SECTION 76(III): 'OF ADMIRALTY AND MARITIME JURISDICTION'

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[The Constitution s 76(iii) enables the Parliament to make laws conferring original jurisdiction on the High Court in any matter 'of Admiralty and maritime jurisdiction'. This provision was copied directly from art 111 s 2(1) of the Constitution of the United States. One issue has been whether s 76(iii) is limited to what was within the jurisdiction in 1901. Another, however, has been whether it confers a substantive power in the power to confer jurisdiction – that is power to legislate on admiralty and maritime law generally. Cases on art 111 s 2(1), and the reasoning they adopt, suggest it does. But is such reasoning applicable to s 76(iii)? Are there countervailing considerations, indicating to the contrary, that s 76(iii) (even if implying a body of law) is no more than merely a power for 'the conferment of jurisdiction in a particular class of controversies'? These are significant questions in Australian constitutional law.]

Introduction

Admiralty jurisdiction is specifically dealt with in s 76(iii) of the Constitution by which the Parliament may make laws conferring original jurisdiction on the High Court in any matter:

> of Admiralty and maritime jurisdiction;

The jurisdiction in s 76(iii) or in s 76(ii) (matters 'arising under any laws made by the Parliament') is able to be conferred upon the Federal Court or any federal court in the power to define the jurisdiction of those courts under s 77(i),[1] and is able to be invested upon the courts of the States under s 77(iii). The courts of the Territories are able to be given admiralty jurisdiction under s 122 by which the Parliament in exercise of a plenary power to legislate[2] 'may make laws for the government of any territory'.

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1 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603.

2 *Attorney-General (WA); Ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492 at 523, 526.

The issue for a long time has been to decide what lies within the scope of s 76(iii).[3] Isaacs J in *John Sharp & Sons Ltd v Ship Katherine Mackall* [4]said that s 76(iii) raised 'some very difficult questions to answer' and opened up 'a field of inquiry by no means clear'. Owen Dixon KC, in evidence at the Royal Commission on the Constitution in 1927, was no less perplexed by s 76(iii) at least as regards the word 'maritime'.[5] The Convention Debates provide no assistance.

The High Court decision in *Owners of the Ship Shin Kobe Maru v Empire Shipping Co Inc*,[6] however, has laid many doubts to rest. The meaning of the words in the provision is now much clearer. A significant remaining issue, however, is whether s 76(iii) should be taken as conferring a substantive power – that is, a power to legislate on the subjects of admiralty and maritime law generally. Or is it, rather, a power, as Barton J described it in *Owners of the ss Kalibia v Alexander Wilson*,[7] merely for 'the conferment of jurisdiction in a particular class of controversies'? Does it imply a body of admiralty or maritime law?

Origins of s 76(iii)

Admiralty jurisdiction itself developed out of the authority of the Lord High Admiral anciently exercised by him through the High Court of Admiralty in England.[8] That court, which came into existence in about 1340 after the Battle of Sluys, was, however, abolished in 1873.[9] The earliest use of the title 'Admiral' in England is in 1300 when Gervase Alard is called Admiral of the fleet of the Cinque Ports.[10] The word 'admiral' itself would seem to be derived from the Arabic and Greek.[11] The first duty of an Admiral, according to *The Black Book of the Admiralty*, was to appoint

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3 See generally The Hon Mr Justice Zelling, 'Of Admiralty and Maritime Jurisdiction' (1982) 56 *Australian Law Journal* 101.

4 (1924) 34 CLR 420 at 428.

5 Royal Commission on the Constitution, 1927, *Minutes of Evidence*, p 784.

6 (1994) 181 CLR 404.

7 (1910) 11 CLR 689 at 704.

8 See RG Marsden, *Select Pleas in the Court of Admiralty*, Seldon Society, 1894, vol 1, xiv. See also LH Laing, 'Historic Origins of Admiralty Jurisdiction in England' (1946) 45 *Michigan Law Review* 163 at 165.

9 See generally DJ Cremean, *Admiralty Jurisdiction: Law and Practice in Australia, New Zealand, Singapore and Hong Kong*, 3rd ed, Federation Press, 2008, pp 1-4.

10 CS Cumming, 'The English High Court of Admiralty' (1993) 17 *Tulane Maritime Law Journal* 209 at 219.

11 J Godolphin, *A View of the Admiral Jurisdiction*, George Dawes, London, 1685, p 7.

deputies 'to the end that by the helpe of God and their good and just government the office may be executed to the honour and good of the realme'.[12]

The first sittings in admiralty in Australia occurred in 1798 under letters patent issued in May 1787 relating to piracy.[13] Civil jurisdiction was governed by the *Colonial Courts of Admiralty Act 1890* (UK) which replaced the old system of Imperial Vice-Admiralty courts which had existed as a system of Imperial courts entirely separate from the ordinary court system.[14] The *Admiralty Act 1988* (Cth), s 44(1), however, repealed the 1890 English Act in Australia with effect from 1 January 1989.

The *Admiralty Act 1988* (Cth) was passed in exercise of the power given by s 76(iii) and followed the Report (No 33) of the Australian Law Reform Commission on *Civil Admiralty Jurisdiction* (1986).

The words in s 76(iii) were copied directly from the provision in art III s 2(1) of the Constitution of the United States[15] which states the judicial power shall extend:

> to all Cases of admiralty and maritime jurisdiction

It has been said that the word 'maritime' was added during the United States' Convention debates to make it clear that the provision was not to be restricted to the limited English jurisdiction.[16] For, at that time, the English jurisdiction was restricted to things done upon the sea by virtue of two statutes of 1389 and 1391 passed during the reign of Richard II. By the former[17] it was provided that 'the Admirals and their Deputies shall not meddle henceforth with anything done within the Realm, but only such things done upon the sea according as was used in the time of the noble King Edward, Grandfather of our Lord the King that now is.' The latter statute[18] enacted

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12 Sir T Twiss QC (ed), *The Black Book of the Admiralty*, Professional Books Ltd (reprint 1985), 1871, vol 1, 2.

13 See JM Bennett, *A History of the Supreme Court of New South Wales*, Law Book Co, 1974, p 153.

14 See *McIlwraith McEacharn Ltd v Shell Oil Co of Australia Ltd* (1945) 70 CLR 175 at 189 per Latham CJ.

15 See H Putnam, 'How the Federal Courts were given Admiralty Jurisdiction' (1925) 10 *Cornell Law Quarterly* 460; WR Castro, 'The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates' (1993) 37 *American Journal of Legal History* 117; JJ Woodruff II, 'Merchants, Traders and Pirates: The Birth of the Admiralty Clause' (2002) 26 *Maritime Lawyer* 563; The Hon Justice J Allsop, 'Australian Admiralty and Maritime Law – Sources and Future Directions' (2007) 26 *University of Queensland Law Journal* 179.

16 CL Black, 'Admiralty Jurisdiction: Critique and Suggestions' (1950) 50 *Columbia Law Review* 259 at 262.

17 13 Ric II, st 1, c 5.

18 15 Ric II c 3.

'that of all Manner of Contracts, Pleas and Quarrels, and of all other things done or arising within the Bodies of the Counties, as well by Land as by Water and also of Wreck of the Sea, the Admiral's Court shall have no Manner of Cognizance, Power nor Jurisdiction.' That art III s 2(1) was intended to enable Congress to confer a wider jurisdiction than that in England, was made clear in a number of early American authorities. For example, in *Waring v Clarke*[19] the Supreme Court said, after a detailed consideration: 'We therefore conclude that the grant of admiralty power to the courts of the United States was not intended to be limited or to be interpreted by what were cases of admiralty jurisdiction in England when the Constitution was adopted'.[20]

Article III s 2(1), it is clear, gives Congress legislative power over the substantive law.[21] As was held in *Panama Railroad Co v Andrew Johnson*[22] the framers of the Constitution intended to place the entire subject - its substantive as well as its procedural features - under national control because of its intimate relation to navigation and to interstate and foreign commerce.

> As there could be no cases of "admiralty and maritime jurisdiction", in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in colonial times and during the Confederation, and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject – its substantive as well as its procedural features – under national control, because of its intimate relation to navigation and to interstate and foreign commerce. In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States.

Thus Congress, as held by the Supreme Court in that case, has power to alter, qualify or supplement the substantive law as experience or changing conditions might require. Earlier, in *The Lottawanna*,[23] Bradley J, delivering the opinion of the Supreme Court, said one thing was 'unquestionable': by art III s 2(1) 'the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the

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19 46 US 441 (1847).

20 Ibid 459.

21 *Francesco Romero v International Terminal Operating Co* 358 US 354 at 378-80 (1959).

22 264 US 375 at 386-7 (1923).

23 88 US 558 at 575 (1874).

whole country.' Certainly, he said, it 'could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.'[24]

The width of the power was confirmed even earlier on in cases such as *De Lovio v Boit*.[25] This was a decision of Story J sitting as a circuit justice. The need for a body of law applicable throughout the nation was recognised 'by every shade of opinion' in the Constitutional Convention according to the Supreme Court in *California v Deep Sea Research Inc*.[26] The need for legislative power on the subject to be national was emphasised by Bradley J again in *Butler v Boston and Savannah Steamship Co*.[27]

Early history of s 76(iii)

In *Owners of the ss Kalibia v Alexander Wilson*[28] the High Court firmly rejected the view, that in the light of the American authorities on art III s 2(1), s 76(iii) should be interpreted as giving power to legislate substantively on admiralty and maritime law. A dominant consideration in the court's reasoning, at least in the judgment of Barton J, in rejecting the use of American authorities to interpret the provision, was that Australia, unlike the United States, was not, at the time of the making of the Constitution, a separated nation of independent sovereignty in its relation to the United Kingdom.[29] The 'implication from imperative necessity', as he called it,[30] could not be drawn in Australia. It seems Barton J was saying, those authorities were decided as they were because, otherwise, there would be no capacity to legislate on admiralty sourced anywhere else. The United States could not call on England to legislate on the topic. Australia, however, if it wished legislation on the topic, could still rely on the United Kingdom Parliament because the United Kingdom Parliament could still pass laws applying in Australia. For, Barton J said, 'there is, an over-riding power to legislate on the subject in the Parliament of the United Kingdom, and the grant in sec 76 (iii) cannot be construed as an implied transfer, or even delegation, of that legislative power to the Parliament of the Commonwealth in respect of Australia'.[31]

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24 Ibid.
25 7 Fed Cas 418 (1815).
26 523 US 491 at 501 (1998).
27 130 US 527 at 557 (1889).
28 (1910) 11 CLR 689.
29 (1910) 11 CLR 689 at 704.
30 (1910) 11 CLR 689 at 715.
31 (1910) 11 CLR 689 at 704.

Since the time of the decision in the *Kalibia*, however, the *Statute of Westminster 1931* (UK) has been adopted (by the *Statute of Westminster Adoption Act 1942* (Cth), s 3) and the *Australia Act 1986* (Cth) has been passed. The United Kingdom Parliament, in consequence, is effectively unable to legislate for Australia. Australia, in the result, is now in the same position in this respect as the United States was when its Constitution took effect. For all practical purposes, it is now, as the United States was then, a separated nation of independent sovereignty. Some have indicated that this was the case, and that Australia achieved independent nation status, even before the coming of the *Australia Act*.[32]

Recent cases

Despite the early uncertainties, s 76(iii), nonetheless, has been widely interpreted by the High Court in *Owners of the Ship Shin Kobe Maru v Empire Shipping Co Inc*[33] as being a power neither confined to admiralty jurisdiction as it existed in 1901 nor confined to admiralty jurisdiction at all:

> Ordinary principles of constitutional construction, which require constitutional provisions to be interpreted liberally according to their terms without imposing limitations that are not found in the express words compel the conclusion that "maritime" in s 76(iii) serves to extend jurisdiction beyond Admiralty jurisdiction as it existed in 1901.[34]

This substantially accords with Story's view of the United States provision - that the word 'maritime' was included in art III s 2(1) as a precaution against a narrow reading of the provision based on the word 'admiralty'[35] – a point made earlier. It also accords with what was submitted by Owen Dixon KC in the *Katherine Mackall*.[36] The court then went on to observe:

> And quite apart from the course of constitutional interpretation of Art III, s 2(1) of the United States Constitution ... those same ordinary principles direct an approach which allows that 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,

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32 See eg *Owners of the Ship Shin Kobe Maru v Empire Shipping Co Inc* (1991) 32 FCR 78 at 87 per Gummow J.

33 (1994) 181 CLR 404.

34 (1994) 181 CLR 404 at 424.

35 JJ Story, *Commentaries on the Constitution of the United States*, 5th ed, Little Brown & Co, 1891, vol II, para 1666.

36 *John Sharp and Sons Ltd v Ship Katherine Mackall* (1924) 34 CLR 420 at 424 (in *arguendo*).

> concerned with the resolution of controversies relating to marine commerce and navigation.[37]

Moreover, as the court also pointed out:

> [O]nce it is accepted that "maritime" in s 76(iii) serves to equate the jurisdiction there referred to with that of maritime nations generally, there is no basis for any qualification or limitation based on jurisdictional divisions peculiar to English law.[38]

Therefore, s 76(iii) is not to be interpreted as confined to what was narrowly within admiralty jurisdiction in England. This is consistent with United States authorities on art III s 2(1). As was said in a Canadian case[39] with reference to s 2 of the *Federal Court Act 1970* (Can), an 'historical approach [to what was within admiralty in England] may serve to enlighten, but it must not be permitted to confine' and as was said in yet another Canadian case[40] the terms 'admiralty' and 'maritime' should be interpreted 'unencumbered by rigid doctrinal categorization and historical straight jackets'.

Nor, significantly, can s 76(iii) be interpreted as necessarily excluding in advance any subject of admiralty and maritime jurisdiction. Remarks of Allsop J (as he then was) in *Elbe Shipping South Australia v Ship Global Peace*[41] to the effect that the list of claims set out in s 4 of the *Admiralty Act 1988* (Cth) does not exhaust the jurisdiction encompassed within the reach of s 76(iii) make this quite clear. His Honour said as follows specifically with reference to s 76(iii) and its relation to that Act:

> There is, therefore, jurisdiction encompassed within the reach of s 76(iii) which parliament has not conferred on federal courts and invested in state courts as federal jurisdiction under the Act.

And, of course, a subject of admiralty and maritime jurisdiction can be one pertaining to the sea without ever actually occurring *at sea* or even in or upon or over water. Indeed, it seems possible for something otherwise not maritime at all to take on a maritime character by being associated with or related to something else which is maritime. That is, something may become maritime by being connected with something which is maritime although it is not, *in itself*, maritime in any way otherwise. A railway line leading into a port terminal is possibly an example. So might be a train laden with goods destined for sea-carriage but still a distance from

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37 (1994) 181 CLR 404 at 424.

38 (1994) 181 CLR 404 at 425-6.

39 *Whitbread v Walley* [1990] 3 SCR 1273 at 1292 per La Forest J for the court. See also *New England Mutual Marine Ins Co v Dunham* 78 US 1 at 24 (1870).

40 See *Pakistan National Shipping Corp v Canada* [1997] 3 FC 601.

41 (2006) 232 ALR 694 at 705.

port. Or, a truck carrying a shipping container to or from port could be another example. These all concern marine commerce. There is no reason to confine s 76(iii) to disputations relating to or dealing with commerce and navigation on the sea itself.[42] The great bulk of marine commerce takes place on land, in any event. And much of it now, also, would be electronic.

This substantially accords with Story J's view in *De Lovio v Boit*[43] that the jurisdiction:

> comprehends all maritime contracts, torts and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea …

Section 76(iii): a substantive power?

There is a certain logic in the view expressed in *Panama Railroad Co v Andrew Johnson*[44] that there can be 'no cases of "admiralty and maritime jurisdiction" in the absence of some maritime law under which they could arise' and that art 111 s 2(1) of the United States Constitution, therefore, 'presupposes the existence in the United States of a law of that character'. For, how else, it might be asked, can one identify whether a case is admiralty or maritime unless one has some defining characteristics to go by? And what could possibly be the source of those defining characteristics except a body of law to apply? If so, such a body of law – a substantive body of law – must exist within the provision itself in some fashion. That is to say, power over the substantive law must exist by virtue of the provision. If it is not express – and it is not – then it must be implied. This has been the approach of the United States' courts. By their approach, Congress may alter or modify that body of law as it sees fit. And it is in the national interest for it to be able to do so for commerce and other reasons.

This same reasoning, however, can be applied to s 76(iii). How is one to identify whether a matter is one of admiralty and maritime jurisdiction unless we have some defining characteristics to go by? If we must have defining characteristics to go by, they have to be sourced somewhere: they cannot be sourced out of nothing. What possibly could be the source of those defining characteristics except a body of law to apply? On this analysis, it makes no sense to speak of s 76(iii) as being merely a power 'for the conferment of jurisdiction in a particular class of controversies' unless one can say what constitutes membership of the class. A class, by definition, stands

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42 See the comment of Lockhart J in *Owners of the Ship Shin Kobe Maru v Empire Shipping Co Inc* (1992) 38 FCR 227 at 247.

43 7 Fed Cas 418 at 444 (1815).

44 264 US 375 at 385-6 (1923).

on its own because it has defining characteristics. But if we cannot decide what falls within a class except by reference to a body of law, then such a body of law exists implicitly within s 76(iii). And it may plausibly be suggested that it would clearly be in the national interest for this to be so.

It seems, moreover, quite unlikely in theory there could be a body of jurisdiction without a body of law to apply in the course of its exercise. Therefore, it seems likely that s 76(iii) does imply a body of admiralty and maritime law corresponding with the jurisdiction it mentions. Justice Allsop, in a searching analysis, writing extra-judicially, has specifically said: 'Section 76(iii) recognises implicitly and directly the existence of substantive law of the same character'.[45] If, as seems likely, a body of law exists implicitly within s 76(iii), then one puzzling question is – what was the content of that body of law in 1901? Certainly (under 'Admiralty') it would have included all the law on matters within admiralty jurisdiction. This would include the matters within admiralty jurisdiction under the *Colonial Courts of Admiralty Act 1890* (UK). But (under 'maritime') it would also include the law on much else besides. It is not inconceivable that it included all the law on matters dealt with in merchant shipping and related legislation.

The body of law on all such matters in a sense still exists under s 76(iii) – if it does presuppose a body of law – except so far as Parliament has altered it. In admiralty it has altered it by the *Admiralty Act 1988* (Cth). But it has altered it also by the *Navigation Act 1912* (Cth) and by a variety of subsequent laws including the *Shipping Registration Act 1981* (Cth). But it is quite possible there would still be areas it has not altered, and which in a way survive.

If a body of law is presupposed by s 76(iii) then, based on art III s 2(1), many would argue the provision does confer a substantive power – that is power to legislate on admiralty and maritime law generally – despite this argument having been specifically rejected by Barton J in the *Kalibia*.[46] Power to alter or modify that body of law some would contend may be impliedly given by s 76(iii) itself – or by s 76(iii) aided by s 51(xxxix) as is suggested by a comment of Dixon J in *Nagrint v Ship Regis*.[47] Section 51(xxxix) of the Constitution provides that, subject to the Constitution itself, Parliament may legislate with respect to matters incidental to the execution of a power vested in the Parliament by the Constitution. It would be incidental to the execution of the power given by s 76(iii), so the argument would go, to be able to alter or modify the body of law it presupposes. Nothing, if it is still maritime, can be excluded in advance from the list of topics which might be dealt with and certainly

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45 See The Hon Justice J Allsop, op cit, 197. See also D J Cremean, op cit, 14-7.

46 *Owners of the ss Kalibia v Alexander Wilson* (1910) 11 CLR 689 at 703-4.

47 (1939) 61 CLR 688 at 696.

such a list would not be confined to topics which answered the description in 1901. The latter is made clear by the *Shin Kobe Maru* decision. Nor is the list confined to things occurring on the sea itself: 'maritime' means related to the sea for it is derived from *maritimus*, meaning 'of the sea'.

Further support for a view that s 76(iii) confers a substantive power is to be found in a contrast with s 76(ii). For, by its terms, s 76(ii) is clearly only a source of power to confer jurisdiction. Power to create the matters it contemplates must come from somewhere else because of the words of the provision itself. It refers to matters 'arising under any laws made by the Parliament'. Parliament must first make a law before being able to confer jurisdiction under s 76(ii) in any matter arising under that law. As such, therefore, s 76(ii) provides the source of a grant of jurisdiction: it does not provide the source of the law to be applied in exercise of that jurisdiction.[48] But this is not obviously the case with s 76(iii). Section 76(iii) is expressed in terms as if it is dealing with a body of existing 'Admiralty and maritime jurisdiction' giving Parliament, thereby, power to make laws on matters falling within its purview, and to confer jurisdiction accordingly. In other words, it is speaking in terms *as if* there is a body of law to be imported into the provision, if it is to be properly construed, which may be dealt with as Parliament sees fit.

However, there may be a critical distinction between the United States and Australia, and care needs to be exercised in using authorities on art III s 2(1) to interpret s 76(iii). By art III s 2(1), the judicial power of the United States is declared to 'extend' to cases of admiralty and maritime jurisdiction. Something (judicial power) taken to exist, is extended. The Australian provision is quite differently expressed. The Commonwealth's judicial power is not in any way declared to extend to matters of admiralty and maritime jurisdiction. Rather, s 76(iii) is expressed as a power to 'make laws', and to make laws of a particular kind – that is, conferring original jurisdiction in such matters on the High Court. It is not expressed to be anything more than that. In this way, it is, as Barton J says, merely a power 'for the conferment of jurisdiction in a particular class of controversies'.[49] The power, he said, 'is merely given *qua* the restricted subject matter to which it is in terms confined, namely, the conferment of jurisdiction in a particular class of controversies'.[50] Isaacs J said exactly the same thing: 'Sec 76 relates solely to original judicial jurisdiction and enables Parliament to confer it on the High Court. Whatever is incidental to that it likewise has power to enact (sec 51(xxxix)). But beyond that it cannot go'.[51] These observations have

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48 See *Anderson v Eric Anderson Radio and TV Pty Ltd* (1965) 114 CLR 20 at 30, 44-5. See also *Owners of the Ship Shin Kobe Maru v Empire Shipping Co Inc* (1992) 38 FCR 227 at 244.

49 *Owners of the ss Kalibia v Alexander Wilson* (1910) 11 CLR 689 at 704.

50 Ibid.

51 Ibid at 715.

nothing whatever to do with the 'implication from imperative necessity' referred to by Barton J. They relate to matters of construction. And, simply because shipping and admiralty were matters of Imperial concern in 1901, it does not seem in point to say that, on a matter of interpretation, s 76(iii) should now bear a meaning it does not obviously have.

On this analysis, s 76(iii), even if it does imply a body of law, goes no further than the conferral of jurisdiction, although it does include incidental matters. In other words, on this analysis, it is not doing justice to the provision as a whole to concentrate on the words of para (iii) alone or in isolation: those words are controlled by the introductory words of s 76 and they, in turn, make it clear that s 76 is a provision about the conferral of jurisdiction. It must be added, too, that it would be odd to find a stand-alone legislative power, on matters not confined to the conferral of jurisdiction, located in Chapter III of the Constitution. Maritime heads of power are found elsewhere; for example, s 51(vii): 'lighthouses, lightships, beacons and buoys'; s 51(x): 'fisheries in Australian waters beyond territorial limits'. Even s 98 (navigation and shipping) only extends s 51(i) ('trade and commerce with other countries, and among the States') and is not a stand-alone power. The arrangement of the Constitution, and its Chapter headings, seems therefore to be against saying s 76(iii) confers a substantive power. It is simply not like art III s 2(1). Quick and Garran, moreover, do not speak of s 76(iii) as other than a provision enabling jurisdiction to be conferred on the High Court.[52]

Isaacs J in the *Kalibia* also said: 'The interpretation and enforcement of admiralty and maritime law, as it is found to exist, is one thing; the alteration of that law is quite another'.[53] This highlights a particularly difficult issue with s 76(iii). If s 76(iii) does pre-suppose a body of substantive law – what follows from that, in Parliament's power to confer jurisdiction? Clearly, it would seem, Parliament can confer less of the jurisdiction it mentions – and, correspondingly, transport less of any body of law pre-supposed. Allsop J, as already noted, has this view of the *Admiralty Act*: that there is jurisdiction within s 76(iii) which is not conferred by that Act.[54] And, of course, Parliament may legislate on admiralty and maritime topics out of use of its other powers, and confer jurisdiction accordingly. And those topics may alter or vary aspects of any body of law implied by s 76(iii). So such a body of law is not therefore destined to remain static. But does Parliament have power under s 76(iii) to legislate on matters, and confer jurisdiction, where it does not have power otherwise to legislate on?

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52 J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth*, Legal Books reprint, 1995, pp 797-800.

53 *Owners of the ss Kalibia v Alexander Wilson* (1910) 11 CLR 689 at 715.

54 *Elbe Shipping South Australia v Ship Global Peace* (2006) 232 ALR 694 at 705.

Part of the difficulty is that 'Admiralty and maritime jurisdiction' is an open-ended expression. In particular, this is because of the word 'maritime'. That word, as we have seen, is hard to delimit. Correspondingly, it is hard to fix boundaries to any body of law implied by s 76(iii). This means it is hard to deny in advance Parliament's capacity to legislate on any aspect of maritime law, and to confer jurisdiction accordingly. And this is so, even though it may not have the power to legislate on the matter otherwise.

This view, however has difficulties, if the suggestion is that it would be one unaffected by s 51(i) as extended by s 98 to navigation and shipping. The relationship between s 76(iii) and s 51(i) as extended by s 98 is largely unexplored.[55] But s 51(i) is limited to interstate or overseas trade and commerce: so, too, is s 98 similarly thus limited in relation to navigation and shipping. In principle, it should not be possible to construe one power (s 76(iii)) so as to overcome specific limitations in others – in this instance s 51(i). And this is so, no matter how worthwhile in the national interest such an outcome may appear to be. For, otherwise, those limitations count for nothing and this cannot be what was intended.[56] And this seems an important principle of Constitutional interpretation. It seems very clear, based on s 98 read with s 51(i), that Parliament did not intend the Commonwealth to be able to legislate on purely intrastate shipping and navigation. Yet an interpretation of s 76(iii) as a substantive power, unrestricted in the way s 51(i) is, would allow the Commonwealth to do this. Then again, s 51(i) is expressed to be 'subject to' the Constitution and this includes s 76(iii). So, on this basis, s 76(iii) (whether or not pre-supposing a body of substantive law) perhaps takes precedence over s 51(i) (even as extended by s 98). But the question again is worth asking: if s 76(iii) confers a substantive power, why make the provision in s 98 specifically extending s 51(i) to interstate and overseas navigation and shipping? Perhaps the States, after all, were intended to have a continuing role in admiralty and maritime matters not falling within the Commonwealth's legislative powers under ss 51(i) and 98. Or, again, if s 76(iii) confers a substantive power, why, in one way, have s 51(vii) (lighthouses etc) or s 51(x) (fisheries)? Or, for that matter, why have s 51(xxix) – the external affairs power?

There is also this difficulty. If s 76(iii) pre-supposes a body of law, power to alter or modify that body of law comes either from s 76(iii) itself or from s 76(iii) read with s 51(xxxix). But s 51(xxxix) itself is also expressed to be 'subject to' the Constitution. So the position is far from straightforward. It is not out of the question that there

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55 See, however, *R v Turner; Ex parte Marine Board of Hobart* (1927) 39 CLR 411.

56 Compare *PJ Magennis v Commonwealth* (1949) 80 CLR 382 (defence power in s 51(vi) subject to limitation in s 51(xxxi) to provide just terms).

could be an acute conflict between two provisions: s 51(i) which is 'subject to' the Constitution and s 51(xxxix) which is also 'subject to' the Constitution. Such a conflict only arises, however, if, assuming all else, s 76(iii) does not itself give power to alter or modify the substantive law.

If s 76(iii), however, is presently regarded as merely a power to confer jurisdiction, and as nothing more, then power to deal with the substantive law – creating, altering or modifying it – except so far as allowed by s 76(iii) itself, must be found elsewhere in other provisions of the Constitution. Provisions of relevance include s 51(i) and 51(xxix). Section 51(i) is the trade and commerce power. The width of this power is well established:[57] all the commercial arrangements of which transportation is the direct and necessary result form part of trade and commerce.[58] The power, however, as noted. is restricted to trade and commerce 'with other countries and among the States'. By s 98, as also noted, the power extends to 'navigation and shipping'. Under s 51(xxix) as noted the Commonwealth has power to make laws with respect to: 'External affairs'. This power is a plenary power to be construed with all the generality that the words of the power admit.[59] The power is not confined to the implementation of treaties and other international agreements [60] but extends to persons, matters or things physically external to Australia[61] and extends also perhaps to matters of international concern.[62]

Other powers in the Constitution of relevance include - s 51(vi): 'The naval and military defence of the Commonwealth ...'; s 51(x): 'Fisheries in Australian waters beyond territorial limits'; and s 51(xx): 'Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.

Procedure in admiralty is able to be dealt with as an aspect of the incidental power[63] or even as an aspect of s 76(iii) itself.

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57 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 382.

58 *W & A Macarthur Ltd v Queensland* (1920) 28 CLR 530 at 547; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 152. Trade and commerce activities, by their nature, bear a trading or commercial character: see *Robin Pty Ltd v Canberra International Airport Pty Ltd* (1999) 179 ALR 449 at 454-5.

59 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 528.

60 See *Victoria v Commonwealth* (1996) 138 ALR 129.

61 *XYZ v Commonwealth* (2005) 227 ALR 495 at 499 per Gleeson CJ, at 507 per Gummow, Hayne and Crennan JJ. There may need to be, however, an obvious and substantial nexus with Australia: see *Horta v Commonwealth* (1994) 181 CLR 183 at 194.

62 See, however, *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 716-7.

63 See *Burton v Honan* (1952) 86 CLR 169 at 178; *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 312.

Legislative power over substantive and procedural law concerning the Territories as noted is given by s 122.[64]

Conclusion

Australia is now a separate and independent nation for all practical purposes. As regards s 76(iii) of the Constitution it is now in exactly the same position as the United States was when art 111 s 2(1) first fell to be considered by the Supreme Court in 1815 in *De Lovio v Boit*.

This would seem to indicate we should now regard s 76(iii), like art 111 s 2(1), as conferring on Parliament a power to legislate with respect to the substantive law, on the basis that it pre-supposes a body of existing law which may be altered or modified by Parliament at will. If s 76(iii) does confer a substantive power of this kind, then Parliament might, out of exercise of the power, legislate on the law relating to salvage or ship collisions or towage or pilotage or charterparties or shipbuilding contracts. It would not be confined merely to conferring jurisdiction on particular topics or heads of jurisdiction – but it would of course be confined to things admiralty or maritime or reasonably incidental thereto. It might go very deep intra-State and legislate on ports and harbours or foreshores or on things incidental to ports and harbours such as storage facilities – oil terminals and the like – and even road and rail conditions leading to ports. These would all be maritime, and related to subjects of marine concern, but this would be a significant incursion into areas thought previously to be solely of State concern. That is, into matters thought to be traditionally State matters. It is not out of the question that town planning and environmental matters and other matters, if still maritime, could fall within the power. The potential for conflict is obvious. The States might get some comfort from s 107 of the Constitution (saving State powers) but not from s 106 (saving State Constitutions) because the latter is expressed to be 'subject to' the Constitution and this includes s 76(iii). But, then again, s 76(iii), if not a stand-alone power, would need to be aided by s 51(xxxix) and this also is expressed to be 'subject to' the Constitution.

Perhaps, the effects of saying that s 76(iii) does confer a substantive power of this kind are so far-reaching, in matters maritime, that s 107 does apply, after all. For, potentially, an exercise of power under s 76(iii) (if a substantive power) to alter substantive law in some respect could significantly reduce State powers. Yet the concern of s 107 is to preserve State powers unless exclusively vested in the Commonwealth or withdrawn by the Constitution. Surely, it might be argued, this would be an occasion where s 107 could be applied and its application warranted. As

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64 *Attorney-General (WA); Ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492 at 523, 526.

against this, however, if s 76(iii) does confer a substantive power of the kind in question then, arguably, power to legislate on matters of admiralty and maritime law was withdrawn (implicitly) from the States when the Constitution took effect. If so, as a result, s 107 may not apply. Then, again, s 107 seems to relate to express withdrawals of power – such as s 90 and the power to impose customs and excise duties. The Constitution does not expressly withdraw State legislative powers in admiralty and maritime matters. Barton J in the *Kalibia*, it should be noted, regarded the States' powers to legislate on matters of admiralty and maritime laws as reserved to them by s 107.[65] Arguably, this could be an application of the reserved powers doctrine. But the point seems right in principle.

In any event, there are respectable arguments for saying that s 76(iii) should be seen as a jurisdiction-conferring provision – and not through 'the borrowed light' of authorities on art III s 2(1). Although expressed in much the same terms as art III s 2(1), the underlying purport of s 76(iii) seems quite different such that cases on the former should not be used to construe the latter. In other words, s 76(iii) is not, as it were, another art III s 2(1). On this basis, it is not, therefore, a power to legislate on admiralty and maritime law generally. To hold otherwise could lead to other provisions of the Constitution being disregarded. It implies a body of law (as seems likely) and enables jurisdiction to be conferred. It allows Parliament to alter or modify that body of law as by subtracting from it, for instance, but not by expanding on it. Its powers to expand on it must come from other provisions in the Constitution. And those provisions may impose limitations which must be observed.

There can be no doubt, however, that the power in s 76(iii), even if not a substantive power, is no longer confined to what was within power in 1901. Even merely as a power for 'the conferment of jurisdiction in a particular class of controversies', and nothing more, Parliament can still choose to confer jurisdiction from a wide range of matters. And that range, moreover, it seems very clear, is not confined merely to the matters set out in the *Admiralty Act 1988* (Cth). In one way or another, the possibility is there for expansion of the jurisdiction in times ahead. Lying in wait, however, could be difficult questions of constitutional interpretation.

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65 *Owners of ss Kalibia v Alexander Wilson* (1910) 11 CLR 689 at 704.