

# THE SAM HAWK: ANOTHER HALCYON ISLE IN AUSTRALIA?

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## Introduction

The recognition and enforcement of foreign maritime liens is an area of maritime and Admiralty law that is fraught with controversies and inconsistencies. The controversies stem from, among others, the lack of uniformity of the claims secured by maritime liens in different jurisdictions and the different private international law rules courts in maritime nations apply to determine foreign maritime lien claims. Since the decision in *Bankers Trust International Ltd v Todd Shipyards Corp*,<sup>1</sup> courts in some maritime nations have found reasons to align their positions with either the majority or minority judgment in that case. The reasons are not far-fetched: *The Halcyon Isle* expressed the spectrum of two prevalent schools of thought on the nature of the maritime lien for conflict of laws purposes — procedural device or substantive right — with far-reaching outcomes on both extremes.<sup>2</sup> The decision of the Full Court of the Federal Court of Australia in *Ship Sam Hawk v Reiter Petroleum Inc* rehashed some sentiments espoused in *The Halcyon Isle* and the dissenting judgment also mirrored some reasonings of the minority in *The Halcyon Isle*.<sup>3</sup> Could this be the outcome which the Australian Law Reform Commission and indeed Parliament intended when they left the issue of recognition and enforcement of foreign maritime lien open for the courts to decide?

This paper highlights the similarities between the reasoning in *The Sam Hawk* and *The Halcyon Isle*, to ringfence the real problem of foreign maritime lien recognition and enforcement, which has troubled courts for decades. This paper argues that since the majority and minority in *The Sam Hawk* concurred on the substantive nature of the maritime lien but disagreed on the enforceability of foreign maritime liens in Australia, the problem of recognition and enforcement of foreign maritime liens is not a substance and procedure problem. The problem stems from the forum court's pursuit of other considerations, including policy objectives. The paper highlights some pertinent issues raised in *The Sam Hawk*, which contributes to the jurisprudence of maritime liens in private international law.

The paper is structured into four parts. In the first part, the authors briefly introduce the maritime lien as generally perceived. In the second part, the authors review the decisions in *The Halcyon Isle* and *The Sam Hawk* and highlight the similarities in the judgements of the majority and minority in both cases. In the third part, the authors discuss some issues arising from *The Sam Hawk* and their contribution to the jurisprudence of foreign maritime liens in private international law. In the fourth part, the authors comment on the dissenting judgment in *The Sam Hawk* and conclude the paper.

## Maritime Lien

The classic definition of the maritime lien is 'a claim or privilege upon a thing to be carried into effect by legal process'.<sup>4</sup> In simple terms, a maritime lien is a right arising from services performed for a ship or damages done by a ship that gives the claimant the right to institute an action to arrest the ship as security for the claim. In the absence of alternative security, the court can sell the ship to provide a fund for the satisfaction of the claim. The essential features of the maritime lien are its enforceability notwithstanding any change of ownership of the vessel, and the priority status accorded the maritime lienee vis-à-vis other competing claimants where the sale proceeds cannot satisfy all the claims.<sup>5</sup> The maritime lien arises by operation of law and does not require possession or 'antecedent formality' to be valid.<sup>6</sup> The maritime lien attaches to the ship from the time the event occurred that gave rise to the maritime lien and travels with the ship wherever it goes until it is discharged one way or another.<sup>7</sup>

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<sup>1</sup> [1981] AC 221 ('*The Halcyon Isle*').

<sup>2</sup> If classified as procedural, the law of the forum will be applied to determine the validity of the foreign acquired right, but if classified as substantive, the law of the place where the lien arose will be applied to determine the validity of the right. See generally *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 ('*John Pfeiffer*').

<sup>3</sup> (2016) 246 FCR 337 ('*The Sam Hawk*').

<sup>4</sup> *The Bold Buccleugh* (1851) 7 Moo PCC 267, 284 (Sir John Jervis).

<sup>5</sup> *The Halcyon Isle* (n 1) 234 (Lord Diplock, Lord Elwyn-Jones and Lord Lane); *The Andrico Unity* [1989] 4 SA 325, 338 (Corbett JA); *The Sam Hawk* (n 3) 353 [49] (Allsop CJ and Edelman J).

<sup>6</sup> *The Tolten* [1946] P 135, 150 (Scott LJ); *The Bold Buccleugh* (n 4) 284 (Sir John Jervis).

<sup>7</sup> *The Two Ellens* (1872) LR 4 PC 161, 169 (Privy Council).

Although the maritime lien is recognised internationally, the concept developed differently in different jurisdictions, which perhaps explains the divergent claims secured by maritime liens and the diverse priority ranking attached to the classes of maritime liens and the private international law rules courts in different jurisdictions apply to determine the validity of the maritime lien. This phenomenon was aptly captured in *Transol Bunker BV v MV Andrico Unity*, when Marais J noted that:<sup>8</sup>

maritime lien is plainly a legal term of art which describes a juristic concept which exists in many legal systems. But it may mean different things to different people. It is conceivable that one legal system may label as a maritime lien a collection of rights which another legal system would not characterise as such because of the absence of one or other attribute which the latter system regards as an essential attribute of a maritime lien. It is equally conceivable (and occurs frequently in practice) that, although the juristic attributes of a maritime lien are identical in two different legal systems, the circumstances which give rise to such a lien are not.

In most Anglo common law countries such as Australia, only a few claims give rise to a maritime lien: salvage, damage done by a ship, wages of the master and crew of a ship, and master's disbursements.<sup>9</sup> In the United States of America (US) however, a wide array of claims are secured by maritime lien.<sup>10</sup> The maritime lien has therefore been reduced to a localized or jurisdiction-biased concept, with the attendant effect that a maritime lien arising *ex lege* under on the laws of one country may not be recognised or enforceable in the country where the claimant commences the enforcement proceeding. The description of the maritime lien as attaching to the vessel wherever it goes may no longer be apt given that courts in some maritime nations have resorted to private international rules to refuse to recognise foreign maritime liens.<sup>11</sup> Presently, it appears that maritime liens attach only to the extent recognisable by the law of the forum where enforcement action is brought, as will be observed in the cases reviewed hereunder.

Many countries have aligned their positions with either of the two prevalent schools of thought on the choice of law for the recognition and enforcement of foreign maritime liens. On one hand, countries determine the validity of the lien based on the law of the country where the maritime lien arose (*lex loci actus*) and on the other hand, some countries apply the law of the place where the enforcement action is instituted (*lex fori*).<sup>12</sup> *The Halcyon Isle* is a landmark decision that greatly influenced this division and revisiting the facts and reasoning therein is necessary for the discussion in this paper.<sup>13</sup>

## The Halcyon Isle

The case arose in Singapore where a mortgagee, a British bank, arrested a British flagged vessel, *The Halcyon Isle*, on a writ in rem issued against the ship. An American ship repairer that rendered repair services and supplied materials to the ship in New York also issued a writ in rem for the outstanding payment for the services and supplies. The bank and ship repairer both obtained judgement in their favour. The ship was sold but the proceeds of the sale were not enough to satisfy the judgment sum of the bank and ship repairer, so the question of priority of distribution arose.<sup>14</sup> The ship repairer contended that the repairs were carried out under United States laws and therefore it had a maritime lien entitling it to priority over the mortgagee. The Court at first instance gave priority to the mortgagee and held that although a maritime lien may secure ship repairs under US laws, Singaporean courts would not recognise or confer such a claim because Singaporean law did not recognise or confer a maritime lien for that class of claims.<sup>15</sup>

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<sup>8</sup> [1987] 3 SA 794, 801.

<sup>9</sup> *Admiralty Act 1988* (Cth) s 15 ('Admiralty Act'). The language of s 15 is unclear as to whether foreign maritime liens were envisaged, hence the need for the Court in *The Sam Hawk* to interpret the purport of s 15. This issue will be discussed subsequently in the paper.

<sup>10</sup> *Bominflot Inc v The M/V Henrich S*, 465 F 3d 144, 147 (4<sup>th</sup> Cir, 2006); Thomas J Schoenbaum, *Admiralty and Maritime Law* (West, 5<sup>th</sup> ed, 2011) 686–90.

<sup>11</sup> D C Jackson, 'Foreign Maritime Liens in English Courts — Principle and Policy' [1981] *Lloyd's Maritime and Commercial Law Quarterly* 335, 335.

<sup>12</sup> Some countries apply the law of the flag of the vessel as well as other countries that apply different conflict of law rules to deal with foreign maritime liens. This paper is however concerned with the *lex fori* and *lex causa* debate. See generally, William Tetley, 'Maritime liens in the Conflict of Laws' in James A R Nafziger and Symeon C Symeonides (eds), *Law and Justice in a Multistate World: Essays in Honor of Arthur T von Mehren* (Brill Nijhoff, 2002) 439; Jan Asser, *Maritime Liens and Mortgages in the Conflict of Laws* (Gothenburg, 1963) 15.

<sup>13</sup> The division between the majority and minority in *The Halcyon Isle* stems from the interpretation of an earlier English Court of Appeal decision in *The Colorado* [1923] P 102 which will be discussed hereunder.

<sup>14</sup> *The Halcyon Isle* [1977] 1 MLJ 145.

<sup>15</sup> *Ibid* 148. The Court also considered *The Colorado* [1923] P 102 and interpreted the decision to the effect that the French hypothèque or mortgage conferred on the holder some proprietary right which entitled him to be ranked higher than the necessaries men who merely had a right in rem and that there was no finding by the English Court of Appeal that the French mortgagee under the hypothèque acquired a maritime lien which the English Court recognised.

On appeal, the Singapore Court of Appeal reversed the decision of the lower court, relying on the decision of the Supreme Court of Canada in *The Ioannis Daskalelis*.<sup>16</sup> The Court of Appeal held that a maritime lien was a substantive right in the ship and the courts in Singapore ought to recognise the substantive right acquired under foreign law as a valid right and give effect to that recognition when determining the questions of priority between the ship repairer and mortgagee.<sup>17</sup> The Court, therefore, gave priority to the ship repairer over the mortgagee.<sup>18</sup>

The Judicial Committee of the Privy Council, in a 3:2 decision, reversed the decision of the Singapore Court of Appeal and held that, based on English conflict of law rules, a foreign maritime lien would only be recognised in England if the events on which the claim was founded would have given rise to a maritime lien in English law.<sup>19</sup> The Court further held that maritime liens were ‘rights that are procedural or remedial only, and accordingly the question whether a particular class of claim gives rise to a maritime lien or not [is] ... one to be determined by English law as the [law of the forum]’.<sup>20</sup> In coming to that conclusion, the majority stated that the Canadian Supreme Court in *The Ioannis Daskalelis* misunderstood the decision in *The Colorado* on which the Singapore Court of Appeal based its decision.<sup>21</sup>

The dissenting minority agreed with the reasoning of the Singapore Court of Appeal and adopted the Canadian Supreme Court’s interpretation of the decision in *The Colorado* to the effect that ‘where a right in the nature of a maritime lien exists under a foreign law which is the proper law of the contract, the English courts will recognise it and accord it the priority which a right of that nature would be given under English procedure’.<sup>22</sup>

### **The Sam Hawk**

Reiter Petroleum (Reiter), a Canadian company, supplied bunkers to a Hong Kong-flagged vessel, *The Sam Hawk*, in Turkey, based on a contract it executed with the time charterer of *The Sam Hawk*, Egyptian Bulk Carriers (EBC).<sup>23</sup> The contract incorporated Reiter’s supply terms and conditions which provided that the contract would be construed under Canadian law. This provision for the application of Canadian law was, however, subject to another clause that gave Reiter the right to assert a lien wherever it found the vessel and that United States law would apply to determine the existence of the maritime lien in any court the proceedings were instituted.<sup>24</sup> The facts indicated that the shipowner was neither a party to the contract or aware of the bunker transaction between Reiter and EBC at the time it was concluded. In addition, the master of *The Sam Hawk* issued a no liability notice to the physical supplier of the bunkers informing them that EBC was responsible for payment of the bunkers, not the owners of *The Sam Hawk*.<sup>25</sup>

EBC failed to pay for the bunkers and Reiter demanded payment from the owners of *The Sam Hawk*, who refused to accede to the demand.<sup>26</sup> Reiter brought an action in rem against *The Sam Hawk* and had it arrested in Albany, Australia, claiming a maritime lien under s 15 of the Admiralty Act and s 17 of the Admiralty Act,<sup>27</sup> on the basis that the charterer had contracted for the bunkers as an agent of the shipowner.<sup>28</sup> The owners of *The Sam Hawk* challenged the jurisdiction of the court to hear the claim because s 15 did not recognise the supply of bunkers as giving rise to a maritime lien under Australian law and sought alternatively, for summary judgement dismissing the action because the claim had no reasonable prospects of success.<sup>29</sup>

The Court at first instance held that on the question whether a foreign maritime lien should be enforceable in Australia (even where the supply of bunkers did not give rise to a maritime lien under the Australian law), the

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<sup>16</sup> *The Halcyon Isle* [1978] 1 MLJ 189, 191 citing *The Ioannis Daskalelis* [1974] SCR 1248. In *The Ioannis Daskalelis*, the ship repairer (incidentally the same ship repairer in *The Halcyon Isle*) performed repair services in New York and was not paid. The ship was arrested in Canada and sold. The priority question was between the mortgagee of the vessel and the ship repairer. The Supreme Court held that the ship repairer had priority because Canadian law recognises the maritime lien of the necessities provider a right validly obtained under US Law, the *lex causa*.

<sup>17</sup> *The Halcyon Isle* (n 16) 191.

<sup>18</sup> *Ibid* 192.

<sup>19</sup> *The Halcyon Isle* (n 1) 238–9 (Lord Diplock, Lord Elwyn-Jones and Lord Lane).

<sup>20</sup> *Ibid* 238 (Lord Diplock, Lord Elwyn-Jones and Lord Lane).

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid* 250 (Lord Salmon and Lord Scarman).

<sup>23</sup> *The Sam Hawk* (n 3) 346–48 [13]–[22] (Allsop CJ and Edelman J).

<sup>24</sup> *Ibid* 347 [18] (Allsop CJ and Edelman J).

<sup>25</sup> *Ibid* 344 [4], 347 [16] (Allsop CJ and Edelman J).

<sup>26</sup> *Ibid* 347 [20] (Allsop CJ and Edelman J).

<sup>27</sup> Section 17 of the Admiralty Act provides for general maritime claims not maritime liens. It gives a claimant the right to proceed in rem in relation to general maritime claims which are listed in s 4(3) of the Admiralty Act, with some conditions as to the relevant person.

<sup>28</sup> *The Sam Hawk* (n 3) 348 [22] (Allsop CJ and Edelman J).

<sup>29</sup> *Ibid* 348 [23] (Allsop CJ and Edelman J).

view of the minority in *The Halcyon Isle* was preferable.<sup>30</sup> Justice McKerracher based his reasoning upon the decision in *John Pfeiffer*,<sup>31</sup> an authority which is debatable in the context of the case.<sup>32</sup> On appeal to the Full Court of the Federal Court of Australia, Allsop CJ and Edelman J with substantial concurrence from Kenny J and Besanko J ('majority' for the purposes of this work)<sup>33</sup> allowed the appeal. They held that recourse must be had to the *lex causa* to determine and characterise the foreign right but such foreign right had to be characterised according to Australian law to determine if it was a maritime lien or sufficiently analogous to a maritime lien within s 15 of the Admiralty Act.<sup>34</sup> The majority further held that since the owner of *The Sam Hawk* was not party to the bunker supply contract, it was 'extremely difficult' to characterise the issue as one of 'contract' so the issue regarding the applicable choice of law became irrelevant.<sup>35</sup> The majority in addition stated that, even if the laws of Canada or United States were to apply, the foreign right as well as the circumstances giving rise to such right would need to be characterised by Australian law as a maritime lien, in which case, such right was neither a maritime lien nor analogous to a maritime lien in Australia.<sup>36</sup>

Justice Rares ('minority' for the purposes of this paper), although agreeing with the orders of the majority in allowing the appeal, opined that the case was inappropriate to give a final opinion whether s 15 could extend to a maritime lien arising from a foreign law because the basis for the claim (bunker contract) did not bind the owners of *The Sam Hawk*.<sup>37</sup> Justice Rares however held that a claim on a maritime lien properly characterised under the law of the place where it attached, would be maintainable under s 15(1) of the Admiralty Act, even if no such maritime lien would attach if the same events had occurred in Australia.<sup>38</sup>

### Similarities between *The Sam Hawk* and *The Halcyon Isle*

*The Sam Hawk* is arguably the most erudite and in-depth analysis of the maritime lien in recent times, especially as it relates to the recognition and enforcement of foreign maritime liens. Although the facts of *The Sam Hawk* and *The Halcyon Isle* are quite distinct, the decision in *The Sam Hawk*, however, reflects some reasonings in *The Halcyon Isle*, which has impliedly domesticated in Australia some of the controversies trailing *The Halcyon Isle*. This similarity is unsurprising as the resolution of the appeal before the Full Court was said to require a choice between the views of the majority and minority in *The Halcyon Isle*.<sup>39</sup> This paper focuses on three similarities between the two cases as highlighted below.

### Characterisation for Private International Law Purposes

The majority in *The Sam Hawk* considered the purport and intent of s 15 of the Admiralty Act as it relates to the recognition and enforcement of foreign maritime liens in Australia. Section 15 of the Admiralty Act provides as follows:

- (1) A proceeding on a maritime lien or other charge in respect of a ship or other property subject to the lien or charge may be commenced as an action in rem against the ship or property.
- (2) A reference in subsection (1) to a maritime lien includes a reference to a lien for:
  - (a) salvage;
  - (b) damage done by a ship;
  - (b) wages of the master, or of a member of the crew, of a ship; or
  - (d) master's disbursements.

<sup>30</sup> *The Sam Hawk* [2015] FCA 1005, [119] (McKerracher J).

<sup>31</sup> *Ibid* [112]–[119], discussing *John Pfeiffer* (n 2).

<sup>32</sup> In *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 520 [75]–[76] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) ('*Zhang*') the High Court counselled that caveats should be entered with respect to extending the principle enunciated in *John Pfeiffer* to foreign torts. Also, special considerations may apply to maritime torts: see also, Poomintr Sooksripaisarnkit, 'Question of Recognition of Foreign Maritime Lien has Troubled the Court Again' (2016) 22 *Journal of International Maritime Law* 19.

<sup>33</sup> The case had three different judgments: Allsop CJ and Edelman J [1]–[192], Kenny and Besanko JJ [193]–[289] (in substantial agreement with the judgement of Allsop CJ and Edelman J) and Rares J (dissenting) [290]–[432]. For the purposes of comparing the judgment with that of *The Halcyon Isle* in this work, the judgments of Allsop CJ and Edelman J and Kenny and Besanko JJ will be treated as the majority.

<sup>34</sup> *The Sam Hawk* (n 3) 385 [183] (Allsop CJ and Edelman J), 406 [286] (Kenny and Besanko JJ).

<sup>35</sup> *Ibid* 395–6 [185] (Allsop CJ and Edelman J).

<sup>36</sup> *Ibid* 387 [191] (Allsop CJ and Edelman J), 405 [281] (Kenny and Besanko JJ).

<sup>37</sup> *Ibid* 407–8 [292]–[293].

<sup>38</sup> *Ibid* 438 [430].

<sup>39</sup> *Ibid* 351 [40] (Allsop CJ and Edelman J).

The majority reasoned that the characterisation process distilled from s 15 required a two-step process. First, the issue had to be characterised to identify the foreign right by reference to its *lex causa* and second, the 'identified foreign right must then be characterised by reference to Australian law to determine whether it is, or is sufficiently analogous to, a maritime lien recognised by Australian law'.<sup>40</sup> The majority posited that the two-step characterisation process was consistent with the provisions of the Admiralty Act and relevant authorities. The majority emphasised that the circumstance upon which the foreign right arose was crucial in the characterisation process.<sup>41</sup>

The characterisation process adopted by the majority in *The Sam Hawk* is akin to the characterisation process adopted by the majority in *The Halcyon Isle*. In *The Halcyon Isle*, the Court characterised the claim by reference to the events upon which the claim was founded and applied the priority which the claim would be entitled had it occurred within the territorial jurisdiction of the Court.<sup>42</sup> The result of the characterisation in both cases was therefore identical: non-recognition of the foreign maritime liens. The characterisation process renders impotent any choice of law rule that points to the application of a foreign rule of law. The majority in effect determined that no matter the choice of law rule applied to identify the applicable law governing the validity of the maritime lien, such foreign maritime lien must be characterised as a maritime lien as understood under Australian law. The characterisation applied in the two cases upholds the primacy of the *lex fori*, the effect of which is the revival of the double actionability principle within foreign maritime lien jurisprudence, although the majority refuted this.<sup>43</sup> The majority argued that the characterisation process did not deny recognition of the foreign right but merely required characterisation by reference to Australian law,<sup>44</sup> however, the same majority held that the claim was not a 'maritime lien' within s 15 of the Admiralty Act.<sup>45</sup> In other words, the Court said: 'yes, we recognise you may have a necessities lien, but sorry, it is not a maritime lien recognised under Australian law'. What use is an academic recognition of a foreign maritime lien to claimants seeking to enforce a substantive right and obtain a remedy? Although reviewed objectively, it could be interpreted as reflecting the principle espoused by the High Court in *John Pfeiffer* to the effect that 'litigants who resort to a court to obtain relief must take the court as they find it ... the plaintiff cannot ask that the courts of the forum adopt procedures or give remedies of a kind which their constituting statutes do not contemplate'.<sup>46</sup>

### The Interpretation of The Colorado

The interpretation of *The Colorado* decision remains one of the main instigators of the division in *The Halcyon Isle* and, unsurprisingly, in *The Sam Hawk*. The majority in *The Sam Hawk* adopted the interpretation of the majority in *The Halcyon Isle* to the effect that the English Court of Appeal in *The Colorado* considered the circumstances in which the right arose and characterised the foreign right created based on English law and that the said interpretation was properly applied in *The Zigurds* and *The Acrux*. *The Zigurds* and *The Acrux* are two cases involving foreign maritime liens where the Courts applied the *lex fori* approach.<sup>47</sup> The majority noted that the two-step characterisation process distilled from s 15 was consistent with the principles espoused in *The Colorado*.<sup>48</sup>

The minority in *The Sam Hawk* in like manner, interpreted the decision in *The Colorado* in line with the interpretation of the minority in *The Halcyon Isle* to the effect that the English Court of Appeal determined as a matter of substance, the nature of the French hypothèque under the *lex loci contractus*, being its proper law and characterised the right as a maritime lien capable of enforcement in England.<sup>49</sup>

With the foregoing, *The Colorado* continues to be an ambiguous decision, capable of several interpretations. Notwithstanding, the fact remains that the question before the English Court of Appeal in *The Colorado* was one of priority between a French hypothèque and an English necessities provider, not one of recognition and enforcement of a foreign maritime lien. It is therefore arguable whether the principles espoused in *The Colorado* could authoritatively be applied to a foreign maritime lien claim as applied by the Courts in the two cases under

<sup>40</sup> Ibid 366–7 [102]–[104] (Allsop CJ and Edelman J).

<sup>41</sup> Ibid 366–7 [102]–[106] (Allsop CJ and Edelman J). The majority in *The Halcyon Isle* also made that point: *The Halcyon Isle* (n 1) 241 (Lord Diplock, Lord Elwyn-Jones and Lord Lane).

<sup>42</sup> *The Halcyon Isle* (n 1) 230, 238–9 (Lord Diplock, Lord Elwyn-Jones and Lord Lane); *The Sam Hawk* (n 3) 380 [155] (Allsop CJ and Edelman J), 406 [287] (Kenny and Besanko JJ).

<sup>43</sup> *The Sam Hawk* (n 3) 367 [105] (Allsop CJ and Edelman J).

<sup>44</sup> Ibid.

<sup>45</sup> Ibid 346 [10] (Allsop CJ and Edelman J).

<sup>46</sup> *John Pfeiffer* (n 2) 543–4 [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>47</sup> *The Zigurds* [1932] P 113, 122–6 (Langton J); *The Acrux* [1976] P 391, 402 (Hewson J). See also *The Sam Hawk* (n 3) 371–2 [120]–[124].

<sup>48</sup> *The Sam Hawk* (n 3) 382 [166] (Allsop CJ and Edelman J).

<sup>49</sup> Ibid 422 [353]–[355] (Rares J).

consideration.<sup>50</sup> This is because the issue of priority before the Court in *The Colorado* was a settled area of law in that the *lex fori* would have been applied irrespective of any other consideration.<sup>51</sup> The French hypothèque, although had some similar characteristics with an English mortgage, was different in nature from an English mortgage as the holder of a French hypothèque could commence an action against the vessel notwithstanding the change in ownership. It is difficult to maintain that the Court of Appeal decided that a French hypothèque or mortgage, spiced up with *droite de suite*, equalled a maritime lien.

On several points, the Courts in *The Halcyon Isle* and *The Sam Hawk* could have distinguished the decision in *The Colorado*. For instance, the subject matter before the Court of Appeal in *The Colorado* could have been distinguished from that in *The Sam Hawk*; priority of competing claims is not equivalent to recognition of a foreign maritime lien; a French hypothèque is not equivalent to a maritime lien. *The Sam Hawk* presented an opportunity for a twenty-first century court sitting on the issue of foreign maritime lien recognition and enforcement to make a clean break from the inconsistencies of *The Colorado*. With this missed opportunity, the inconsistencies and ambiguities of *The Colorado* have made a triumphant entry into modern-day maritime and Admiralty law and practice.

### Policy Considerations in Both Judgments

Policy consideration formed a significant basis for the majority decision in *The Sam Hawk*.<sup>52</sup> Between the intention to balance the rights of both ship operators and suppliers,<sup>53</sup> and the need to adhere to the position applicable in England,<sup>54</sup> the Court expressed extensively the policy reasons why only maritime liens falling within the express provisions and contemplation of the Admiralty Act will be recognised and enforced in Australia.<sup>55</sup> The majority stated as follows:<sup>56</sup>

In characterising the right, there are reasons of construction of the Admiralty Act, and separate reasons of principle and policy, why Australian law should follow the long established English approach (that is widely adopted in jurisdictions recognising a narrow class of maritime liens) to give significant effect to the *lex fori*, even if it be the case that such does not arise from a posited dichotomy of substance and procedure, but by having regard to the circumstances in which the right arose.

In *The Halcyon Isle*, the Court's consideration of policy issues was more implicit in the judgment than explicit. The Privy Council considered the policy in England which was the need to 'keep down to a minimum the number of maritime liens that should be recognised, so as to prevent ... "secret charges" arising and gaining priority over mortgages'.<sup>57</sup> The importance of this policy was reflected in England's refusal to ratify the *International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages*.<sup>58</sup> It has been convincingly argued that this policy consideration was at the heart of the majority's decision in *The Halcyon Isle*.<sup>59</sup> It is not novel for policy consideration to form the basis of a court's decision regarding the recognition and enforcement of foreign maritime liens. Canadian courts that recognise and enforce maritime liens wherever and however they are created also rely on policy considerations.<sup>60</sup> These observations indicate that policy consideration plays a significant role in court's determination of foreign maritime liens.

<sup>50</sup> *Transol Bunker BV v MV Andrico Unity* [1987] 3 SA 794, 813–18, where Marais J objectively analysed the decision in *The Colorado*.

<sup>51</sup> *The Colorado* (n 13) 106–7 (Bankes LJ), citing *Harrison v Sterry* (1809) 5 Cranch 289, 298 (Marshall CJ); *The Colorado* (n 13) 108 (Scrutton LJ), citing *Don v Lippman* (1837) 5 Cl & Fin 1, 13 (Lord Brougham).

<sup>52</sup> *The Sam Hawk* (n 3) 346 [10], 351 [40], 357 [69], 358 [75], 367 [106], 370 [117] (Allsop CJ and Edelman J), 405 [282] (Kenny and Besanko JJ). See generally Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 *Journal of Private International Law* 201.

<sup>53</sup> *The Sam Hawk* (n 3) 358 [75] (Allsop CJ and Edelman J).

<sup>54</sup> *Ibid* 357–8 [71]–[72] (Allsop CJ and Edelman J).

<sup>55</sup> *Ibid* 346 [10]–[11], 375–8 [137]–[149] (Allsop CJ and Edelman J).

<sup>56</sup> *Ibid* 346 [10] (Allsop CJ and Edelman J).

<sup>57</sup> *The Halcyon Isle* (n 1) 240 (Lord Diplock, Lord Elwyn-Jones and Lord Lane).

<sup>58</sup> *Ibid*. *International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages*, opened for signature 10 April 1926 (entered into force 2 June 1931).

<sup>59</sup> *Transol Bunker BV v MV Andrico Unity* [1987] 3 SA 794.

<sup>60</sup> In *The Strandhill v Walter W Hodder Co* [1926] SCR 680 ('*The Strandhill*'), the Court did not classify the issue as substance or procedure but merely noted that a maritime lien validly created under foreign law will be recognised in Canada as long as it was not opposed to some rule of domestic policy. In *The Ioannis Daskalelis* (n 16) which was a case on priority, the Court relied on *The Strandhill* to hold that the US maritime lien for necessities was recognised and enforceable in Canada. The Court's reference to the maritime lien as a substantive right was with respect to determining the priority between the necessities supplier and the mortgagee and this reference was a quotation of G C Cheshire and P M North, *Cheshire's Private International Law* (8<sup>th</sup> ed, 1970) 676: *The Ioannis Daskalelis* (n 16) 1254. In *The Har Rai* [1984] 2 FC 345, 353 (Le Dain J), confirmed by the Canadian Supreme Court, the Court noted that '[t]here is no question that the recognition of maritime liens is an important question of policy in maritime law on which there has been strong differences of view among the maritime nations'. See also Sarah C Derrington and James M Turner, *The Law and Practice of Admiralty Matters* (Oxford University Press, 2<sup>nd</sup> ed, 2016) 80 [4.50]; Aldo Chircop, William Moreira, Hugh Kindred, Edgar Gold (eds) *Canadian Maritime Law* (Irwin Law, 2<sup>nd</sup> ed, 2016) 365.

## Some Notable Issues from *The Sam Hawk*

### The Demise of the Substance/Procedure Dichotomy

A high point in the majority's decision was their departure from *The Halcyon Isle* as it relates to the substance and procedure dichotomy. The majority held that the substance and procedure dichotomy was a distraction both in *The Halcyon Isle* as well as in *The Sam Hawk* because the dichotomy did not affect the reasoning in both cases.<sup>61</sup> The majority noted that the reasons why a foreign right needed to be characterised arose not from the substance and procedure dichotomy but from reasons of construction of the Admiralty Act and other principle and policy reasons.<sup>62</sup> The importance of this departure goes to the very issue that has bedevilled courts in common law countries for years. Courts have for years resorted to the substance and procedure classification in determining questions on the recognition and enforcement of foreign maritime liens.<sup>63</sup>

The decision in *The Sam Hawk* confirms unequivocally that the recognition and enforcement of foreign maritime liens is not in reality a substance/procedure problem. The majority and minority agreed that the maritime lien was a substantive right for which the *lex causa* will be applied in determining the nature and extent of the foreign right.<sup>64</sup> If substance/procedure was the problem, having agreed on the nature of the maritime lien — based on the clarification in *John Pfeiffer*<sup>65</sup> and *Zhang* —<sup>66</sup> the majority and minority ought to have agreed on the point whether foreign maritime liens not falling within s 15(2) of the Admiralty Act, would be recognised and enforceable in Australia. However, the majority and minority came up with different reasonings to support their opposing views as to the recognition and enforceability of maritime liens arising from foreign law. This is reminiscent of *The Halcyon Isle* where the majority, although conceding that the maritime lien had the nature of a proprietary right in the ship due to its ability to attach to the ship irrespective of the change in ownership,<sup>67</sup> still characterised the maritime lien as a procedural or remedial right to apply the *lex fori*.<sup>68</sup> The majority in *The Halcyon Isle* conveniently hid under the age-long substance/procedure characterisation problem.<sup>69</sup>

Professor Davies stated that the decision in *The Sam Hawk* achieved very little, ie, it merely provided a sounder theoretical basis for *The Halcyon Isle* rule applying the *lex fori*.<sup>70</sup> With utmost respect, on the contrary, *The Sam Hawk* achieved a significant feat in that it has set the record straight that the recognition and enforcement of foreign maritime liens is not a substance/procedure characterisation problem but one that requires courts to consider crucial factors including forum policy and coherence with existing law.<sup>71</sup> The decision, in other words, restated — though on a different basis —<sup>72</sup> a *sui generis* conflict of law rule regarding foreign maritime liens, for which the *lex fori* must be applied in determining the validity of the maritime lien in the forum, notwithstanding that the maritime lien is a substantive right.<sup>73</sup> Classic private international law rules — determining the proper law using connecting factors — serve little purpose in the face of the primacy of forum law as upheld by this *sui generis* approach. Courts in jurisdictions whose local policies and laws are not disposed to recognising foreign maritime liens no longer need to resort to the red herring of substance and procedure characterisation. Upon such revelation, therefore, it appears that achieving the goal of uniformity of outcomes in the different jurisdictions as it relates to foreign maritime liens may not be achievable within the domain of private international law.

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<sup>61</sup> *The Sam Hawk* (n 3) 380–1 [157]–[160] (Allsop CJ and Edelman J).

<sup>62</sup> *Ibid* 346 [10] (Allsop CJ and Edelman J).

<sup>63</sup> See, eg, *The Andrico Unity*, (n 5) 350; *Hassanein v Ship Hellenic Island* [1989] 1 CLR 406; *Fournier v Ship Margaret Z* [1999] 3 NZLR 111, 116 (Fisher J); *Ocean Gain Shipping v The Dong Nai* [1996] 4 MLJ 454, 463 (Abdul Malik Ishak J).

<sup>64</sup> *The Sam Hawk* (n 3) 353 [50], 363 [91] (Allsop CJ and Edelman J), 320–1 [346], 438 [429] (Rares J).

<sup>65</sup> *Ibid* 428–30 [384]–[389] (Rares J), citing *John Pfeiffer* (n 2).

<sup>66</sup> *Ibid* 438 [428]–[430] (Rares J), citing *Zhang* (n 32) 517 [66]–[67] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>67</sup> *The Halcyon Isle* (n 1) 234 (Lord Diplock, Lord Elwyn-Jones and Lord Lane).

<sup>68</sup> *Ibid* 238 (Lord Diplock, Lord Elwyn-Jones and Lord Lane).

<sup>69</sup> See *Boys v Chaplin* [1971] AC 356, 392 (Lord Wilberforce).

<sup>70</sup> Martin Davies, 'Recognition of Foreign Maritime Liens' [2017] *Lloyd's Maritime and Commercial Law Quarterly* 206, 211–12.

<sup>71</sup> *The Sam Hawk* (n 3) 346 [10] (Allsop CJ and Edelman J). See also Anton P Trichardt, *Maritime Lien and the Conflict of Laws* (Centre for Business Law, 2012) 320, where he stated that 'when confronted with the issue of the recognition and enforcement of a foreign maritime lien, an Australian court must instead of following foreign precedent rather look at the issue afresh, applying legal principles and taking Australian policy concerns into account'.

<sup>72</sup> The position in Australia regarding the issue of recognition and enforcement of foreign maritime lien has been that of the majority of *The Halcyon Isle* as reflected in the case *Morelines Maritime Agency Ltd v Proceeds of Sale of the Ship Skulptor Vuchetich* [1997] FCA 432 [78]–[83] (Sheppard J) ('*The Skulptor Vuchetich*'). The difference is that in *The Skulptor Vuchetich* the Court held that a maritime lien was a procedural right for which the *lex fori* will apply whereas in *The Sam Hawk*, the Court held that a maritime lien is a substantive right for which the *lex causa* will apply to determine the validity or extent of the right but such right must still be characterised to see if it fits into the Australian list of maritime liens to be enforceable in Australia.

<sup>73</sup> *The Sam Hawk* (n 3) 381 [160] (Allsop CJ and Edelman J).

## Statutory Interpretation

Before the Admiralty Act came into being, the Australian Law Reform Commission (Commission) set the scene for the reform of Australia's Admiralty jurisdiction. The Commission acknowledged that Australia, being a country of shippers, was dependent on foreign shipping and supported the policy of maintaining and broadening Admiralty jurisdiction in rem, but emphasised the importance of balancing the interests of ship operators and those dealing with ships.<sup>74</sup> The Commission recommended that a list of the 'four significant categories of liens (salvage, damage, wages and masters disbursement)'<sup>75</sup> should be added in the new statute with specific provisions to the effect that the new statute created no new class of maritime lien.<sup>76</sup> Concerning foreign maritime liens, the Commission, after noting the difficulties presented in choosing between the position of the 'bare majority' and that of the minority in *The Halcyon Isle* recommended that:<sup>77</sup>

Although the dominant view expressed to the Commission favoured the Canadian and South African approach rather than that of the majority in *The Halcyon Isle*, the matter is best left to be resolved through further attempts at international unification (either through amendments to the Arrest Convention or through a further and more satisfactory Convention on Maritime Liens and Mortgages). In the absence of formal international agreement (and consistently with the recommendation in para 122 relating to liens generally) the question is best left to the courts to resolve, taking into account developments in other jurisdictions.

Parliament implemented the recommendation, and the Admiralty Act made no overt reference to the recognition and enforcement of foreign maritime liens. This 'rather bland recommendation'<sup>78</sup> in retrospect, perhaps laid the foundation for the division reflected in the Court in *The Sam Hawk*.

The question, therefore, is whether the interpretation of s 15 of Admiralty Act by the majority in *The Sam Hawk* has settled the position in Australia in view of the recommendation of the Commission and ultimately, the intention of the legislature. Although the minority noted that *The Sam Hawk* was not a 'desirable or necessary' case to express a final view on whether s 15 could extend to the recognition of foreign maritime liens, the decision of the Court has — at least for now — put to rest all questions on the issue of the recognition and enforcement of foreign maritime liens in Australia, save for cases where an applicable foreign law does not recognise a claim as giving rise to a maritime lien but Australian law recognises such claim or right as a maritime lien.<sup>79</sup> The interpretation of s 15 put forth by the majority seems apposite because, although s 15 is a generally worded statutory provision that does not indicate the circumstances for which they apply, the Admiralty Act and the Admiralty jurisdiction of the Court extends to '(a) all ships, irrespective of the places of residence or domicile of their owners; and (b) all maritime claims, wherever arising'.<sup>80</sup> Section 15(2) qualified the general statement of s 15(1) to the effect that the maritime lien for which an action in rem may be brought should fall within the purview those claims so listed. In addition, by the provisions of the *Acts Interpretation Act 1901* (Cth), the preferred interpretation is the interpretation that will best achieve the purpose or object of the Act (whether the purpose or object is expressly stated in the Act or not).<sup>81</sup> Considering the purport of s 6 of the Admiralty Act, it would seem that the interpretation that allows for the recognition and enforcement of only maritime liens listed or similar to those listed in s 15(2) would achieve the purpose of the Act.<sup>82</sup>

## What Are 'Closely Analogous' Maritime Liens?

The Court emphasised that it was possible to enforce in Australia, foreign maritime liens that are 'closely analogous' or 'sufficiently analogous' to the maritime liens listed in the Admiralty Act.<sup>83</sup> In reality, it is quite difficult to come up with examples of rights or claims that could fall within the description of being 'closely analogous'. If history is anything to go by, 'analogous' foreign maritime liens may open a Pandora's box of knotty

<sup>74</sup> Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (Report No 33, December 1986).

<sup>75</sup> *Ibid* [122]. The recommendation was implemented in the Admiralty Act s 15(2).

<sup>76</sup> Australian Law Reform Commission (n 74) [122]. The recommendation was implemented in the Admiralty Act s 6(a).

<sup>77</sup> Australian Law Reform Commission (n 74) [123].

<sup>78</sup> Martin Davies and Kate Lewins, 'Foreign Maritime Liens: Should They be Recognised in Australian Courts?' (2002) 76 *Australian Law Journal* 775, 782.

<sup>79</sup> *The Sam Hawk* (n 3) 366 [102] (Allsop CJ and Edelman J). The Court hinted that perhaps an Australian court may apply Australian law in that circumstance. But not being an issue raised in this case, it is still open for determination in cases in the future.

<sup>80</sup> Admiralty Act (n 9) s 5; Lawrence Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 14<sup>th</sup> ed, 2006), 19–20 [1-037]–[1-041].

<sup>81</sup> Acts Interpretation Act 1901(Cth) s 15AA

<sup>82</sup> Section 6 of the Admiralty Act (n 9) provides that: 'The provisions of this Act (other than section 34) do not have effect to create: (a) a new maritime lien or other charge; or (b) a cause of action that would not have existed if this Act had not been passed. See the analysis of Kenny and Besanko JJ in *The Sam Hawk* (n 3) 404–5 [278]–[283].

<sup>83</sup> *The Sam Hawk* (n 3) 346 [10], 366 [101], 366–7 [104], 386 [188] (Allsop CJ and Edelman J).

legal issues. *The Colorado* is a good example of this, and the consequences of that decision still reverberate today in maritime and Admiralty practice.<sup>84</sup> Perhaps, for purposes of clarity, the Court could have set down some guidelines or tests that will aid the determination of rights or claims that would pass the test of being ‘closely analogous’ to the maritime liens recognised under Australian law.

### **The Position in Other Jurisdictions**

Based on the Commission’s report, the question whether Australia should adopt the position of either the majority or minority in *The Halcyon Isle* was left to be determined by the courts, ‘taking into accounts developments in other jurisdictions’.<sup>85</sup> The report did not specify the jurisdictions referred to: was it jurisdictions adopting the majority position or jurisdictions adopting the minority position? Since the Commission’s report and the enactment of the Admiralty Act, some notable developments on the subject matter had taken place in other jurisdictions. For instance, South Africa adopted the majority decision in *The Halcyon Isle* in the case of *The Andrico Unity*;<sup>86</sup> Canada amended the *Marine Liability Act*, SC 2001, c 6, which created a maritime lien for necessaries in favour of Canadian necessaries suppliers to ameliorate the injustice suffered by Canadian necessaries suppliers who were prejudiced by Canadian courts recognising and enforcing US maritime lien for necessaries. The majority in *The Sam Hawk* rightly observed that the developments in some other common law jurisdictions such as New Zealand, Cyprus, South Africa, Singapore and Malaysia have seen them adopting the majority position in *The Halcyon Isle*.<sup>87</sup> The developments in these other common law jurisdictions — save for Canada and the US — may reasonably imply that the position of the majority in *The Sam Hawk* upholds the spirit and intention of the legislature as elicited from the Commission’s report.

### **Some Implications from the Decision**

*The Sam Hawk* decision does nothing radical to the position of Australia as a destination for the institution of claims secured by a maritime lien. The decision merely re-emphasised Australia’s position regarding the recognition and enforcement of foreign maritime liens which existed prior to the decision in *The Sam Hawk* at first instance.<sup>88</sup> Although the ‘legitimate expectations’ of practitioners that Australia would become a lucrative venue for foreign maritime lien enforcement has been abruptly cut short, the judgment achieved a silver lining of clarity and preciseness. A basic principle expressed in the Commission’s report was the need to strike a balance between the interest of ship operators and those dealing with ships and such balance needed to be clear and precise. *The Sam Hawk* has clarified and set straight the position in Australia and perhaps, has been able to maintain that balance.

### **Comments on the Dissenting Opinion**

It is common knowledge that dissenting opinions evoke mixed reactions. Some scholars perceive dissenting opinions as effective safeguards against judicial lethargy and powerful weapons against error,<sup>89</sup> while others view dissents as lessening the dignity and authority of judicial decisions and therefore should be discouraged.<sup>90</sup> The fact, however, remains that dissenting opinions have been instrumental to the development of the law and the facilitation of change, amongst others.<sup>91</sup> Regarding the recognition and enforcement of foreign maritime liens, the dissenting opinion in *The Halcyon Isle* has fuelled several debates — academic and jurisprudential — in the realms of maritime law and private international law. The dissenting opinion *The Halcyon Isle* holds sway in Canada.<sup>92</sup> The dissenting opinion in *The Sam Hawk* was erudite and enriches the jurisprudence on the concept of maritime liens and hypothecation. Some aspects of the dissenting opinion are however worthy of comments.

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<sup>84</sup> *The Colorado* was analysed extensively and given differing interpretations in *The Sam Hawk* (n 3), *The Halcyon Isle* (n 1), *The Ioannis Daskalelis* (n 16), *The Strandhill* (n 60), *The Acrux* (n 47), *The Zigurds* (n 47), among others.

<sup>85</sup> Australian Law Reform Commission (n 74) [123].

<sup>86</sup> *The Andrico Unity* (n 5).

<sup>87</sup> *The Sam Hawk* (n 3) 384 [175]–[179] (Allsop CJ and Edelman J).

<sup>88</sup> *The Sam Hawk* (n 30).

<sup>89</sup> Jesse W Carter, ‘Dissenting Opinions’ (1953) 4 *Hastings Law Journal*, 118; William J Brennan Jr, ‘In Defense of Dissents,’ (1986) 37 *Hastings Law Journal* 427.

<sup>90</sup> C A Hereschoff Bartlett, ‘Dissenting Opinions’ (1906) 32 *Law Magazine & Review: Quarterly Review of Jurisprudence* 54.

<sup>91</sup> Andrew Lynch, ‘Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia’ (2003) 27 *Melbourne University Law Review* 724; Robert G Flanders Jr, ‘The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable’ (1999) 4 *Roger Williams University Law Review* 401.

<sup>92</sup> *The Har Rai* (n 60).

The minority conceded that the recognition of a foreign maritime lien may result in an anomaly as it will affect the 'perceived harmony and structure' of the order of priority and differential treatment of maritime creditors.<sup>93</sup> The minority, however, proceeded to argue that whenever a forum court undertakes a classification of a claim arising from a foreign law to allocate it with legal consequences under the local law, an anomaly must occur.<sup>94</sup> Justice Rares stated that such potential for injustice could be dealt with when considering enforcement of the foreign maritime lien.<sup>95</sup> The minority, in other words, opined that there existed two hard choices before the Court — the Scylla of not recognising the foreign right at all or the Charybdis of recognising the foreign right but not enforcing the foreign right by utilising tools such as laches to negate the enforcement the foreign right. The minority preferred the latter choice.<sup>96</sup> With utmost respect, the practicality of that position is arguable. The preferred position of the minority was tested in Canada but was unsuccessful as it created more anomaly and injustice. Canada operated and still operates a policy of recognising foreign maritime liens from whatever jurisdiction they arise notwithstanding that such foreign maritime liens are not maritime liens under Canadian law. For instance, Canadian courts recognised foreign claims for necessities as secured by a maritime lien although Canadian law did not recognise maritime lien for necessities. The result was a grievous anomaly that was detrimental to local suppliers as US necessities suppliers were able to enforce their claims as maritime liens in Canada, but Canadian necessities suppliers could not enforce their claims for necessities as maritime liens, either in Canada or the United States.<sup>97</sup> Maritime stakeholders affected by this lopsided policy campaigned for law reforms which saw the amendment of the *Marine Liability Act*, SC 2001, c 6, in 2009. The amendment created a new maritime lien for necessities in favour of Canadian suppliers that provide supplies and repairs to foreign vessels. The efficacy of the amendment as it relates to fulfilling the objective of 'parity in treatment between claims of American and Canadian ship suppliers for unpaid invoices' is however,<sup>98</sup> beyond the purview of this paper. The point however is that, 'borrowing a leaf from the Canadian experience', the recognition of foreign maritime liens in Australia which does not fall within the contemplation of maritime liens under Australian law may result in anomalous results which only statutory amendment would remedy and that is hardly a lesser evil as portrayed by the minority position. Some eminent jurists had foretold such an outcome in Australia.<sup>99</sup>

The effect of any rule of law or policy on the populace must be of paramount consideration, especially as it relates to the application of foreign law or the recognition of a right acquired under a foreign law. As noted by Joseph Story several years ago:<sup>100</sup>

The law of a foreign country is admitted, in order that the contract may receive the effect which the parties to it intended. No state, however, is bound to admit a foreign law even for this purpose, when that law would contravene its own positive laws, institutions, or policy, which prohibit such a contract, or when it would prejudice the rights of its own subjects.

The position of the majority allows for clarity and predictability as potential maritime claimants are armed with the information that Australia is not a favourable jurisdiction to bring a claim to enforce a maritime lien which is not identical with the maritime liens listed in the Admiralty Act. The minority position on the other hand, with respect, would have the effect of luring foreign claimants to institute enforcement actions in Australia with the assurance that their foreign maritime liens may be recognised, but then some legal principles could be applied to negate the enforceability of the foreign maritime lien as a means of addressing the anomalies or injustice that may potentially arise.<sup>101</sup> With respect, the latter position appears to portend more hardship and anomaly.

The minority judgment displayed influences of the vested rights theory, ie, that the forum court should recognise all validly foreign acquired rights.<sup>102</sup> Although the minority referred to the public policy safeguard of the vested rights theory, the minority did not agree that foreign maritime lien recognition was a circumstance for which policy considerations should be invoked.<sup>103</sup> It is however a known fact that the vested rights theory has been

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<sup>93</sup> *The Sam Hawk* (n 3) 433 [405] (Rares J).

<sup>94</sup> *Ibid* 434 [411] (Rares J).

<sup>95</sup> *Ibid* 436–7 [422].

<sup>96</sup> *Ibid* 436–7 [422]–[423] (Rares J).

<sup>97</sup> Paul Myburgh, 'The Ship Supplier's Lien: Taking a (Maple) Leaf out of the Canadian Statute Book?' (2010) 18 *Asia Pacific Law Review* 279, 285–7.

<sup>98</sup> *Ibid* 287.

<sup>99</sup> Davies and Lewins (n 78) 781–2.

<sup>100</sup> Joseph Story, *Commentaries on the Conflict of Laws* (Little Brown, 4<sup>th</sup> ed, 1852) s327, 551.

<sup>101</sup> *The Sam Hawk* (n 3) 436–7 [422] (Rares J).

<sup>102</sup> A B Keith (ed), *Dicey on the Conflict of Laws* (Sweet & Maxwell, 5<sup>th</sup> ed, 1932), 17, 43.

<sup>103</sup> *The Sam Hawk* (n 3) 433 [404] (Rares J); M Davies, A S Bell, P L G Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 9<sup>th</sup> ed, 2014) 291 [12.2].

actively rejected by the High Court of Australia.<sup>104</sup> It has been shown from a combined analysis of judicial decisions, that the High Court toes the line of certainty in the law,<sup>105</sup> a value well captured by the majority judgment.<sup>106</sup>

The minority relied on *John Pfeiffer*<sup>107</sup> and *Zhang*<sup>108</sup> in holding that a foreign maritime lien characterised by its *lex causa* as a matter of substance, will be maintainable under s 15(1) of the Admiralty Act.<sup>109</sup> Taken at face value, this is plausible, however, the minority, with respect, did not address the caveats raised in the two cases in detail.<sup>110</sup> It is arguable whether the principle enunciated in the referenced cases can apply in all cases without requiring ‘further elucidation’ and other considerations.<sup>111</sup> As shown by the judgment of the majority, foreign maritime lien recognition and enforcement goes far beyond the substance and procedure characterisation. To merely conclude that the maritime lien is a substantive right without more ‘does not necessarily mean, however, that the relevant rule will direct attention to some law other than the law of the forum’.<sup>112</sup>

## Conclusion

*The Sam Hawk*, in many ways, re-enacts *The Halcyon Isle* in Australia especially as it relates to the implication of the decision, to wit, notwithstanding the *lex causa*, a foreign maritime lien must be screened under Australian law to determine whether the foreign maritime lien is a ‘maritime lien’ recognisable and enforceable in the forum. One conclusion from the decision is that the maritime lien may not be subject to the sweeping private international law clarification made by the High Court in *John Pfeiffer* on matters of substance and procedure. Most importantly, *The Sam Hawk* has clarified the misconception that the recognition and enforcement of foreign maritime liens was a substance/procedure characterisation problem. A court faced with a foreign maritime lien no longer needs to hide under the façade that the maritime lien is a procedural remedy to apply forum law. The court can boldly consider domestic policy, statutes and other factors it may deem necessary to determine if the foreign maritime lien can be recognised and enforced in the forum. The resultant implication, however, is that private international law has fallen short of achieving the objectives of uniformity of outcome and discouragement of forum shopping as it relates to foreign maritime liens.<sup>113</sup> Pending international alignment on harmonisation of the laws relating to maritime liens — if ever — maritime claimants at the receiving end of this judicial pyrotechnics, may need to resort to realistic business strategies that will aid the protection of their hard-earned security interests.

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<sup>104</sup> *Breavington v Godleman* (1988) 169 CLR 41; *Koop v Bebb* (1951) 84 CLR 629, 643–4 (Dixon, Williams, Fullagar and Kitto JJ); restated in *John Pfeiffer* (n 2) 526–7 [39]–[40] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) and *Blunden v Commonwealth* (2003) 218 CLR 330, 340–1 (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also Davie, Bell and Brereton (n 103) 293 [12.5].

<sup>105</sup> Davie, Bell and Brereton (n 103) 305 [12.18].

<sup>106</sup> *The Sam Hawk* (n 3) 374–5 [134]–[135] (Allsop CJ and Edelman J).

<sup>107</sup> *Ibid* 428–30 [384]–[389] (Rares J), citing *John Pfeiffer* (n 2).

<sup>108</sup> *The Sam Hawk* (n 3) 438 [428]–[430] (Rares J), citing *Zhang* (n 32) 517 [66]–[67] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>109</sup> *The Sam Hawk* (n 3) 438 [428]–[430] (Rares J).

<sup>110</sup> In *Zhang*, the court held that several caveats should be entered with respect to extending the principle enunciated in *John Pfeiffer*, to foreign torts. The Court also noted that special considerations may apply to maritime torts. See *Zhang* (n 32) 520 [75]–[76] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). By necessary implication, caveats should also apply with respect to applying the principle to non-tortious claims and in other areas of law where choice of law issues arise.

<sup>111</sup> *John Pfeiffer* (n 2) 544 [100] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>112</sup> *Ibid* 528–9 [47] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>113</sup> Richard Garnett, *Substance and Procedure in Private International Law* (Oxford University Press, 2012) 2 [1.03].