PAPER FOR THE 33rd ANNUAL MLAANZ CONFERENCE

SYDNEY

27 – 29 SEPTEMBER 2006

MARITIME LAW PROCEDURES AND FEDERAL COURT INITIATIVES

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1. Introduction – Pressures for Change

With the new Millennium, Courts, and Tribunals, as a consequence of the drive for greater transparency and efficiency, have re-examined their performance in order to align Court practices with efficient, just and speedy case management, hearing, and adjudication. Courts are in the process of modification and adoption of new procedures. In some nations it is necessary to consider entire new systems. Vietnam is an example of this.

Litigants in the international community do not accept that the longer and more exhaustive the path to a final hearing and the longer the judgment, the greater is its quality. Delay does not mean greater deliberation or sounder reasoning in an age of real time processing.

This pressure for efficacy in litigation management resonates strongly in maritime disputes, where litigants inevitably compare the performances of courts in different countries. As in other areas of practice, such as intellectual property, comparisons are made as to costs, timeliness and consistency of outcome. Where a national court system falls below expectations its courts are not only in danger of losing respect and authority, but litigants will by-pass them with arbitration, mediation and neutral evaluation mechanisms.

Alternative resolution services are useful, but only effective when conducted against a background of pragmatic and clear legal authority, properly reasoned by the courts, against which parties can assess their prospects of success or failure in negotiation or arbitration by reference to predictable outcomes in the Courts in the event of ultimate disagreement.

Where courts are consistently bypassed as a consequence of delay, lack of flexible procedure, uncertainty and reduced expense, the benchmarks will not be available and resort to alternative resolution will be greater and of diminishing effectiveness. Litigants resort to ADR because of perceived finality, speed and expense.

Faced with these considerations the Federal Court has examined its practices and rules in maritime matters. Today, I will outline some initiatives the Court has taken. The goal is, in broad terms: efficiency; a speedy hearing, determination and outcome; early identification and resolution of the real issues in dispute; and a minimum of interlocutory disruption. This involves a limitation of documentary material consistent with proper presentation of the case. Generally, the quicker the hearing, and the better the reasoning, the greater the confidence in a predictable outcome will be and less appeals will be taken. An unpredictable dilatory appellate process is a major disincentive.

The objective of this Court, as a national Court operating in all States and Territories throughout Australia, is to coordinate disparate conferrals of jurisdiction in all maritime matters, much of which is given to the Court on a piecemeal basis under many different Acts ranging from the *Maritime Safety Act* to *Seafarers*

Compensation Act and the *Admiralty Act* with core areas in the *Navigation Act1912 (Cth)* (*Navigation Act*) and *Admiralty Act* 1988 (*Cth*) (*Admiralty Act*). The *Admiralty Act* was drafted by the Australian Law Reform Commission comprising eminent experts resulting in an outstanding report explaining the rationale underpinning the provisions. The Court has listed on its Admiralty webpage (www.fedcourt.gov.au) under 'Information for Litigants' in the order of twenty-five Acts involving maritime matters conferring jurisdiction. In addition, there is a general jurisdiction in the Court, arising from the *Judiciary Act 1903 (Cth)*, the *Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act)* and the principle of pendent jurisdiction whereby the Court can determine non-federal matters related to a federal claim raised so as to comprehensively resolve the dispute between the parties. The Court has a largely unexplored jurisdiction to hear "matters associated with Admiralty and maritime jurisdiction", not otherwise within its jurisdiction under s12 of the *Admiralty Act*. The Court takes a proactive policy of considering Federal legislation with a view to ensuring that matters arising under Federal legislation come to the Court including some jurisdiction in criminal matters.

2. Specialisation – Integration

The Court proceeds on the basis that maritime jurisdiction calls for expertise and specialisation in its judges. Accordingly, in each State the Court has a panel of judges with an interest and experience in maritime matters to whom maritime proceedings are allocated. This national organisation, together with the panel, is discussed later. The aim is that when an Admiralty case comes to the Court the matter is listed before a Judge with appropriate experience, interest and knowledge of the jurisdiction and is able to deal with urgent and practical considerations. Often there is simply not enough time for a Judge unfamiliar with maritime practice to promptly deal with such matters.

Those Judges who exercise the jurisdiction commit to the process of judicial education and liaison with the profession to which I refer later.

At an appellate level the Court has regard to the expertise of the Judges when it constitutes the Full Bench Panel to hear appeals. The national arrangements are notified to practitioners throughout the country of the Judges in each State and Territory who will handle maritime matters and to identify the local Registry convening Judges who co-ordinate the work and harmonise practice and procedure.

The Court's web page has a comprehensive list of relevant Federal legislation conferring jurisdiction on the Court. There is also a general jurisdiction under the *ADJR Act* and under the *Judiciary Act* ss39B(1), 1(A) to deal with judicial review in relation to offices of the Commonwealth and matters arising under Federal legislation. An example is given of a marine insurance dispute arising under the *Marine Insurance Act 1909* (Cth) which would be within jurisdiction because it arises under a law of the Federal Parliament.

Practitioners are urged to ensure that Registry staff is told, when the proceeding is filed, that the matter is one of Admiralty or maritime jurisdiction so it can be duly assigned to the State panels. There is a description of the way in which the convening Judges in each State or Territory will harmonise the procedure. The rule of convening Judge is to deal with hearings and interlocutory issues before trial and the subsequent allocation at random among the Admiralty Judges in the particular Registry in accordance with the Court's docket system. A procedure is specified for urgent matters and the role of the Marshal is discussed in relation to *in rem* proceedings. Marshals are available to arrest a vessel anywhere in Australia on a 24/7 basis.

The Note to Practitioners also deals with the increased use of Court ordered mediation using the power conferred by s53A of the *Federal Court of Australia Act 1976 (Cth)*. The vast majority of cargo claims are settled, but often at a late stage after unnecessary expense has been incurred. If parties wish to obtain outside assistance, ADR mediators and arbitrators can be approached. Section 53A gives the Court power to refer matters to arbitration by a Court Registrar knowledgeable and experienced in maritime matters. This is appropriate for small cargo claims. Cases can be tailored to meet needs of smaller claims by more summary procedures such as submissions in writing, minimum oral evidence, limited discovery and waiving rules of evidence where parties agree, with power to refer legal questions to the Court.

3. Fast-Tracking

In recent cases turning on short questions of law, the Court has expedited matters to such an extent that they have been first heard by a Full Court and finally resolved within a short time or a matter of days using a video-conference and convening a panel from Judges throughout the country to constitute the Court. This procedure of direct referral to a Full Court is used when there are no disputed facts or there is a point of law which will resolve the matter, or dramatically shorten a matter, if determined in a particular way.

One example is found in the case of *The Genco Leader* [2005] FCAFC 162. In that case, the vessel was arrested off Fremantle. Shortly after, on 10 August 2005, a motion for release was filed. The vessel was due to load a cargo of wheat on Monday 15 August 2005 and depart on Tuesday 16 August 2005. The short important question of law concerned s17 of the *Admiralty Act* as to the meaning of the expression "property." When the matter came before Allsop J, arrangements were made with the Chief Justice to convene a Full Court from the Admiralty Judges, including an Admiralty Judge from Western Australia. The matter was heard by a Full Court and an ex-tempore judgment given on Friday 12 August 2005. An application for special leave was made to the High Court on that afternoon and heard by Gleeson CJ on the following Monday 15 August 2005, when leave was refused. The case illustrates how the resources of the Court and availability of Judges throughout the country on short notice, using video-link, can be marshaled to obtain final resolution of a matter within days, after exhausting all avenues of appeal. That vessel was able to depart as originally planned on schedule and fully laden.

The case of *The Taruman* [2006] FCAFC 75, was also referred to the Full Court for a first hearing in which Judges from three States constituted the panel. That case involved two short questions of law concerning questions whether bunkers could be arrested independently of the vessel and as to the interaction of the provisions of the *Fisheries (Management) Act 1991 (Cth)* and the *Admiralty Act*, the delay of a first hearing, reserved judgment and the time lapse for hearing an appeal were avoided.

In *The Boomerang* [2006] FCA 859 on Saturday 24 June 2006, Allsop J, in Sydney, heard and determined an application to permit a vessel arrested that morning in Fremantle to load and sale to Sydney and stood the matter over to a Full Court. On 27 June 2006, a Full Court, comprising two Sydney Judges and a Perth Judge, directed release of the ship and set aside the writ, but granted a stay until 29 June 2006. On 29 June 2006, Heydon J in the High Court refused a stay but expedited the application for special leave for hearing on 4 August 2006. The application was heard by the High Court on that day and dismissed as not having any prospect of success. Again, video-link was used.

4. Liaison

Recognising the need for transparency and the practice of consultation as developed over the past decade, there have been ongoing and extensive consultations in relation to the amendment of the *Admiralty Rules*. This consultation process involved user groups in each of the capital cities around Australia and discussion and liaison with the New Zealand Court practitioners and shipping interests. This was a lengthy process which has ensured that all points of view were taken into account in considering proposed amendments. Periodically, the Court in a less formal way consults practitioners and members of the industry by way of "user groups" to enable the ventilation and discussion of perceived difficulties and enhancements to the Court's practice, ranging from possible amendments to the legislation and practice notices, through to administrative matters dealing with inconveniences which may have been experienced.

On 13 September 2006, the Court entered into a Memorandum of Understanding with the ports authorities, to facilitate communication in relation to the administration of the ports when exercising Admiralty and maritime jurisdiction so that matters such as ship movements, cargo loading and unloading and berthing could be coordinated. In October 2004, the Court entered into a Memorandum of Understanding with the Australasian Maritime Safety Authority [AMSA], which sets out a procedure of reciprocal consultation. Further arrangements are being considered having regard to the increased requirements of port safety and terrorism. The Court has received considerable assistance from port authorities, tug boat operators, pilots

and providers of berthing facilities with a view to familiarising the Court as to the way port facilities and bodies operate and the problems they face. The Court also liaises with the Department of Transport.

An International Pilots Association Conference was recently held in Sydney at which Judges of the Court spoke and had the opportunity to discuss matters relating to pilotage, which in recent times has played an important role in litigation before the Court. As a result of the cooperation between the Court, agencies and the profession, our experience has been that matters have been handled more efficiently and have taken into account interests concerning all relevant parties in an integrated way.

5. Discussion of Rule Changes

The late Richard Cooper J, a pre-eminent Australian law expert, presented a paper to the 2000 MLAANZ Conference on "The Review of Admiralty Rules in Australia and New Zealand". In that paper his Honour referred to the ongoing process of reform and to meetings between the Sydney and Perth Admiralty Judges and Marshals and the profession. The issues raised in this paper concerned financial considerations including solicitors being required to give personal undertakings, concerns as to the duration, operation and overlap of undertakings given under different provisions of the rules at different stages of the arrest. There was, for example, dissatisfaction in the profession, with paying in advance for the Marshal's expected costs and expenses on the basis that these could be carried by the Marshal and recovered from the unsuccessful party or from the proceeds of sale of the vessel. In addition, there was dissatisfaction at the level of costs and expenses incurred by the Marshal in relation to the custody and maintenance of vessels under arrest. The paper discussed in some detail the position in North America, namely Canada and the United States, in relation to the Marshal's role. In the United States his Honour pointed out that Marshal's costs are required to be paid in advance.

In particular, the use of private, commercial substitute custodians to assume custody of the vessel was discussed. In the United States there is provision for a ship's keeper who is a party appointed to act as agent for the Marshal and a Substitute Custodian who is a person or corporation who acts in place of the Marshal. The Custodian is appointed by order of the Court and has powers specified in the order of appointment. It is pointed out that the use of a Custodian was driven by a desire to save costs to avoid having to outlay upfront costs to obtain arrest and to administer custody under arrest. However, as his Honour pointed out, there may be a tradeoff in the quality of care exercised by Custodians where custody is not that of the Court, or an agent of the Marshal. The threat of proceedings for contempt, for example, will dissuade the owners of a vessel, particularly a foreign vessel, from attempting to flee the jurisdiction. The custody of the Court carries with it power to punish for contempt which is a significant deterrent to interference with the vessel while under custody.

The requirements of the US Marshal, as reflected in the United States Marshal's Manual, involved prepayment of sums substantially in excess of sums required in Australia and it is possible that where a substitute commercial custodian is used the costs could be more expensive to the parties because of the profit margin involved. It is highly unlikely that the Government in Australia will be persuaded to fund the arrest and custody of vessels pending determination of the dispute, but rather parties will be required to fund the cash. The fact is that public funds, as pointed out by Sheen J on one occasion, are simply not available to meet the costs of keeping a ship under arrest.

In relation to solicitors' undertakings to meet expenses, the principle the Court has adopted is that the Marshal should not risk financial liability. It is open to the solicitor to seek an indemnity from his client before making an arrest. Uncertainty as to relative responsibilities have arisen in relation to the duration and extent parties are required to pay Marshal's costs because separate undertakings are required at different stages of the process, ranging from arrest through to eventual sale. It has been decided in Australia that provided the present system is fairly administered, the undertakings should remain. Undertakings given to the Court continue under the present rules to operate until the Marshal is paid costs and expenses and where they overlap they have a concurrent operation with the Marshal being able to call upon any one or more of the undertakings. This ensures protection to the Marshal. In the view of the Judges this is not an unreasonable situation.

In relation to the provision of cash or security for release, the Court has modified its practice and the rules so as to enable the giving of a bond. In addition, any hardship arising from the requirement to pay Marshal's fees in advance can be reduced by staging the provision of such funds over the period of the arrest in custody.

Consideration was given throughout the consultation process to the desirability of having a more detailed affidavit in support of a warrant for arrest, rather than simply having it as a matter of assertion. The solution adopted was to have more information in the Affidavit of Arrest than at present, but having regard to the urgency and contingencies of an arrest such details need not be lengthy. There was support for the view that a copy of the Affidavit on Arrest be served at the time of the arrest.

In relation to the cost of administrating an arrest, Ryan J of this Court delivered a paper entitled "*Time and Cost Implications of the Arrest of Vessels*" to the MLAANZ Conference on 3 October 2002. His Honour analysed the costs which were incurred in relation to three specific arrests leading up to the sale of the vessels and taking into account the Marshal's expenses, the cost of repatriation of the crew and claims for crew wages throughout the custody period. His Honour noted that these proceedings, in which the arrest leads to sale by the Court were rare, but considered that it was prudent to assume from the arrest that each vessel will be the subject of an order for sale and an attendant litigation for funding purposes. He suggested that the parties and the Marshal should draw on experience afforded by these three cases to minimise delay and expense and ensure that in the event of a sale, the maximum proceeds are promptly and efficiently distributed to claimants with a minimum of administrative expense deducted.

In conclusion, the simple fact is that the Courts are not in a position to fund arrest and custody of the vessel and will not allow the Marshal or the Court to be personally liable. The question of a private commercial custodian is a possibility but although raised for consideration there is no strong pressure for such a solution at the present time. Indeed, such a "solution" could prove to be more expensive and less effective having regard to the powers of the Court.

6. Proposed Rule Changes

The proposed rule changes, which the Court is pursuing after extensive consultation and which are at a very advanced stage, deal with the following:

a) disclosure on applications for arrest of matters which could affect the safety of the Marshal or personnel on the arrest or during custody as a continuing obligation;
b) the giving of particulars on an arrest application of the claim and the essential facts to justify an action *in rem* to be brought in respect of the claim;
c) undertakings by solicitors to be given in the name of the firm;
d) the use of "clean bonds" to secure Marshal's expenses which are issued by an Australian bank and are irrevocable unconditional bonds or guarantees;
e) clarification and consistency as to the terms of undertakings to be given on arrest and on making applications to the Court during the Court custody;
f) the power of the Marshal to fund costs and expenses from an overdraft and to call in cash on demand to meet payments. This is intended to deal with interim payment of fees and expenses which are made part of the Marshal's expenses in relation to and during the arrest up to sale;
g) the power of the power of the Marshal to obtain insurance cover;
h) aid between Courts so that fees and expenses of Marshal and any Court acting in aid of another Court form part of the fees and expenses of the Marshal, and taking steps in aid of State and Federal Courts with Admiralty jurisdiction;
i) the Court has considered conferring of flexible powers in the form of an "omnibus order" on the Marshal. At this stage this is under consideration with respect to matters such as preserving the ship, maintaining the class, moving the vessel within the Port, supplying fuel and necessaries, food, and water to crew, loading and discharge of cargo and orders enabling movement out of Port be obtained from a Judge together with consideration as to whether the Marshal should have power to repatriate the crew;

j) the informing by the Marshal of parties or caveators against release, of the current status of the arrest, and the fees and expenses incurred, anticipated, and the timing of amount of anticipated demands;
k) implementation by the Marshal of steps under International Ships and Port Facilities Security Code as seen fit in relation to a ship or property under arrest;
l) possible changes to bail bonds to enable one or more unrelated corporations to act as sureties on full disclosure of financial position in order to ensure surety has sufficient substance;
m) measures to streamline the process and minimise expense of the sale of vessels in custody under arrest. The rule could provide for sale by private tender in accordance with a specified form requiring payment within one week of acceptance after due advertisement;
n) elimination of the need for Marshal's fees to be taxed and the exclusion of fees incurred otherwise than in good faith;
o) provision that costs are not to be constrained by the amount claimed in Admiralty proceeding. The rationale is that costs should not necessarily be linked to the amount claimed. For example, if the claim is for less than a certain amount the Court considers there should not be any amount rule that proper costs cannot be awarded, having regard to the complexity of the matter while recognising that maritime cases can be complex factually and legally without these features being reflected in the quantum of the claim.

The new rules are at the stage where there is a draft Explanatory Memorandum drawn and the Rules are in the required legislative format.

7. Education

Several weeks ago in an address to celebrate the 30th anniversary of the Administrative Appeals Tribunal, the Chief Justice of Australia Murray Gleeson emphasised the importance of judicial education, securing the respect and authority of the Courts and Tribunals. In the past five years in particular this Court has engaged in judicial education by conducting a regular series of lectures and training sessions in maritime and Admiralty law and practice. This involved Judges, Registrars, Marshals and administrative staff in exchanges as to the needs and best practices in exercising Admiralty and maritime jurisdiction. Addresses have been delivered by Dr Edgar Gold QC, an eminent professor of shipping law and author with many years hands-on experience in the maritime industry and Professor Sarah Derrington from the Beirne School of Law in Queensland which conducts a course in maritime law. The educational sessions have included practical contributions from members of the industry on matters of seamanship and industry practice.

As an example, a day was given to the role of the Marshal in exercise of the Court's jurisdiction involving registrars and other officers of the Court throughout Australia. In addition, the Court arranged a series of lectures on documentation in maritime disputes from Professor Martin Davies of Tulane and Melbourne Law Schools by video-link from the United States. These involved four one-hour talks dealing with the operation of bills of lading, other shipping documentation, relationships between parties and the role of other interests including insurers. They were presented over four sessions with members of the industry, the public and the profession. The lectures were of outstanding quality and were well received.

The purpose of this "education" is to enhance the strong relationship between the Court, the profession and the industry and to ensure a well informed and educated profession which is invaluable in enabling the Court to deliver prompt and sound decisions wherein the real issues are identified and resolved. The importance of an experienced and informed profession cannot be overemphasised. The Court has conducted an Admiralty Education Day for officers focused on the law and practice, which bears on practical problems as to cargo loading and unloading, moving the ship and crew repatriation. In its current 2007 programme, the Court has arranged a series of talks by panel judges to other Admiralty judges on selected topics.

As a general research tool, I urge the use of the Court's web page dealing with Admiralty and maritime practice (www.fedcourt.gov.au). This site contains comprehensive information including recent cases, both here and overseas. The hyperlinks on that page provide instant access to this facility. The Court has

produced a DVD using Court officers which takes the viewer through the procedures and manner in which an arrest is carried out and administered with particular emphasis on the Marshal's function.

The Court is committed to enhancing this educational function by internal education in conjunction with the profession. This includes an active participation by the Judges in the internal education process and the activities of MLAANZ which is perhaps the most useful obvious annual forum for liaison between the Court practitioners and the industry. The Court has been a regular participant in MLAANZ activities for over twelve years and members of the Court have given Dethridge Memorial Keynote Addresses to MLAANZ together with papers on particular topics of current interests. Internally, the Court has developed a comprehensive library for Judges available on a national basis throughout the country in Admiralty and maritime matters.

8. Conclusion

Procedural improvement is an ongoing, essential and urgent process. It is best effected by communication in the form of extensive feedback and suggestion from the profession and the industry. Ultimately the authority of the Courts turns largely on acceptance, confidence and respect of the maritime community.