5. CURRENT TOPICS

A. ADMIRALTY JURISDICTION

In March 1983 the Australian Law Reform Commission sought the views of the Association and its members as to whether concurrent or exclusive Admiralty jurisdiction should be conferred upon the Federal Court of Australia. After seeking the views of the Australian branches of The MLAANZ, a comprehensive letter was sent to the Chairman of the Australian Law Reform Commission, Mr Justice Kirby. The text of that letter is set out below.

Dear Judge

Reference is made to your letter of 21 March 1983 in which you sought the views of the Association and its members as to whether concurrent or exclusive jurisdiction in Admiralty matters should be conferred upon the Federal Court of Australia.

In your letter of 21 March 1983 you referred to a number of arguments having been advanced in favour of exclusive jurisdiction in Admiralty matters being conferred upon the Federal Court and listed some of the reasons for that view. They included:

1. The desirability of replacing the original jurisdiction of the High Court of Australia with jurisdiction in a subordinate national court.
2. The desirability of preserving nationwide jurisdiction in a single national court particularly to deal with the problem of moving ships and the limited availability of Admiralty expertise in some of the smaller cities of Australia.
3. The desirability of developing a coherent Australian Admiralty jurisprudence.
4. The availability in the Federal Court of at least one judge with specific interest and experience in and knowledge of Admiralty law and practice.
5. The established field of expertise of many Federal Court judges in commercial litigation.
6. The general desirability of discouraging the drift of Admiralty disputes to arbitration in overseas countries said to arise, in part at least, by reason of the lack of developed expertise in the smaller centres of Australia.

The Recommendations of the Joint Committee

The Joint Committee of the Law Council of Australia and The Maritime Law Association of Australia and New Zealand discussed the following question at paragraph 13 in its Report: "[w]hat is the most appropriate court system for Australian Admiralty jurisdiction?"

The Joint Committee were of the opinion that there were seven alternative court systems to choose from. They were:

(a) Exclusive jurisdiction in the Federal Court of Australia;
(b) Creation of dual jurisdiction;
(c) Invest State courts with federal jurisdiction with an appeal to the Federal Court of Australia;
(d) Invest State courts with federal jurisdiction but continuing the existing channels of appeal in Admiralty from Supreme Courts;
(e) Retain both the High Court's original and its appellate jurisdiction in Admiralty;
(f) Confer upon County or District Courts a restricted jurisdiction in Admiralty similar to that conferred upon County Courts in England;
(g) Confer upon Magistrates' Courts a restricted jurisdiction in Admiralty similar to that conferred upon Magistrates' Courts in New Zealand.

The Joint Committee favoured investing State courts with federal jurisdiction but continuing the existing channels of appeal in Admiralty from Supreme Courts (d) and the retention of the High Court's original and appellate jurisdiction in Admiralty (e).

The main reasons, which emerge from the Joint Committee Report, for rejecting the first alternative (a), that is giving the exclusive jurisdiction to the Federal Court, was that it would be

> contrary to the long history of involvement of the States in admiralty jurisdiction matters; and it would be inconvenient in practice . . . The nature of admiralty proceedings and the emergency situations in which such proceedings often occur call, in our view, for a continued decentralization of admiralty jurisdiction through the States and Territories.[1]

It is apparent from the choice of alternatives (d) and (e) by the Joint Committee that it was felt that there is considerable benefit to be gained in retaining the original jurisdiction of the High Court and that the giving of federal jurisdiction to the State courts would have the benefit of dealing with the problem of moving ships.

The Views of the Branches of The Maritime Law Association of Australia

On receipt of your letter of 21 March the Executive Committee referred the matters raised by you to the branch secretaries in each State of the Association. The response which has been received is overwhelmingly in favour of retaining jurisdiction in the State Supreme Courts. The following responses were received.

[1] Para. 13.3(a) of the Report of the Joint Committee of the Law Council of Australia and The Maritime Law Association of Australia and New Zealand on Admiralty Jurisdiction in Australia.

Queensland Branch

The Queensland Branch is very strongly of the view that the State Supreme Courts should not be deprived of Admiralty jurisdiction and that, therefore, any attempt to give the Federal Court exclusive Admiralty jurisdiction should be strenuously resisted. There are a number of sound reasons for this. As you may be aware, the Queensland Supreme Court has district registries in many country centres and, in particular, in ports such as Cairns, Townsville, Mackay and Rockhampton. The Supreme Court goes on circuit to all those (and other) centres and, in addition, there is a judge permanently stationed in each of Townsville and Rockhampton. Consequently, it is possible to commence an Admiralty action, whether *in rem* or *in personam,* in all of the significant ports of the State and to have the action heard in such port. This is an important consideration as the bulk of actions *in rem* concern small vessels such as fishing boats and are more likely to arise outside the south-east Queensland area than within that area.

The Federal Court does not have any registry in Queensland outside Brisbane and it would be impractical to establish registries to service the variety of provincial ports serviced by the Supreme Court. The advantage of being able to issue a writ *in rem* and arrest a vessel in most significant ports in the State quickly and without having to file documents in Brisbane should not be underestimated.

Similarly, the convenience to the parties and witnesses of being able to have the trial in the area in which they work and reside, rather than in having to travel several hundred miles to a capital city, should be emphasised.

The suggestion that professional Admiralty expertise is confined to Sydney and Melbourne is, of course, resented. Without wishing to appear parochial (and without the benefit of firm statistics) it is the impression of this Branch that there are probably as many Admiralty actions underway in this State at any given time as in any other State, in part because of the large number of fishing vessels operating from ports within this State and the large volume of bulk mineral exports originating in Queensland. Because of the decentralised development of the State there are more significant ports outside the capital city in Queensland than in any other State.

As for the expertise of the judiciary, there are certainly judges of the Supreme Court of Queensland with at least as much experience of the Admiralty jurisdiction as has any judge of the Federal Court and I understand the position is similar in some other States.

Western Australian Branch

I do not think that is is possible to make a comprehensive consideration of the benefits or otherwise of the Federal Court having concurrent or exclusive jurisdiction in Admiralty without first knowing what the mechanics of the two alternatives would be. By this I mean

that it must be necessary to have an accurate idea of how the Federal Court will be modified in its practice, increased in size, improved in its accessability and mechanics so as to cater for the demands of this very important jurisdiction. For the present at least, my comments on the proposal must be limited to the Federal Court in its operation as we now know it in Western Australia.

I would submit that there are many persuasive reasons why it is crucial to retain Admiralty jurisdiction in the State Supreme Courts. The following are some of those reasons. It is conceded that some may be peculiar to our State.

1. We have in Western Australia only one resident Federal Court judge. I am led to believe that his work load is very heavy as well as being varied. In almost every case where a plaintiff proceeds in Admiralty it will be in urgent situations. The essence of modern shipping is quick turnabout — preventing delays to ships. In the case of container ships for example they may be in a port for only 18 hours. A bulk carrier can be loaded at 5,000 mt. per hour and will be in and out within a matter of two days. A plaintiff must, therefore, have urgent accessability to judges and the court so as to achieve an arrest on very short notice. It is of equal importance to a defendant ship and her interests to have accessability to judges and the court in situations where having been arrested, release must be arranged urgently. Invariably such release will follow the arrangement of security and this security is provided by foreign interests of the arrested vessel such as P. & I. Associations, foreign banks and hull underwriters. As luck would have it, such security is usually not arranged until Friday night. This may mean that a judge has to be made available after hours to order the release. Similarly, it is necessary in some cases to make other urgent interlocutory applications to a judge after hours, for example, to permit an arrested vessel to change berths, go to anchor, or work cargo. In Western Australia the Marshall requires such an order before such things can be done. Obviously, in such situations the more judges available, the more conveniently these urgent matters can be seen to. Arranging such applications with only one judge locally available would be difficult, to say the least.
2. This is related to point 1 above and, again, concerns the availability of the judiciary. Because of their very nature, actions in Admiralty commonly give rise to jurisdictional arguments. It is not uncommon for a defendant to conditionally appear to an Admiralty action as a matter of course pending further investigation as to a jurisdiction contest. Our present archaic Admiralty jurisdiction provides much

potential for jurisdictional arguments. For example, in claims for necessaries against vessels on time charter an argument by the owner that he is not liable is often encountered as the basis for an immediate application to set aside. In such cases preparation for contests must be done locally, including preparation of affidavit evidence. A locally available judge to preside is essential. The alternative to this must mean significantly increased costs and, most important to a shipowner, time delays.

3. In the case of vessels such as liner service operators to a particular port only, (several of which we have in Fremantle trading to South East Asia, Japan and west coast of America ports), they have their financial and operational bases here. If such a vessel was arrested by an Eastern States entity, which is not uncommon, an exclusive federal jurisdiction may then require negotiation of the security to effect release in the place where the proceedings were taken out, for example, Sydney. This would again mean having to involve an extra link in the chain to arrange security. Admittedly this can now occur with the High Court Registry although in practice it does not seem to. Most claimants will avail themselves of the Supreme Court jurisdiction rather than the High Court.
4. In Western Australia there are operating 1,325 vessels in our rock lobster industry. As well as this, most of Australia's largest and most successful prawn trawling fleets are operated from Fremantle. West Australia's main port is Fremantle. Some ten miles south of Fremantle are situated an alumina/caustic soda jetty (Alcoa), an iron/steel jetty (A.I.S.), B.P. Refinery, F.P.A. bulk cargo jetty and co-operative bulk handling jetty, which is the most modern and largest grain terminal in the Southern Hemisphere. From Fremantle, Geraldton, Albany and Esperance are shipped the bulk of the country's livestock. The country's main livestock operators, which include the world's largest, are based in Perth. There are five large iron ore facilities exporting ore in bulk from West Australian nor-west ports. Several years ago Port Hedland was (in tonnage terms) the world's fourth largest port. I mention this to illustrate the extent of shipping in this State. I believe that in our Supreme Court there would be as many, if not more, Admiralty actions taken each year as in any other State. In West Australia there have been more reported decisions in salvage cases than in any other State. It is nonsense to suggest that there is not the ability or experience in this State, both in the judiciary and practitioners, to properly handle even the most compli-

cated of Admiralty matters. Our history shows this. Indeed, I know of occasions where Admiralty practitioners in this State have been called upon to assist in allied problems in such places as Singapore and Indonesia.

5. In West Australia, which is Australia's largest exporter of bulk cargoes, and with by far the greatest coastline, we have more potential for Maritime casualty than any other State. Off-shore gas and petroleum exploration have more recently increased such potential. For this reason, it must be in the interest of those associated with the Maritime industry — shipowners, jetty owners, exporters, importers, stevedores, tugowners, etc. — to have continued immediate access to local courts and local lawyers to provide this. An exclusive jurisdiction, as I understand how it may operate, could deprive them of this and result in substantial cost increase.

If the present system is to be altered it may be preferable to give the Federal Court concurrent jurisdiction with the State Supreme Courts. One long term advantage of this would be to develop expertise in the judiciary in such matters. The other advantage is to serve proceedings in another State.

New South Wales Branch

We can see advantages in State and Territory Supreme Courts (on the one hand) and the Federal Court (on the other hand) having concurrent jurisdiction. There is already considerable expertise in the State and Territory Supreme Courts in Admiralty and it would be a very great pity to waste that expertise. Furthermore, we do not see the Federal Court as being the appropriate forum for Admiralty matters affecting purely local events such as a collision between two fishing boats on Sydney Harbour.

South Australian Branch

Whilst South Australia has a much shorter coastline than either Queensland or Western Australia and, thus, giving Admiralty jurisdiction to the Federal Court might not present quite so many practical difficulties here as in those States, it is felt that what is obviously seen to be a lack of Admiralty expertise in the profession and the judiciary in South Australia would not be resolved by investing the Federal Court with Adimarlty jurisdiction. Indeed, despite the limited availability of Admiralty expertise to which the Chairman of the Law Reform Commission alludes, it was felt that it should be mentioned that two of the decisions referred to on page 36 of the Joint Committee's Report were South Australian cases. Whilst admittedly there is not the volume of Admiralty work available in this State, it does appear that there is sufficient expertise, both in the profession and in the judiciary, to cope with such matters when they do arise. As in Western Australia, in South Australia there is only one resident Federal Court judge.

Victorian Branch

It is our view that the Supreme Courts of the States are the more appropriate courts on which to confer federal jurisdiction. Whatever may be the position in the future, at this stage, the development of the Federal Court structure in States other than Victoria and New South Wales is clearly insufficient to support the needs which will arise in Admiralty cases.

Summary

Insofar as jurisdiction at first instance is concerned there would seem to be a strong feeling amongst the branches of The MLAANZ for retaining Admiralty jurisdiction in the Supreme Courts not only for the obvious benefit of retaining the expertise which has been developed over many years by those Courts and the judges administering them but also for cogent practical reasons.

Not only are there practical advantages of being able to issue writs *in rem* and arresting vessels in most significant ports in the State expeditiously and more cheaply than would otherwise be the case but this also assists in promoting expertise outside the capital city. There is clearly greater convenience to the parties and witnesses in being able to have trials in the areas in which they work and reside rather than in having to travel several hundred miles to a capital city.

Although it is probably true to say that the majority of actions relating to cargo take place in Sydney and Melbourne there would probably be as many if not more Admiralty actions arising from collisions between fishing vessels and small craft in Queensland and, particularly, arising in ports other than Brisbane than in any other State in Australia. Although much Admiralty work is generated by fishing vessel activity, the large volume of bulk mineral exports originating in Queensland and Western Australia should not be overlooked as a source of litigation work in the Admiralty jurisdiction in those two States. The majority of those exports do not, of course, take place from Brisbane or Fremantle but from the other ports in those States.

Alternative Submission to that of the Joint Committee

If the Law Reform Commission is not in favour of the court system proposed by the Joint Committee and to which reference was made earlier, as an alternative, there would seem to be merit in conferring upon the Supreme Courts of the various States and the Federal Court itself first instance jurisdiction.

It is considered that there are good historical reasons for leaving the Supreme Courts of the States with their Admiralty jurisdiction and no reason why, if the High Court is to lose its original jurisdiction in Admiralty, that jurisdiction should not be conferred upon the Federal Court. By instituting an appellate structure from the State Supreme Courts to the Federal Court assistance would be given to the develop-

ment of a coherent Australian Admiralty jurisprudence. By permitting concurrent jurisdiction to exist between the State Supreme Courts and the Federal Court the problem of moving ships is resolved without destroying the practical advantages, to which reference has been made, of retaining the State Supreme Court jurisdiction.

It is felt that the above comments deal in whole or in part with the first three matters referred to in paragraph 5 of your letter of 21 March 1983. Reference was also made to the availability of at least one judge with a specific interest and experience in and knowledge of Admiralty law and practice as well as there being in the Federal Court judges who had an established field of expertise in commercial litigation prior to taking their appointments in the Federal Court.

The availability of one judge in the Federal Court with Admiralty experience as compared with the availability of a judge specifically appointed to deal with Admiralty matters in some of the States does not bear comparison. Similarly, the availability of Federal Court judges with experience and expertise in commercial litigation is not sufficient reason for removing from the State Courts this area of the law as similar experience and expertise is available in most State Supreme Courts.

In conclusion, the final point raised in paragraph 5 of your letter of 21 March related to the general desirability of discouraging the drift of Admiralty disputes to arbitration in overseas countries by reason of the lack of expertise in the smaller centres of Australia.

It does not seem that the drift of Admiralty disputes to arbitration in overseas countries would be arrested by withdrawing from the State Courts the expertise which is constantly being developed. The reluctance of parties to arbitrate shipping matters in Australia appears more to arise from the lack of expertise amongst arbitrators in Australia and has nothing to do with the court structure in any of the States. A slowing down in the drift of arbitration disputes to overseas countries has been observed in New South Wales in recent times, mainly, it is surmised, due to the speed and flexibility which are the hallmarks of the Commercial List in the Supreme Court. This is seen as a positive advantage over the arbitral process.

The availability of rights of arrest and the greater use being made of mareva injunctions all assist in retaining litigation within Australia. It is thought that the reform of the Admiralty jurisdiction and the expanding of the circumstances in which vessels can be arrested, so as to include charterparty disputation and sistership arrests, for instance, as two specific extensions of the current Admiralty jurisdiction, would facilitate the retention of Admiralty litigation within Australia.

Yours sincerely,
Stuart Hetherington,
Executive Secretary.