

Articles

JURISDICTIONAL CHOICES IN MARITIME ACTIONS



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An understanding of the choices to be made as to appropriate jurisdictions for maritime actions depends, to some extent, upon some comprehension of the development of the law from foundation of the colony of NSW to the present day. It is desirable, therefore, to traverse this ground first.

Historical Background

The commission issued to Governor Phillip, the first governor of New South Wales, included provision for a court of Vice-Admiralty. This court was established and functioned, with various changes from time to time. The other Australian colonies also established vice-admiralty courts as they came into existence.¹

In 1890 the *Colonial Courts of Admiralty Act 1890*² was enacted. It provided that every court in a British possession having unlimited civil jurisdiction for the time being so declared should be a Court of Admiralty. Those courts should have jurisdiction over the like persons, matters and things as the Admiralty jurisdiction of the High Court in England.

The transition from vice-admiralty courts to colonial courts of Admiralty came into force in Queensland, South Australia, Tasmania and Western Australia on 1 July 1891 and in New South Wales and Victoria on 1 July 1911.³ From this source, therefore, the Supreme Courts of the states derived their jurisdiction thereafter in admiralty matters.

With federation came further changes. In the Australian Constitution the Commonwealth Parliament was granted power to make laws to confer

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1 On 12 April 1787 a commission was issued under the Great Seal of the United Kingdom empowering the Lands Commissioners of the Admiralty to establish a vice-admiralty court in NSW and on 30 April Letters Patent were issued to Governor Phillip as Vice Admiral and Robert Ross as judge under the Great Seal of the High Court of Admiralty. For a detailed monograph see 'Vice Admiralty Court of New South Wales 1787-1911'. Guide to the Archives of New South Wales No 22 (1980).

2 53 and 54 Vic c27.

3 'Australian Maritime Law' ch 1. To be published by Bond University in late 1990.

on the High Court, inter alia, Admiralty and maritime jurisdiction;⁴ to define the jurisdiction of any federal court other than the High Court,⁵ and to invest any court of a state with federal jurisdiction.⁶ There are other constitutional sources of power for maritime actions.⁷ The Commonwealth Parliament has invested the state courts with federal jurisdiction in all matters in which the High Court had jurisdiction or in which original jurisdiction could be conferred on it.⁸ Thus the High Court and the State courts had two sources of jurisdiction.

Until the *Admiralty Act* 1988 (Cth) came into effect, on 1st January 1989, the courts of competent jurisdiction for actions *in rem* were the High Court, the Supreme Courts of the States and the Supreme Court of the Northern Territory. There was an argument that the Federal Court may have had jurisdiction but it was not tested.⁹

Admiralty Act 1988

The Australian Law Reform Commission produced an excellent research paper on Australian Admiralty jurisdiction in November 1984¹⁰ and a report on 'Civil Admiralty Jurisdiction' in 1986.¹¹ The report recommended a bill and rules which became the *Admiralty Act* 1988 (*the Act*) and the Admiralty Rules (Statutory Rules 1988 No 269). By this legislation the civil maritime jurisdiction was substantially altered. It has become the main source of civil maritime jurisdiction in Australia repealing the *Colonial Courts of Admiralty Act* 1890 except for proceedings then on foot.¹² It should be borne in mind that the Act is not necessary for an ordinary action *in personam* based on common law or statutory rights, eg personal injury caused during water-skiing in Moreton Bay.¹³

The Act confers jurisdiction on the Federal Court and the courts of the Territories, and the courts of the States are invested with federal jurisdiction in respect of proceedings commenced *in personam* for a maritime claim or for damage done to a ship.¹⁴ Actions *in rem*, i.e., involving the arrest of a ship or cargo and actions for limitation proceedings are restricted to the Federal and the Supreme Courts,¹⁵ although there is

4 s76(iii).

5 s77(i).

6 s77(iii).

7 eg s51(i) (trade and commerce), s98 (navigation and shipping), s51(vi) (defence), s51(vii) (lighthouses, lightships, beacons and buoys), s51(x) (fisheries in Australian waters beyond territorial limits) etc further discussion see 'Australian Maritime Law', ch 1; Davies and Dickey 'Shipping Law', Law Book Co 1990 ch 2.

8 *Judiciary Act* 1903 (Cth) s39(2).

9 See McPherson QC (as he then was) 'Admiralty Jurisdiction and the Federal Court' (1981) 55 ALJ 71.

10 'Reference on Admiralty Jurisdiction. Research Paper No 1. An Australian Admiralty Act. The Ambit of Admiralty Jurisdiction'.

11 Report No 33 'Civil Admiralty Jurisdiction'.

12 s44.

13 *Jenkins v Campbell and Jenkins* [1980] QdR 96; but the activity giving rise to the action in *Wyong Shire Council v Shirt* (1979-1980) 146 CLR 40 and *Rootes v Shelton* (1967) 116 CLR 383 occurred in 'inland waters,' as to which waters see post.

14 s9.

15 ss 9(2), 10.

power for the Governor-General to proclaim other courts to have jurisdiction *in rem*.¹⁶ The jurisdiction extends to matters associated with matters in which the courts have express jurisdiction.¹⁷ Being a Commonwealth Act where no request and consent jurisdiction has been referred by the States no attempt is made to confer or invest jurisdiction in a matter not of a kind mentioned in s76 or s77 of the Constitution.¹⁸

Actions *in rem* against a ship or property may only be commenced as provided by the Act.¹⁹ Such actions may relate to a 'proprietary maritime claim' or a 'general maritime claim'. A proprietary maritime claim relates to possession, title, ownership or mortgage of a ship or a share in it or a claim between co-owners relating to it, mortgage of the ships freight or a claim for satisfaction or enforcement of a judgment against a ship or other property in proceedings *in rem*.²⁰

A general maritime claim relates to a claim for damage done by a ship (collision or otherwise), liability arising under the *Protection of the Sea (Civil Liability) Act* 1981 or the equivalent State acts (oil pollution), loss of life or personal injury, an act or omission of owner or charterer or their servants or agents relating to loading or unloading, or embarkation or disembarkation or carriage of goods or persons, a claim relating to charter parties, salvage, general average, towage, pilotage, goods, materials or services supplied, construction, alteration, repair or equipping, liability for port, harbour or canal etc., fees, a levy, disbursements, insurance, wages, arbitral award or interest.²¹

A distinction is made between a proprietary maritime claim and a general maritime claim because in the latter case the proceeding is only competent when, in relation to the ship or other property (usually cargo), the same person must have been the owner or charterer or in possession or control of the ship or property when the cause of action arose *and* the owner of it when the proceeding is commenced.²² So, if there is not that ownership connection the claimant may not proceed *in rem* for general maritime claims but is restricted to proceedings *in personam*. This means that the ship or property may not be arrested but of course there is still the jurisdiction in the court to hear the action.²³

Other than the claims just described actions *in rem* may be commenced for maritime liens (salvage, damage done by a ship, wages, master's disbursements) or other charges.²⁴ Also, any maritime claim (general or proprietary) concerning a ship (but not cargo etc) may be commenced *in rem* if the same person was owner, charterer, or in possession or control when the cause of action arose and was the demise charterer when the proceedings were commenced.²⁵ This is a similar limitation to

16 s11.

17 s12.

18 s13.

19 s14.

20 s4(2).

21 s4(3).

22 s17.

23 s9.

24 s15.

25 s18.

that on a general maritime claim; which is not surprising as a demise charterer is regarded as the owner for many purposes.²⁶

The Act is predominantly procedural in that it mainly seeks to codify the law and clarify the appropriate courts and procedures. However it does create some new law. It extends the right of relief to enable arrest of surrogate (sister) ships if, in relation to a general maritime claim, the same person was the owner or charterer, or in possession or control of the first ship when the cause of action arose and was the owner of the second (arrested) ship when the proceeding is commenced.²⁷ It should be noted that the claimant can only arrest one ship at a time in relation to a claim,²⁸ and the re-arrest of a ship or other property is only allowable by order of a court.²⁹

Under the Act service and arrest is permissible at any place within Australia, including within the limits of the territorial sea,³⁰ but not ships (or cargo in them) when exercising a right of innocent passage.³¹ The *Service and Execution of Process Act* 1901 (Cth) does not apply.³² The Admiralty Rules cover service and many other procedural aspects. The schedule to the Rules has a very useful set of forms for use in proceedings under the Act.

When the Act was passed the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 and the 1979 Protocol were given effect.³³ By the *Limitation of Liability for Maritime Claims Act* 1989 (Schedule 2) the Act is amended and the 1976 Convention is given force, although this latter Act has not yet been proclaimed.³⁴ The Courts have jurisdiction to determine whether an applicant's liability may be limited and its amount and to determine the constitution of the fund and the payment of claims therefrom.³⁵ Thus the Act provides for a limitation action to be commenced in a competent court and also for a defence to limit liability in an action.³⁶

26 The test is whether the owner has parted with the whole possession and control of the ship and whether he has a power and right 'to do what he pleases with regard to the captain, the crew, and the management and employment of the ship'—per Lord Esher in *Baumroll v Gilcrest* [1892] 1 QB 253, 259 CA; approved by the House of Lords [1893] AC 8; see also Scrutton on 'Charterparties' (15th edn) Ch IV; *Australasian United Steamship Navigation Co Ltd v The Shipping Control Board* (1945) 71 CLR 508, 521-522; *Oswald v Australian Steamships Ltd* [1914] VLR 329, 336.

27 s19. It gives effect to the Arrest Convention 1952 art 3(4); see Hetherington 'Annotated Admiralty Legislation' p66 Law Book Co (1989).

28 s20.

29 s21.

30 s22.

31 s22(4), (5).

32 s23.

33 ss 25 and 3(i).

34 Unless earlier proclaimed it comes into force on 1 July 1991—s2(2).

35 s25 gives power to the Federal Court, the High Court and Supreme Courts having it already. Examples of limitation actions are *James Patrick & Co Ltd v Union Steamship Co of New Zealand* (1938) 60 CLR 650; *Gaggin v Moss* [1983] 2 QdR 486, on appeal [1984] 2 QdR 513; (1983-1984) 5 ALR 721; *Barameda Enterprises Pty Ltd v O'Connor* [1988] 1 QdR 359.

36 s25(4).

Transfer and Remittal Among Courts

The Act provides for transfer and remittal of proceedings of the action,³⁷ but *in rem* actions can only be transferred to a Federal or Supreme Court, not an inferior court.³⁸ However those superior courts can remit an *in rem* action to an inferior court appropriate to that courts jurisdiction (monetary) if service was effected within that courts locality.³⁹ By way of example an *in rem* action commenced in Melbourne for arrest of ship for a claim within the monetary limits of the Queensland District Court can be remitted to that court if the service and arrest is effected within the jurisdiction of that court. Courts are required to act in aid of each other.

Power to transfer actions is also to be found in the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) and the equivalent in each state.⁴⁰ These acts erect a system of cross-vesting of jurisdiction among federal, state and Territory courts. Under this legislation Supreme Courts are invested with federal jurisdiction of Federal and Family Courts and the Territory Supreme Court's jurisdiction is conferred on them.⁴¹ (The exceptions are not relevant to maritime cases—the *Industrial Relations Act 1988*, the *Conciliation and Arbitration Act 1904* and ss 45D and 45E of the *Trade Practices Act 1974*).⁴² Where a proceeding is transferred that court has jurisdiction⁴³. Proceedings may be transferred where it appears that it is 'more appropriate' having regard to where it could otherwise have been commenced, whether it involves questions of the law of the Commonwealth or a state, where it is more appropriate and the interests of justice.⁴⁴ A barrister or solicitor continues to have the same entitlement to practise in the court to which the matter is transferred.⁴⁵

Under the Cross-Vesting Acts where it is a 'special federal matter' the Supreme Court shall transfer the action to the Federal Court unless a positive order is made to the contrary,⁴⁶ and notice must be given to the Attorney-General and if he so requests the Supreme Court must then transfer it.⁴⁷ Special arrangements are set out for appeals.⁴⁸ The court to which the matter is transferred is to apply the law in force in the State or Territory in which it is sitting, except where it is a matter arising under a written law of another State or Territory, when it is to apply that 'written and unwritten law'.⁴⁹ The rules of evidence and procedure

37 s27.

38 ss 27(2), 10.

39 s28.

40 In Queensland the *Jurisdiction of Courts (Cross-Vesting) Act 1987*. The provisions of the other state acts are in substantially the same terms.

41 For a discussion as to the difference that arises between 'conferred' and 'invested' jurisdiction see *Australian Trade Commission v Film Funding Management Pty Ltd* Federal Court 26 May 1989, Gummow J, unreported. (Discussed *High Court and Federal Court Practice*. CCH vol 2 p90,074).

42 s4(4).

43 s4(3).

44 s5.

45 s5(8).

46 s6(1). A 'special federal matter' is defined in s3(1) and includes matters under the *Trade Practices Act 1974* and *Administrative Decision (Judicial Review) Act 1977*.

47 s6(3), (7).

48 s7.

49 s11(1).

are to be those of a superior court as the court considers appropriate. No appeal lies from a decision in relation to transfer or removal or as to which rules of evidence and procedure are to be applied.⁵⁰ The Acts also give effect to relevant rules and it has been held that the legislation enlivens the powers of a court in relation to service of process.⁵¹

Particular Classes of Actions

I turn now to consider some aspects of particular classes of maritime actions.

(a) ARREST OF SHIPS AND CARGO

The plaintiff is entitled to commence the action, which is *in rem*, in any of the Supreme Courts in Australia or any of the registries of the Federal Court. In Queensland the staffs of the Supreme Courts are more familiar with the procedure than that of the Federal Court and if the arrest is to be effected outside Brisbane the Supreme Courts in Rockhampton or Townsville are to be preferred to the Brisbane based Federal Court. If it is not clear in which Australian State the arrest will be effected it is probably better to issue out of the Federal Court in Brisbane to preclude any arguments as to the effectiveness of the arrest outside the Supreme Courts original jurisdiction, which is limited to the State.

(b) WRONGFUL ARREST

Prior to the *Admiralty Act* the Queensland provision was contained in the *Arrest of Ships Act* 1848 (NSW).⁵² The plaintiff and his 'proctor' (solicitor) were at risk for costs if the arrest was effected when there was no jurisdiction,⁵³ and a party who suffered damage could sue the arresting party or his proctor for damages in an action on the case.⁵⁴ To succeed he had to show *mala fides* or 'gross negligence'.⁵⁵

The Act changed this law by providing a new cause of action in s34 whereby, in relation to any proceeding commenced under the Act, a party (but not his proctor) who demands excessive security or obtains the arrest of a ship, or fails to give consent to release 'unreasonably and without good cause' is liable in damages to one who has suffered loss 'as a direct result'. The section expressly grants jurisdiction in determining such a claim to the court in which the original proceeding is commenced.

The NSW Act has not been repealed but the jurisdiction of the Supreme Courts to hear such actions has because the *Colonial Courts*

⁵⁰ s12.

⁵¹ *Seymour-Smith v The Electricity Trust of South Australia* Supreme Court of New South Wales 14 August 1988, Rogers J, unreported.

⁵² By force of s33 of the *Constitution Act* 1867 (Qld) and s36 *Supreme Court Act* 1867. Section 2 of the *Statute Law Revision Act* 1908 repealed the preamble. See Qld Statutes 1828-1962 vol 1 p122.

⁵³ s1.

⁵⁴ s2.

⁵⁵ The '*Evangelismos*' (1858) Schwab 378; 166 ER 1174 PC; *The 'Strathnaver'* (1875) App Cas 58 PC, and other cases noted in ALRC Report 33 p256.

of *Admiralty Act* 1890 has been repealed.⁵⁶ For all practical effect, therefore, actions for damages for wrongful arrest should be commenced in the court which effected the arrest.

(c) LIMITATION ACTIONS

By s25 of the Act the Federal Court is expressly given jurisdiction to hear a limitation of liability matter where a person 'apprehends' that a relevant claim 'may be made'. The High Court already has jurisdiction under the Constitution and the Supreme Courts have that jurisdiction under the *Judiciary Act*. It would appear, therefore, that a limitation action may be commenced in any of the Federal, Supreme or High Courts. If it is commenced in the High Court it very likely will be remitted to a Federal or a Supreme Court. By s34(4) jurisdiction is expressly extended to any court having jurisdiction over the claim to entertain 'a defence' by way of limitation of liability. In summary a limitation action may be commenced in any appropriate superior court but may be used as a *defence* in any court having jurisdiction to hear the claim.

(d) PRIZE ACTIONS

There have been no prize actions in Australian courts since the disposal of those arising from World War II. There is presently no jurisdiction in any court to hear prize actions as the English legislation upon which the jurisdiction is based has been repealed.⁵⁷ A Commonwealth Prize Act is presently in contemplation by the Australian Law Reform Commission. It is certainly needed.

(d) EVENTS OCCURRING IN INLAND WATERS

In *Kirmani v Captain Cook Cruises Pty Ltd & Ors*⁵⁸ the High Court addressed the issue of the extent of the powers of the Commonwealth Parliament to pass legislation relating to vessels that were not sea-going and which relevantly were operating within a state. The action related to a cruise vessel in Sydney Harbour. The Court held there was power to repeal relevant provisions of the *Merchant Shipping Act* 1894 (Imp), relating to limitation of liability, and to replace it with provisions of the *Navigation Act* 1912. The point relevant to this discussion is that the Commonwealth legislation must have regard to the limits of its constitutional powers. Hence the *Navigation Act* 1912 excludes provisions for ships that are not trading ships proceeding overseas, inland waterways, vessels and pleasure craft.⁵⁹ The *Admiralty Act* defines ship as excluding a seaplane, inland waterways vessel and a vessel under construction that has not been launched, and the sea as only including waters within the ebb and flow of the tide.⁶⁰

As to actions which the Commonwealth legislation does not cover there has to be real doubt whether there is any jurisdiction in the

⁵⁶ *Admiralty Act* 1988 s44.

⁵⁷ See 'Australian Maritime Law' Ch 10. To be published 1991, and ALRC 'Reference on Admiralty Jurisdiction. Research Paper No 5. Prize Law, Jurisdiction and Procedure.'

⁵⁸ (1984-1985) 159 CLR 351.

⁵⁹ s2(1).

⁶⁰ s3(1).

(1990) 2 Bond L R

Supreme Courts to hear any matter *in rem*. It may not matter much as the desirability of arresting, for example, a pleasure craft on the Somerset Dam, seldom arises. However, it is an area of law that should be tidied up by the State legislatures.⁶¹

(f) CRIMINAL ACTIONS

The jurisdiction of the courts in criminal matters is untouched by the Act.⁶²

Conclusion

The *Admiralty Act* 1988 and the Cross-Vesting legislation gives a very wide jurisdiction to courts in Australia in maritime matters both *in rem* and *in personam* actions. A claimant can be fairly confident in commencing any maritime matter in either the Federal or Supreme Court as suits his convenience and then if the court so orders the action can later be transferred or remitted to a more appropriate court. However, jurisdiction of courts is still something of a minefield and a detailed knowledge of the constitutional limitations and the relevant acts granting jurisdiction is desirable. The State legislatures should address the uncertain and untidy areas of state of maritime law. (In Western Australia this has already been done to a large extent by its Western Australian *Marine Act* 1982).

61 Western Australia has done so by its *Marine Act*.

62 For articles on criminal Jurisdiction see Saunders, 'Maritime Crime' (1979) 12 *MelbULR* 158 and Gibbs J 'Criminal Law on the High Seas' (1988) F S Dethridge Memorial Address (MLAANZ 1989).