

# TRANS-TASMAN SHIP ARRESTS: A MISSED OPPORTUNITY

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## 1 Introduction

On the 12 May 1995, the ship *Barde Team* was in dock at Timaru, New Zealand. While it was discharging goods, it tilted and caused damage to machinery below deck. The damage was estimated at USD 3 000 000. The owners of the machinery did not arrest the ship in Timaru and the ship sailed for Australia. The ship was arrested on its arrival in Australia to recover damages for the damaged machinery. The case was heard in Australia, however, the damaged machinery, witnesses and evidence were mostly in New Zealand.<sup>1</sup>

This scenario is not uncommon in shipping. Ships come and go quickly from ports. The chance to arrest a ship and have an action in rem heard within the same jurisdiction as that which gave rise to the claim is often missed. This paper enquires into whether there is a more effective way of dealing with trans-Tasman Admiralty disputes in light of the commercial and legal developments that have taken place between Australia and New Zealand.

The Australia-New Zealand Closer Economic Relations Trade Agreement (CER),<sup>2</sup> the Single Economic Market initiative (SEM) and the *Trans-Tasman (Proceedings) Acts* (TTPAs) of Australia<sup>3</sup> and New Zealand<sup>4</sup> have brought both countries closer in trade, commerce and law. Importantly, the TTPAs have made it easier to initiate proceedings or to have judgments recognised and enforced between Australia and New Zealand. This allows trans-Tasman civil disputes to be resolved more effectively and efficiently. However, despite these improvements, actions in rem and arresting property have been excluded from the TTPAs. This exclusion means that the majority of Admiralty law is also excluded from the TTPAs. Thus, despite the improvements to trans-Tasman disputes under the TTPA, if the *Barde AS* was decided today, the machinery owner would still not be able to bring their claim in New Zealand while an Australian court held the ship on arrest for the New Zealand claim.

## 2 The Relationship Between Australia and New Zealand

The relationship between Australia and New Zealand is close. In a recent poll of feelings toward other countries, Australia ranked New Zealand as the most favourable nation out of a group of 21 nations including the United States, the United Kingdom and Canada.<sup>5</sup> We have fought alongside each other in war and against each other on the sports field. We share similar histories of British colonialism and still retain the monarch as our respective Head of State. New Zealand was under the jurisdiction of the New South Wales Colony until 1840 and was invited to join the Federation in 1901.<sup>6</sup> Furthermore, Australians and New Zealanders have moved freely between the two countries since the 1840s, with the free movement becoming formalised in the 1920s and in 1973.<sup>7</sup> We also share similar judicial and political systems based on the British model.<sup>8</sup> Most obviously, we are geographically proximate.

Trade between Australia and New Zealand is also substantial. Trade in goods between the two countries exceeds NZD 18 billion per annum and grows each year.<sup>9</sup> Australia is New Zealand's largest trading partner.<sup>10</sup> Australia

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<sup>1</sup> *Barde AS v ABB Power Systems* [1995] FCA 1602 (17 October 1995) ('*Barde AS*').

<sup>2</sup> 1983, [1983] ATS 2.

<sup>3</sup> *Trans-Tasman Proceedings Act 2010* (Cth).

<sup>4</sup> *Trans-Tasman Proceedings Act 2010* (NZ).

<sup>5</sup> Alex Oliver, *The Lowy Institute Poll 2014* (Lowy Institute, 2014) 15.

<sup>6</sup> Michael Kirby, 'Trans-Tasman Federation – Achievable, Impossible, Unnecessary?', (2010) 16 *Canterbury Law Review* 1, 4-5. The Australian Constitution still leaves open the possibility of New Zealand joining the Federation by defining the States of Australia to include New Zealand. See *Commonwealth of Australia Act 1900* (Imp) cl 6. See also John H Farrar, 'Harmonisation of Business Law Between Australia and New Zealand', (1989) 19 *Victoria University of Wellington Law Review* 435, 436-7.

<sup>7</sup> Robert Scollay, Christopher Findlay and Uwe Kaufmann, *Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) and Regional Integration* (Institute of Southeast Asian Studies, 2011) 21.

<sup>8</sup> Kirby, above n 6, 9; and Scollay, *Ibid*, 19.

<sup>9</sup> New Zealand Ministry of Foreign Affairs and Trade (NZMFAT), *Australia – Trade and Economic Links* (2013) <www.mfat.govt.nz>; and Australian Department of Foreign Affairs and Trade (ADFAT), *Australia-New Zealand Closer Economic Trade Agreement* (2014) <www.dfat.gov.au>.

<sup>10</sup> By the March 2013 Quarter, China overtook Australia for the largest market of imports and exports of goods into New Zealand. However, Australia is still that largest trading partner when goods and services are combined. See ADFAT, *New Zealand Country Brief* (2014) <www.dfat.gov.au>.

takes 23% of all New Zealand's exports. Conversely, New Zealand is Australia's 7th largest trading partner. Since 1991, trade between the two countries has grown on average 6.2% per annum.<sup>11</sup> Shipping supports most of the trade between Australia and New Zealand as our major goods of trade are oil and petroleum products, gold, timber, cars and wheat.<sup>12</sup> In fact, ships transported 87% of exports and 76% of imports by value to and from New Zealand between the years 2000-2010.<sup>13</sup> Several moves have been made to strengthen commercial and political ties between Australia and New Zealand over the last several decades.<sup>14</sup> The developments have brought the two countries so close that it has even been argued that the relationship forms a sort of 'loose confederation'.<sup>15</sup>

### 3 CER and SEM

Agreements between Australia and New Zealand to liberalise trade are not a recent phenomenon. In 1966, both countries signed the *New Zealand Australia Free Trade Agreement* (NAFTA).<sup>16</sup> However, the agreement was seen as largely unsuccessful.<sup>17</sup> There was a desire to continue to liberalise trade between the two countries and thus a new agreement was entered into. CER came into force in 1983. The objectives of the agreement included: the strengthening of the broader relationship between the countries; developing closer economic relations through mutually beneficial trade; eliminating barriers to trade; and developing conditions of fair competition in trade.<sup>18</sup> CER was designed to create a relationship or framework for trade that would benefit both countries and by 1990s, trade in goods was completely liberalised.<sup>19</sup> The CER model has generally been viewed as a success.<sup>20</sup> The World Trade Organisation describes CER as 'the world's most comprehensive, effective and mutually compatible free trade agreement'.<sup>21</sup>

The framework of CER included measures to review the relationship. In 1988, further agreements were reached and the governments of both countries signed a Memorandum of Understanding (MOU) toward the harmonisation of business law.<sup>22</sup> The MOU recognised that more was required to liberalise trade than simply removing barriers and tariffs. It recognised that different business laws and regulations may impede trade between the countries and that harmonisation of business laws would create a trade environment that would be mutually beneficial. The MOU noted that the governments would look into areas of business law that might be harmonised. These included such areas as: companies, securities and futures law; competition law; consumer protection; intellectual property; commercial arbitration; sale of goods and services law; and mutual assistance between regulatory agencies. Additionally, agreements were made to look into harmonising quarantine procedures.<sup>23</sup>

In 1992, the governments met again. The result was another commitment to business harmonisation, the inclusion of services under the CER umbrella, and a scheme to mutually recognise product standards and registration of occupations.<sup>24</sup> In 1995, a further review led to improving regulatory impediments such as food standards and establishing an annual review of CER. In 2000, a further MOU was signed to replace the 1988 MOU with a renewed focus on specific areas of business law harmonisation.<sup>25</sup>

The thread running through these developments between Australia and New Zealand under the CER umbrella is built on the idea of harmonisation. Paul Myburgh noted as early as 1995 that 'it has become usual, indeed almost obligatory, to discuss the issue of harmonisation of New Zealand and Australian laws within the context of CER and its harmonisation programme'.<sup>26</sup> The concept of harmonisation might be an elusive concept to nail down.<sup>27</sup> However, for the purposes of this paper, harmonisation under CER seems to be a process of developing

<sup>11</sup> NZMFAT, *Australia* (2013) <www.mfat.govt.nz>.

<sup>12</sup> Ibid.

<sup>13</sup> Statistics New Zealand, *Methods of transporting imported and exported goods* (2012) <www.stats.govt.nz>.

<sup>14</sup> Discussed below.

<sup>15</sup> JLR Davis, 'Closer Economic Relations – A Trans-Tasman Confederation?', (2010) 16 *Canterbury Law Review* 47, 60.

<sup>16</sup> 1966, [1966] ATS 1; ADFAT, *Closer Economic Relations: Background guide to the Australia New Zealand Economic Relationship* (AGPS, 1997) 6.

<sup>17</sup> Scollay, above n 7, 22.

<sup>18</sup> NAFTA Art 1.

<sup>19</sup> Scollay, above n 7, 26.

<sup>20</sup> Scollay, above n 7, 18.

<sup>21</sup> NZMFAT, above n 11.

<sup>22</sup> See Farrar, above n 5, 442-5.

<sup>23</sup> Ian Barker and B A Beaumont, 'Trans-Tasman Legal Relations – Some Recent and Future Developments', (1992) 66 *Australian Law Journal* 566, 567.

<sup>24</sup> ADFAT, above n 16, 7.

<sup>25</sup> Scollay, above n 16, 46-47.

<sup>26</sup> Paul Myburgh, 'The Harmonisation of New Zealand And Australian Maritime Laws', (1995) 6 *Canterbury Law Review* 69, 69.

<sup>27</sup> For an in-depth look at the topic of harmonisation and CER, see Ibid, 70-73.

laws and regulations between Australia and New Zealand that will enhance mutually beneficial trade between the two countries. It was noted in the 1998 MOU that the laws do not need to be identical to achieve harmonisation.<sup>28</sup> However, it seems that reciprocity, in the sense of a commitment to develop mutually beneficial laws together, is an essential part of the harmonisation process.<sup>29</sup>

From 2000, Australia and New Zealand entered trade agreements with other trading nations.<sup>30</sup> This raised questions about the role CER would play in the 21st century. Instead of CER dwindling away, both governments decided in 2004 to enhance the relationship with a commitment towards a Single Economic Market (SEM).<sup>31</sup> The idea of the SEM was to build 'upon the very open trading environment created by CER and related agreements and aims to address behind-the-border impediments to trade deepening economic linkages'.<sup>32</sup> Its aim is to 'reduce trans-Tasman discrimination and transaction costs, and make it as easy for New Zealanders to do business in Australia as it is to do business in and around New Zealand'.<sup>33</sup> While developments in the years immediately after the 2004 agreement have been seen as slow,<sup>34</sup> there have still been substantial developments. These include cooperation between each country's competition commissions, mutual recognition of securities offerings and a council to supervise trans-Tasman banking.<sup>35</sup> Furthermore, in 2009, in a joint press statement of intent, the Prime Ministers of both countries confirmed their commitment to the SEM initiative.<sup>36</sup> The press statement of intent proposed more developments in insolvency law, financial reporting, financial services policy, competition policy, business reporting, corporation law, personal property securities law, intellectual property law, and consumer policy.<sup>37</sup>

Australia and New Zealand have signed more than 80 agreements under the CER/SEM umbrella.<sup>38</sup> Other than the ones already mentioned, these include harmonisation of customs processes, healthcare and social security agreements, double taxation and opening up the aviation markets, to name a few.<sup>39</sup> A recent joint press statement by the Prime Ministers of both countries shows the extent of harmonisation: as Australia and New Zealand will be co-hosting the Cricket World Cup in 2015, people coming from other parts of the world will only be required to obtain one visa for both countries.<sup>40</sup> While not exhaustive of the trans-Tasman relationship, these developments highlight how close the two countries have become politically, economically and legally.

## **4 Trans-Tasman Proceedings Acts, the Mozambique Rule and the Exclusion of Actions in Rem**

### **4.1 Working Group Discussion Paper**

In light of the developments made under the CER/SEM umbrella and the closeness of the two countries, it was recognised that there will be an increase in disputes between parties on either sides of the Tasman.<sup>41</sup> The Australian Attorney-General's Department and the New Zealand Ministry of Justice set up a Working Group to research this area and make recommendations. In 2005, the Working Group released a public discussion paper. The paper recognised that integrating the civil justice systems more closely would help resolve such disputes and that this would be necessary for the success of CER/SEM.<sup>42</sup> It was also recognised that the current arrangements for cross-border disputes were the same as for any other foreign country and this was insufficient considering the 'special relationship'.<sup>43</sup> The paper highlighted that a successful trans-Tasman legal framework would result in a reduction of costs, an increase in efficiency, a reduction of forum shopping and would support the other developments under the CER umbrella.<sup>44</sup>

<sup>28</sup> Ibid 70.

<sup>29</sup> See generally Ibid, 71; and Farrar, above n 6, 445-447.

<sup>30</sup> Scollay, above n 7, 58.

<sup>31</sup> Scollay, above n 7, 58.

<sup>32</sup> NZMFAT, *Australia – CER and SEM* (2013) <www.mfat.govt.nz>.

<sup>33</sup> Ibid.

<sup>34</sup> Achim Rogmann, 'The Trans-Tasman Single Economic Market: Best Practice For Regional Integration?' (2013) 16 *International Trade & Business Law Review* 1, 19.

<sup>35</sup> Scollay, above n 7, 66-7.

<sup>36</sup> Rogmann, above n 34, at 19.

<sup>37</sup> *Single Economic Market Outcomes Framework as Identified in Prime Ministers Rudd and Keys Joint Statement of Intent* (20 August 2009) <http://archive.treasury.gov.au>. See also Rogmann, above n 33, 19.

<sup>38</sup> Rogmann, above n 34, 5.

<sup>39</sup> Rogmann, above n 34, 60-61; and Davis, above n 15, 48-53.

<sup>40</sup> 'Joint Statement by Prime Minister Tony Abbott and Prime Minister John Key' (Press Release, 7 February 2014) <www.pm.gov.au>.

<sup>41</sup> Trans-Tasman Working Group, *Trans-Tasman Court Proceedings and Regulatory Enforcement: A Public Discussion Paper* (Australian Attorney-General's Department and the New Zealand Ministry of Justice, 2005) 1.

<sup>42</sup> Ibid 1.

<sup>43</sup> Ibid 2.

<sup>44</sup> Ibid 2.

## 4.2 Issues and Recommendations

The paper raised 11 issues. This paper is concerned with two of those issues. First, the paper noted the '[p]ractical difficulties in recognising and enforcing judgments between Australia and New Zealand'.<sup>45</sup> As noted above, at the time of the paper, Australia and New Zealand treated the decisions of each other's courts as they did any other foreign court.<sup>46</sup> A problem highlighted with this arrangement was that a default judgment from a foreign court might not be registered because the foreign court lacked jurisdiction over the defendant simply by a lack of presence on the defendant's part in the proceedings or a lack of submission to the jurisdiction.<sup>47</sup> Thus, people could potentially avoid the enforcement of a judgment against them by residing across the Tasman and out of the jurisdiction. The paper noted how easy it was for people to change residence between Australia and New Zealand.<sup>48</sup>

The paper recommended a model based on the *Service and Execution of Process Act 1992* (Cth) (SEPA).<sup>49</sup> SEPA, and its predecessor in 1901,<sup>50</sup> were remedies to the problem highlighted above, but between the states of Australia. The model allows a claimant to serve on a defendant in a different jurisdiction without leave of the court, and to have a judgment from a different jurisdiction recognised and enforced as if it had been delivered from the local jurisdiction.

The second issue was that interim orders in support of foreign proceedings were not readily available between the Australia and New Zealand.<sup>51</sup> The paper highlighted that at common law, it was difficult to get an award for interim relief to protect a claimant's rights prior to a final award when the defendant or their assets were in another jurisdiction.<sup>52</sup> A claimant would need to bring proceedings in the defendant's jurisdiction for interim relief, which would be costly and inconvenient. However, the most likely way to be awarded interim relief is if the proceedings are on the substantive claim. The problem with this approach is that the foreign court may decline relief, on the basis that it is not the appropriate forum.<sup>53</sup> The paper recommended that legislation be passed to allow Australian and New Zealand Courts to award interim relief in support of trans-Tasman proceedings.<sup>54</sup>

## 4.3 Actions in Rem Left Out and the Mozambique Rule

The Working Group recommended that their proposed solutions apply only to actions in personam and not actions in rem.<sup>55</sup> The reason why actions in rem were left out was that the Working Group did not 'propose to address the *Moçambique* rule' (*Moçambique*).<sup>56</sup> The *Moçambique* rule means that a court has no jurisdiction over claims involving title or possession of immovable property or land in a foreign jurisdiction, nor can it hear claims for damages for trespass when the land, the subject of the claim, is in a foreign jurisdiction.<sup>57</sup> The paper noted that the rule is applied variously throughout the Australian States and New Zealand and this was a sufficient reason to not include actions in rem into any proposed legislation.<sup>58</sup> The effect of this reasoning meant that not only are actions in rem of immovable property excluded from the trans-Tasman legislation but Admiralty actions in rem for moveable property are also excluded. The result is problematic as the *Moçambique* rule rests on different conceptual underpinnings that do not apply to Admiralty actions in rem. Thus, due to the significant effect the Working Group's reasoning had on Admiralty law, this paper will thoroughly cover the *Moçambique* rule and why it should not have been used as a reason to exclude actions in rem – or at least Admiralty actions in rem – from the trans-Tasman legislation.

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<sup>45</sup> Ibid 9.

<sup>46</sup> Except tax and lower court judgments.

<sup>47</sup> Trans-Tasman Working Group, above n 41, 9-10; *Foreign Judgments Act 1991* (Cth) s 7(2)(a)(iv); Reciprocal Enforcement of Judgments Act 1934 (NZ) s 6.

<sup>48</sup> Trans-Tasman Working Group, above n 401, 10.

<sup>49</sup> Ibid 11.

<sup>50</sup> *Service and Execution of Process Act 1901* (Cth).

<sup>51</sup> Trans-Tasman Working Group, above n 41, 21.

<sup>52</sup> Ibid 21-22.

<sup>53</sup> Ibid 22.

<sup>54</sup> Ibid 22.

<sup>55</sup> Ibid 31.

<sup>56</sup> Ibid 31.

<sup>57</sup> Ibid 31 and *British South Africa Co v Companhia de Moçambique* [1893] AC 602, 629 (HL) ('*Moçambique*'). For Australia, see *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479. For New Zealand, see *Re Fletcher Deceased* [1921] NZLR 46 (SC); *Dowson v Lloyds Bank NZA Ltd* (Unreported, New Zealand High Court, 13 March 1991) and *Nippon Credit Australia Ltd v Girvan Corporation New Zealand Ltd* (1991) 5 PRNZ 44 (HC).

<sup>58</sup> Trans-Tasman Working Group, above n 41, 31.

#### 4.4 Reliance on the Mozambique Rule was Flawed

The legislation that resulted from the paper excludes enforcing actions in rem and arresting property for interim relief.<sup>59</sup> Although the paper was not addressing Admiralty law, Admiralty actions in rem and arresting ships and property are excluded from the provisions.<sup>60</sup> Aside from the ease with which the Working Group dismissed actions in rem,<sup>61</sup> the reasoning in the discussion paper regarding the *Mozambique* rule and the result it produced may be regarded as flawed and insufficient, for several reasons.

First, as the Working Group rightly noted, '[t]he *Moçambique* rule has been acknowledged to be difficult to justify except on historical grounds, and neither logical nor satisfactory in the result it produces'.<sup>62</sup> The rule can be traced back to the 12th century in England.<sup>63</sup> The jury performed a role more akin to a witness than a judge of facts.<sup>64</sup> For this reason, the jury was chosen from the same village where the matter arose, as they would be already acquainted with the facts of the case. Jurors from outside the village were not permitted to sit on the case. As disputes became more advanced in the 13th and 14th centuries and involved transactions across different regions, the rule that only people from the village could serve on the jury was problematic, as the cases would normally deal with facts covering different locations.<sup>65</sup> Thus, the courts created a distinction between local and transitory actions.<sup>66</sup> Local actions had a necessary connection to the location, and required local jurors. An example would be ejectment from land. Transitory actions did not have a necessary connection to the location and could be heard in different jurisdictions. An example would be a breach of contract. By the 16th century the role of the jury became that of a trier of fact, but a requirement created for local actions remained the same.<sup>67</sup> That is, if it was a local action, it could only be heard in that locality. The *Judicature Act 1873* (Eng) 'abolished the need for a local venue to be laid'.<sup>68</sup> Thus, it was thought that the English courts would not be limited to matters involving local actions. In the *Mozambique* case it was argued that the *Judicature Act* did not restrict the courts from awarding damages for trespass to land when the land was foreign.<sup>69</sup> However, it was held that along with questions of title and possession to land, questions of damages for trespass to land were also barred when the matter involved foreign land.<sup>70</sup>

In a report on the jurisdiction of local courts over foreign land, the NSW Law Reform Commission highlighted the problems with the *Mozambique* rule, as interpreted in Australia,<sup>71</sup> with a hypothetical example of a trans-Tasman property dispute:<sup>72</sup>

Suppose that P, a resident of New South Wales, owns a house in New Zealand, which he lets for a month to D, also a resident of New South Wales, and that, while in occupation of the house, D negligently causes damage to the house. On D's return to New South Wales, P would not be able to bring an action in the Supreme Court of this State ... Furthermore, P would be denied any effective remedy against D, even if the former were to commence proceedings in the New Zealand High Court. That court would have the power to entertain the matter, despite the fact that D was no longer, present in that country ... But if D did not appear, and took no part, in the New Zealand proceedings, the default judgment which ... would be made in P's favour could not be enforced against D in New South Wales, since the Supreme Court of this State would not regard the New Zealand High Court as having had sufficient jurisdiction over D. It may be observed that if P's house were in another, State or Territory of Australia, a judgment given in P's favour in that other jurisdiction could be enforced in New South Wales by virtue of Part IV of the *Service and Execution of Process Act 1901* (Cth).

Furthermore, the Commission highlighted a peculiar result the rule produces by allowing some actions relating to the foreign land but not others.<sup>73</sup> This can be explained with the example above. Say D also breached the

<sup>59</sup> *Trans-Tasman Proceedings Acts 2010* s 12(2)(b), 31(2)(c), 61(2)(c).

<sup>60</sup> Discussed below.

<sup>61</sup> Three short paragraphs.

<sup>62</sup> Trans-Tasman Working Group, above n 41, 31, citing *Hesperides Hotels Ltd v Muftizade* [1979] AC 508, 543-4 (HL) ('*Hesperides*').

<sup>63</sup> NSW Law Reform Commission (NSWLRC), *Jurisdiction of Local Courts Over Foreign Land*, Report 63 (1988) [2.15]. See also W Rupert Johnson, 'The Mozambique Rule and the (Non) Jurisdiction of the Supreme Court of Western Australia over Foreign Land' (2003)

31 *University of Western Australia Law Review* 266, 270-2.

<sup>64</sup> *Ibid* [2.15].

<sup>65</sup> *Ibid* [2.16].

<sup>66</sup> *Ibid*.

<sup>67</sup> *Ibid* [2.17].

<sup>68</sup> *Ibid* [2.18].

<sup>69</sup> *Moçambique* [1893] AC 602.

<sup>70</sup> *Ibid* 624-5.

<sup>71</sup> See *Commonwealth v Woodhill* (1917) 23 CLR 482, which includes tort damages into the rule.

<sup>72</sup> NSWLRC, above n 63, [2.26].

<sup>73</sup> *Ibid*, [2.26] and [4.3].

tenancy agreement (contract) along with causing the damage to the house (tort). P could bring proceedings for the breach of contract in New South Wales against D but not for the damage to the house.

The purpose of establishing the Working Group was to look into such problems and remedies in trans-Tasman disputes. Some were resolved but unfortunately not all. Thus, the arbitrary,<sup>74</sup> unjust,<sup>75</sup> and illogical<sup>76</sup> results from the *Mozambique* rule would continue to thrive under the recommendations of the Working Group, despite the rationale for developing the trans-Tasman legislation. W Rupert Johnson clearly sums up the problem when he states:<sup>77</sup>

The origin of the *Mozambique* rule is steeped in the development of the ancient common law doctrine of venue, which has no contemporary relevance ... The rule has been the subject of much curial and academic criticism but has remained in existence, chiefly due to judicial adherence to stare decisis.

Second, other jurisdictions are relieving themselves of the *Mozambique* rule. Lord Wilberforce in *Hesperides* argued that the rule is accepted in other common law jurisdictions.<sup>78</sup> This has been doubted, as the cases relied on did not establish that the *Mozambique* rule was accepted in other jurisdictions but simply the cases were questioning the ambit of the rule as they considered themselves bound by it.<sup>79</sup> However, a stronger reason to reject the Working Group's acceptance of the rule was that there had been moves to abolish the rule or part of its ambit at the time the paper was published.<sup>80</sup> New South Wales had abolished the rule with the *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW). The Australian Capital Territory had weakened its ambit by the *Law Reform (Miscellaneous Provisions) Act 1995* (ACT).<sup>81</sup> At the Federal level there had been moves which practically removed some of the issues of the *Mozambique* rule by the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth). The Act allows the State and Federal courts to work alongside each other to enable disputes covering different States by having rules to transfer actions to the more appropriate court.<sup>82</sup> Further afield, the United Kingdom had partially reduced the ambit of the rule by s 30(1) of the *Civil Jurisdiction and Judgments Act 1982* (UK). There has also been a long history of developments in the United States to abolish the rule.<sup>83</sup>

Third, the Working Group's recommendations were based on the SEPA model which was designed to remove the difficulties of dealing with cross-border disputes in Australia, and is not limited to in personam claims. The SEPA model allows for service of proceedings, execution of warrants and recognition and enforcement of judgments throughout the states of Australia. The SEPA model does not have an in rem exception and yet the Working Group suggested the in rem exception should apply to the trans-Tasman model.<sup>84</sup>

Fourth, the development of conflict of laws rules and specifically *forum non conveniens* has meant that firm adherence to the *Mozambique* rule is no longer needed.<sup>85</sup> Courts are now more willing to look into private international law claims subject to an appropriate forum test. The Working Group highlighted that Australia and New Zealand apply different tests. Australia adopts the 'clearly inappropriate' test<sup>86</sup> and New Zealand applies the 'more appropriate' test.<sup>87</sup> The Working Group rightly highlighted that the different tests between Australia and New Zealand might result in a claimant being left without any forum in the Tasman as they might fail on both tests.<sup>88</sup> Peculiarly, even though there was a clear example of varying application of tests here, just like the *Mozambique* rule, the Working Group were willing to recommend that there be a common statutory test to replace the different tests in Australia and New Zealand.<sup>89</sup> The test is based on the SEPA model and is closer to the New Zealand approach. Although the recommendations based on the SEPA model include several criteria to

<sup>74</sup> See Ibid [2.2], [6.5]-[6.8] and Johnson, above n 62, 284.

<sup>75</sup> See NSWLRC, above n 63, [6.9] and Johnson, above n 63, 286.

<sup>76</sup> See NSWLRC, above n 63, [6.10] and Johnson, above n 63, 286-7.

<sup>77</sup> Johnson, above n 63, 291.

<sup>78</sup> *Hesperides* [1979] AC 508, 536-8 and see Johnson, above n 63, 279-80.

<sup>79</sup> Johnson, above n 63, 280 and NSWLRC, above n 63, [5.2].

<sup>80</sup> The Working Group did mention this but did not explore the topic.

<sup>81</sup> s 31(1).

<sup>82</sup> There are arguments regarding whether the cross-vesting legislation diminished the *Mozambique* rule completely; see Johnson, above n 63, 288-90.

<sup>83</sup> NSWLRC, above n 63, [3.5]-[3.12]. The US equivalent is *Livingston v Jefferson* (1811) 15 Fed Cases 660.

<sup>84</sup> The SEPA model does not apply to Admiralty claims. I will deal with this point below.

<sup>85</sup> NSWLRC, above n 63, [1.4]. See also David Goddard and Campbell McLachlan, *New Zealand Law Society Continuing Legal Education Seminar Paper: Private International Law – litigating in the trans-Tasman context and beyond* (NZLS CLE, 2012) 157. The authors suggest that the rule should be rejected by an appellate court in NZ as the rules of jurisdiction and *forum non conveniens* are 'perfectly adequate to deal with proceedings relating to foreign land'.

<sup>86</sup> *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

<sup>87</sup> *Fournier v The Ship Margaret Z* [1997] 1 NZLR 629 (HC).

<sup>88</sup> Trans-Tasman Working Group, above n 41, 27-28 citing *Gilmore v Gilmore* [1993] NZFLR 561 (HC) and in *Marriage of Gilmore* (1993) 110 FLR 311 (FamCA).

<sup>89</sup> Trans-Tasman Working Group, above n 41, 28.

determine whether jurisdiction should be declined if it is not the most appropriate forum, it nonetheless frees the court to make an enquiry into the claim and transfer it to the more appropriate forum, rather than leaving a claimant without any remedy.

#### 4.5 The Justifications for Retaining the *Mozambique* Rule do not Apply to Admiralty

The *Mozambique* rule has been justified on the merits of the rule itself.<sup>90</sup> The first justification is that ‘a court has jurisdiction only over matters in which it can give effective judgment’.<sup>91</sup> That is, land is immovable and when it is located in another jurisdiction, it is difficult for a court to enforce any judgment it might give. This reason seems generally plausible. However, the rationale does not apply to trans-Tasman disputes or Admiralty. This is because the purpose of the paper was to look at ways to make trans-Tasman judgments enforceable. Moreover, courts can have effective judgments over foreign flagged ships in Admiralty law.

The second justification is that the rule ‘is in accord with the comity of nations’.<sup>92</sup> That is, jurisdiction should be exclusive to the sovereign state regarding matters that relate to title to land within its own jurisdiction.<sup>93</sup> Again, this justification cannot be supported in light to the purpose of the working paper, the CER/SEM initiative and the confidence the Australian and New Zealand courts have for each other.<sup>94</sup> To maintain the *Mozambique* rule in light of the trans-Tasman developments requires maintaining an arbitrary distinction between in personam and in rem. That is, in the interests of comity the court will not entertain any question in relation to specific things (land, ships, etc) across the Tasman, but the courts are free to enforce judgments across most other areas which, until now, were to be decided exclusively within the jurisdiction.

#### 4.6 The *Mozambique* Rule is Based on Different Conceptual Underpinnings to Admiralty

The above points suggest that the *Mozambique* rule should have been dealt with to better resolve trans-Tasman disputes. Those arguments apply to the *Mozambique* rule generally. However, there is an even stronger argument which applies specifically to Admiralty law. That is, while actions in rem concerning land may look similar to Admiralty actions in rem, they are nonetheless built on different conceptual underpinnings. Thus, even if the *Mozambique* rule is justified in relation to land, that justification does not equally apply to Admiralty law.

Admiralty law has been explained as one of the several exceptions to the *Mozambique* rule. The discussion paper highlighted some of these exceptions, but failed to mention Admiralty.<sup>95</sup> The English Court of Appeal in *The Tolten* most famously states the exception.<sup>96</sup> The question was whether the Admiralty court had jurisdiction to hear a case regarding damage done by a ship to a wharf in Nigeria. The Court held that it did, and was not barred by the *Mozambique* rule.<sup>97</sup> Lord Justice Scott stated:<sup>98</sup>

In my opinion (Admiralty Jurisdiction) ... is today so wide, so self-sufficient and of such a character that in an Admiralty ‘cause of damage’ the *Mozambique* rule can have no place, whether the proceeding be in rem or in personam, and even apart from a maritime lien to which the damage gives rise. The *Mozambique* rule is, in short, a conception wholly foreign to the essential nature of Admiralty jurisdiction, as shown by its history, judicial and Parliamentary. The limiting rules of the common law about venue were unknown in the Court of Admiralty, and the universality of the world area, over which it is administered justice both civil and criminal, affords a striking contrast to the locally restrictive rules of common law jurisdiction.

Thus, on the most basic level, Admiralty actions in rem are an exception to the *Mozambique* rule. However, describing Admiralty as an exception does not fully appreciate the different conceptual underpinnings or give justice to Lord Justice Scott’s passage above. That is, Admiralty actions in rem look similar to actions involving title or possession to land in that they both deal with claims to a particular thing. This is especially so with

<sup>90</sup> See *Hesperides* [1979] AC 508, 543-4 and Johnson, above n 63, 277-9.

<sup>91</sup> *Hesperides* [1979] AC 508, 543-4; see also Johnson, above n 63, 277 and NSWLRC, above n 63, 6.11.

<sup>92</sup> *Hesperides* [1979] AC 508, 544 and see Johnson, above n 63, 278-9.

<sup>93</sup> Johnson, above n 63, 279.

<sup>94</sup> Trans-Tasman Working Group, above n 41, 2.

<sup>95</sup> Ibid 31.

<sup>96</sup> [1946] P 135. See Law Reform Committee on Admiralty Jurisdiction (LRCAJ), *Admiralty Jurisdiction; Report of the Special Law Reform Committee on Admiralty Jurisdiction* (New Zealand, 1972) 52.

<sup>97</sup> LRCAJ, above n 96, 154.

<sup>98</sup> Ibid 154.

maritime liens as they possibly attach proprietary interests in the ship itself.<sup>99</sup> However, Admiralty law is premised on the idea that ships come and go from different ports all over the world. They are not situated in one jurisdiction like land. Thus, Admiralty actions in rem will almost inevitably be heard in foreign courts to the ship's Flag. Moreover, the rationale for having Admiralty claims in rem and allowing the arrest of ships for the in rem claim was that without it, ships could sail off and creditors would be left without any remedy. These features of Admiralty are non-existent in land law. Land is, and will always remain, situate in the one jurisdiction.

Additionally, the reasons why Admiralty was seen as an exception to the *Mozambique* rule is that Admiralty is a separate jurisdiction to the common law, and is thus not limited by its rules. However, it might be argued that if Admiralty is a separate jurisdiction to the general jurisdiction, then Admiralty law should not be included under any trans-Tasman legislation that was of a general nature.<sup>100</sup> This might be a reasonable argument for excluding Admiralty specifically from the TTPAs but it does not generally form a good argument for two reasons. First, based on the exclusions noted in the paper, the Working Group might not have: (a) considered whether Admiralty actions in rem should be excluded or not; or (b) whether they should be included because they were an exclusion to the *Mozambique* rule. Second, if trans-Tasman Admiralty disputes could be made easier and more efficient with the TTPAs, then it should have been considered.

#### 4.7 TPA Legislative History<sup>101</sup>

The remaining legislative history was no more enlightening on the question of the *Mozambique* rule or the exclusion of actions in rem. The Working Group report dealt with the matter quickly by stating that '[a]ctions in rem should also not be covered'.<sup>102</sup> Interestingly, the report stated that '[t]he range of eligible interim orders should not be limited, so could include Mareva injunctions ... at the discretion of the court'.<sup>103</sup> One might question the logic for excluding arresting property for interim relief while at the same time allowing assets, including property, to be frozen.

The working group report was the basis for a joint governmental agreement<sup>104</sup> and the parliamentary bills.<sup>105</sup> Throughout the parliamentary process, the question of the *Mozambique* rule or the exclusion of actions in rem was not raised. This seems unsurprising considering the legislation was passed under urgency.

#### 4.8 The Trans-Tasman Proceeding Act 2010

The *Trans-Tasman Proceedings Act 2010* (NZ) (TTPA) came into force on the 13 October 2013. The purpose of the Act is to streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency; minimise existing impediments to enforcing certain Australian judgments and regulatory sanctions; and implement the Trans-Tasman agreement in New Zealand law.<sup>106</sup> As per s 12(2)(b), the Act excludes serving initiating documents in Australia for proceedings that relate wholly or partly to actions in rem. As per s 31(2)(c), warrants for the arrest of property are excluded as interim relief in support of Australian proceedings provisions. As per s 54(2)(a), the recognition and enforcement of Australian in rem judgments are excluded.

### 5 Should there be a Mechanism for Trans-Tasman Ship Arrests in Light of the Trans-Tasman Developments?

#### 5.1 The Problem Generally

As stated above, the problem that the TTPAs were concerned with was that there was no effective way to deal with trans-Tasman legal disputes and that they would increase with the CER/SEM developments. This problem should apply equally to Admiralty and maritime disputes. Australia and New Zealand engage in substantial

<sup>99</sup> This is a topic in itself and will not be discussed here.

<sup>100</sup> This point will be discussed in greater depth when the paper looks at different solutions.

<sup>101</sup> The New Zealand legislative history only is covered due to the scope of the paper.

<sup>102</sup> Trans-Tasman Working Group, *Trans-Tasman Court Proceedings and Regulatory Enforcement: A Report* (Australian Attorney-General's Department and the New Zealand Ministry of Justice, 2006) 4.

<sup>103</sup> Ibid 14.

<sup>104</sup> *Agreement between the Government of New Zealand and the Government of Australia on Trans-Tasman Court Proceedings and Regulatory Enforcement*, 2008, [2008] ATNIF 12. See *Trans-Tasman Proceedings Act 2010* (NZ), sch 1.

<sup>105</sup> *Trans-Tasman Proceedings Bill 2009* (105-1).

<sup>106</sup> s 3.



trade with one another. Nearly all of that trade is via ships. Allowing these claims to be made across the Tasman would also decrease transaction costs and potentially make for more effective dispute resolution.

The scenario in *Barde AS v ABB Power Systems* highlights the problem. Under the current arrangement, the owner of the damaged machinery could bring a claim in personam against the ship owner in a court in New Zealand and have that enforced in Australia via the TTPA. This solution might be ineffective as the owner of the ship might be located overseas or be hard to find. Such a situation is not rare as Australia and New Zealand are primarily countries of shippers rather than ship owners.<sup>107</sup> Moreover, the structure of many ship companies makes it difficult to locate the owners to enforce an in personam claim. The owner of the damaged machinery would be barred from bringing a claim in rem across the Tasman via the TTPAs.<sup>108</sup> The last option is for the machinery owner to bring a claim in rem in Australia (as they did) when the ship visits Australia.<sup>109</sup> If the ship went to another country, then the machinery owner would have to bring an action in rem in that country. One might argue that this process is as simple as arranging with a solicitor across the Tasman (or in another country) to arrange for its arrest. However, the inefficiency, inconvenience and transaction costs were a sufficient justification for the creation of the TTPAs. Under the rationale of the TTPAs, resolving the dispute should be as simple as it would be within one's own country. Furthermore, the court dealing with the substantive issues might find it easier to resolve the case, as they would likely have better access to witnesses and evidence.

## 5.2 The Current Interim Relief Under the TTPA is Insufficient

It might be argued that the TTPAs already provide for interim relief and that this relief would be sufficient, as a party could apply for a Mareva injunction from across the Tasman to prevent the defendant's assets, most likely only the ship, from leaving the country. This view is rejected on the basis that Mareva injunctions are an insufficient remedy in comparison to arresting a ship for an action in rem for several reasons discussed below.

### 5.2.1 Actions in Rem and Ship Arrest

Arresting a ship for an action in rem is a 'recognised feature of international maritime commerce and international maritime jurisdiction'.<sup>110</sup> Damien J Cremean notes that '[t]he ability to proceed in rem is the most distinctive feature of Admiralty jurisdiction. It allows a party to sue a thing – the res – and to carry on proceedings against it'.<sup>111</sup> Verónica Ruiz Abou-Nigm notes, 'it is the speed with which the defendant's main asset – the ship – could leave the jurisdiction that the arrest of ships is primarily trying to counteract'.<sup>112</sup> The effect of commencing proceedings in rem allows a warrant to be issued to arrest the ship.<sup>113</sup> This provides a 'protective function' as it secures the ship, as security, under the court's custody until the claim is adjudicated.<sup>114</sup> The action in rem indirectly forces the ship owner<sup>115</sup> to make an appearance.<sup>116</sup> If the ship owner does not enter an appearance to defend the ship and the claimant is awarded a default judgment, then the court can sell the ship and the proceeds will provide a remedy for the claimant, subject to priorities.<sup>117</sup> However, the action in rem is not just a 'procedural device'.<sup>118</sup> If the ship owner enters an appearance the claim becomes both in personam and in rem.<sup>119</sup> Thus, the claimant may have recourse against both the ship and the ship owner.

Ruiz further explains that the rationale for the arrest of ships 'is to provide a useful device for international commerce and to compensate for the difficulty of enforcing judgments aboard'.<sup>120</sup> She elaborates that the ship will normally be the only asset that the claimant will have access to for security for the judgment.<sup>121</sup> Thus:<sup>122</sup>

<sup>107</sup> Australian Law Reform Commission (ALRC), *Civil Admiralty Jurisdiction*, Report No 33 (1986) [96].

<sup>108</sup> I will discuss the Admiralty Acts out of jurisdiction provisions below.

<sup>109</sup> This is presumed to be frequent in either trans-Tasman trade or international trade routes servicing both countries.

<sup>110</sup> Damien J Cremean, *Admiralty Jurisdiction: Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (Federation Press, 3<sup>rd</sup> ed, 2008) 221.

<sup>111</sup> Damien J Cremean, 'Admiralty and maritime' (2012) 86 *Australian Law Journal* 296, 296.

<sup>112</sup> Verónica Ruiz Abou-Nigm, *The Arrest of Ships in Private International Law* (Oxford University Press, 2011) 219.

<sup>113</sup> Cremean above n 110, 24.

<sup>114</sup> Ruiz, above n 112, 9.

<sup>115</sup> Or in some cases the beneficial owner or charterer.

<sup>116</sup> Cremean above n 110, 24; and *The Parlement Belge* (1880) 5 PD 197, 205.

<sup>117</sup> Cremean above n 110, 24.

<sup>118</sup> *Ibid* 24.

<sup>119</sup> *Ibid* 25 and see *Caltex Oil v Dredge Willemstad* (1976) 136 CLR 529, 538; *Rankura Moana Fisheries Ltd v The Ship Irina Zharkikh* [2001] 2 NZLR 801, 822 (HC) at 822; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, 63.

<sup>120</sup> Ruiz, above n 112, 19.

<sup>121</sup> *Ibid*.

<sup>122</sup> *Ibid*.

The possibility to arrest a ship in an appropriate jurisdiction is of paramount importance to the international shipping and trading community ... Ships trade worldwide; they spend their economic life moving between different jurisdictions often far from the country of registry; and their commercial management poses peculiar problems for those faced with unpaid debt incurred in the course of shipping. Against this background, the arrest of ships, inherently connected with jurisdiction and security, has played a key role since ancient times.

She argues furthermore that the importance of arresting a ship is not dependent on the number of times ships are actually arrested.<sup>123</sup> The value of it is in the ability to do so. Or as Dr Lushington noted, 'an arrest offers the greatest security for obtaining substantial justice in furnishing a security for prompt and immediate payment'.<sup>124</sup>

### 5.2.2 Mareva Injunctions Vis-à-Vis Ship Arrests

On the other hand, a Mareva injunction,<sup>125</sup> is 'an interlocutory injunction ... prohibiting the defendant, before or during a suit, or even after judgment, from removing assets (real or personal, moveable or immovable) from the court's jurisdiction or from dealing with them, where it appears to the court that without such an order the plaintiff's recovery on his claim will be jeopardized'.<sup>126</sup> As noted above, these are available under the interim relief provisions of the TTPAs. A Mareva injunction can be issued to prevent a ship from leaving a jurisdiction and thus it might have a similar effect to arresting the ship for an action in rem.<sup>127</sup> However, ship arrests and Mareva injunctions are distinct remedies and there are several benefits to the former over the latter.

Gregory Nell SC, highlights the differences between Mareva injunctions and arresting a ship for an action in rem.<sup>128</sup> The advantages of arresting a ship over Mareva injunctions are numerous. First, by arresting a ship, a claimant is less likely to be effected by an insolvent defendant.<sup>129</sup> When the ship is arrested the security is the ship itself and it is in the safe custody of the court at the commencement of proceedings.<sup>130</sup> On the other hand, a Mareva injunction only holds the assets and is not necessarily secured before proceedings. If the claimant is successful against the claimant in an action in rem, then they will be paid out subject to other maritime claims.<sup>131</sup> Whereas, if the claimant is successful and they only had a Mareva injunction and the defendant became insolvent, then they would be paid subject to all other claims against the defendant. Thus, the judgment is arguably more likely to be paid out under an action in rem than under a Mareva injunction based on the same claim. Additionally, banks and P & I clubs routinely offer security to release the ship. This form of security is generally not affected by the solvency of the plaintiff.

Second, arresting a ship is of right when a claimant has an action in rem,<sup>132</sup> whereas a Mareva injunction is a discretionary order of the court.<sup>133</sup> For a Mareva injunction, a claimant must prove that its claim is likely to be successful and that there is a risk that the defendant will move assets from the jurisdiction rendering the judgment valueless.<sup>134</sup> The claimant must also prove that it will not inconvenience third parties. However, it is irrelevant if the arrest of the ship inconveniences third parties.<sup>135</sup>

Third, the procedure to arrest a ship is arguably easier.<sup>136</sup> A claimant does not need to go through the court. They only need to complete the relevant forms and give them to the Registrar. The ship or alternative security is also held for the entire judgment or until the claim is settled. A Mareva injunction might need to be extended when the defendant enters an appearance.

<sup>123</sup> Ibid 20.

<sup>124</sup> *The Volant* (1842) 166 ER 615, 618, quoted in Cremean, above n 110, 222.

<sup>125</sup> Also known as freezing order or injunction.

<sup>126</sup> William Tetley, *International Maritime and Admiralty Law* (Les Éditions Yvon Blais, 2002) 410; see also Cremean, above n 109, 234-5.

<sup>127</sup> Cremean, above n 110, 234-5.

<sup>128</sup> Gregory Nell, 'The Interaction between Admiralty and Insolvency Law: A Commentary on Some Recent Issues Concerning the Arrest of Ships' (Paper presented at the MLAANZ 2009 Annual Conference, Queenstown, September 2009). See also ALRC, above n 107, [245].

There are other potential differences but these seem to be most important.

<sup>129</sup> Nell, above n 128, [15], [25]-[26].

<sup>130</sup> Ibid [16].

<sup>131</sup> Ibid [28]-[30].

<sup>132</sup> And complies with the relevant legislation and rules.

<sup>133</sup> Nell, above n 128, [32]-[39] and ALRC, above n 107, [245].

<sup>134</sup> ALRC, above n 107, [245].

<sup>135</sup> ALRC, above n 107, [245].

<sup>136</sup> Nell, above n 128, [60]-[63].

Fourth, the court has jurisdiction over the ship regardless of the ship's Flag, registration, residence of owner or where the incident took place.<sup>137</sup> The court has jurisdiction simply by having the ship in its jurisdiction.

Fifth, judicial sale of a ship following an action in rem can be a more effective remedy as it may yield a higher price than if the ship were sold through other means.<sup>138</sup> This is because a judicial sale of the ship is free of all claims, liens and encumbrances and is sold with a clear title. This is not necessarily the case when a ship owner sells their ship. There may be outstanding claims and liens that follow the ship regardless of the change in title. Thus, the judicial sale is likely to return a higher price for the ship than if it was sold otherwise. Additionally, under certain circumstances, the ship may be sold before final judgment.<sup>139</sup> For example, where the value of the ship may deteriorate during the course of proceedings. This feature is not available with Mareva injunctions.

Sixth, Admiralty has its own unique priorities on the judicial sale of the ship, which are only available via an action in rem in the court's Admiralty jurisdiction.<sup>140</sup> For example, those with maritime liens will rank higher than mortgagees who would likely exhaust whatever fund may be generated from the sale of the ship. On the other hand, if the ship were sold after a Mareva injunction in the court's general jurisdiction, then those who would have had a maritime lien would only be unsecured creditors and rank after mortgagees.

There are some disadvantages to arresting a ship over a Mareva injunction. First, the action in rem is only limited to one ship, being the guilty ship or a sister ship.<sup>141</sup> On the other hand, a Mareva injunction can apply to all the defendant's assets.<sup>142</sup> The problem is that a single ship may be insufficient to cover the claim. However, it is also possible to arrest a ship as well as getting a Mareva injunction over the defendant's other assets.<sup>143</sup> This might be effective if the defendant has other assets in the jurisdiction, but will often not be effective since the ship owner is likely to be in another jurisdiction and/or a single ship company.<sup>144</sup> Second, a Mareva injunction is potentially cheaper than arresting the ship.<sup>145</sup> The claimant is potentially required to enter security for the costs of maintaining the ship while under arrest. However, this scenario is rare as other security is normally entered to release the ship.<sup>146</sup>

### 5.3 Ship Arrests from out of Jurisdiction not Currently Available

The current Admiralty Acts of Australia and New Zealand do not allow for service out of jurisdiction. As per s 23 of the Australian Act, the provisions of the SEPA 1992 does not apply to service of initiating process on, or the arrest of, a ship or other property under the Act. Section 22 of the Act allows for service of initiating proceedings into any place within Australia if the proceedings are brought within a Federal court. If the proceedings are brought within a State court then service of initiating process can be into any place in Australia provided that the ship was within the jurisdiction of the court at the time when the process was effective for service. Thus, it is not possible to serve initiating process of an action in rem into a foreign country. It is only possible within Australia.

The New Zealand Admiralty Act does not provide such a provision for service out of jurisdiction or, understandably, between states. Rules 6.27-6.35 of the High Court Rules provide rules for notice of proceedings in rem from out of the jurisdiction.<sup>147</sup> However, these rules do not apply to trans-Tasman proceedings.<sup>148</sup> Trans-Tasman proceedings are dealt with solely by the provisions of the *Trans-Tasman Proceedings Act 2010*, which excludes actions in rem.

<sup>137</sup> Ibid [76]-[83]. Note that this is subject to a stay of proceedings on the grounds of *forum non conveniens*, or an arbitration or choice of forum clause.

<sup>138</sup> Ibid [87]-[92].

<sup>139</sup> *Judicature Act 1908* (NZ) r 25.51.

<sup>140</sup> See generally *ABC Shipbrokers v The Ship Offi Gloria* [1993] 3 NZLR 576 (HC).

<sup>141</sup> Nell, above n 128, [52]-[54].

<sup>142</sup> Ibid [55]; and ALRC, above n 107, [245].

<sup>143</sup> Tetley, above n 126, 418.

<sup>144</sup> ALRC, above n 107, [93].

<sup>145</sup> Nell, above n 128, [57].

<sup>146</sup> ALRC, above n 107, [245].

<sup>147</sup> *Judicature Act 1908* (NZ) r 25.7(3).

<sup>148</sup> Ibid r 6.36.

## 5.4 Trans-Tasman Ship Arrests Align with the Rationales of the TPA and the CER/SEM Development

The discussion under Part Five so far has shown some of the problems of resolving Admiralty disputes and that the TTPAs as they currently stand do not help. However, providing a mechanism to better resolve Admiralty disputes does not run counter to the rationale and purpose of either the TTPAs or the harmonisation developments under the CER/SEM umbrellas. In fact, it is supported by them.

The overarching goals of the trans-Tasman developments can be summed up as the desire to make trans-Tasman business, trade, commerce, travel and litigation easier, more efficient and more effective. Providing a trans-Tasman ship arrest mechanism would give potential applicants greater recourse to having their claims met and making the process easier. The main benefit would be the speed and ease at which one could arrest a ship from across the Tasman before the ship departs again and recourse to fulfilling one's claim might be lost temporarily or permanently within Australia or New Zealand, or still open but in another jurisdiction further afield. Additionally, the costs should reduce to not much more than if the ship were arrested within one's own country and the court would have better access to witnesses and evidence.

## 5.5 Are the Australian and New Zealand Admiralty Laws Compatible?

As mentioned, the laws of each country do not need to be identical for the CER/SEM harmonisation process. However, it is worth comparing the Australian and New Zealand Admiralty laws. The closer the laws are, the easier it would be for a trans-Tasman arrest mechanism to work efficiently and effectively, since the courts are less likely to be faced with different Admiralty claims and concepts.

### 5.5.1 Similarity in Maritime Law Generally<sup>149</sup>

The broader maritime laws of Australia and New Zealand are already similar or have been harmonised to a considerable extent. Paul Myburgh highlights four reasons for this similarity and harmonisation.<sup>150</sup> First, the similarity and harmonisation is a 'natural consequence of British colonisation'.<sup>151</sup> Australia and New Zealand were given similar or identical maritime laws from the Imperial administration, or the domestic laws were based on the Imperial statutes. Some examples include the *Merchant Shipping Act 1894* (Imp), *Bills of Lading Act 1855* (UK), *Marine Insurance Act 1906* (UK), and the *Colonial Courts of Admiralty Act 1890* (Imp).<sup>152</sup> These Imperial statutes led to uniformity and reduced conflict of laws issues.<sup>153</sup> Myburgh notes that this point should not be overstated as there have been several significant moves to break with this tradition.<sup>154</sup>

Second, comparative law reform in the two countries has tended to look to the UK for guidance.<sup>155</sup> Myburgh has labeled this 'importing harmony'.<sup>156</sup> An example includes the *Carriage of Goods by Sea Act 1992* (UK).

Third, while maritime laws have not been included specifically into the CER and business laws harmonisation process, other areas of harmonisation of business law under this umbrella have led indirectly to an impact on trans-Tasman maritime law and commerce; for example, international sale of goods and commercial arbitration.<sup>157</sup> To this we could add the moves under the TTPAs in relation to proceedings in personam. Additionally, CER has had a direct impact on maritime laws. For example, while looking into the adoption of the Hague-Visby Rules, the New Zealand Ministry of Transport looked to the CER and harmonisation of business laws with Australia as important.<sup>158</sup>

<sup>149</sup> Even though Australia and New Zealand might have similar provisions, it is conceded that the courts might interpret them differently. This topic will not be discussed but it is assumed that the courts will look to each other for interpretation when the claim has a trans-Tasman flavour. See Gary A Hughes, 'Redirecting CER and the Harmonisation of Competition Law' (1995) 7 *Auckland University Law Review* 1039, from 1048.

<sup>150</sup> Myburgh, above n 26.

<sup>151</sup> *Ibid* 73.

<sup>152</sup> *Ibid* 73-74.

<sup>153</sup> *Ibid* 74.

<sup>154</sup> *Ibid* 75. An example given is the *Maritime Transport Act 1994* (NZ).

<sup>155</sup> *Ibid*.

<sup>156</sup> *Ibid*.

<sup>157</sup> *Ibid* 75-9.

<sup>158</sup> *Ibid* 79.

Lastly, international law and commerce has had a large impact on the harmonisation of maritime laws globally and within Australia and New Zealand.<sup>159</sup> For example, treaties and/or domestic legislation have been adopted giving effect to law relating to the carriage of goods by sea, maritime collisions, limitation of liability, marine pollution, salvage, trade finance, general average, international sales contracts and arbitration.<sup>160</sup> Such moves have had an ‘extremely effective and comprehensive harmonising influence on New Zealand and Australian maritime laws’.<sup>161</sup>

### 5.5.2 Similarity of the Admiralty Acts Generally

Harmonisation and similarity is also common between Australia and New Zealand in regards to the arrest of ships and Admiralty actions in rem. Before the current Admiralty Acts of Australia and New Zealand, both countries’ Admiralty jurisdiction was governed by the *Colonial Courts of Admiralty Act 1890* (Imp).<sup>162</sup> This Act has been repealed and replaced by domestic legislation in Australia and New Zealand. The current Admiralty Acts are both based on the *Administration of Justice Act 1956* (UK), which gave effect to the 1952 *International Convention Relating to the Arrest of Sea-Going Ships*.<sup>163</sup> The New Zealand Act is closer than the Australian Act to the UK Act. In the Report that led to the Australian Act, it was noted that it was not within Australia’s interests simply to copy the UK Act, as NZ did.<sup>164</sup> However, the Report noted that it was nonetheless going to work with the UK model.<sup>165</sup> It is a reasonable conclusion that the Admiralty laws and rules within Australia and New Zealand are remarkably similar when viewed in general terms.

### 5.5.3 Differences of the Admiralty Acts Specifically<sup>166</sup>

Although the Admiralty laws in Australia and New Zealand are similar, there are nonetheless several differences between the Admiralty Acts and rules that might prove to be problematic for a trans-Tasman ship arrest mechanism.

First, Australia and New Zealand do not have the same heads of jurisdiction in rem. Australia recognises additional actions in rem for: claims for marine insurance;<sup>167</sup> enforcement of arbitration awards and judgments;<sup>168</sup> maritime safety charges and oil pollution levies, charges and penalties;<sup>169</sup> and unpaid interest in respect for other maritime claims.<sup>170</sup> This might be an issue if the Registrar in New Zealand arrested a ship on an action in rem that was not a head of jurisdiction under the New Zealand Admiralty Act. The defendant could argue for a stay of proceedings on the basis of a lack of jurisdiction.<sup>171</sup> Any proposed mechanism should align the heads of jurisdiction.

Second, Australia and New Zealand have different tests for unjustified or wrongful arrests of ships.<sup>172</sup> The common law test of bad faith or gross negligence as per *The Evangelismos*<sup>173</sup> is applied in New Zealand.<sup>174</sup> Australia applies a less onerous test of ‘unreasonably and without good cause’ as per s 34 of the Act.<sup>175</sup> The result is that it should be easier on the ship owner to make a claim for damages for an unjustified arrest in Australia. This might give rise to forum shopping across the Tasman. A common statutory test could remedy this.

Third, the costs of arrest are arguably more in Australia than in New Zealand. As Williams J, speaking extrajudicially, notes, ‘in New Zealand, the taxpayer meets much of the cost of providing the service to the

<sup>159</sup> Ibid 80.

<sup>160</sup> Ibid 80-84.

<sup>161</sup> Ibid 84.

<sup>162</sup> See LRCAJ above n 96, Part 5; and ALRC, above n 107, at terms of reference.

<sup>163</sup> 1952, 439 UNTS 193. Cremean, above n 110, 8; and Myburgh, above n 26, 74. Neither Australia nor New Zealand are parties to the convention.

<sup>164</sup> ALRC, above n 107, [95].

<sup>165</sup> ALRC, above n 107, [95].

<sup>166</sup> It is beyond the scope of this paper to offer a full comparison of the Australian and New Zealand Admiralty laws and rules.

<sup>167</sup> *Admiralty Act 1988* (Cth) s 4(2)(s); see Paul Myburgh, *Extending New Zealand’s Admiralty Jurisdiction: A Modest Proposal For Reform*, (March 2004) <[www.maritimelaw.org.nz](http://www.maritimelaw.org.nz)> [3.17].

<sup>168</sup> *Admiralty Act 1988* (Cth) s 4(3)(u); see Myburgh, above n 167, 3.19.

<sup>169</sup> *Admiralty Act 1988* (Cth) s 4(3)(q); see Myburgh, above n 167, 3.21.

<sup>170</sup> *Admiralty Act 1988* (Cth) 4(2)(d) and s 4(3)(w); see Myburgh, above n 167, 3.27.

<sup>171</sup> Currently the only Admiralty actions in rem are those brought under the Act.

<sup>172</sup> Cremean, above n 110, 233-4.

<sup>173</sup> [1858] 166 ER 1174.

<sup>174</sup> *Transpac Express Ltd v Malaysian Airlines* [2005] 3 NZLR 709, 718 [74] (HC).

<sup>175</sup> ALRC, above n 107, [301]-[304] and Michael Woodford, ‘Damages for Wrongful Arrest: Section 34, *Admiralty Act 1988*’ (2005) 19 *Australian and New Zealand Maritime Law Journal* 115, 115-116.

maritime trade of the arrest and management of ships'.<sup>176</sup> This is because the costs in New Zealand to arrest a ship are an application fee for the warrant and a commission for the valuation and sale of the ship.<sup>177</sup> In Australia, however, the costs of arresting the ship might include: a filing fee; deposit; insurance; salary of officer; costs to execute; helicopter or vessel hire if the ship is at anchor; travel costs if the ship is in a regional location and there is no local officer to execute arrest; and ship movement costs or tugs.<sup>178</sup> Additionally, if the proceedings are protracted, then the amounts will likely increase. It might be argued that the costs are effectively the same as the costs of arrest will be paid out of the proceeds before all other claims. However, the costs of arrest must still be borne initially by the arresting party. Furthermore, if the arresting party is commercially small, then arresting a ship will be more burdensome in Australia. This again might lead to confusion between the courts as to the upfront costs of arrest. For example, the arresting party could bring a claim in New Zealand when the ship is in Australia and argue for the expenses that it would pay under a New Zealand arrest. Again, a common statutory schedule of fees could remedy this.

## 6 Resolving Trans-Tasman Admiralty Disputes: Two Possible Models

The discussion thus far has shown that the trans-Tasman developments would support resolving Admiralty disputes more effectively and that the current arrangements are insufficient. Furthermore, the Admiralty laws are generally similar enough to allow for a platform to push harmonisation further. However, the specific differences noted above between the Admiralty Acts and rules will most likely need to be completely harmonised to make any trans-Tasman ship arrest mechanism work effectively. There seem to be two possible models or mechanisms for trans-Tasman ship arrests. The first is the TTPA model and operates under the TTPAs. The second is the Admiralty model and operates separately to the TTPAs.

### 6.1 TTPA Model

This model is based on the developments already made under the TTPAs. It would use the TTPAs as the framework but make it also apply to ship arrests. The amendments needed would be to remove the exclusions of actions in rem and arresting property in the TTPAs. The Admiralty Acts and rules would also need provisions to allow service of proceedings from across the Tasman.

The model would practically work as follows. The arresting party would arrange with their local solicitor to arrange for the ship's arrest for an action in rem. The solicitor would arrange for the arrest directly with the Australian Marshal/Registrar and they would have the ship arrested. The ship would be held in the port where it was arrested and the substantive claim would be held in the jurisdiction where the arresting party brought their action in rem i.e. in New Zealand. The court that hears the substantive claim could still decline jurisdiction on the ground that it was not the appropriate forum as per the TTPA, but it would transfer the claim across the Tasman to the appropriate forum.

There are several issues that must logically follow with this model. First, service of proceedings will be from out of the jurisdiction. This is how the example above and the TTPAs both operate. While this might not be problematic within the general jurisdiction, service from out of the jurisdiction for an Admiralty action in rem is generally a foreign idea to Admiralty law the world over. In the *Aichhorn & Co KG v Ship MV Talbot*, the High Court of Australia set aside a service of an action in rem issued out of Singapore.<sup>179</sup> The High Court agreed with the reasoning of the Court of Appeal that 'it would run counter both to the general practice of Admiralty courts and to the basic concept of Admiralty actions in rem to permit service of process in rem out of the jurisdiction'.<sup>180</sup> The court referred to *The Espanoleto* which stated that '[o]f course, a writ in rem cannot be served till the res comes within the jurisdiction, but I can see no reason why the writ cannot be issued and then served when the res comes within the jurisdiction'.<sup>181</sup> The High Court then went on to remark that:<sup>182</sup>

[s]ince the jurisdiction of the court to entertain an action in rem is based on the presence of the res within the territory of the state under whose authority the court sits, and since the purpose of such an action is to enable the judgment to be satisfied out of the res, it must follow, at least as a general rule, that a writ in an action in rem can only be served if the res is within the jurisdiction.

<sup>176</sup> Hugh Williams, 'Comparative Maritime Law Procedures and Changes to Admiralty Law: a New Zealand Perspective' (2007) 21 *Australian and New Zealand Maritime Law Journal* 17, 19.

<sup>177</sup> *Ibid* 19.

<sup>178</sup> Rainer Gilich, 'Practical Issues Arising from the Arrest of Ships' (2009) *Australian and New Zealand Maritime Law Journal* 63, 63-4.

<sup>179</sup> *Aichhorn & Co KG v Ship MV Talbot* (1974) 132 CLR 449 ('*Aichhorn*').

<sup>180</sup> *Ibid* 452.

<sup>181</sup> *Ibid* 450, quoting *The Espanoleto* [1920] P 223, 225.

<sup>182</sup> *Aichhorn* (1974) 132 CLR 449, 455.

There are practical reasons for such a rule. For example, if the ship is not within the jurisdiction then any judgment will be practically useless. However, a stronger reason for the rule is that the basis of having jurisdiction over the ship for an action in rem is not due to the ship's Flag, owners or seamen's residence, or the location of the event which gave rise to the claim. The jurisdiction is based simply on having the ship within the geographical jurisdiction of the Admiralty court. Thus, to avoid uncertainty and to make judgments legitimate, the court that arrests the ship should also be the court that hears the substantive claim and deals with the consequences of that claim. While these reasons are plausible for the rule generally, they might not apply to the trans-Tasman context for several reasons. First, under the TTPAs, there would be an ability to have an effective outcome because the judgment would be recognised and enforced across the Tasman. Second, the TTPAs only apply between Australia and New Zealand and thus would not create the uncertainty that would arise if it were open to all countries.

The next issue that follows on the TTPA model is similar to the above point. It is that it splits the Admiralty jurisdiction between the part that holds the ship and the part that hears the substantive claim. Such a model resembles the South African security arrest.<sup>183</sup> The security arrest model means that a South African court will arrest a foreign ship when it is within its jurisdiction for pre-judgment security when the foreign ship is subject to a pending cause of action in another country.<sup>184</sup> The security arrest has been seen as a potentially oppressive mechanism that can be abused. In fact, the South African courts have tempered the rule by stating that the claim will only be enforced in South Africa if it is based on a substantive claim that would be enforced if it were brought in South Africa.<sup>185</sup> While this model might be seen as problematic, the issues faced by the South African model do not necessarily apply in the trans-Tasman context. This is because the model is only limited to Australia and New Zealand rather than being a security arrest for any country.<sup>186</sup> One could not use the model to arrest a ship within either country from a claim based in a third country. The arrest (and thus the ship) and the substantive claim must both be within Australia and/or New Zealand. However, the problem that might arise is when the ship is arrested in New Zealand on a claim based on a head of jurisdiction under the Australian Admiralty Act that is not a head of jurisdiction under the New Zealand Act.<sup>187</sup> This will likely cause issues. While the judicial solutions in the South African context might be plausible, they are unsatisfactory under the trans-Tasman model, as it will only go part way in making trans-Tasman Admiralty disputes more effective and efficient. For example, a New Zealand court might have difficulty arresting a ship in New Zealand on a head of jurisdiction that was available in Australia but not in New Zealand. This is because there would be a legitimate question as to whether the New Zealand court had jurisdiction to arrest the ship despite the Australian Admiralty Act and the TTPA. Thus, it is essential that the heads of jurisdiction, or even better, the Admiralty Acts and rules were completely harmonised at the same time.

## **6.2 Admiralty Model**

The second possible model does not operate under the TTPAs. This model is based on the premise that Admiralty law is too separate and exceptional that it should not come under the general jurisdiction of the TTPAs. The model keeps Admiralty's separate status while still attempting to remedy trans-Tasman disputes more effectively. The model also attempts to not split the arrest jurisdiction, nor allow service from out of the jurisdiction, as the TTPA model does.

The practical aspects of the model would be the same as the TTPA above. That is, one would apply through their own solicitor who would apply to the registrar on the other side of the Tasman. The ship will be held in the port it was arrested in and the substantive claim would be heard in the court where the applicant is based.

However, the legal aspects of the model would be different to the TTPA model. The model would treat New Zealand and Australia as the same jurisdiction for the purposes of the Admiralty jurisdiction. In a way it would be a trans-Tasman Admiralty jurisdiction. This could either be done by a treaty with subsequent harmonised Admiralty laws or New Zealand could adopt the Australian Admiralty Act.<sup>188</sup> If we were to adopt the Australian Act, there would be several amendments needed. Under s 11, the jurisdiction under the Australian Act would need to include the New Zealand High Court. Additionally, the provisions for initiating service under the

<sup>183</sup> *Admiralty Jurisdiction Regulation 1983* s 5(3).

<sup>184</sup> See Gys Hofmeyr, *Admiralty Jurisdiction Law and Practice in South Africa* (Juta and Company, 2<sup>nd</sup> ed, 2012) 172 and John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (Juta and Company, 2<sup>nd</sup> ed, 2009) 117-124.

<sup>185</sup> See *Babel Shipping Co Ltd: The Rosario Del Mar* 1995 (1) SA 716 (C) 724C-G and Hofmeyr, above n 184, 181.

<sup>186</sup> Note that this still covers ships under foreign Flags and claims that were based on events that happened outside of Australia or New Zealand.

<sup>187</sup> As discussed above.

<sup>188</sup> The Australian Act is more up to date than the New Zealand Act and is the reason why it is suggested the Australian version be adopted.

Federal courts under s 22(1) would also need to include the New Zealand High Court. Thus, if initiating service has been made under the Australian Federal or New Zealand Courts, then the ship may be arrested anywhere within the jurisdiction of either Australia or New Zealand. The Australian Act already provides for transfer and remittal of proceedings between different state, territory and federal courts.<sup>189</sup> A court may transfer the case of its own accord or on application to it by the parties or another court. The courts will make orders in auxiliary of each other and the arrested ship can be held by the first court for the action in the second court. A statutory test for the transfer and remittal between the Australian and New Zealand courts could be made along similar lines as the TTPAs. That is, the court could transfer the case to the more appropriate forum having regards to certain specified criteria.

The result of this model is that the model would be neither splitting the Admiralty jurisdiction nor allowing for service out of the jurisdiction as the Admiralty jurisdiction would be trans-Tasman. Thus, the model is less offensive to Admiralty law conceptions of jurisdiction. However, the problem with this model is that framing the Admiralty jurisdiction as the same is somewhat artificial. The practical reality is that Australia and New Zealand will remain two distinct jurisdictions in every other way. Thus, while there might be a framework that says that the Admiralty jurisdiction is the same between Australia and New Zealand, people might question how accurate that idea really is. Furthermore, even though the TTPAs and CER/SEM have brought Australia and New Zealand much closer, the developments are still premised on making two *different* jurisdictions operate together more effectively rather than combining the jurisdictions. Thus, the Admiralty model might be bringing the trans-Tasman relationship much closer than was envisioned under CER/SEM or the TTPAs.

### 6.3 Which Model?

While both of the models have some issues, the TTPA model seems to be the better model of the two for several reasons. First, the Admiralty model might raise constitutional questions between Australia and New Zealand. For example, whether New Zealand was conceding its sovereignty to Australia. While this might not actually be the case as Australia and New Zealand would be joint partners in the Admiralty model,<sup>190</sup> it might possibly be unpalatable to the New Zealand public. Moreover, such constitutional questions should not be the result of an attempt to make Admiralty disputes more efficient. They are questions that should be developed on their own terms, if at all. Second, the Admiralty model is built on somewhat of an artificial concept to avoid splitting the Admiralty jurisdiction and service from out of the jurisdiction. Third, it is pushing harmonisation beyond what was envisioned under the trans-Tasman developments thus far. Fourth, the Admiralty model might also require a trans-Tasman Admiralty court as opposed to the Admiralty jurisdiction being shared by two separate courts. This is because the appeal process and the precedential status of judgments might be difficult to develop under the model. For example, there might be a rule that appeals follow the normal process under the particular countries rules i.e. appeals from the New Zealand High Court go to the New Zealand Court of Appeal. However, the jurisprudence from the appellate courts from Australia and New Zealand might develop along different lines and the lower courts would be faced with the question of which court they would be bound by. If the court considered itself bound by the courts within its jurisdiction, then the trans-Tasman Admiralty model might not work efficiently and effectively, as the Admiralty jurisdiction would contain opposing views. If the court considered itself bound by the court from the other side of the Tasman, then the constitutional questions suggested above might become a real issue. Thus, the way to resolve this possible tension would be to develop a final appellate Admiralty court for Australia and New Zealand. This development might be pushing the trans-Tasman developments further than what was originally envisioned under the trans-Tasman developments thus far. An even stronger reason for not having the one Admiralty court is that it would be submitting all Admiralty claims in Australia and New Zealand to a trans-Tasman court that did not have a trans-Tasman nature i.e. claims where the ship is arrested and the substantive claim is heard in the same jurisdiction.

The TTPA model has problems in that it splits the Admiralty jurisdiction and allows for service from out of the jurisdiction. Both ideas being potentially offensive to established Admiralty law and practice. However, these issues seem to be mitigated by that fact that the TTPAs only operate between Australia and New Zealand. Thus, the reasons for not splitting the jurisdiction or serving out of the jurisdiction seem to not apply under the trans-Tasman context. Additionally, the model would not increase uncertainty. It would simply enable would-be Admiralty claimants to better resolve trans-Tasman Admiralty disputes. Moreover, the model would sit comfortably with the rationales of CER, SEM and the TTPA.

<sup>189</sup> See *Admiralty Act 1988* (Cth) s 27-30, 40.

<sup>190</sup> Which is akin to European countries joining the European Union.



## **7 Conclusion**

Australia and New Zealand are close economically, politically and legally. We partake in substantial trade between the two countries and shipping supports most of that trade. There have been significant developments to make trans-Tasman dealings easier. These developments have also provided legislation to resolve trans-Tasman legal disputes more effectively and efficiently. However, this legislation does not apply to actions in rem or for the arrest of property and thus excludes Admiralty law almost entirely. The reasoning for not including actions in rem or the arrest of property is flawed and insufficient. Australia and New Zealand's Admiralty jurisdictions are sufficiently compatible to push the harmonisation initiative further and provide for a trans-Tasman arrest mechanism. Furthermore, such a development would be supported by the rationale of the CER/SEM initiative. The possible models would either operate under the current TTPA framework or outside of it. The model under the TTPA appears to be the better model both conceptually and in line with the CER/SEM initiative. If such a model were implemented, it could enable more effective and efficient resolutions of Admiralty disputes that involve Australia and New Zealand.