritime jurisdiction’ on the High Court of Australia,⁸¹ Australian legislation did not extend the admiralty jurisdiction conferred by the *Colonial Act*.⁸² That is perhaps notable in itself given the vast extensions of admiralty jurisdiction in England after 1890 which did not apply in Australia.

The nineteenth century saw great extensions of admiralty jurisdiction in England,⁸³ some of which was reflected in the separate extension of the jurisdiction of Vice Admiralty Courts as discussed above. There were also extensions to the admiralty jurisdiction exercised by the English High Court of Admiralty by the *Admiralty Court Act of 1840* (3 & 4 Vict. C 65) and the *Admiralty Court Act of 1861* (24 Vict. C 10). The *Judicature Acts* incorporated the admiralty jurisdiction of the High Court of Admiralty into the Probate, Divorce and Admiralty Division of the High Court of Justice.⁸⁴ To understand the admiralty jurisdiction of the High Court of Justice in 1890, it is useful to discuss this jurisdiction under three headings, namely: (a) the ‘inherent’ jurisdiction of the High Court of Admiralty; (b) the jurisdiction conferred by the *Admiralty Court Acts of 1840 and 1861* (Imp); and (c) what this jurisdiction did not include.

3.2.1. The ‘Inherent’ Jurisdiction of the High Court of Admiralty

The ‘inherent’ jurisdiction of the High Court of Admiralty may be described as the recognised jurisdiction of that Court without statutory conferral of jurisdiction.⁸⁵ This jurisdiction is a result of the early history of the varied disputes brought in that Court.⁸⁶ The inherent jurisdiction of the High Court of Admiralty may be summarised as follows,⁸⁷ albeit it should be noted that there are no bright lines, and indeed many inconsistencies, in the exercise of this jurisdiction.⁸⁸ I am not here concerned with the prize jurisdiction of the High Court of Admiralty, which was separate from the Court’s ordinary or ‘instance’ jurisdiction.⁸⁹

Following an infamous quarrel between the Common Law Courts and the Court of Admiralty in Richard II’s reign,⁹⁰ two statutes were passed which limited the High Court of Admiralty to hearing causes of actions which arose within the body of a county.⁹¹ This, however, would cause issues as it related to certain contracts which were made within the realm but which were performed at sea. In 1632, the Privy Council moved various resolutions, following an agreement between the judges of the King’s Bench and the Court of Admiralty in 1575, which, among other things, recognised that the High Court of Admiralty had jurisdiction in freight, seamen’s wages and certain actions for breach of charterparties.⁹²

The inherent jurisdiction included claims over droits of admiralty, being property rights the Crown enjoyed under the general law over goods found afloat and derelict on the high seas.⁹³ This included jetsam (that is, shipwreck and cargo and deck gear jettisoned to lighten a vessel and so prevent her from foundering), derelicts (that is, abandoned vessels), *deodands* (that is, objects instrumental to death aboard a ship, or goods and belongings found upon a corpse floating

⁸¹ Even when this legislation was in effect by *Judiciary Act 1914* (Cth) s 2 the High Court of Australia’s jurisdiction in admiralty was, in the disputes which came before that Court, exercised under the *Colonial Act*: see below Part IV(iv).

⁸² It did, however, raise doubts in Canada about whether the *Maritime Conventions Act 1914* (Can) (conferring admiralty jurisdiction in claims arising from charterparties) was validly enacted: see FR Scott (n 79) 783 fn 9. It also appeared to stymie the Parliament of Canada from enacting legislation conferring admiralty jurisdiction over claims for carriage of goods, which was withdrawn after its first reading in the 1928 session: Burchell (n 76) 373.

⁸³ See generally Wiswall Jr (n 22).

⁸⁴ *Judicature Act 1873* (UK) s 16(5).

⁸⁵ For greater detail on such jurisdiction see: Arthur Browne, *Compendious View of the Civil Law and the Law of the Admiralty* (2nd ed, 1802); Henry Charles Coote, *Practice of the High Court of Admiralty* (1869, 2nd ed); ES Roscoe, *Admiralty Jurisdiction and Practice* (5th ed, 1931); FL Wiswall Jr, *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge University Press, 1970).

⁸⁶ See generally RG Marsden, *Select Pleas in the Court of Admiralty* (1894) (Selden Society, 1894) vol 1; William Holdsworth, *A History of English Law* (1938) vol 1, 552–9; *De Lovio v Boit* 7 Fed Cas 418 (1815).

⁸⁷ See Browne (n 85) 45–122; Wiswall Jr (n 22) 8–11; Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (Report No 33, December 1986) [48]–[52].

⁸⁸ See, eg, Australian Law Reform Commission Report No 33 (n 2) [180].

⁸⁹ See Edwin Edwards, *A treatise on the jurisdiction of the High Court of Admiralty in England* (W Benning, 1847) 30–1; Edward Stanley Roscoe, *A treatise on the jurisdiction and practice of the Admiralty Division of the High Court of Justice, and on appeals therefrom* (Stevens and Sons, 2nd ed, 1882) 5. See also Michael White, *Australian Maritime Law* (Federation Press, 3rd ed, 2014) 669–72 [17.1].

⁹⁰ See Geoffrey Hutchinson (ed), *Roscoe’s Admiralty Jurisdiction and Practice* (Stevens & Sons, 5th ed, 1931) 4.

⁹¹ See 13 Rich II, st 1, c 5; 15 Rich II c 3.

⁹² See, eg, Browne (n 85) 77–9.

⁹³ *The King v Forty-nine Casks of Brandy* (1936) 3 Hagg Adm 257, 270 (Sir John Nicholl).

at sea or cast ashore),⁹⁴ and certain Royal fish (including sturgeon, grampuses, porpoises, and stranded whales). Jurisdiction also extended to claims of salvage (but not for life salvage) arising on the high seas.⁹⁵ It also extended to claims arising from contracts cognisable in admiralty whose consideration was maritime (such as bottomry, the provision of necessities, as well as certain contracts made on land including freight and charterparties) and not ratified by deed nor under seal.⁹⁶ It included claims for seamen's wages (but not master's wages),⁹⁷ claims of tort committed on the high seas,⁹⁸ and wrongful possession of a ship (where the taking of the ship did not occur within the body of a county).⁹⁹ The Court, however, had no jurisdiction to hear matters of ship mortgages, whether made ashore or at sea.¹⁰⁰

One dispute which involved the inherent jurisdiction of the High Court of Admiralty was *Union Steamship Company of New Zealand Ltd v Ferguson*.¹⁰¹ The High Court of Australia, sitting as a Colonial Court of Admiralty,¹⁰² considered whether a tort was committed on the high seas to fall within the inherent jurisdiction of the High Court of Admiralty. The matter involved a claim by a crew member against a shipowner for injuries sustained when he fell into the hold of a ship. Since the alleged negligence occurred when the vessel was made fast to a wharf at Burnie, Tasmania, an issue arose as to whether any tort occurred on the high seas. Both Windeyer J (at first instance) and Barwick CJ (on appeal) considered that the alleged tort occurred on the high seas within the meaning of that phrase.¹⁰³ But Windeyer J held that the alleged tort nevertheless occurred within the county of Tasmania, which at common law extended to rivers, arms or creeks of the sea which were *intra fauces terrae*, such that the court did not have jurisdiction under the inherent jurisdiction of the High Court of Admiralty.¹⁰⁴ Barwick CJ held that even though the tort occurred within the county of Tasmania, such that common law jurisdiction was concurrent with any jurisdiction in admiralty, s 2(4) of the *Colonial Act* abrogated any exercise of common law jurisdiction in favour of the exclusive application of admiralty jurisdiction under the *Colonial Act*. That section provided:

Where a Court in a British possession exercises in respect of matters arising outside the body of a county or other like part of a British possession any jurisdiction exercisable under this Act, that jurisdiction shall be deemed to be exercised under this Act and not otherwise.

The remaining members of the full court found it unnecessary to address this issue.¹⁰⁵

3.2.2. Jurisdiction Conferred by the Admiralty Court Acts of 1840 and 1861

The principal extensions of the High Court of Admiralty's jurisdiction occurred through the *Admiralty Court Act of 1840* (3 & 4 Vict. C 65) ('1840 Act') and the *Admiralty Court Act of 1861* (24 Vict. C 10) ('1861 Act'). A panoply of other statutes enacted before 1890 also conferred jurisdiction on the High Court of Admiralty but which will not be discussed.¹⁰⁶

⁹⁴ Deodand was, however, abolished in 1846: see *Deodands Act 1846* (UK) (9 & 10 Vict c. 62).

⁹⁵ *The Zephyrus* (1842) 1 W Rob 329; *The Johannes* (1860) Lush 182, 187 (Dr Lushington).

⁹⁶ See Browne (n 85) 72; *De Lovio v Boit* 7 Fed Cas 418 (1815), 431 (Story J). This jurisdiction is riddled with inconsistencies, particularly as it relates to whether the contract was made at sea: see Arthur Browne (n 85) 72; *De Lovio v Boit* 7 Fed Cas 418 (1815), 439–40 (Story J).

⁹⁷ See, eg, *De Lovio v Boit* 7 Fed Cas 418 (1815), 436–7 (Story J).

⁹⁸ The ancient history of the admiralty court included all torts committed on the high seas: see, eg, *De Lovio v Boit* 7 Fed Cas 418 (1815), 421, 441 (Story J). But it would seem that this jurisdiction was qualified to claims of collision against the shipowner: see *The Queen v Judge of City of London Court* [1892] 1 QB 273, 295.

⁹⁹ Browne (n 85) 113.

¹⁰⁰ *Ibid* 94–5.

¹⁰¹ (1969) 119 CLR 191.

¹⁰² The plaintiff brought the claim in the diversity jurisdiction of the Court on a mistaken understanding of s 75(iv) of the Constitution. Justice Windeyer declined to exercise jurisdiction under s 75(iv) but proceeded on the basis that the Court had admiralty jurisdiction as conferred under the *Colonial Act*: *ibid* 196–7.

¹⁰³ *Ibid* 200 (Windeyer J), 208 (Barwick CJ). The high seas included all oceans, seas, bays, channels, rivers, creeks, and waters below low-water mark, and where great ships could go, with the exception only of those parts which were within the body of some county: see *The Mecca* [1895] P 95, 107.

¹⁰⁴ *Ibid* 201 citing *East's Pleas of the Crown* (1803), vol II, 803.

¹⁰⁵ *Ibid* 209–10 (Menzies J, Kitto J agreeing), 211 (Owen J, Kitto J agreeing).

¹⁰⁶ See, eg, *Wreck and Salvage Act 1846* (UK) s 19 (conferring jurisdiction to hear matters for salvage of life).

On 10 June 1833, the House of Commons ordered that a Select Committee inquire into the office and duties, appointment, salary, and emoluments of the Judges of the High Court of Admiralty and other courts.¹⁰⁷ Whilst that reference appeared to be restricted to an investigation into judicial office, the Committee opened their Report with the following:¹⁰⁸

In order to arrive at any satisfactory conclusion as to what ought to be the future Constitution of these Tribunals, Your Committee have found it necessary to enter upon an extensive field of inquiry, to ascertain what will be the probable amount and nature of the business which will hereafter be brought to them.

The Committee relevantly recommended that the jurisdiction of the High Court of Admiralty be extended to recognise claims for seamen's wages under 'Special Contracts', claims of title to ships which arose incidentally in cases of possession, and claims of Nautical Men and mortgagees where the vessel had been arrested (or the proceeds of the vessel were in the Registry of the Court).¹⁰⁹ The Committee also recommended, consistent with the testimony of Dr Stephen Lushington and others,¹¹⁰ that the High Court of Admiralty have concurrent jurisdiction with other courts in issues of title to ships, freight, and potentially other mercantile matters.¹¹¹ With the determination of Dr Lushington, then a Member of Parliament, the 1840 Act was passed which, in large measure, adopted the recommendations in the Report.¹¹²

The 1840 Act provided several extensions to the admiralty jurisdiction of the High Court of Admiralty. The Act extended its original jurisdiction to:

1. Claims in respect of any mortgage of a ship or vessel under arrest (or the proceeds of that ship where they are brought into and are in the Court's registry) by process issued from the Court (section 3). This did not extend to adjudicating on issues of freight or earnings of the ship or vessel which was under arrest;¹¹³
2. Questions as to the title or ownership of any ship or vessel (or the proceeds thereof remaining in the Registry) arising in any cause of possession, salvage, damage, wages or bottomry (section 4);
3. Claims of towage, salvage, and claims for necessities supplied to any foreign ship or vessel, regardless of if the ship may have been within the body of a county, or upon the high seas, at the time the services or necessities were furnished (section 6); and
4. All matters and questions concerning Booty of War referred to by the Privy Council (section 22).¹¹⁴

The 1861 Act was introduced before the House of Lords at a time when the High Court of Admiralty 'had now become one of the most important tribunals in the country for the determination of civil causes'.¹¹⁵ The Bill was introduced with the concurrence of Dr Stephen Lushington, then Judge of the High Court of Admiralty and who had presided over that Court since 1838.¹¹⁶ The Act provided jurisdiction to the High Court of Admiralty over:

1. Building, equipping or repairing any ship (or its proceeds) which is under arrest of the court (section 4);
2. Necessaries supplied to ships provided they were not supplied in the ship's home port and a shipowner was not domiciled in England or Wales (section 5);
3. Any claim by an owner, consignee or assignee of any bill of lading of goods carried into a port in England or Wales in any ship for damage done to goods by negligence, breach of contract or breach of duty on the

¹⁰⁷ See Select Committee on Admiralty Courts, *Report from the Select Committee on Admiralty Courts with the Minutes of Evidence* (House of Commons Paper No 670, Session 1833) 2.

¹⁰⁸ *Ibid* 3.

¹⁰⁹ *Ibid* 4.

¹¹⁰ *Ibid* 51–2 [511] (Stephen Lushington). See also at 68 [732]–[738] (William Fox), 107 [1126]–[1127] (William Adams).

¹¹¹ *Ibid* 4.

¹¹² Wiswall Jr (n 22) 40–1.

¹¹³ *The Fortitude* (1843) 2 W Rob 217, 223 (Dr Lushington).

¹¹⁴ 'Booty' is distinguished from prize in that the former is property captured on land by land forces exclusively: see *Banda and Kirwee Booty* (1866) LR 1 AE 109, 129 (Dr Lushington).

¹¹⁵ Hansard, 5 March 1861, House of Lords, Second Reading Speech to the Admiralty Court Jurisdiction Bill, column 1394 (Lord Chancellor Campbell).

¹¹⁶ *Ibid*.

- part of the shipowner, master or crew of the ship unless any shipowner or part shipowner is domiciled in England or Wales (section 6);
4. Any claim for 'damage done by any ship' (section 7);
 5. Claims of shipowners inter se regarding the ownership, possession, employment and earnings of any ship registered in England or Wales (section 8);
 6. Claims of salvage of life from any British ship or boat wherever those services may have been rendered, or from any foreign ship or boat where the salvage was rendered wholly or in part in British waters (section 9);
 7. Any claim for seamen's wages, master's wages, and master's disbursements made on account of the ship (section 10);
 8. Any claim in respect of any mortgage registered under the *Merchant Shipping Act 1854* (UK) regardless of whether the ship is arrested (section 11);
 9. Claims under ss 62–65 of the *Merchant Shipping Act 1854* (UK) regarding the sale of a ship or part thereof upon transmission of ownership in a ship or a share in a ship to a person not qualified to be an owner of a British ship (section 12);
 10. Limitation of liability claims by a shipowner under Part 9 of the *Merchant Shipping Act 1854* (UK) where the ship or vessel is under arrest of the Court (section 13); and
 11. The foregoing jurisdiction could be exercised either in rem or in personam (section 35).

The following are examples of the exercise of this jurisdiction under the *Colonial Act* in Australian courts sitting as Colonial Courts of Admiralty.

There were several claims which purported to engage the jurisdiction conferred under s 6 of the 1840 Act or s 5 of the 1861 Act in respect of the supply of necessities. In *The Lastrigoni*¹¹⁷ the plaintiff brought a claim in rem for bunkers supplied to a time charterer of a vessel. Menzies J concluded the jurisdiction under either s 6 of the 1840 Act or s 5 of the 1861 Act could not be established in circumstances where necessities were only provided to a charterer, and not a shipowner.¹¹⁸ In *The Rose Pearl*,¹¹⁹ Kriewaldt J held that the Supreme Court of the Northern Territory had jurisdiction under either s 6 of the 1840 Act or s 5 of the 1861 Act to hear a claim for the supply of necessities to a vessel registered in Panama. Jurisdiction was established under either provision on the basis that the ship was a foreign vessel, that the necessities were not furnished in her home port, and no owner or part-owner of the vessel was domiciled in the Northern Territory.¹²⁰ In contrast to *The Lagistrone*, an in personam claim was available against the shipowner, such that the in rem jurisdiction could be engaged.¹²¹ And in *The Bosna*,¹²² Mitchell J held that the Supreme Court of South Australia had no jurisdiction to hear a claim in rem for necessities supplied to a fishing vessel registered at Port Adelaide in the British register of ships. Since the vessel was not a foreign vessel, s 6 of the 1840 Act did not apply.¹²³ Since the vessel was not under arrest when the writ was issued, s 4 of the 1861 Act did not apply.¹²⁴ And since the shipowners were domiciled in South Australia (or Australia), and since the necessities were supplied in the vessel's home port, s 5 of the 1861 Act did not apply either.¹²⁵

Several cargo claims brought under s 6 of the 1861 Act failed on the basis that the carriage of goods did not occur *into* a port in Australia. Hence the High Court of Australia, sitting as a Colonial Court of Admiralty, had no admiralty jurisdiction in *The Shahzada*¹²⁶ in relation to a claim for cargo transported from Sydney to Kobe, Japan, nor in *The Terukawa Maru*¹²⁷ for cargo shipped from Melbourne to Georgetown, Guiana.

¹¹⁷ *Shell Oil Co v The Lastrigoni* (1974) 131 CLR 1.

¹¹⁸ *Ibid* 5.

¹¹⁹ (1957) 2 FLR 219.

¹²⁰ *Ibid* 225–6.

¹²¹ *Ibid* 228 citing *The Henrich Bjoern* [1886] 11 AC 270, 277.

¹²² *Kali Boat Building & Repair Pty Ltd v The Bosna* (1977) 19 SASR 112.

¹²³ *Ibid* 116.

¹²⁴ *Ibid* 116.

¹²⁵ *Ibid* 116–17.

¹²⁶ *F Kanematsu & Co Ltd v The Ship Shahzada* (1956) 96 CLR 477.

¹²⁷ *The Ship Terukawa Maru v Co-operated Dried Fruit Sales Pty Ltd* (1972) 126 CLR 170.

Two personal injury claims aboard ships were established as ‘damage done by any ship’ under s 7 of the 1861 Act. Whether this jurisdiction was established depended on the following distinction drawn by Dixon J in *The Regis*.¹²⁸ Where ‘the injury arises from some defect in the condition of the ship considered as premises or as a structure upon which the person injured is standing, walking or moving’ a person’s injury aboard a ship was not ‘damage done by any ship’ under s 7; however, ‘where the injury is the result of the management or navigation of the ship as a moving object or of the working of the gear or of some other operation, then the damage is to be regarded as done by the ship as an active agent or as the “noxious instrument”’ such as to fall within s 7.¹²⁹ Admiralty jurisdiction was established under s 7 in one case where a plaintiff suffered injury when the vessel she was aboard capsized due to its improper navigation,¹³⁰ and was also established in another case where the plaintiff fell into the hold of a ship as a result of the defective operation of a winch.¹³¹ However, there were some reservations about the clarity of the distinction drawn by Dixon J in *The Regis*.¹³²

In relation to the limitation of liability under s 13 of the 1861 Act, in *China Shipping Co v South Australia*,¹³³ the owner, agent and master of the *Wuzhou* sought to limit their liability under the *Merchant Shipping Act 1894* (Imp) for damage done to a jetty. However, neither the *Merchant Shipping Act 1894* (Imp) nor cognate legislation permitted a shipowner to limit liability to damage done to person or property which was not afloat. After 1890, section 1 of the *Merchant Shipping (Liability of Shipowners and Others) Act 1900* (Imp) extended a shipowner’s ability to limit liability to include loss or damage caused to property which was not afloat (such as, for example, to wharves or jetties). Accordingly, Stephen J pointed out that the Court did not have jurisdiction under the *Colonial Act* to hear the limitation claim;¹³⁴ instead, the jurisdiction was conferred by s 504 of the *Merchant Shipping Act 1894* (Imp) (as amended by s 1 of the *Merchant Shipping (Liability of Shipowners and Others) Act 1900* (Imp)), which was a separate imperial enactment which invested ‘any competent court’ ‘in a British possession’ to hear limitation proceedings by a shipowner.¹³⁵

3.2.3. Extensions of Admiralty Jurisdiction After 1890

This section briefly explains the principal extensions of admiralty jurisdiction after 1890 to understand the limits of the admiralty jurisdiction conferred by the *Colonial Act*.

Section 5 of the *Maritime Convention Act 1911* (Imp) extended the existing admiralty jurisdiction in respect of damage to include damages for loss of life or personal injury, and permitted such proceedings to be brought in personam or in rem.¹³⁶ This remedied the House of Lords decision in *The Vera Cruz*¹³⁷ that a ‘claim for damage done by a ship’ under section 7 of the 1861 Act did not include a claim for loss of life. Hence in *Parker v The Commonwealth*,¹³⁸ Windeyer J held that the High Court of Australia had no jurisdiction under the *Colonial Act* to hear a claim by a widow when her husband died in a shipping collision alleged to have been caused by the negligence of Commonwealth officers.¹³⁹ The action instead proceeded in the High Court of Australia’s original jurisdiction, seemingly under s 75(iii) of the Constitution.¹⁴⁰

Section 5 of the *Administration of Justice Act 1920* (UK) extended the admiralty jurisdiction of the High Court of Justice to any claim arising out of a charterparty, any claim in relation to the carriage of goods, and any claim in tort in respect of goods carried in any ship, provided that any owner or part owner of the vessel was not domiciled in

¹²⁸ *Nagrint v The Ship ‘Regis’* (1939) 61 CLR 688.

¹²⁹ *Nagrint v The Ship ‘Regis’* (1939) 61 CLR 688, 700 (Dixon J).

¹³⁰ *Ibid* 700.

¹³¹ *Union Steamship Co of New Zealand Ltd v Ferguson* (1969) 119 CLR 191, 202–3 (Windeyer) upheld on appeal at 209 (Barwick CJ), 209 (Kitto J), 210 (Menzies J), 211–12 (Owen J).

¹³² *Ibid* 202 (Windeyer J), 209 (Barwick CJ)

¹³³ (1979) 145 CLR 172.

¹³⁴ *Ibid* 225–6 (Stephen J),

¹³⁵ *Ibid* 226 (Stephen J, Aickin J agreeing).

¹³⁶ Section 9(1) of the *Maritime Convention Act 1911* (Imp) stipulated that the Act did not extend to, amongst other places, the Commonwealth of Australia.

¹³⁷ (1884) 10 App Cas 59.

¹³⁸ (1965) 112 CLR 295.

¹³⁹ *Ibid* 298.

¹⁴⁰ *Ibid*.

England or Wales. Had this extension applied in Australia, admiralty jurisdiction would have been established in *The Shahzada* and *The Terukawa Maru* provided the shipowner or any part shipowner of the relevant vessels were not domiciled in Australia.¹⁴¹ In *The Yuri Maru* and *The Woron*,¹⁴² the Privy Council held that the jurisdiction conferred by the *Colonial Act* did not permit the Exchequer Court of Canada (the Court declared by the Parliament of Canada as the Colonial Court of Admiralty) to hear a claim for breach of a charterparty under s 5 of the *Administration of Justice Act 1920* (UK).

Section 22 of the *Supreme Court of Judicature (Consolidation) Act 1925* (UK) included some incremental additions to the admiralty jurisdiction of the High Court of Justice. This included jurisdiction to hear questions as to title or ownership of a ship arising in an action for necessities.¹⁴³ It also included claims for damage ‘received by a ship’ (not merely ‘damage done by any ship’).¹⁴⁴ It extended claims for salvage of life regardless of where the salvage occurred.¹⁴⁵ And the Act defined ‘ship’ broadly to include ‘any description of [a] vessel used in navigation not propelled by oars’.¹⁴⁶

The *Administration of Justice Act 1956* (UK) was the most significant statutory extension of admiralty jurisdiction.¹⁴⁷ That Act extended that jurisdiction to include a general claim to possession or ownership of a ship (not merely British registered ships and not merely inter se between shipowners).¹⁴⁸ It recognised claims of mortgages and charges to any ship or share therein (not merely British registered ships).¹⁴⁹ It recognised any claim for personal injury or death ‘sustained in consequence of any defect in a ship or in her apparel or equipment’ or due to ‘the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or the master or crew thereof’ (not merely those personal injury claims which are ‘damage done by any ship’ under the distinction drawn by Dixon J in *The Nagrint*).¹⁵⁰ It recognised a claim for pilotage (not merely towage).¹⁵¹ It recognised a claim for goods or materials supplied to a ship for her operation or maintenance (not merely necessities provided outside the ship’s home port and where a shipowner is not domiciled in England and Wales).¹⁵² It recognised a claim for construction, repair or equipment of a vessel or for dock charges or port dues. It recognised a claim by a shipper, charterer or agent in respect of disbursements made on account of the ship (not merely those by a master).¹⁵³ It recognised a claim for general average.¹⁵⁴ And it recognised any claim for bottomry (not merely those bottomry claims which arose out of questions as to title or ownership of the vessel).

4. Effect of Federation

Some of the effects of federation upon the exercise of the admiralty jurisdiction under the *Colonial Act* have already been described, such as the High Court of Australia becoming a Colonial Court of Admiralty upon its establishment in 1903, and the reference to the ‘British possession’ in the *Colonial Act* becoming the Commonwealth of Australia. This section describes the various other effects that federation had for the exercise of admiralty jurisdiction conferred under the *Colonial Act*.

Section 76(iii) of the Constitution (when read with ss 77 (i) and 77(iii)) permits the Commonwealth Parliament to confer original jurisdiction on the High Court of Australia and federal and state courts in any matter of ‘Admiralty and maritime jurisdiction’. Four points may be made about the ambit of this jurisdiction. First, as with several

¹⁴¹ It is unclear from the reports in each case whether that is so. Jurisdiction in *The Nieuw Holland* [1957] St R Qd 507 would not have been established since the shipowner in that case was domiciled in Australia: see at 510.

¹⁴² [1927] AC 906.

¹⁴³ *Supreme Court of Judicature (Consolidation) Act 1925* (UK) s 22(a)(i).

¹⁴⁴ *Ibid* s 22(a)(iii).

¹⁴⁵ *Ibid* s 22(a)(v).

¹⁴⁶ *Ibid* s 22(3). That definition was *in pari materia* to the definition of ‘ship’ in s 2 of the *Merchant Shipping Act 1854* (UK) and had been interpreted broadly: see, eg, *The Mac* [1882] 7 PD 126. The definition of ‘ship’ is relevant to admiralty jurisdiction because it defines what *res* an in rem claim may be brought against, and enables an admiralty court to, for example, arrest a vessel or sell the vessel to satisfy a claim brought in rem: see generally *Vallianz Shipbuilding & Engineering Pte Ltd v Owner of the Vessel ‘Eco Spark’* [2025] 1 *Lloyd’s Reports* 195.

¹⁴⁷ FL Wiswall Jr (n 83) 149.

¹⁴⁸ *Ibid* s 1(1)(a).

¹⁴⁹ *Ibid* s 1(c).

¹⁵⁰ *Ibid* s 1(1)(f).

¹⁵¹ *Ibid* s 1(1)(l).

¹⁵² *Ibid* s 1(1)(m).

¹⁵³ *Administration of Justice Act 1956* (UK) s 1(1)(p).

¹⁵⁴ *Ibid* s 1(1)(q).

provisions in Chapter III, the text of s 76(iii) is *in pari materia* to art III, sec 2(1) of the United States Constitution.¹⁵⁵ However, the interpretation of that provision in the United States, which is to the effect of implying a power on Congress to legislate as to admiralty and maritime law generally,¹⁵⁶ has not been accepted in Australia.¹⁵⁷ Secondly, the enactment of the Commonwealth Constitution itself did not have the effect of abrogating the operation of imperial legislation in Australia.¹⁵⁸ In the *SS Kaliba*, writing before the enactment of the *Statute of Westminster 1931* (Imp), Barton J described the United Kingdom Parliament having ‘an over-riding power to legislate on the subject [of admiralty and maritime jurisdiction]’ which was not displaced by s 76(iii).¹⁵⁹ It was not until the enactment of the *Statute of Westminster 1931* (Imp) in Australia that the Imperial Parliament ceased to have paramount legislative authority to apply an act of parliament to the colonies.¹⁶⁰ Even then, imperial legislation which was passed before the enactment of the *Statute of Westminster 1931* (Imp) in Australia continued to apply until Commonwealth Parliament legislated to repeal or amend the legislation,¹⁶¹ and would continue to apply to override state legislation until passage of the *Australia Act 1986* (Cth).¹⁶² Thirdly, the scope of matters which may fall under the jurisdiction conferred by s 76(iii) is not necessarily, and may be wider than, the common law admiralty jurisdiction existing at federation in England,¹⁶³ and even matters arising under laws that Commonwealth Parliament can legislate with respect to.¹⁶⁴ And fourthly, even when s 30(b) of the *Judiciary Act 1903–1937* (Cth) conferred original jurisdiction in admiralty and maritime matters on the High Court of Australia pursuant to s 76(iii) of the Constitution, the exercise of admiralty jurisdiction in the High Court of Australia was, in at least the disputes which came before it, exercised under the *Colonial Act*, and not from the federal jurisdiction conferred under s 30(b).¹⁶⁵ A similar result appears to follow in admiralty disputes litigation in State Supreme Courts, in which such Courts did not exercise the federal jurisdiction conferred over ‘Admiralty and maritime matters’ under s 39 of the *Judiciary Act 1903* (Cth), but exercised the imperial jurisdiction conferred by the *Colonial Act*.¹⁶⁶

Commonwealth Parliament also recognised the continued operation of the *Colonial Act* post federation.¹⁶⁷ The declaration in s 30A of the *Judiciary Act 1914* (Cth) (made under s 3(a) of the *Colonial Act*) that the High Court of Australia was a Colonial Court of Admiralty was one such example. Upon repeal of that declaration, the State and Territory Supreme Courts also became Colonial Courts of Admiralty pursuant to the *Colonial Act*.

A final effect of Federation is that, under s 2(a) of the *Colonial Act*, references to the ‘High Court in England’ in English legislation which referred to the admiralty jurisdiction of the High Court of England were replaced with that

¹⁵⁵ Art III, s 2 of the United States Constitution, however, makes jurisdiction federal but is not assigned to the original jurisdiction of the Supreme Court of the United States: see Zelman Cowen (ed) *Federal Jurisdiction in Australia* (Oxford University Press, 1959, 1st ed) 58.

¹⁵⁶ See, eg, *Butler v Boston and Savannah Steamship Co* 130 US 527 (1889), 557 (Bradley J); *Re Garnett* 141 US 1 (1891), 14 (Bradley J); *Romero v International Terminal Operating Co* 358 US 354 (1959), 360–1.

¹⁵⁷ *SS Kaliba v Wilson* (1910) 11 CLR 689, 699 (Griffith CJ), 704 (Barton J), 715 (Isaacs J); *R v Turner; Ex parte Marine Board of Hobart* (1927) 39 CLR 411, 447–8 (Higgins J). See also *John Sharp & Sons Ltd v The Ship Katherine Mackall* (1924) 34 CLR 420, 427–8 (Isaacs J).

¹⁵⁸ See, eg, *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 181 (Barwick CJ), 194 (Gibbs J), 207–214 (Stephen J), 240 (Aickin J). A similar conclusion was reached as to the continued operation of the *Merchant Shipping Act 1894* (Imp) after federation: see *Union Steamship Co of New Zealand v Commonwealth* (1925) 36 CLR 130, 151–2 (Isaacs J).

¹⁵⁹ *SS Kaliba v Wilson* (1910) 11 CLR 689, 704.

¹⁶⁰ See *R v Marais* [1902] AC 51, 54.

¹⁶¹ *Statute of Westminster 1931* (Imp) s 2(2).

¹⁶² See *Statute of Westminster 1931* (Imp) s 9(2). See also Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (The Federation Press, 2010) ch 2.

¹⁶³ *John Sharp & Sons Ltd v The Ship Katherine Mackall* (1924) 34 CLR 420, 428 (Isaacs J); *McIlwraith McEacharn Ltd v Shell Co of Australia* (1945) 70 CLR 175, 208–9 (Dixon J); *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 204 (Gibbs J); *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404, 424.

¹⁶⁴ *John Sharp & Sons Ltd v The Ship Katherine Mackall* (1924) 34 CLR 420, 428 (Isaacs J); *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404, 424. There are some difficulties in knowing the precise contents of ‘Admiralty and maritime jurisdiction’. Mr Owen Dixon KC in evidence before the *Royal Commission on the Constitution of the Commonwealth* (Report, 1927) 787 said: ‘no one seems to know what maritime jurisdiction is’. A unanimous High Court in *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404 said at 424:

... s. 76(iii) extends to matters of the kind generally accepted by maritime nations as falling within a special jurisdiction, sometimes called Admiralty and sometimes called maritime jurisdiction, concerned with the resolution of controversies relating to marine commerce and navigation.

¹⁶⁵ See *John Sharp & Sons Ltd v The Ship Katherine Mackall* (1924) 34 CLR 420, 428 (Isaacs J); *Nagrint v The Ship 'Regis'* (1939) 61 CLR 688, 696 (Dixon J). Section 30(b) was repealed by the *Judiciary Act 1939* (Cth).

¹⁶⁶ See *McIlwraith McEacharn Ltd v Shell Co of Australia* (1945) 70 CLR 175, 210 (Dixon J); *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 227 (Stephen J), 243–4 (Aickin J).

¹⁶⁷ See generally *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 213 (Stephen J).

of the Commonwealth, and not that of any State or Territory. For example, when applied in Australia, the jurisdiction to hear a claim for any bill of lading of goods carried into a port in England or Wales, under s 6 of the *Admiralty Court Act 1861* (UK), was to be read as though the words of ‘England or Wales’ were replaced with that of the Commonwealth of Australia. This was not uniformly followed, and there were frequent decisions where the reference to ‘England and Wales’ were read as a reference to a State, rather than the Commonwealth.¹⁶⁸

5. Reform

The following are some of the uncertainties and limitations which arose from the exercise of admiralty jurisdiction conferred by the *Colonial Act*. It was uncertain whether Commonwealth Parliament’s declaration pursuant to s 3(a) of the *Colonial Act* that the High Court of Australia was a Colonial Court of Admiralty was constitutionally valid. It was uncertain whether the High Court of Australia, and Supreme and Territory Supreme Courts, were the only courts which could exercise admiralty jurisdiction under the *Colonial Act*. It was uncertain whether the Western Australian Parliament’s investiture of (limited) admiralty jurisdiction in the Broome Local Court pursuant to s 3(b) of the *Colonial Act* was valid. The admiralty jurisdiction conferred under the *Colonial Act* was limited to that admiralty jurisdiction exercised by the High Court of Justice in 1890; several important extensions of admiralty jurisdiction after 1890 in England therefore did not apply in Australia. There were uncertainties, at least from the perspective of Commonwealth Parliament, about how the jurisdiction conferrable under s 76(iii) of the Constitution interacted with that jurisdiction conferred under the *Colonial Act*.¹⁶⁹ And there were inconsistencies in how references to ‘England and Wales’ in the *Admiralty Acts 1840* and *1861* were to be applied in Australia under s 2(a) of the *Colonial Act*. Whilst these uncertainties cannot all be attributed to the *Colonial Act*, they all arose because of applying the *Colonial Act* in Australia.

There were pleas for reform. Writing shortly after the agreement at the Imperial Conference of 1923 that dominions could enter bilateral treaties, Professor Herbert A Smith noted the incongruity between dominions having diplomatic independence from Britain yet not having autonomy in adjudicating upon admiralty cases.¹⁷⁰ In *Ferguson*,¹⁷¹ after remarking that the High Court of Australia in 1969 was ‘oddly enough still [] a Colonial Court of Admiralty’, Barwick CJ said:

It is now too late judicially to arrest the development of the jurisdiction which has its inception in the Admiralty Court Act, 1861: but it is apparent from what I have written and from what has fallen from Justices of this Court in earlier cases that the jurisdiction in Admiralty now calls for examination resulting in clearer definition and appropriate limitation by the legislature.¹⁷²

The passage of the *Statute of Westminster 1931* (Imp) meant that legislation enacted by dominion parliaments (after the adoption of that legislation) was no longer fettered by the *Colonial Laws Validity Act 1865* (Imp). Section 2 of the latter legislation enshrined in narrow form the limitation that a colonial law which was repugnant to imperial legislation (or order or regulation) applicable to a colony was void. Between 1970 and 1980, several jurisdictions enacted legislation repealing the *Colonial Act* in favour of their own legislation governing admiralty jurisdiction. This occurred as early as 1934 for Canada,¹⁷³ in 1973 for New Zealand,¹⁷⁴ and in 1983 for South Africa.¹⁷⁵

In 1982, the Joint Committee of the Law Council of Australia and the Maritime Law Association of Australia and New Zealand, chaired by the Honourable Mr Justice Zelling, released a report on Admiralty Jurisdiction in Australia.

¹⁶⁸ See *The Ship Marlborough Hill v Alex Cowan & Sons Ltd* (1920) 21 SR(NSW) 101, 104 (Lord Phillimore); *H S Bird and Co Ltd v The Ship ‘Karu’* (1925) 86 WN(NSW) 178, 178 (Street CJ); *Larsen v The Ship Nieuw Holland* [1957] St R Qd 605, 615 (Philp J, Mack J and O’Hagan J agreeing); *Lewmarine Pty Ltd v The Ship Kaptayanni* [1974] VR 465, 469 (Pape J); *Kali Boat Building and Repair Pty Ltd v The Bosna* (1977) 19 SASR 112, 116 (Mitchell J).

¹⁶⁹ See above fn 57. See also Zelman Cowen, *Federal Jurisdiction in Australia* (Oxford University Press, 1959) 61, 62–4.

¹⁷⁰ Herbert A Smith (n 78) 428–9.

¹⁷¹ (1969) 119 CLR 191.

¹⁷² *Ibid* 207, 209.

¹⁷³ *Admiralty Act 1934* (Can).

¹⁷⁴ *Admiralty Act 1973* (NZ).

¹⁷⁵ *Admiralty Jurisdiction Regulation Act 1983* (SAf).

That Report relevantly recommended the repeal of the *Colonial Act*, the enactment of Australian admiralty legislation by Commonwealth Parliament, and the conferral of federal jurisdiction in state courts to hear admiralty disputes.¹⁷⁶

In November 1982, the Commonwealth Attorney General referred the Australian Law Reform Commission to inquire, review and report on all aspects of admiralty jurisdiction in Australia. There was a consensus regarding the need to remedy the conferral of admiralty jurisdiction under the *Colonial Act*.¹⁷⁷ The Report sought to collate the heads of civil admiralty jurisdiction under the *Colonial Act* (and other imperial enactments), the 1952 Arrest Convention, and the legislation in Canada, New Zealand and South Africa providing for admiralty jurisdiction.¹⁷⁸

The Australian Law Reform Commission's *Civil Admiralty Jurisdiction* Report proposed the following heads of in rem admiralty jurisdiction within a new federal statute:¹⁷⁹

1. Claims to 'title to, or ownership or possession of, a ship or a share in a ship'. This jurisdiction is derived from s 1(1)(a) of the *Administration of Justice Act 1956* (UK), which in turn is a broader form of s 4 of the 1840 Act.
2. Claims between co-owners of a ship relating to the possession, ownership, operation or earnings amongst the ship. This jurisdiction is derived from s 6 of the 1861 Act.
3. Claims to a mortgage of a ship or a share in a ship and a ship's freight. This is a broader form of s 11 of the 1861 Act.
4. Claims in respect of towage of a ship. This jurisdiction is derived from s 6 of the 1840 Act.
5. Claims in respect of pilotage of a ship. This jurisdiction is derived from s 1(1)(l) of the *Administration of Justice Act 1956* (UK).
6. Claims of salvage. This jurisdiction is derived from s 6 of the 1840 Act.
7. Claims in respect of general average. This jurisdiction is derived from s 1(1)(q) of the *Administration of Justice Act 1956* (UK).
8. Claims by a master or crew member for wages. This jurisdiction is derived from s 10 of the 1861 Act.
9. Claims of disbursements by a master, shipper, charterer or agent on account of a ship. This jurisdiction is derived from s 10 of the 1861 Act (for masters) and s 1(1)(p) of the *Administration of Justice Act 1956* (UK) (otherwise).
10. Claims for damage done by a ship. This jurisdiction is derived from s 7 of the 1861 Act.
11. Claims for personal injury involving the operation of a ship. This jurisdiction is derived from s 1(1)(f) of the *Administration of Justice Act 1956* (UK).
12. Claims for loss or damage to goods carried by a ship. This jurisdiction is derived from s 5(1)(c) of the *Administration of Justice Act 1920* (UK).
13. Claims arising out of an agreement for carriage of goods by ship. This jurisdiction is derived from s 5(1)(c) of the *Administration of Justice Act 1920* (UK).
14. Claims arising out of an agreement for the use or hire of a ship. This jurisdiction is derived from s 5(1)(a) of the *Administration of Justice Act 1920* (UK).
15. Claims in respect of the construction, repair, alteration or equipping of a ship. This jurisdiction is a broader form of s 4 of the 1861 Act.
16. Claims in respect of goods, materials and services supplied to a ship for its maintenance or operation. This jurisdiction is derived from s 1(1)(m) of the *Administration of Justice Act 1956* (UK), which in turn is a broader form of s 5 of the 1861 Act.

These bases of jurisdiction were, along with other bases which did not have their source in imperial legislation,¹⁸⁰ enacted within the *Admiralty Act 1988* (Cth). The in rem jurisdiction provided by the Act was conferred concurrently

¹⁷⁶ Joint Committee of the Law Council of Australia and the Maritime Law Association of Australia & New Zealand, *Admiralty Jurisdiction in Australia* (Report, 1982) [10.3], [11.4], [12.1], [13.3(d)].

¹⁷⁷ James Crawford, 'Admiralty Jurisdiction in Australia: The Australian Law Reform Commission's Reference' (1983) 1(2) *Australian and New Zealand Maritime Law Journal* 4, 4 ('It is comforting and unusual for a Law Reform Commission to be asked to report on an area of law which all shades of opinion agree is antiquated, indefensible and in need of reform. ... But no-one suggests we would be better off muddling along with the Colonial Courts of Admiralty Act 1890 (Imp) with its labyrinth of historical anomalies, jurisdictional uncertainties and archaic restrictions on Admiralty jurisdiction.').

¹⁷⁸ Australian Law Reform Commission Report No 33 (n 2) [145].

¹⁷⁹ *Ibid* [149]–[171].

¹⁸⁰ See generally *ibid* [173]–[175], [179]–[184], [186], [192].

on the Federal Court and all State and Territory Supreme Courts.¹⁸¹ The Act expressly confers that jurisdiction which is derived from s 76(ii) or s 76(iii) of the Constitution.¹⁸² The Act repealed the *Colonial Act*, and other imperial enactments, insofar as it was part of a law of the Commonwealth or a Territory.¹⁸³ The Act is simple and coherent, and comprises only 59 sections. That perhaps masks the extraordinary effort undertaken by those individuals involved in the Australian Law Reform Commission's *Civil Admiralty Jurisdiction* Report. They included Justice Donnell Ryan, Mr Richard Cooper QC, Dr Damien Cremean, Justice Ian Sheppard, Justice Michael Kirby and especially Professor James Crawford, among many others. It is to their efforts that we are indebted.

6. Conclusion

It seems unique that the source of jurisdiction to hear admiralty disputes in Australia was, for such an extended period, governed by legislation British in source. Yet it also seems unsurprising that this occurred in an admiralty context, where uniformity was desired and the Empire had significant influence on merchant shipping. Sir Ninian Stephen has described admiralty jurisdiction as romantic.¹⁸⁴ But romantic or not, the legal history of admiralty jurisdiction in this country is certainly unique. Whilst admiralty jurisdiction in Australia took on a new form through the *Admiralty Act 1988* (Cth), the influence of British admiralty jurisdiction lives on even through that Act.

¹⁸¹ *Admiralty Act 1988* (Cth) s 10.

¹⁸² *Ibid* s 13.

¹⁸³ *Ibid* pt 6.

¹⁸⁴ The Right Honourable Sir Ninian Stephen, 'Foreword to the Second Edition' in Damien J Cremean, *Admiralty Jurisdiction* (The Federation Press, 2020, 5th ed) ix.