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### Frank Stuart Dethridge Memorial Address

#### **'FROM LUTINE BELL TO LAW REFORM — A CASE STUDY IN AUSTRALIAN ADMIRALTY LAW'**

The Hon Justice Michael Kirby AC CMG\*

#### **My Lutine Bell Tolls**

In life, vanity ultimately gives way to reality. I am well aware that I have been invited to give this Dethridge Lecture in a representative and not a personal capacity.

I do so, first, as a Justice of the High Court of Australia, our nation's final appellate and constitutional court which occasionally decides cases involving admiralty jurisdiction and maritime law. And secondly, as the erstwhile Chairman (as the office was then styled) of the Australian Law Reform Commission (ALRC). It is twenty years since that Commission delivered its important report on admiralty jurisdiction. It is therefore timely to reflect on that achievement: on what has been secured and what may lie ahead.

If my life had turned out differently, I might have been giving this address in a personal capacity. As chance would have it, I came within a whisker of a lifetime's dedication to admiralty and maritime law. The invitation to contribute to the Dethridge Lecture series brings the memories flooding back.

In 1962, I had just graduated from the Sydney University Law School. With my brilliant school results and outstanding university record, I was looking around for a worthwhile future in the law.

Out of the blue a letter arrived at my parents' home. It invited applications from new law graduates for appointment as a starting solicitor. I duly made an application and was invited to call at the premises of Mr John Bowen, solicitor. His office, in an old building since demolished, commanded a vista of Bridge Street in Sydney. Engraved on the door in gold (or was it brass?) was the legend 'Ebsworth & Ebsworth'. Showing great foresight, Mr Bowen selected me. He promised me an exciting career in admiralty and maritime law. My youthful imagination conjured up images of the mighty ships and ancient precedents. I felt that I was being piped aboard a vessel that would sail me forward into a life of calm and prosperous waters.

Imagine my surprise when an urgent letter arrived soon after from Ebsworths asking me to call again on their office with its great city vistas. A misfortune had occurred. It was as if the Lutine Bell was being sounded for the sinking of my professional vessel, full of hope. The Hon Fred Osborn CMG, DSC, VRD, Federal Minister for the Navy in the Menzies Government, Member for Evans, had lost his seat in Federal Parliament. These things have an unpleasant way of happening in federal elections. He was a partner in Ebsworths. Unexpectedly, he had to be received back into the fold. In consequence, there was no space for an aspiring new recruit.

The offer of a lifetime in admiralty law was summarily, and unilaterally, withdrawn. With heart shattered, I stumbled out into the sunlight of Bridge Street, my decks awash with tears. My great ambition had come to a

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shuddering halt, before even leaving the harbour. I would never thereafter recapture the dreams of expertise in admiralty and maritime law. In idle moments, in intervening years, I have pondered whether, due to infancy at the time, I could obtain an extension to sue for damages for this horrible disappointment. Who knows what might have become of my career if only Mr Osborn had won his seat?

You will understand, therefore, how precious it is to me to be invited back into the midst of admiralty and maritime lawyers, for whose company I yearned nearly five decades ago. To be here is, in fact, a small consolation. I cherish it. In a very modern mood of reconciliation, I am banishing the memories of what might have been so as to concentrate on the thoughts of what is and what will be.

Despite my unexpected imperfections, so cruelly inflicted, I am glad to offer these thoughts mostly addressed to the ALRC Report on Civil Admiralty Jurisdiction.<sup>1</sup> It was the work of this Association, in combination with the Law Council of Australia, in producing its 1982 Report, *Admiralty Jurisdiction in Australia*, that acted as a spur to the ALRC's project.<sup>2</sup> The link was confirmed by the terms of reference to the ALRC which specifically required the Commission to have regard to that Report.<sup>3</sup> As Chairman of the ALRC I signed off on the Division that produced the ALRC Report, although the final document was completed after my resignation from the Commission in 1984.

The ultimate purpose of my lecture, in a most distinguished series, is to highlight the importance of law reform bodies such as the ALRC. In effect, I will use the ALRC Report on admiralty law as a case study.<sup>4</sup> The Australian law of civil admiralty jurisdiction was in urgent need of modernisation and reform in the early 1980s. It had been in need of reform for decades. The ALRC Report proposed legislation which was adopted with few exceptions in the *Admiralty Act 1988* (Cth).<sup>5</sup> The Admiralty Rules, that were subsequently made, were also closely based on those recommended by the ALRC.<sup>6</sup> The Report is, therefore, an important example of the success which can be achieved by law reform agencies, given proper governmental and parliamentary support.

## A Necessary Reform

*Occasion for reform:* The need for reform was the key message of the report of the Joint Committee of the Law Council of Australia and this Association. As the ALRC Report said: 'Everyone who has considered the present state of admiralty law in Australia recognises the need for reform.'<sup>7</sup>

The essential inadequacy in Australian law, identified by the Joint Committee Report, was that, in 1982, Australia did not have its own law comprehensively dealing with admiralty jurisdiction. Admiralty jurisdiction in Australia was then still principally governed by the *Colonial Courts of Admiralty Act 1890* (Imp).<sup>8</sup>

The admiralty jurisdiction invested by the *Colonial Courts of Admiralty Act* was the admiralty jurisdiction of the High Court of England, as existing at 1890. The later expansion of admiralty jurisdiction in the English courts was not passed on to Australia's courts.<sup>9</sup> Although other potential constitutional sources of further jurisdiction in Australia were identified by the ALRC,<sup>10</sup> their applicability was not always free from doubt.

By the 1980s it was indisputable that the nature of maritime affairs had changed significantly over ninety years and that this affected questions of jurisdiction. The admiralty jurisdiction in England had been expanded significantly after 1890. The 1982 Law Council Report observed that:<sup>11</sup>

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<sup>1</sup> Australian Law Reform Commission, *Civil Admiralty Jurisdiction*, Report No 33, (1986) ('ALRC Report').

<sup>2</sup> Joint Committee of the Law Council of Australia and the Maritime Law Association of Australia and New Zealand, *Admiralty Jurisdiction in Australia* (1982) ('Law Council Report').

<sup>3</sup> See also Commonwealth, *Parliamentary Debates*, Legislative Assembly, ('Hansard (H of R)') 21 April 1988, 2035 (Peter Reith), where Mr Reith observes that the Joint Committee Report 'was the predecessor to and laid much of the groundwork for the [ALRC] report'.

<sup>4</sup> This paper does not aim to be a review of the substantive law enacted by the *Admiralty Act 1988* (Cth). For an excellent examination of the Act, see Crawford, J, 'The Australian Admiralty Act: Project and Practice' [1997] *Lloyd's Maritime and Commercial Law Quarterly*, 519.

<sup>5</sup> ALRC Report, 263.

<sup>6</sup> *Ibid.*, 301.

<sup>7</sup> *Ibid.*, 59 [83].

<sup>8</sup> For a discussion of the other sources of admiralty jurisdiction in Australia before the enactment of the *Admiralty Act*, see *ibid.*, 15-16 [21].

<sup>9</sup> *Ibid.*, 27-28 [36].

<sup>10</sup> *Ibid.*, Chapter 4.

<sup>11</sup> Law Council Report, 17 [6.1].

Since 1890 the Parliament in England has repealed virtually all of the legislation which founded the admiralty jurisdiction of the Admiralty Court in 1890; and has since enacted a number of Acts culminating in the Administration of Justice Act 1956 ..., the County Courts Act 1959 ... and the Administration of Justice Act 1970 ... which now form the main basis for the existing admiralty jurisdiction in England. Those Acts contain many additional and useful provisions which were not in force in 1890: some, not in contemplation in 1890.

*Development of the old law:* In Australia the law of admiralty jurisdiction had developed in an ad hoc way without consideration of its overarching purpose. The ALRC Report remarked:<sup>12</sup>

A survey of the development of admiralty jurisdiction makes it clear how much the present state of that jurisdiction is the result of historical accident and of conflicts between courts over business, and how little it is the product of any coherent assessment of need.

This much had probably been true even when the *Colonial Courts of Admiralty Act* was enacted in 1890. However, by the 1980s, the problem was exacerbated by the many changes in maritime and trading circumstances that had occurred since the 1890s.

Apart from the developments in the maritime industry which prompted the evolution of the English admiralty jurisdiction, there had also been distinct changes in Australia. Not the least of these was the advent of Federation in 1901. It is fair to assume that accommodating that circumstance, so important for Australia, was not considered by the Imperial Parliament in 1890. The first of the Australian Constitutional Convention debates did not occur until the following year. As it was to transpire, the new Australian *Admiralty Act* was not enacted until after the final legal linkages to the Imperial Parliament were terminated by the *Australia Act 1986* (Cth) (UK).

*Deficiencies:* A deficiency that resulted from this lack of modernisation was the obscurity in the governing law. Professor James Crawford, the Commissioner in charge of the project, remarked in the first edition of his text *Australian Courts of Law*, published in 1982, that [d]etermining the exact status of the [*Colonial Courts of Admiralty Act*], and of the systems of appeal embodied in it, is of quite atrocious difficulty'.<sup>13</sup>

Strong language, even for that distinguished and plain speaking Australian scholar.

A second deficiency was undue complexity. The ALRC Report suggested that s 39 of the *Judiciary Act 1903* (Cth), in combination with the 'admiralty and maritime jurisdiction' provision in s 76(iii) of the Australian Constitution, might have conferred admiralty jurisdiction on State Supreme Courts. However, this suggestion raised two important questions. First, how was such a purported grant of jurisdiction to be reconciled with the express grant of jurisdiction to those Supreme Courts by the Imperial *Colonial Courts of Admiralty Act*? And, secondly, what was the resulting scope of the admiralty jurisdiction of State Supreme Courts? These quandaries were rightly said by the ALRC to be 'tortuous and unnecessary'.<sup>14</sup>

A third deficiency was that the *Colonial Courts of Admiralty Act* seemed to confer jurisdiction upon courts which were arguably unsuitable for its exercise. The ALRC Report contended that the legal propositions that supported the exercise of admiralty jurisdiction by the Federal Court of Australia would have also supported that exercise by the New South Wales Land and Environment Court. This would be so, notwithstanding the fact that the Land and Environment Court was clearly never intended to exercise admiralty jurisdiction. The ALRC no doubt correctly identified that it would be 'manifestly inconvenient' for specialised courts such as the Land and Environment Court to have jurisdiction in admiralty cases.<sup>15</sup>

It is important to reflect on these deficiencies in any assessment of the importance of Australia's law reform agencies. The *raison d'être* of such agencies is to reform and modernise the law. In many cases, the principal cause of such deficiencies is legislative and governmental neglect. Law reform agencies and legal bodies that advocate law reform, such as this Association, provide a means to address this neglect. Such bodies perform a vitally important function in rejuvenating our law. I pay my tribute to the Maritime Law Association and its enterprising, insistent members — past and present.

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<sup>12</sup> ALRC Report, 9 [8].

<sup>13</sup> Crawford, J, *Australian Courts of Law* (1982), 114.

<sup>14</sup> See ALRC Report, 24-25 [33].

<sup>15</sup> *Ibid*, 19-20 [25].

*The Hon Howard Zelling*: I would also like to pay special respects to the commitment to law reform, and, particularly, to admiralty law reform, of the Hon Howard Zelling. Howard Zelling was Chairman of the South Australian Law Reform Committee for its entire existence, from 1968 to 1987. For most of that time, he was also a judge of the Supreme Court of South Australia.<sup>16</sup> He was a remarkable lawyer and a very considerable legal intellectual. I knew him well.

Zelling's efforts to secure reform to admiralty jurisdiction date at least to 1968 when he prepared a paper on admiralty jurisdiction, including a draft Bill, for the Law Council of Australia.<sup>17</sup> He delivered the Dethridge Memorial Address in 1981, with the title 'Of Admiralty and Maritime Jurisdiction'.<sup>18</sup> He was chairman of the Law Council's joint committee that produced its 1982 Report. In the first paragraph of the ALRC Report, it was acknowledged that:<sup>19</sup>

The [ALRC] Report was a continuation of efforts by Justice Zelling over many years to bring about the reform of the Australian law of admiralty: the [ALRC] has benefited greatly from his work and writing in this area, and from discussion with him.

The Australian community is also the beneficiary of the perseverance and dedication of Dr Zelling to the task of law reform. He was not alone but he was especially persistent. He was a friend, colleague and stimulus to reform in this area. He is in my mind, a strong and vivid memory, as I offer these words.

## The ALRC Process

The ALRC conducts inquiries into matters referred to it by the Federal Attorney-General.<sup>20</sup> Its functions today are broadly similar to the functions set out in the original legislation that established it.<sup>21</sup>

The terms of reference relating to civil admiralty jurisdiction required the ALRC to review 'all aspects of the Admiralty jurisdiction in Australia'. It was given specific requests, which included to:<sup>22</sup>

- (i) make recommendations on the provisions to be included in an Australian Admiralty Act; [and]
- (iii) formulate draft Rules of Court for possible application by courts upon which Admiralty jurisdiction may be conferred by the Admiralty Act as recommended by the Commission[.]

The terms of reference were dated 23 November 1982. I was Chairman of the ALRC until 1984. After my resignation, Justice Wilcox was Acting Chairman until the appointment of the Hon Xavier Connor QC in 1985. Justice Connor saw the Admiralty Report to its successful conclusion.

The team assembled to produce the ALRC Report was truly outstanding. The Commissioner in charge was Professor James Crawford, now Whewell Professor of Law at Cambridge University, a leading expert in international law and frequent advocate before the World Court. The other Commissioners who served on the reference were Sir Maurice Byers QC, Justice Frank Neasey, Professor Michael Pryles, Justice Don Ryan and Mr (later Justice) Theo Simos QC. The Secretary and Director of Research for the Commission was Mr Ian Cunliffe and from 1986, Mr Stephen Mason. Mr Mason was also the legislative drafter. The draft legislation that he produced was settled in collaboration with Mr John Ewens QC, the former First Parliamentary Counsel of the Commonwealth. The research for the reference was led by Dr Damien Cremean,<sup>23</sup> Mr S Curran and Mr V Thompson. There was also a most impressive list of honorary consultants to the Commission. I pay tribute to them all.

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<sup>16</sup> The Hon Howard Zelling was a judge of the Supreme Court of South Australia from 23 October 1969 to 13 August 1986.

<sup>17</sup> Law Council Report, 8 [1.12].

<sup>18</sup> Zelling, H E, 'Of Admiralty and Maritime Jurisdiction' in Hastings, W K (Ed), *F. S. Dethridge Memorial Addresses 1977-1988* (1989) 35.

<sup>19</sup> ALRC Report, 3 [1].

<sup>20</sup> *Australian Law Reform Commission Act 1996* (Cth), ss 20-21; see previously *Law Reform Commission Act 1973* (Cth), s 6(1).

<sup>21</sup> See *Law Reform Commission Act 1973* (Cth), s 6(1)(a). Section 6(1)(a) only had four sub-paragraphs and did not make reference to the notion of providing improved access to justice.

<sup>22</sup> The terms of reference are set out in full at ALRC Report, xii.

<sup>23</sup> Professor Cremean is the author of *Admiralty Jurisdiction: Law and Practice in Australia and New Zealand* (2<sup>nd</sup> Ed, 2003).

*Consultation:* One of the keys to the success of the ALRC has been its commitment to widespread consultation.<sup>24</sup> The consultation process adopted for the civil admiralty jurisdiction reference exemplifies this practice. A great number of experts within Australia and overseas were consulted. They included leading lawyers in the United Kingdom and a representative from both the Canadian Department of Justice and the South African Law Commission.

Consultation was also undertaken with the relevant Federal Departments, State Departments of Law and Chief Justices of State Supreme Courts, the Federal Court and the High Court. One of the honorary consultants was a senior officer of the New Zealand Crown Law Office who had been involved in preparing the *Admiralty Act 1973* (NZ). Each Australian State was asked to nominate a government official as a contact person who would attend the consultants' meetings.<sup>25</sup> This precaution was followed to minimize inter-jurisdictional tensions and out of respect, shown in those times, for Australia's federal constitutional arrangements.

The ALRC issued three Research Papers<sup>26</sup> and a Discussion Paper<sup>27</sup> to facilitate the process of consultation.

*Public meetings:* In February 1985, in conjunction with this Association, the ALRC held public meetings in each of the five mainland State capitals. In May 1985, a public meeting was also held in Launceston, Tasmania, in conjunction with the Australian Maritime College. At the Annual Conference of this Association in October 1985, a complete session was devoted to consideration of the reference and the ALRC's draft proposals. The ALRC also published items relating to the reference in the press and specialist journals. More than 80 written submissions were made to the Commission.<sup>28</sup> They are faithfully recorded in the report, as is the ALRC debt to this Association and its members.

## The ALRC Report

For the purposes of my case study, it is instructive to consider the general aims of the ALRC in drafting its Bill. It reveals how the Commission developed a framework to reform admiralty law in a systematic way.

At the outset the ALRC observed that the 'uniqueness of admiralty [jurisdiction] lies in the action *in rem*'.<sup>29</sup> That action therefore became a major focus of the ALRC Report. The ALRC sought to reform admiralty law to advance Australia's interests whilst recognising the important limitation that any reforms needed to be generally acceptable to the international community.<sup>30</sup> It asserted that the primary concern of admiralty jurisdiction was providing Australian plaintiffs with a remedy in 'the situation where the shipowner or the defendant is outside the territory and has no assets within the jurisdiction apart from the ship itself'.<sup>31</sup>

The Commission highlighted the fact that Australia is still primarily a *user* of maritime services rather than a *supplier* of such services.<sup>32</sup> Its huge coastline and small population make it likely that this will continue to be so for the foreseeable future.

The Commission surveyed maritime law in foreign jurisdictions. It observed that, at the time of the ALRC Report, there remained a 'conspicuous lack of uniformity on maritime law even between western countries'.<sup>33</sup> As a result, the ALRC was faced with 'considerable scope for choice in considering what should be Australia's position'.<sup>34</sup> The Commission set out options for reforming admiralty jurisdiction. It offered a concept for the shape of the new law of admiralty jurisdiction.

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<sup>24</sup> See Kirby, M D, 'The ALRC: A Winning Formula' (2003) 82 *Reform* 58, 60.

<sup>25</sup> ALRC Report, 3-4 [2].

<sup>26</sup> Australian Law Reform Commission, *An Australian Admiralty Act: The Ambit of Admiralty Jurisdiction*, Reference on Admiralty Jurisdiction, Research Paper No 1 (1984); Australian Law Reform Commission, *Admiralty Jurisdiction in Australia: The Courts Exercising Original and Appellate Jurisdiction*, Reference on Admiralty Jurisdiction, Research Paper No 2 (1984); Australian Law Reform Commission, *Draft Legislation: Admiralty Procedure and Rules*, Reference on Admiralty Jurisdiction, Research Paper No 3 (1985).

<sup>27</sup> Australian Law Reform Commission, *Admiralty Jurisdiction*, Discussion Paper No 21 (1984).

<sup>28</sup> ALRC Report, 4 [4]. The list of submissions is contained in Appendix B to the Report.

<sup>29</sup> *Ibid*, 63 [92].

<sup>30</sup> *Ibid*, 63 [91].

<sup>31</sup> *Ibid*, 63 [92].

<sup>32</sup> *Ibid*, 63 [93].

<sup>33</sup> *Ibid*, 64 [94].

<sup>34</sup> *Ibid*, 64 [94].

The ALRC posed a threshold question of whether, in formulating its proposals for a new law of admiralty jurisdiction, the existing English law should be adopted or a new and uniquely Australian law should be codified. Following the English law had the advantage of drawing on an extant body of precedent of a large maritime power whose cases could be called upon in deciding cases. This was an important consideration in Australia given that ‘in terms of admiralty litigation, Australia is a small country’ and therefore unlikely to generate quickly a detailed jurisprudence of admiralty jurisdiction of its own.

On the other hand, the ALRC recognised that some of the existing English law was obscure. Many of the relevant precedents still dated from the 19th century. The ALRC therefore decided to take the sensible course of adopting English admiralty law notions where they had a well understood meaning and seeking to provide clear legislative guidance in areas which they left uncertain.<sup>35</sup> Professor Crawford said of the process:<sup>36</sup>

[T]he Commission adopted an empirical approach, based upon a full study of relevant overseas developments: in the end, the question was whether particular proposals were, all things considered, desirable or preferable. In determining that question, particular stress was placed on achieving clarity and consistency in the law, and especially as to the relationship between admiralty and other areas of the law such as insolvency. At the same time the Report sought to derive as much advantage as possible from the special features of admiralty jurisdiction.

## The Parliamentary Process

The *Admiralty Bill* 1988 (Cth) was introduced into the House of Representatives on 24 March 1988.<sup>37</sup> During the second reading speech, the Attorney-General, Mr Lionel Bowen, acknowledged: ‘The Bill follows the recommendations contained in report No. 33 on civil admiralty jurisdiction prepared by the Australian Law Reform Commission and issued at the end of 1986.’<sup>38</sup>

The report was well received by the Parliament. Indeed, the Attorney-General commented that:<sup>39</sup>

The report is a comprehensive analysis of admiralty jurisdiction and the Government, in seeking reactions to the report, found widespread support for early implementation of the recommendations contained in it. I commend the Commission for its report, which has been widely praised.

During the Committee stages in the House of Representatives, the Government proposed three minor amendments to the Bill, which were agreed to by the Opposition. On 26 April 1988 the Bill was then read a third time in the House.<sup>40</sup> The first, second and third reading of the Bill in the Senate all occurred on 28 April 1988.<sup>41</sup> The Bill was given the Royal Assent on 22 May 1988. It entered into force on 1 January 1989.

## Evaluation of the Act

The Act was generally well received. While it was evolutionary and not radical, there can be no doubt that it marked an enormous advance on the state of admiralty law before its enactment.

Professor Crawford gave the following evaluation of the success of the Act during his fifth Ebsworth & Ebsworth Maritime Law Lecture in 1996:<sup>42</sup>

As a matter of impression from the reported cases, one gains the sense that the Act is working reasonably well, and that the courts are striking a reasonable balance between respect for international trends and developments and an independent view of the merits of particular interpretative issues.

A later assessment of the success of the Act was made by Mr Stephen Thompson in a paper delivered at the 29th Annual Conference of this Association in October 2002:<sup>43</sup>

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<sup>35</sup> See *ibid*, 67-68 [95].

<sup>36</sup> Crawford, above n 4, 525.

<sup>37</sup> Hansard (H of R) 24 March 1988, 1336 (Lionel Bowen, Attorney-General).

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid*.

<sup>40</sup> Hansard (H of R) 26 April 1988, 2073.

<sup>41</sup> Hansard (H of R) 28 April 1988, 2051 and 2055.

<sup>42</sup> Crawford, above n 4, 535.

After nearly 14 years, the [Admiralty] Act has survived without substantial amendment, and has been the subject of only limited High Court consideration.

This rather uncontroversial history is perhaps not surprising given the Act's pedigree in the form of the ALRC 33, and the preceding reviews referred to in it.

While the Act has generally had an 'uncontroversial history' like everything and everyone else in Australia, it has not been free of criticism. Thus, it has been criticised for failing to extend the scope of admiralty jurisdiction broadly enough to protect sufficiently the interests of Australian shippers;<sup>44</sup> and this despite recognition by the ALRC of Australia's status as predominantly a country of shippers, not ship owners.<sup>45</sup> Australians still encounter a number of significant difficulties that prevent them recovering from foreign ship owners.

The primary difficulty faced by Australian plaintiffs is that of establishing ownership. In his recent Cooper Lecture, Justice James Allsop pointed out that the requirement that the arresting party prove, on a final basis, that the allegedly liable party *owns* the ship in question is often an onerous and complex task.<sup>46</sup> The problem is perpetuated by the general unwillingness of Australian courts to lift the corporate veil.

The expansion of admiralty jurisdiction to include surrogate ship arrest was an important recommendation of the ALRC Report.<sup>47</sup> Section 19 of the Act provides that:

A proceeding on a general maritime claim concerning a ship may be commenced as an action *in rem* against some other ship if:

- (a) a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first-mentioned ship; and
- (b) that person is, when the proceeding is commenced, the owner of the second-mentioned ship.

Accordingly, the ships which an operator owns comprise a series of funds that are available in actions *in rem* in respect of claims against that particular operator arising out of the operator's involvement with other ships. These provisions can, however, be circumvented by operators with relative ease. This fact was illustrated by *Kent v The Vessel Maria Luisa*.<sup>48</sup> The Full Court of the Federal Court's decision held that:<sup>49</sup> 'a party who owned all the relevant units in a unit trust of which a company in which it owned all the shares was the *trustee*, [and] was not the *owner* of the ship which was the only trust property'.

The courts' refusal in Australia to lift the corporate veil means that it is often possible to avoid surrogate ship arrest by simply 'interposing a wholly-owned subsidiary and/or a unit trust'.<sup>50</sup> As Professor Martin Davies pointed out in his 2003 speech to the 30<sup>th</sup> Annual Maritime Law of Australia and New Zealand Conference, 'this puts Australian plaintiffs at a distinct disadvantage when proceeding against foreign ship operators, who routinely set up shipowning structures designed to utilise the corporate veil to the maximum extent possible'.<sup>51</sup>

At first glance, the decision in *The Iron Shortland*<sup>52</sup> appears to have made it a little easier for claimants to proceed *in rem* against ships under the Act and to arrest them as security. By interpreting 'owner' (which is not defined in the Act) as including 'beneficial' as well as 'registered' owner, Justice Ian Sheppard extended the scope of Australian admiralty jurisdiction. Professor Davies points out that the decision seems to circumvent the

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<sup>43</sup> Thompson, S, 'The Admiralty Act 1988 Reviewed' (Speech delivered at the 29th Annual Conference of the Maritime Law Association of Australia and New Zealand, Melbourne, 3 October 2002), 8.

<sup>44</sup> Fryberg, H, 'The Admiralty Act 1988' (1989) 19 *Queensland Law Society Journal* 505, 508.

<sup>45</sup> ALRC Report, 63 [93].

<sup>46</sup> Allsop, J, 'Lecture in Memory and Honour of the Honourable Justice Richard Cooper: Australian Admiralty and Maritime Law — Sources and Future Directions' (2007) 26 *University of Queensland Law Journal* 179, 199.

<sup>47</sup> See ALRC Report, 153-161 [201]-[209], especially 155 [204].

<sup>48</sup> [2003] FCA 93.

<sup>49</sup> Emphasis added. Cf Allsop, above n 46, 199.

<sup>50</sup> Davies, M, 'International Perspectives on Admiralty Procedures' (Speech delivered at 30th Annual Maritime Law of Australia and New Zealand Conference and AGM, Brisbane, 1-3 October 2003), 2.

<sup>51</sup> *Ibid*, 2-3.

<sup>52</sup> *Malaysian Shipyard and Engineering Sdn Bhd v The Ship Iron Shortland* (1995) 59 FCR 535.

problem of a chain of one-ship subsidiaries.<sup>53</sup> However, while the decision does not lift the corporate veil, it ‘allows the claimant to peer through it if it is sufficiently diaphanous.’<sup>54</sup> Nevertheless, claimants are still faced with the practical difficulty of demonstrating:<sup>55</sup>

that the fleet ‘owner’ beneficially owns *the ships* and not merely the shares in the companies that own the ships. To do this, it must effectively show that the registered owner is a mere shell, and the effective disposition of the ship lies with the fleet owner, not the one-ship companies.

A plaintiff must also find such evidence before arresting the surrogate. This can be particularly difficult when the shipowner is a foreign entity. Failure to gather the evidence puts a plaintiff in danger of having damages for wrongful arrest awarded against it on the basis of arresting the ship ‘unreasonably and without good cause’ within s 34(1) of the *Admiralty Act*. Professor Davies therefore suggests that, while the decision in *The Iron Shortland* ‘appears at first sight to be very promising from the perspective of potential claimants, that promise is like the allure of the Venus Fly Trap — more deadly than delightful’.<sup>56</sup>

## Some Future Challenges

*Extending the scope of admiralty jurisdiction:* At first glance, it appears arguable that what Australian admiralty law needs is for courts to take a different, more realistic, approach as to how they should treat the corporate form. Many other countries, which have a similar approach in terms of their written law, are prepared to look through corporate structures to ascertain whose actual financial interests are involved in the administration of this area.<sup>57</sup>

The most extensive statutory provisions in this regard are probably those contained in the South African *Admiralty Jurisdiction Regulation Act 1983* (S Af). Section 3(7) of that Act, in effect, aggregates for admiralty purposes all one-ship companies under group ownership. It ‘lifts the corporate veil’ by circumventing the widespread arrangement of a fleet of one-ship companies which are owned by a holding company. Thus, the potential for associated ship arrest is greatly enhanced.

The ALRC considered these South African provisions in preparing its report. It concluded, however, that ‘a special provision in the [Australian] legislation was undesirable.’<sup>58</sup> The Commission considered that, conceptually, it was more appropriate for questions of the liability of corporate groups to be addressed in a context of company or insolvency law. I can understand this conclusion.

The notion of lifting the corporate veil is one that is easy to propound but is potentially risky. It has a potential to spread like wildfire leaving little of the brilliant idea of separate corporate identity in its wake. The concept of incorporation and of corporate identity, separate from the shareholders, officers and staff, is one of the most brilliant and beneficial inventions of the English law, of which we in Australia are beneficiaries. The corporation today dominates international trade and commerce, including maritime trade and commerce. It encourages risk-taking that is vital to economic progress and inventiveness. Of course, it has down sides. It is abused. There are corporate cowboys. There are frauds and cheats and individuals who walk away from their clear moral responsibilities. However, demands for exceptions to separate corporate personality are easy to make. Lifting the corporate veil is a demand often advanced. In admiralty law, as everywhere else, we must tread warily. If exceptions are to be provided this should be done with the greatest of care. Otherwise, we might find that we destroy a central concept of our legal system that has proved so beneficial. Without prudence we could effect great changes in much the same way as the British Empire was said to have been built — in a fit of absence of mind.

One method of extending the admiralty jurisdiction without the dangers of lifting the corporate veil, could be to utilise the concept of attachment. This is employed both in South Africa and the United States of America. I will focus on the United States legislation on attachment as an illustration of what might be done.

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<sup>53</sup> Davies, M, ‘What is “Ownership” for the Purposes of Ship Arrest under the Admiralty Act 1988 (Cth)?’ [1996] *Australian Business Law Review* 24, 79.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, 76.

<sup>57</sup> Allsop, above n 46, 199.

<sup>58</sup> ALRC Report, 108.



There is no procedure for associated ship arrest, as such, in the United States. A plaintiff may only arrest the wrongdoing ship itself, by proceeding against it *in rem*. In addition to the procedure for an arrest, however, there is a parallel procedure for a maritime attachment, which is much broader in scope. Rule B(1)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims (US) provides that:

If a defendant is not found within the district, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of the garnishees named in the process.

Like Australia's surrogate ship provisions, the United States Rule allows a claimant to attach any ship owned by the person who would be personally liable. It extends, however, beyond the scheme of the Australian surrogate ship provisions because it enables attachment of the defendant's property, regardless of whether that property has anything to do with the claim.

The ALRC considered attachment only in the context of a substitute for admiralty jurisdiction. Professor Davies has argued that it was unfortunate that the Commission did not consider the possibility of incorporating attachment as part of the admiralty jurisdiction, assuming (as I also would) that this would create no constitutional difficulty in Australia.<sup>59</sup> Indeed, it is worth noting that United States attachment grew from the Civil Law tradition of the English courts of Admiralty. It has since been abandoned in English law. So, whilst attachment does not provide a complete solution to the one-ship company structure, Professor Davies argues that adoption of the American-style attachment procedure would be desirable.

The issue of how to address the difficulties faced by Australian plaintiffs is a matter of policy which, 'require[s] substantial industry input'.<sup>60</sup> In the field of admiralty law, it is always necessary to balance domestic national interests with the interests of harmony in the international maritime community.<sup>61</sup> And it is always necessary for Australians to remind themselves of our national dependence on shipping lines and that we are a small player in a growing global market for maritime services.

*Conflict of laws:* A further challenge that arises in the context of admiralty jurisdiction is how to manage the divergences between admiralty jurisdiction in Australia and in other nations. For example, there are a number of acts or events that give rise to maritime liens under United States law but not under Australian law.<sup>62</sup> Australian plaintiffs may be disadvantaged if Australian courts were to give effect to a foreign maritime lien which would arise under a foreign law, but not under Australian law. This topic was explicitly left unresolved in the ALRC Report.<sup>63</sup> Given other recent Australian developments in the field of private international law, it could be timely to submit this issue to fresh attention.

*Developing an international framework:* Another issue that Australia must certainly address is its contribution towards a developing international framework of admiralty jurisdiction. A decade ago Professor Crawford pointed out that 'an international framework in reality means a diffuse and rather uncoordinated long-term movement towards some level of harmonisation of standards, practices and norms'.<sup>64</sup>

In accordance with this responsibility, the courts have demonstrated an increased readiness to consider comparative and international experience and standards in construing the concept of 'Admiralty and maritime jurisdiction' in s 76 (iii) of the Constitution. This was reflected in the High Court's decision in the *Shin Kobe Maru* case. The Court there stated:<sup>65</sup>

Ordinary principles of constitutional interpretation ... direct an approach which allows that s 76(iii) extends to matters of the kind generally accepted by maritime nations as falling within a special jurisdiction, sometimes called Admiralty and sometimes called maritime jurisdiction, concerned with the resolution of controversies relating to maritime commerce and navigation.

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<sup>59</sup> Davies, above n 50, 8.

<sup>60</sup> Harvey, M, 'Arresting Surrogate Ships: Who is an Owner?' (2004) 18 *Maritime Law of Australia and New Zealand Journal* 82.

<sup>61</sup> Allsop, above n 46, 180.

<sup>62</sup> See Davies, M, and Lewins, K, 'Foreign Maritime Liens: Should they be Recognised in Australian Courts?' [2002] 76 *Australian Law Journal* 775; Crawford, above n 4.

<sup>63</sup> ALRC Report, 91-92 [123].

<sup>64</sup> Crawford, above n 4, 538.

<sup>65</sup> *Owners of the Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404, 424.

As legal standards gradually become harmonised across nations, the previous conflict of laws problems will gradually be reduced. But they remain present today.

## Some Constitutional Considerations

In an examination of reforms to existing admiralty jurisdiction, it is necessary to keep in mind the ambit of s 76(iii) of the Australian Constitution, and, in particular, the principle laid down in *The Kalibia*.<sup>66</sup>

Section 76(iii) was modelled on Art 3, s 2 of the United States Constitution. In *The Kalibia*, it was argued that as the American courts had interpreted Art 3, s 2 as including the power to legislate substantively in relation to admiralty and maritime law generally, a similar construction should be adopted when interpreting s 76(iii) of the Australian Constitution. However, in 1910 Griffith CJ, Barton J and Isaacs J held that, under 76(iii) of the Australian Constitution, the Federal Parliament has power to make laws on the subject of admiralty and maritime *jurisdiction*, but it does not have power to alter admiralty and maritime law *in substance*, other than by reliance on other heads of power in s 51 of the Constitution.

In reaching this conclusion, particular emphasis was placed by Barton J on the fact that, unlike the United States, Australia was not then a 'separated nation of independent sovereignty in its relation to the United Kingdom'.<sup>67</sup> Over the High Court in those days was the *Colonial Courts of Admiralty Act*, the imperial Privy Council and the home-grown notion of the reserved powers of the Australian States, so clear in the minds of the foundation justices of the Court all of whom had been delegates at the Conventions.

The continuing legitimacy of the principle laid down in *The Kalibia* must now be regarded as questionable. Indeed, the opinion of Gummow J in *The Shin Kobe Maru* raises explicit doubts about it. His Honour there noted that Barton J's reasoning 'no longer represented the modern constitutional position'.<sup>68</sup> Furthermore, the views of Griffith CJ, Barton J and Isaacs J on this issue have been treated as *obiter*<sup>69</sup> — inessential to the actual orders made in *The Kalibia*.

Resolution of this issue is relevant in considering reform in this area of law. For example, would a provision such as the South African specific power to pierce the corporate veil go beyond the Australian constitutional framework as suggested in *The Kalibia*? The ambit of s 76(iii) is thus a threshold issue that may need reconsideration by the High Court before long. Yet, as we know, the first step in the equation is the enactment of federal legislation that depends upon a different constitutional postulate. Such is the way in which constitutional boundaries are normally tested. So far the test has not been presented.

## In Praise of Law Reform Bodies

*Reports aid interpretation*: I have noted elsewhere<sup>70</sup> that, whilst there was initially some hostility and scepticism towards the ALRC from some members of the judiciary and legal profession in Australia, reports of the Commission are now used without question and with utility as an aid to the interpretation of legislation that has been enacted to implement the ALRC proposals or to cast light on related law. This is now common in all Australian courts. A whole generation of lawyers has come to maturity with an appreciation of the utility of institutional law reform investigations in this country. Such bodies are now part of the legal and institutional furniture.

The Civil Admiralty Jurisdiction Report has been considered by the High Court on three occasions in appeals and on other occasions in special leave applications where the decisions of the courts below have been affirmed. On each occasion, the ALRC Report has assisted the High Court's interpretation of the *Admiralty Act*.<sup>71</sup>

<sup>66</sup> *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689.

<sup>67</sup> *Ibid*, 704.

<sup>68</sup> *Empire Shipping Co Inc v Owners of the Shin Kobe Maru* (1991) 32 FCR 78, 86.

<sup>69</sup> *R v Turner; Ex parte Marine Board of Hobart* (1927) 39 CLR 411, 447-448 per Higgins J.

<sup>70</sup> Kirby, M D, 'Are We There Yet?' in Opeskin, B, and Weisbrot, D, (Eds) *The Promise of Law Reform* (2005) 433, 439-439; Kirby, above n 24, 61.

<sup>71</sup> See *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404, 416-417 and 420 (the Court); *Laemthong International Lines Co Ltd v BPS Shipping Ltd* (1997) 190 CLR 181, 189 (Brennan CJ), 190 and 193-194 (Toohey J), 195 and 204-206 (Gaudron, Gummow and Hayne JJ); *'Iran Amanat' v KMP Coastal Oil Pte Limited* (1999) 196 CLR 130, 136 [15] and 138 [20].

The greatest assistance appears to have been afforded in *Laemthong*.<sup>72</sup> In that case, the High Court was required to consider an issue concerning s 19 of the *Admiralty Act* which dealt with proceedings *in rem* against surrogate ships. That provision relates to surrogate ship arrest. It was an innovation of the *Admiralty Act*. The issue raised by the matter was whether a voyage charterer was not a ‘charterer of ... the first-mentioned ship’ within the meaning of s 19(a).

Three separate reasons were delivered in *Laemthong*. There was an individual opinion published by both Chief Justice Brennan and Justice Toohey and joint reasons published by Justices Gaudron, Gummow and myself. I will not go in to the detail of the Court’s statutory interpretation analysis. But each of the reasons quoted from paragraph 205 of the ALRC Report which discussed the appropriate content of a surrogate ship provision.<sup>73</sup> The reasons of Justices Gaudron, Gummow and myself quoted the following passage:<sup>74</sup>

The appropriate rule is one which, as an alternative to allowing an action *in rem* to be commenced against the wrongdoing ship, allows such an action against a ship owned by the relevant person even though this person is not the owner of the wrongdoing ship. This will occasionally allow an action against a surrogate ship even where there could be no action against the wrongdoing ship. The most obvious examples are where the wrongdoing ship has sunk or been sold (where there is no *droit de suite*). *But another case would be where the claim is by an owner against someone using the owner’s ship on a time or voyage charter.* In such a case the owner has already got possession of his own ship, but he could, under the recommended provision, proceed against any other ship owned by the defendant.

The joint reasons observed that this ‘consideration of matters extrinsic to the text of the Act further supports the conclusions reached earlier in these reasons as to the proper construction of s 19’.<sup>75</sup>

*Bipartisanship*: The ALRC has aimed to be, and I believe has succeeded in being and being perceived to be, bipartisan in its work. In a prior article, in reviewing the ten key principles that have led to the success of the ALRC, I listed ‘strict bipartisanship’ as the first principle. On that subject I wrote that:<sup>76</sup>

[T]he ALRC has worked successfully with federal, state and territory governments of differing political persuasion[s], interests and priorities. The unwavering avoidance of any hint of partisanship has been faithfully observed, a course not only proper but prudent.

The *Admiralty Act* is proof of the importance of this principle and of the success of the ALRC in acting in accordance with it. During the Second Reading Speech in the House of Representatives, Mr Lionel Bowen observed that the ALRC Report ‘followed a reference given to the [ALRC] by the former coalition Government in 1982’.<sup>77</sup> It was the then Labor Government that introduced the *Admiralty Bill* 1988 (Cth) into the Federal Parliament and saw the Bill enacted into law with support and admiration expressed on all sides of the chambers of each House. We need more law reform measures of this kind and especially in areas of the law that tend to get neglected in the political excitement of a parliamentary democracy. I do not wish to be unkind to my present audience but not every citizen, and not every politician, finds admiralty law a subject of fascination and priority.

*Measures of success*: While the implementation of reports of a law reform body like the ALRC is not the only measure of the utility and success of such a body,<sup>78</sup> the enactment in 1988 of the *Admiralty Act*, based on the ALRC Report, is a clear demonstration of the utility of such bodies. Indeed, in replying to the Attorney-General’s Second Reading Speech, Mr Peter Reith for the Opposition observed that:<sup>79</sup>

It is probably the ultimate compliment to the Law Reform Commission that the Bill it proposed in fact becomes law. In this case the Bill before the Parliament is very nearly a total adoption by the Government of that Bill recommended by the Law Reform Commission. It is thus a mark of respect to the quality of the report that its recommendations should be so comprehensively adopted.

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<sup>72</sup> (1997) 190 CLR 181.

<sup>73</sup> *Laemthong*, above n 71, 189 (Brennan CJ), 194 (Toohey J), 204 (Gaudron, Gummow and Kirby JJ).

<sup>74</sup> ALRC Report, 158 [207] (Emphasis added, footnotes omitted.)

<sup>75</sup> *Laemthong*, above n 71, 205.

<sup>76</sup> Kirby, above n 24, 59.

<sup>77</sup> Hansard (H of R), above n 37.

<sup>78</sup> See Kirby, ‘Are We There Yet?’, above n 70, 437-441.

<sup>79</sup> Hansard (H of R), 21 April 1988, 2035 (Peter Reith). See also Hansard (H of R), 26 April 1988, 2070 (Eamon Lindsay).

## Returning to Port

Professionalism. Integrity. Widespread consultation of the relevant interests. Bipartisanship. Building on earlier work within the legal profession and thinking in the target industry. These were the hallmarks of the ALRC project on admiralty jurisdiction that was completed twenty years ago. We can be proud of that report as an example of what can be done. Bodies such as this Association need to support the ALRC. Indeed, the time may have arrived when the Association and the Law Council could suggest a follow-up investigation to bring the *Admiralty Act* and maritime law generally up to date, twenty years on. There are several issues that could be timely for fresh consideration:

- Reform of the structure of alternative dispute resolution in maritime disputes;<sup>80</sup>
- Consideration of whether the scope of admiralty jurisdiction could and should be expanded in Australia to extend to inland waterways and the use of ‘ships’ and other ‘vessels’ on inland waters;<sup>81</sup>
- Consideration of any relevance, by analogy, of admiralty law and jurisdiction for aviation claims;<sup>82</sup>
- Examination of conflicts of laws issues affecting maritime disputes;<sup>83</sup> and
- The inter-relationship of maritime law and environmental protection.

I look on the ALRC’s Report on admiralty law in Australia as an outstanding start — but only a start — to providing our island nation with an up to date and technologically adapted law on maritime issues. I endorse the opinion expressed in the House of Representatives by Mr Eamon Lindsey:<sup>84</sup>

[The ALRC Report] will stand as a milestone of competence by the Australian Law Reform Commission and will bring to the legal profession, including judges, who will be involved in administering Australia’s admiralty law, a piece of legislation which is easily understandable and able to be easily adjudicated.

It is unhealthy to rest on institutional laurels. Or for old men to gather to congratulate themselves on the past. I have previously suggested that the ‘most enduring polities and economies are those that have inbuilt methods of updating the law and removing the barnacles of injustice and inefficiency’.<sup>85</sup> Although the ALRC approach was ‘revisionist rather than revolutionary’,<sup>86</sup> its Report was undoubtedly effective in clearing many of the barnacles from the fast moving ship of admiralty jurisdiction. It is probably now time to reassemble the enterprise of reform, to muster a new crew and to look afresh at the issues presented to the law and the courts of Australia by this vital national and international industry. It links our nation, its people and its trade to different parts of the continent and to the different parts of the region and the globe. It is part of the imagery of our establishment and development as a modern nation. Things move on and there are new worlds to conquer.

There is something especially stimulating about maritime law. It is at once deeply historical and vibrantly modern. It is replete with old precedents; yet constantly challenged by new ideas and new technology. It is local and international. Indeed, as I look back on my long public career in the law, I cannot imagine another area of the law more worthwhile and fascinating, if I were starting out, to engage with and to make the specialist focus of my life in the legal profession. When I retire from the High Court in eighteen months time, I may even come knocking on Ebsworth & Ebsworth’s door and see if, by chance, I can have my old job back.

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<sup>80</sup> See Allsop, above n 46, 200.

<sup>81</sup> See *Admiralty Act 1988* (Cth) definition of ‘ship’ and ‘vessel’. Cf *Jackson v The Steamboat Magnolia* 61 US (20 How) 296 (1857); Allsop, above n 46, 190-191.

<sup>82</sup> See Davenport, B, ‘Proposed Reforms of Admiralty Jurisdiction in Australia’ *Lloyd’s Maritime and Commercial Law Quarterly* [1987] 317, 319; Crawford, above n 4, 522; Bartsch, R, *Aviation Law in Australia* (2<sup>nd</sup> Ed, 2004), 8.

<sup>83</sup> See Davies and Lewins, above n 62; Crawford, above n 4, 526-7.

<sup>84</sup> Hansard (H of R), 26 April 1988, 2073.

<sup>85</sup> See Kirby, ‘Are We There Yet?’, above n 70, 444-445.

<sup>86</sup> Crawford, above n 4, 525.

As is ever the case with law reform, ongoing re-examination of the law is always required. This is particularly the case in this context given the responsibility of Australia to contribute to a developing international framework of modern admiralty jurisdiction. Important work was achieved by the ALRC twenty years ago. I pay tribute to the Commission for its success. But the greatest tribute that could be paid for its earlier achievements would be a new reference from the Attorney-General to strike out more boldly than was then appropriate upon new boundaries of admiralty law and jurisdiction suitable to a new age, with new technology, new analogies and new thinking for one of the oldest established categories within the legal discipline.