

THE SUBSTANCE OF
“OF ADMIRALTY AND MARITIME JURISDICTION”[‡]

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Section 76 of the Constitution provides, inter alia, that:

The Parliament may make laws conferring original jurisdiction on the High Court in any matter –

...
(iii) Of Admiralty and maritime jurisdiction.”

The power to confer “Admiralty and maritime jurisdiction” in section 76(iii) of the Australian Constitution has been a seldom used provision. It was copied from the United States Constitution without significant deliberation by the drafters of the Australian Constitution¹ and its wording does not purport to do anything more than empower the Commonwealth Parliament to legislate with respect to the

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¹ G Lindell “Admiralty and Maritime Jurisdiction: Necessity for Retaining Section 76(iii) of the Commonwealth Constitution” in *Australian Constitutional Convention* (AGPS, Adelaide, 1993) vol II, para 35. See n 6 infra for the text of Art III § 2.

conferral of federal jurisdiction on the High Court.² As such, section 76(iii) has always been open to be interpreted as a limited jurisdictional power by reference to the natural and ordinary meaning of the words "conferring original jurisdiction on the High Court".

However, section 76(iii) is susceptible to two constructions: either the limited jurisdictional construction that has prevailed since the High Court's decision in *The Owners of the Ship "Kalibia" v Wilson*³ in 1910; or a construction that results in a substantive legislative power⁴ (the former construction focusing on the express words, "conferring original jurisdiction", and the later giving effect to the words "Admiralty and maritime" by necessary implication). Accordingly, in considering the Commonwealth's power to amend the admiralty jurisdiction exercised pursuant to the Colonial Courts of Admiralty Act 1890 (Imp), Justice Zelling queried:⁵

Why should we not therefore use section 76(iii) as a substantive power to delineate the contours and outer boundaries of the Admiralty and maritime jurisdiction so given?

It is in response to this query that this paper attempts to consider why that substantive construction is required to amend jurisdiction, and then to consider the nature of the substantive legislative power sought by Justice Zelling. The approach adopted is to consider both the United States experience in interpreting a similar provision in Article III § 2 of the United States Constitution⁶ and the meaning of

² In addition to the power to confer original jurisdiction on the High Court the Commonwealth Parliament has the power to confer original jurisdiction on the Federal Court and the various State Courts pursuant to ss 77(i) and (iii) of the Constitution respectively.

³ (1910) 11 CLR 689 at 704 per Barton J, 715 per Isaacs J.

⁴ *R v Turner; ex parte Marine Board of Hobart* (1927) 39 CLR 411 at 447-8 per Higgins J in dissent, referring approvingly to *Re Garnett* (1891) 141 US 1.

⁵ H Zelling "Of Admiralty and Maritime Jurisdiction" (1982) 56 ALJ 101 at 105.

⁶ Art III § 2 provides inter alia "that the Supreme Court shall have jurisdiction with respect to all matters of Admiralty and maritime jurisdiction."

“Admiralty and maritime” envisaged by the Australian Constitution; the latter method of constitutional construction lending itself to a consideration of the nature of the right conferred when one legislates with respect to the conferral of admiralty jurisdiction. Specifically, it is submitted here that the conferral of jurisdiction for an action in rem – that is an action against the res (usually the ship) – is to confer a substantive right against the owner’s asset independent of their in personam liability. By contrast, the conferral of jurisdiction in personam, pursuant to sections 75 or 76, merely confers a right to proceed on an existing cause of action. This is an issue to which I will return in more detail. However, the argument advanced in this paper is that to confer a right in rem against the res is to confer a right that is substantive in nature, and hence that exercise requires a substantive legislative power.

At its highest, a substantive construction of section 76(iii) would adopt the United States approach to interpreting Article III § 2 of the United States Constitution in the late 19th century.⁷ There Justice Bradley held that Article III § 2 gives rise to a substantive admiralty power which permits the Congress to legislate with respect to the admiralty and maritime law of the United States generally. Following this construction, the Supreme Court of the United States has held that Article III § 2 can support legislation providing for the limited liability of all shipowners, irrespective of whether the vessels are engaged in inter or intra-state commerce and whether the vessel is foreign owned or registered, and legislation providing for the registration of mortgages, without resort to any other source of legislative power.⁸

Whilst this substantive construction is by no means obvious from the language of the Australian or United States Constitutions, the

⁷ See generally *The Lottawanna* (1875) 88 US 558 for the consequences of the jurisdiction conferred and also see *Butler v Boston Steamship Co* (1889) 130 US 527 in relation to the extent of legislative power.

⁸ *Butler*, supra n 7; and *The “Thomas Balum”* (1934) 293 US 21.

power's utility is unquestionable when one considers the constitutional history of maritime legislation.⁹ For instance, in a number of circumstances there has been confusion regarding whether the constitutional validity of maritime legislation is based on sections 51(i), (xxix) or either of these heads of power.¹⁰ As a result, disputes may arise in relation to the applicability of these powers, and as to whether competing State or Commonwealth legislation applies to a particular maritime dispute. As a result of dilemmas such as this, a number of commentators have argued for the acceptance of a substantive construction of section 76(iii), although these arguments have occasionally lacked any significant discussion of the basis of that construction.¹¹

For this reason, it is not appropriate to resort to utility as a substitute for constitutional analysis. It is accepted that any argument for the recognition of a substantive admiralty power must adopt a construction consistent with established principles of constitutional analysis. It is not enough merely to argue for a substantive legislative power on the basis of utility or by analogy from principles of United States constitutional law. To do so would be to "perceive convenience as a criterion of constitutional validity instead of legal analysis and the application of accepted constitutional doctrine".¹²

⁹ For examples, see *The Kalibia*, supra n 3; *Newcastle & Hunter River Steamship Co Ltd v Attorney-General (Cth)* (1921) 39 CLR 411; *New South Wales v Commonwealth* (1975) 135 CLR 337; *James v Commonwealth* (1936) 55 CLR 1; *Australian Steamships Ltd v Malcolm* (1914) 19 CLR 298; *R v Turner*, supra n 4; *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351.

¹⁰ For example, see the Carriage of Goods by Sea Act 1991 (Cth); The Navigation Act 1912 (Cth); Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth); Seaman's Compensation Act 1911 (Cth).

¹¹ *Civil Admiralty Jurisdiction*, ALRC Report No 33, paras 69-70 (hereinafter "ALRC Report"); H Zelling "Constitutional Problems of Admiralty Jurisdiction" (1984) 58 ALJ 8.

¹² *Re Wakim; Ex parte McNally & Anor* (1999) HCA 27, para 126 per Gummow and Hayne JJ; see also para 225 per Kirby J.

It is for this reason that this paper seeks to articulate the foundation of a substantive admiralty power as a matter of Australian constitutional law, rather than adopting the construction developed in the United States in relation to Article III § 2. As a result, any Australian substantive admiralty power could not go as far as the United States power, which empowers Congress to alter any admiralty or maritime law. However, whilst the United States authorities are not directly applicable, they are of some assistance in construing section 76(iii). For instance, it is appropriate to recognise, as the United States Supreme Court did in interpreting Article III § 2, that the word “Admiralty” is a term of art with a specific constitutional meaning. The constitutional analysis advanced here focuses on what the Constitution envisaged by the words “Admiralty and maritime jurisdiction”. The approach ultimately propounded is to consider the substantive admiralty power by reference to the meaning of the word “Admiralty” presupposed by section 76(iii) of the Australian Constitution. In this regard, it is submitted that a substantive law with respect to section 76(iii) would be a valid exercise of Commonwealth power provided the relevant legislation has a sufficient connection with the exercise of “Admiralty and maritime jurisdiction”.

CURRENT MEANING OF SECTION 76(iii)

The starting point for any discussion of section 76(iii) is to consider its application to support the Admiralty Act 1988 (the “Admiralty Act”), which has been the only valid exercise of the power to support legislation. The application of section 76(iii) in that context demonstrates the ordinary operation of the power, i.e. section 76(iii) appears to be merely a power to confer jurisdiction, which is also the reason that it has not been used since 1910 with the exception of the Admiralty Act. Historically this lack of consideration results from admiralty jurisdiction having been exercised pursuant to the Colonial Courts of Admiralty Act 1890 (Imp). This jurisdiction was exercised

by the High Court and State Supreme Courts notwithstanding extension of United Kingdom admiralty jurisdiction much earlier than 1988.¹³ In this regard, it is perhaps worth noting that there would have been some impediment to amendment of the existing admiralty jurisdiction prior to the adoption of the Statute of Westminster in 1942 as a result of the Colonial Laws Validity Act 1865.¹⁴ As a result, the only consideration of the application of section 76(iii) was with respect to the Seaman's Compensation Act 1909 (Cth)¹⁵, and sections 262¹⁶ and 364¹⁷ of the Navigation Act 1912 (Cth). Accordingly, the only comments of particular interest were those by Chief Justices Gibbs¹⁸ and Dixon¹⁹ who expressed the view that the jurisdiction that could be conferred pursuant to section 76(iii) is not limited to the jurisdiction that existed in admiralty in 1900.

The above view, expressed by Chief Justices Gibbs and Dixon regarding the limits of jurisdiction, was later adopted by the High Court in *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc ("Shin Kobe Maru")*.²⁰ There the High Court considered the construction of sections 4 and 16 of the Admiralty Act. The relevant claim related to a joint venture agreement between the plaintiff and defendant which the plaintiff claimed gave it a beneficial interest in the ship. The issue was therefore essentially whether the claim for beneficial ownership was "a claim relating to ... possession of, ... title to, or ownership of, a ship" within the

¹³ Administration of Justice Act 1956 (UK).

¹⁴ See generally C Ying "Colonial and Federal Admiralty Jurisdiction" (1981) 12 FLR 236.

¹⁵ Which was held unconstitutional in *The Kalibia*, supra n 3.

¹⁶ Zelling, supra n 5, 106, notes that Chief Justice Dixon expressed the view that that section could be supported by s 76(iii) of the Constitution in *Nagrint v The Ship "Regis"* (1939) 61 CLR 688 at 696.

¹⁷ *R v Turner*, supra n 4, per Higgins J.

¹⁸ *China Shipping Co v The State of South Australia* (1979) 54 ALJR 57 at 68.

¹⁹ *McIlwraith McEacharn Ltd v Shell Co of Australia Ltd* (1945) 70 CLR 175.

²⁰ (1994) 181 CLR 404.

meaning of section 4 of the Admiralty Act. This question had two elements: does the Commonwealth have power to confer jurisdiction with respect to new proprietary claims pursuant to section 76(iii); and secondly, was the claim asserted a proprietary maritime claim as defined by section 4 of the Act? The defendant pressed its argument before the High Court on the basis that the kind of claim asserted was not one within the meaning of section 4(2) of the Act because such a novel claim in relation to a beneficial interest in a ship had not existed in admiralty in 1901. Thus, it could not be a claim in relation to “possession or ownership” of the vessel, because section 13 of the Admiralty Act does not confer jurisdiction with respect to matters not within sections 76(ii) and (iii) of the Constitution. On the defendant’s argument, a claim not previously made in rem in relation “to third parties’ title” could not be maintained under the Admiralty Act because section 76(iii) of the Constitution only empowered the Commonwealth to confer the admiralty jurisdiction that existed in 1901, and hence the Court’s jurisdiction was limited by section 13.²¹

In this sense, the argument advanced by the defendant in *The Shin Kobe Maru* was in reality a question of statutory construction rather than a constitutional challenge with respect to any part of the Admiralty Act. All the defendant really suggested was that the Act does not extend jurisdiction to new categories of jurisdiction, as any such claims are beyond the jurisdiction able to be conferred by the Parliament pursuant to section 76(iii). For this reason, all that the High Court was required to decide in *The Shin Kobe Maru* was the limit of the jurisdiction that can be conferred pursuant to section 76(iii) of the Constitution and whether the Commonwealth can legislate with respect to jurisdiction that did not exist in 1901. Clearly such an issue was capable of being resolved by resorting to the wording of section 76(iii), giving effect to the word “maritime” in

²¹ Appellant’s written submissions before the High Court at page 4.

section 76(iii) in addition to "Admiralty"²² and applying established principles of constitutional interpretation.²³

Indeed, this issue was finally resolved by the High Court by construing the jurisdiction conferred by the Admiralty Act by reference to the natural and ordinary meaning of the language of section 76(iii).²⁴ By adopting this approach the Court concluded that the relevant claim was both a claim in relation to possession and ownership of the ship, which was clearly a claim in admiralty and maritime jurisdiction within the meaning of section 76(iii). The Court therefore adopted the relatively uncontroversial position that in section 76(iii) the word "Admiralty" is a term of art, whereas:²⁵

"maritime" in s76(iii) serves to equate the jurisdiction there referred to with that of maritime nations generally; there is no basis for any qualification or limitation based on jurisdictional divisions peculiar to English law.

This conclusion then moved Australian constitutional interpretation to a position equivalent to that which had been accepted in the United States in 1815 by Justice Storey in *De Lovio v Boit*.²⁶

It is for this reason that *The Shin Kobe Maru*, as argued before the High Court, is more interesting for what it did not decide and those issues not pressed after the first instance decision.²⁷ These unresolved issues included the nature of the power conferred by section 76(iii) and the nature of admiralty rights per se. The former issue relates to whether, in addition to a power for the Parliament to confer federal jurisdiction to determine a matter, section 76(iii) includes a power to legislate on substantive rights and causes of action. The latter issue,

²² Where the Court applied *De Lovio v Boit* (1815) 7 Fed Cas 418 at 441-444 and *John Sharp & Sons Ltd v The Ship "Katherine Mackall"* (1924) 34 CLR 420 at 424.

²³ *Lansell v Lansell* (1964) 110 CLR 353 at 362, 366, 369 and 370.

²⁴ *Supra* n 20, at 423-4.

²⁵ *Id.*, at 425.

²⁶ *Supra* n 22, at 443.

²⁷ (1992) 32 FCR 78.

which relates to the determination of an implied power with respect to the former, includes whether the jurisdiction that is conferred in admiralty with respect to both statutory rights in rem and maritime liens is a substantive exercise of power or merely the conferral of procedural rights.

Section 76(iii) and Substantive Legislation

The issues dealt with by the High Court in *The Shin Kobe Maru*, which relate to section 13 of the Admiralty Act limiting the jurisdiction that can be conferred pursuant to section 76(iii), did not necessitate the consideration of other constitutional issues relating to the conferral of substantive rights. Accordingly, there is a residual issue regarding the role of section 6 of the Admiralty Act as a limitation on the rights conferred and the constitutional relevance of that section.²⁸ Section 6 of the Admiralty Act, much like section 13, is a key constitutional validity saving provision for the Act. However, the limitation purportedly created by that section attempts to make the Act constitutional by limiting the nature of rights that it confers to procedural rights.²⁹

This question of the nature of rights that can be conferred pursuant to section 76(iii) arises, and is to some extent explained by comments by Justice Gummow at first instance in *The Shin Kobe Maru*. Indeed, the only detailed explanation of the constitutional validity of the Admiralty Act was undertaken by Gummow J, where his Honour premised the validity of the jurisdiction conferred by the Admiralty

²⁸ Section 6 of the Admiralty Act provides inter alia: “The provisions of this Act (with the exception of section 34) do not have the effect to create: (i) a new maritime lien or other charge; or (ii) a causes of action that would not have existed if this Act had not been passed.”

²⁹ The explanatory memorandum for the Admiralty Act refers to section 6 ensuring that the Act “is concerned with procedure and jurisdiction”.

Act on the characterisation of the statutory right in rem as merely procedural.³⁰

Such a view is consistent with the High Court's decision in *The Owners of the Ship "Kalibia" v Wilson* (the "*Kalibia*")³¹ where the Court determined that section 76(iii) is not a substantive legislative power, contrary to the argument advanced in this paper. Indeed, Gummow J comments in this regard that "the Parliament has respected the views of three members of the High Court in *Owners of the Ship "Kalibia" v Wilson*" in drafting the Admiralty Act".³² Similarly, Gummow J's conclusions are consistent with a long line of English authorities regarding the nature of statutory rights in rem, such that his Honour concluded that the jurisdiction conferred by the Admiralty Act "is to create procedural rights with respect to an existing cause of action, rather than new substantive rights".³³ Notwithstanding this apparently uncontroversial conclusion, for reasons that appear later in this paper my respectful view is that Gummow J's conclusion in this regard is open to challenge and was the result of the binding decision of *The Kalibia*. However, it is convenient at this stage to consider the decision in *The Kalibia* prior to discussing the nature of rights conferred by the Admiralty Act and pursuant to section 76(iii) in more detail.

The *Kalibia* – A Narrow View of Section 76(iii)

In *The Kalibia* the High Court considered the constitutional validity of the Seaman's Compensation Act 1909 (Cth). That legislation, unlike the current Seaman's Compensation Act 1911 (Cth), purported to apply to the owners of "all vessels" within Australia's territorial

³⁰ Supra n 27, at 86. In support of this proposition Gummow J refers to *The Monica S* [1966] P 741 and ALRC Report, para 126.

³¹ Supra n 3.

³² *The Shin Kobe Maru*, supra n 27, at 86.

³³ Ibid.

waters irrespective of whether they were trading between the States.³⁴ Accordingly, the Court held that the Seaman's Compensation Act 1909 could not be supported by section 51(i) of the Constitution, in that it purported to apply to vessels engaged in intra-state trade in addition to inter-state trade. Further, the Court held that the 1909 Act could not be read down, that is within the power conferred by sections 51(i) and 98, and accordingly the Act was prima facie beyond power.

What is most interesting about this decision for present purposes is the argument pressed by the Attorney-General for the Commonwealth in support of the Act which relied on section 76(iii). That argument was premised on a line of authority in the United States Supreme Court, particularly in *Re Garnett*,³⁵ developed by Bradley J where that Court considered the consequences of the similar provision of Article III § 2 of the United States Constitution. The Commonwealth argued that the 1909 Act's application to all vessels was supported by section 76(iii) because "the Parliament can make laws in any matter of Admiralty and maritime jurisdiction".³⁶

This argument was effectively summarily rejected by the High Court. For instance, Chief Justice Griffith was of the view that it was not "necessary to refer to the argument based on pl.iii. of sec. 76 of the Constitution, which I think is quite untenable".³⁷ Justices O'Conner and Higgins expressed similar views regarding the Commonwealth Parliament's power to legislate regarding intra-state trade pursuant to section 76(iii).³⁸ Their Honours were of the view that the Commonwealth's legislative competence is limited to those matters within section 51(i).

³⁴ *The Kalibia*, supra n 3, at 694.

³⁵ Supra n 4.

³⁶ *The Kalibia*, supra n 3, at 693, where the Attorney-General for the Commonwealth expressly adopts the United States authorities in relation to Art III § 2, particularly *Re Garnett*, supra n 4.

³⁷ Id at 699.

³⁸ Id at 707 and 718.

Of more interest are the judgments of Justices Barton and Isaacs who similarly rejected the Commonwealth's argument, as they were of the view that the implication of a substantive admiralty power from section 76(iii) in accordance with the United States position was not warranted because that implication was not necessary in Australia.³⁹ Their Honours observed that the implication was necessary in the United States because, at the time of drafting the United States Constitution, the United States was an independent nation that required a uniform maritime law. In Australia a similar implication was not warranted or indeed necessary because, in their Honours' view, such an implication could have no practical relevance – there was an “over-riding power to legislate on the subject in the Parliament of the United Kingdom”.⁴⁰ There was therefore no necessity to imply a similar power for the Commonwealth Parliament because the Parliament in Westminster had legislated, and continued to legislate with respect to Australian maritime law.

Whilst the intention behind section 76(iii) and the relevance of Imperial considerations are issues to which I will return later, it is enough to say at this stage, with respect, that the High Court's view in 1910 was arguably flawed and historically inaccurate, and it clearly no longer reflects the state of the law. It is certainly true that the United Kingdom Parliament provided for Australian maritime law prior to 1900 by providing that legislation such as the British Merchant Shipping Acts⁴¹ and Colonial Courts of Admiralty Act 1890 would apply in the Australian States, but this process did not

³⁹ Id at 704 per Barton J and at 715 per Isaacs J who expressed a similar view regarding the necessity of making an implication of the kind made by the United States Supreme Court regarding Art III § 2.

⁴⁰ Ibid.

⁴¹ That is, the Merchant Shipping Act of 1854 and subsequent Acts of 1894 and 1906.

continue to occur to any great extent.⁴² In any event, following the Statute of Westminster Adoption Act 1942 (Cth) and certainly the Australia Act 1986 (Cth) there has been no possibility that Imperial legislation would apply in the Australian States.⁴³ Hence the narrow construction of section 76(iii) propounded by Barton and Isaacs JJ is clearly no longer appropriate. However, prior to considering in detail the construction of section 76(iii) advanced here it is useful to consider the United States authorities relied on by the Commonwealth in *The Kalibia*.

The United States Position — The Implied Substantive Admiralty Power

The Commonwealth's argument in *The Kalibia* for an independent legislative power with respect to admiralty and maritime law was premised on a line of authority developed in the United States Supreme Court by Bradley J. There Bradley J, in a series of judgments commencing with *The Lottawanna*⁴⁴ and culminating in *Re Garnett*,⁴⁵ developed the implied substantive admiralty power from the conferral of original jurisdiction on the Supreme Court pursuant to Article III § 2.

In the leading case on this issue, *Re Garnett*, the United States Supreme Court gave the first authoritative description of the substantive admiralty power, whereby Congress had power to legislate in relation to maritime law generally where the subject matter was within the ambit of admiralty and maritime jurisdiction.⁴⁶

⁴² For example, the amendments to United Kingdom Admiralty jurisdiction in the Administration of Justice Act 1956 and subsequent amendments never applied, nor were they intended to apply in Australia.

⁴³ *Bisticic v Rokov* (1976) 135 CLR 552 and *Kirmani*, supra n 9.

⁴⁴ Supra n 7.

⁴⁵ Supra n 4.

⁴⁶ This decision followed two similar decisions of the Supreme Court in *Butler*, supra n 7, and *The Lottawana*, supra n 7, which considered the consequences of

Re Garnett related to a fire on board the river steamer *Katie* that occurred on the Savannah River within the state of Georgia. The owners and consignees of the cargo commenced proceedings in the Georgia District Court against the owners of the *Katie*, and the owners sought to limit their liability pursuant to federal limitation of liability legislation.⁴⁷

The ultimate issue before the Supreme Court was the validity of amendments to the relevant federal limitation legislation, such that an owner's right to limit liability "shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers, or in inland navigation".⁴⁸ It was argued that these amendments were invalid in that they could not be supported by the commerce clause.⁴⁹ It was clear that, because the limitation legislation purported to apply to all vessels rather than only those vessels that were engaging in trade between the States, the Act could not be supported by the commerce clause. Thus the Court, led by Bradley J who wrote the opinion of the Court, turned to the admiralty power that arose as a result of the federal maritime common law and Article III § 2 as the source of validity for the amendment. Bradley J summarised the power of Congress with respect to maritime law in the following terms:⁵⁰

The Act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendment is co-extensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends.

the vesting of admiralty jurisdiction federally. *Re Garnett*, supra n 4, was the first case to hold legislation valid pursuant to the implied admiralty power independent of the trade and commerce power.

⁴⁷ Limitation of Liability Act, 9 Stat 635 (1851).

⁴⁸ *Ibid*.

⁴⁹ *Re Garnett*, supra n 4, at 3 and 5.

⁵⁰ *Id*, at 12.

This independent admiralty power was therefore directly linked with, and arose as a consequence of the recognition of the development of a discrete federal maritime common law in the earlier case of *The Lottawanna*.⁵¹ Indeed, commentators such as Robertson have observed that, once it is accepted that there is a federal maritime common law as part of the law of the United States, the leap to a substantive admiralty power is not great.⁵² This is because Congress must have power to alter the terms and content of that general maritime law if it is to be the law of the United States. As the recognition of this discrete body of maritime rules was the precondition to the recognition of the substantive legislative power in the United States, and a possible source of such a power in Australia, it is appropriate to consider the development, status and characteristics of the federal maritime common law.

FEDERAL MARITIME COMMON LAW

The Basis of the Implied Admiralty Power in the United States

The concept of a general maritime law or federal maritime common law was first discussed by Bradley J in *The Lottawanna* in the context of the source of law for a maritime lien. Thus in *The Lottawanna*, the plaintiffs (necessaries men),⁵³ asserted a claim against the proceeds of sale of a ship *Lottawanna* for services

⁵¹ *Supra* n 7.

⁵² D Robertson *Admiralty and Federalism* (The Foundation Press, New York, 1970) 141.

⁵³ Necessaries men have a maritime lien for services provided to ship that are essential to the continuation of the voyage in the United States: M Davies & A Dickey *Shipping Law* (2 ed, LBC, North Ryde, 1995) 117. Whilst a lien does not arise for necessaries in Australia, similar principles are inherent in the maritime lien appertaining to a bottomry and respondentia bond. See *The Royal Arch* (1857) Swab 269; 166 ER 1131; and D R Thomas *Maritime Liens* (Stevens & Sons, London, 1980).

provided to the vessel in its home port. The ultimate issue in dispute was whether the plaintiffs' claim constituted a maritime lien because it related to home port repairs, which according to the law of nations did not constitute such a lien. The argument premised on the law of nations relied on Chief Justice Marshall's earlier comments in support of the general maritime law of nations influence in admiralty cases which:⁵⁴

are as old as navigation itself; and the law, admiralty and maritime *as it has existed for ages*, is applied by our Courts to the cases as they arise.

As a result, the Court had to determine the source of the maritime lien, which could feasibly have been either the general maritime law of nations, the maritime law of the United States (federal law) or the maritime law of the state where the incident occurred. Ultimately, Bradley J rejected the argument based on the maritime law of nations dictating the terms of the maritime lien, and held that the rule with respect to maritime liens for necessities "is adopted by the laws and usages" of the United States which makes it binding, not the law of another nation.⁵⁵

More importantly, in reaching this conclusion the Court further recognised that the federal maritime common law of the United States was premised on, and was a direct result of the importance of a uniform maritime law enshrined in the Constitution pursuant to Article III § 2.⁵⁶ This importance of uniform maritime law was enshrined in the United States Constitution as a result of the constitutional guarantee that all maritime disputes would be administered by a Federal Court pursuant to Article III § 2.⁵⁷ This link from administration of dispute to uniform substantive law was premised on the idea that the law that applies to and governs

⁵⁴ *American Ins Co v Canter* (1828) 26 US 516 at 545 (emphasis added).

⁵⁵ *The Lottawanna*, supra n 7, 573; Robertson, supra n 52, 137.

⁵⁶ *The Lottawanna*, supra n 7, 571-3.

⁵⁷ Ibid.

maritime trade and foreign shipowners is of interest to the federation rather than any particularly state individually.⁵⁸ This proposition is reflected in other sources regarding the original intent behind the United States Constitution. For instance, Alexander Hamilton's comments in *The Federalist* express this constitutional presumption in the following terms:⁵⁹

The most bigoted idolizers of State authority have not thus far shown a disposition to deny the National Judiciary the cognizance of maritime causes.

For this reason Article III § 2 gives expression to the importance of maritime law and that law's administration federally. From this express conferral of jurisdiction in matters of "Admiralty and maritime jurisdiction" exclusively in the Supreme Court, Bradley J implied a uniform body of maritime common law consistent with the policy behind Article III § 2, which culminates in a substantive legislative power.

Federal Maritime Common Law in Australia?

Turning now to Australia, it is worth considering that, once one observes the significance of Article III § 2 in the United States, that matters "of Admiralty and maritime jurisdiction" are intended to be determined federally (with some exceptions resulting from the saving to suitors clause), which has been held to imply a uniform federal maritime common law that can be altered by Congress,⁶⁰ it is not difficult to recognise the possibility of that argument's application in

⁵⁸ *Panama Railroad Co v Andrew Johnson* (1923) 264 US 375 at 386.

⁵⁹ *The Federalist*, No 80 at 590-1 (J Hamilton ed, 1864).

⁶⁰ "From Judicial Grant To Legislative Power: The Admiralty Clause in the Nineteenth Century" (1954) 67 Harvard LR 1214; and see also Robertson, *supra* n 52, 138; and G Gilmore & C Black *The Law of Admiralty* (2 ed, Foundation Press, New York, 1975) 45-7.

Australia with respect to section 76(iii).⁶¹ This argument's application in Australia arises if for no other reason than that there was no discussion at the Australian constitutional conventions in relation to the inclusion of section 76(iii). As a result of this one may reasonably assume that section 76(iii) was inserted in the Australian Constitution for the same reason as Article III § 2.⁶²

However, for Australian purposes, the analysis is slightly different because sections 75, 76 and 77 of the Australian Constitution differ from Art III of the United States Constitution. The first difference of note is that section 76(iii) does not exclusively vest jurisdiction in admiralty and maritime matters with the High Court, unlike the other heads of jurisdiction expressly conferred pursuant to section 75. Rather, section 76(iii) permits the conferral "of Admiralty and maritime jurisdiction" on the High Court and/or any other court by the Commonwealth Parliament pursuant to sections 77(ii) and 77(iii). However, in the absence of any such enactment, the state courts would continue to exercise jurisdiction pursuant to the Colonial Court of Admiralty Act 1890 or any state law amending the same.⁶³ The second difference is that the Australian Constitution always envisaged the conferral of federal jurisdiction on state courts pursuant to section 77(iii) of the Constitution which permits the Commonwealth Parliament to confer federal jurisdiction on any state courts.⁶⁴ The Australian Constitution thus expressly envisaged the

⁶¹ As presumably the Attorney-General for the Commonwealth did in *The Kalibia*, supra n 3, because this was the basis on which the Commonwealth pressed for a substantive admiralty power pursuant to section 76(iii) in that case.

⁶² Lindell, supra n 1, Annex C, at 11-12, 23.

⁶³ It is worth noting in passing that there has never been any state admiralty jurisdiction, civil or criminal, prior to 1988. Both the High Court and State Supreme Courts were colonial Courts of Admiralty and exercised jurisdiction as such. See *The Katherine Mackall*, supra n 22 at 427-8 per Issacs J and *The Queen v Bull* (1974) 131 CLR 203 at 235 per Barwick CJ.

⁶⁴ Subject to the incompatibility limitations identified by a majority of the High Court in *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577.

continued exercise of admiralty jurisdiction, federal or otherwise, by state courts, and one must therefore conclude that the Constitution did not necessarily intend maritime law to be administered federally in the same sense as in the United States Constitution.

Alternatively, it may be that the exclusion of matters “of Admiralty and maritime jurisdiction” from section 75 of the Constitution was a matter of convenience rather than any contrary intention. This alternative explanation possibly arises because the High Court of Australia did not come into existence until August 1903 with the commencement of the Judiciary Act 1903 (Cth), and as a result it would not have been able physically to exercise original jurisdiction with respect to matters of admiralty and maritime jurisdiction until that time.⁶⁵ Even if one takes into account the possibility of such jurisdiction being vested retrospectively in the Court, that would not have been of assistance to a vessel being arrested in 1901. In a practical sense, many of the disputes encompassed by the other enumerated heads of power in section 75 did not necessarily have the urgency of the arrest of a vessel at that time, therefore making it inappropriate to include admiralty and maritime jurisdiction in section 75. This is also reflected in the fact that admiralty jurisdiction was already uniformly administered under the Colonial Court of Admiralty Act 1890 with appeals from State Courts to the Privy Council.

These practicalities, arising from the creation of a new federation in 1901, which arguably favoured the continued exercise of admiralty jurisdiction pursuant to the Colonial Laws of Admiralty Act 1890, made it unnecessary to include section 76(iii) in the enumerated heads of diversity jurisdiction within section 75. Indeed, to some

Also see Z Cowen & L Zines *Federal Jurisdiction in Australia* (2 ed, OUP, Melbourne, 1978).

⁶⁵ Consider *Hannah v Dalgarno* (1903) 1 CLR 1 at 4, particularly Wise KC’s argument in relation to s 73, but presumably a similar argument would also be relevant for s 75, if not vested retrospectively.

extent this could explain the context of Justice Barton's conclusions in *The Kalibia* that:⁶⁶

there would be, and there is, an overriding power to legislate on the subject matter [of Admiralty and maritime law] in the Parliament of the United Kingdom, and the grant in section 76(iii) cannot be construed as an implied transfer, or even delegation, of that legislative power to the Parliament of the Commonwealth in respect of Australia.

However, whilst this observation on one view described the reality in 1910, its relevance to the interpretation of section 76(iii) diminished with the Statute of Westminster Adoption Act 1942.⁶⁷ Further, this consideration was no longer relevant following the Australia Act 1986 (Cth) (as opposed to its Imperial counterpart) whereby Australia confirmed its status as an independent sovereign nation able to legislate without limitation or interference from the United Kingdom Parliament.⁶⁸ Accordingly, the original intent behind section 76(iii), being intertwined with the notion of imperial dominance of maritime law, has no relevance to the construction of section 76(iii) following 1986. Therefore, whilst the above analysis, prefaced on a continued involvement of the Imperial legislature, may reflect the initial purpose behind section 76(iii) and its use in the early part of the Federation, it has certainly not been the correct view since 1986, and arguably since 1942.

Context of the Federal Maritime Common Law

⁶⁶ *The Kalibia*, supra n 3, 704.

⁶⁷ *Bisticic*, supra n 43; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172; *Kirmani*, supra n 9; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁶⁸ See *Australian Capital Television*, supra n 67, 137-8 and G Lindell "Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 FLR 29.

It is useful at this stage to digress to some extent and to examine both the United States and Australian conception of the common law. This is because the recognition of a federal maritime common law was a precondition to the implication of the substantive legislative power.

In the United States, following the Supreme Court's decision in *Swift v Tyson*,⁶⁹ it was generally accepted that the various state judiciaries and the federal judiciary were all in equivalent positions to determine the content of the common law in relation to any particular issue. As a result, at the time when the substantive admiralty power was first conceived in the United States, there was no notion of a uniform or anterior common law applying in the different states, nor was there any sense in which the different common laws were unified by the Supreme Court.⁷⁰ As a consequence of this, any two State Courts, or federal District Courts, could come to different conclusions in relation to the same common law right or cause of action and there was no mechanism for reconciling the two contrary decisions. Thus any two State Courts could take contrary views of a common law rule. However, in a maritime context involving interstate trade or foreign vessels there is rarely a peculiarly local element that justifies the application of local law without reference to wider national consideration. For this reason, the United States in essence always needed a federal maritime common law to avoid any "bigoted" State Court imposing prejudicial local common law rules on foreign or interstate vessels contrary to the trade interests of the balance of the nation.

⁶⁹ (1842) 41 US 1.

⁷⁰ O Dixon "The Common Law as the Ultimate Constitutional Foundation" (1957) 31 ALJ 240, 241. It must be acknowledged that United States law in this regard has substantially changed following the over-ruling of *Swift v Tyson* in *Erie Railroad Co v Tompkins* (1938) 304 US 64. Whilst the effect of the later decision is beyond the scope of this paper, it should be noted that the *Lottawanna*, supra n 7, and *Re Garnett*, supra n 4, have not been substantially affected by this change in the law: see generally "From Judicial Grant To Legislative Power", supra n 60; and Robertson, supra n 52.

In contrast, in Australia the predominant conception of the common law and its application in a federal jurisdiction varies in a number of significant respects from the federal maritime common law developed by Bradley J, and the distinct common laws of *Swift v Tyson*. Australia to some extent has always had an anterior or uniform common law that only diverges from time to time.⁷¹ Thus, whilst in Australia there have been suggestions that there are seven separate and distinct common laws, one for each respective State and Territory law area,⁷² the modern view is now that there is a uniform Australian common law.⁷³

This move to an Australian common law as opposed to six separate state common laws was premised upon the High Court performing a different role to the Supreme Court of the United States. Pursuant to section 73 of the Constitution the High Court is constituted as the final appellate court from each State Court which determines the common law for its distinct law area and resolves any disagreement between intermediate appellate courts of different law areas.⁷⁴ As a result, the concerns regarding uniformity of administration of maritime law and the development of federal common law, that were relevant in the United States, do not arise in Australia in the same way to necessitate the implication of a federal maritime common law.⁷⁵

Further, in a federal context, where a court approaches the exercise of federal jurisdiction, where there is no referable federal

⁷¹ Dixon, *supra* n 70, at 240-242.

⁷² A I Clark *Studies in Australian Constitutional Law* (C F Maxwell, Melbourne, 1901) at 192-194. Also see J Priestly "A Federal Common Law in Australia" (1995) 6 Public LR 221 at 227-228 and *Lipohar v R* [2000] HCA 65 per Callinan J.

⁷³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-5; *Lipohar*, *supra* n 72, per Gleeson CJ at para 24 and per Gaudron, Gummow and Hayne JJ at paras 44-6, 50-53 and 57.

⁷⁴ *Lipohar*, *supra* n 72, at paras 43-5.

⁷⁵ *Id.*, at paras 52-3.

substantive law (i.e. diversity jurisdiction), other issues arise.⁷⁶ Diversity jurisdiction most commonly arises in circumstances where jurisdiction is exercised under any of the enumerated heads of jurisdiction in section 75 of the Constitution, particularly sections 75(iii), (iv) and similarly section 76(iii) of the Constitution, such that the exercise of that jurisdiction is independent of any other law made by the Commonwealth Parliament for the purposes of section 76(ii).⁷⁷ Where the High Court has had occasion to consider the exercise of diversity jurisdiction, the Court has tended to imply a federal substantive law from the conferral of jurisdiction. This implied substantive rule has taken the form of either a judicial discretion⁷⁸ or choice of law rule.⁷⁹ For example, when a court exercises federal jurisdiction in relation to a bill of lading issued by the owner of a vessel for intra-state shipment, the court has jurisdiction pursuant to sections 4(3)(f), 18 and 10 of the Admiralty Act and that conferral of jurisdiction would be within section 76(iii) of the Constitution because it is an admiralty and maritime dispute. However, neither the Admiralty Act nor any other Commonwealth Act provides a federal substantive law to determine the parties' rights under the contract. The court would therefore apply the ordinary rules of private international law to determine the *lex causae* to be applied to the contract, pursuant to section 79 of the Judiciary Act 1903 (Cth) which provides that a court exercising federal jurisdiction always applies a state choice of law rule.⁸⁰ As a result, section 79 of the

⁷⁶ Cowen and Zines, *supra* n 64, at 82, 121-129.

⁷⁷ For example, see the jurisdiction conferred pursuant to section 19 of the Admiralty Act with respect to a contract to carry goods from Newcastle to Sydney, or an associated claim in contract against a corporation that accrues to the Trade Practices Act 1975 jurisdiction.

⁷⁸ *R v Commonwealth Court of Conciliation and Arbitration; ex parte Barrett* (1945) 70 CLR 141 at 169.

⁷⁹ *Suehle v Commonwealth* (1967) 116 CLR 353 at 355.

⁸⁰ Section 79 of the Judiciary Act 1903 provides, *inter alia*: "The laws of each State, including the laws relating to *procedure*, evidence, and the competency of witnesses, shall, . . . , be binding on all Courts exercising federal jurisdiction in

Judiciary Act 1903 has, to a significant extent, meant that there can never be a true federal common law as understood in the United States, because a court exercising federal jurisdiction must apply state choice of law and common law rules (section 80 of the Judiciary Act).⁸¹ As a consequence, there is no necessity to imply a discrete federal common law, such as a federal maritime common law, in Australia. In addition, it is submitted that the mode of implication of federal substantive rules from a purely jurisdictional context in *Suehle v Commonwealth* provides further support for the implied legislative power advanced in this paper. That is, the implication of an implied substantive admiralty power is consistent with an implied choice of law rule that arises from jurisdiction.

Having said this, the differences identified above regarding the source and conception of the common law, whilst not determinative, do tend to weigh against the recognition of a discrete federal maritime common law in Australia. In any event, the inapplicability of the federal maritime common law principally results from the structure of Chapter III of the Constitution discussed above in combination with these considerations regarding the common law.

CONTENT OF SECTION 76(iii) — MEANING OF “ADMIRALTY”

The Substantive Nature of Admiralty Jurisdiction for the Purposes of Constitutional Interpretation

Notwithstanding the difficulties identified above associated with the implication of a federal maritime common law in Australia, there is an analogous argument in support of a substantive admiralty power advanced here that is referable to the meaning of the word “Admiralty” in section 76(iii) of the Constitution. This argument is

that State in all cases to which they are applicable.” (emphasis added). Similarly, see s 80 in relation to the common law rights to be applied.

⁸¹ Priestly, *supra* n 72, at 226-7.

analogous to the United States approach in *The Lottawanna*, in the sense that it emphasises the Constitution presupposing a power to confer a particular kind of jurisdictional right by the use of the word “Admiralty”. Indeed, this approach to construing section 76(iii) was acknowledged in the ALRC Report, where the Commission discussed the difference between statutory rights in rem and maritime liens in the context of *The Kalibia*.⁸² Accordingly, the constitutional analysis advanced here focuses on the power to confer jurisdiction with respect to an action in rem which is presupposed by the word “Admiralty” in section 76(iii) of the Constitution. It is therefore necessary to consider the nature of admiralty jurisdiction presupposed by section 76(iii), in 1900 and in 1988. More specifically, is admiralty jurisdiction, i.e. the action in rem, procedural or does it connote substantive rights for constitutional purposes?⁸³

Justice Gummow’s Views on the Constitutionality of Statutory Rights in Rem

Our starting point is to revisit the judgment of Gummow J in *The Shin Kobe Maru*, where his Honour concluded that the jurisdiction conferred by the Admiralty Act, with respect to statutory rights in rem, is procedural. As a consequence, Gummow J concluded that the jurisdiction conferred by the Act was constitutionally valid with respect to the High Court’s decision in *The Kalibia*.⁸⁴ However, more interestingly, immediately prior to that observation his Honour also commented that:⁸⁵

⁸² See ALRC Report, para 16, where the ALRC noted that the distinction between maritime liens and statutory rights in rem “may be relevant in determining the meaning of the phrase ‘Admiralty jurisdiction’ in s76(iii) of the Constitution”.

⁸³ Id, para 17.

⁸⁴ See text supra at nn 30-33.

⁸⁵ Supra n 27, at 86 (citation omitted).

a maritime lien has proprietary characteristics (*The Halcyon Isle* ...) and to create new liens would be to change the substantive law. But to extend by statute jurisdiction in rem for maritime claims is to create procedural rights in respect of subsisting causes of action, rather than new substantive rights.

There are three points to note about this statement: first, the distinction between statutory rights in rem and maritime liens; secondly, the distinction between creating new liens and altering the categories of previously existing jurisdictional rights; and thirdly, the characterisation of statutory rights in rem as procedural.

There is no real question about the correctness of the first comment. Clearly a maritime lien does have proprietary characteristics. It is an inchoate right that attaches to the vessel at the instant of the incident giving rise to it and it is only extinguished by full payment of the debt, the provision of bail or the sale of the ship by the court.⁸⁶ However, it is submitted that Gummow J's conclusions in relation to the second and third issues, regarding the creation of new rights and the amendment of statutory rights in rem, are open to challenge. In short, it is submitted that for constitutional purposes there is no distinction between altering earlier rights and creating new rights; they are either within power or they are not. Further, it is submitted that to construe the statutory right in rem as procedural is to misconstrue the nature of the action in rem. Such a construction of the action in rem is not warranted by the merged administration of the courts of common law and admiralty effected by the Judicature Acts of 1873 (Imp).

Section 6 of the Admiralty Act — A Limitation?

We turn now to the second issue regarding the creation of new liens and categories of jurisdiction. This issue turns on the operation, or

⁸⁶ F L Wiswall *The Development of Admiralty Jurisdiction and Practice Since 1800* (CUP, London, 1970) 167; Thomas, *supra* n 53, at 12-13 and 286-292.

purported operation, of section 6 of the Admiralty Act, which provides, inter alia, that:

- The provisions of this Act (other than section 34) do not have effect to create:
- (a) a new maritime lien or other charge; or
 - (b) a cause of action that would not have existed if this Act had not been passed.

Whilst this section was intended to accommodate the constitutional consequences of the High Court's decision in *The Kalibia*,⁸⁷ as a matter of construction it should not be understood as having this effect.⁸⁸ This is because section 6 can only limit the creation of new causes of action and liens and cannot affect the character of rights otherwise created or altered. For example, section 6 could not affect the character of a previously existing right which was substantive but has been extended to new categories of maritime claim – the cause of action that is modified is still substantive and accordingly section 6 cannot affect its validity. It is therefore submitted that the proper construction of section 6 is that it may limit the creation of new liens or causes of action, but cannot affect the validity of modified jurisdictional rights. Further, in relation to section 15 of the Admiralty Act, section 6 limits the categories of maritime liens created to those liens that already existed in 1988. As a result, section 15 merely codifies the jurisdiction for existing maritime liens.

It is submitted that, for constitutional purposes, there can be no distinction between the Commonwealth creating new categories of admiralty claims and legislating with respect to existing statutory rights in rem. No matter what the history of the jurisdiction

⁸⁷ The explanatory memorandum for the Admiralty Act refers to section 6 ensuring the Act “is concerned with procedure and jurisdiction”, and thus not conferring substantive rights contrary to the procedural view of the power contained in section 76(iii) of the Constitution. See ALRC Report, paras 80 and 121 in relation to the ALRC's concerns about not limiting the Act to procedural rights.

⁸⁸ Also see Gummow J's judgment in *The Shin Kobe Maru*, supra n 27, at 85-6.

conferred, either a codification of existing jurisdiction or the conferral of new jurisdiction, the character of the right created by the conferral of jurisdiction must be either procedural or substantive. The constitutional validity of statutory rights cannot depend on the manner in which Parliament creates or alters them. All categories of jurisdiction must be laws "Of Admiralty and maritime jurisdiction" and must also be of the relevant character of right (procedural or substantive) within the Commonwealth's power in section 76(iii). As a consequence, a statutory right in rem is either a procedural or a substantive right. Its characterisation and validity cannot depend on whether it creates a novel jurisdictional right or amends an existing category of right.⁸⁹

This construction is demonstrated by considering the hypothetical example of Commonwealth legislation in identical terms to the Colonial Courts of Admiralty Act 1890. Such a law would not necessarily be valid simply because it would not create new categories of jurisdiction. Its constitutionality would depend on whether it was a law with respect to section 76(iii) of the Constitution, i.e. whether the jurisdiction conferred substantive rights contrary to the decision in *The Kalibia*.

Gummow J and the Procedural Rights Theory

We turn now to the third issue in relation to the procedural nature of statutory rights in rem. It is initially worth noting that Gummow J's conclusion reflects the usual division between statutory rights in rem (as procedural) and maritime liens (as substantive), which reflects a long line of authority this century which supports the procedural

⁸⁹ This proposition is partly reflected in the High Court's reasoning in *The Shin Kobe Maru*, supra n 20, at 425-6, to the extent that the validity of a new category of maritime claim is in no way restricted by the historical classification of claims.

theory of actions in rem. This procedural theory was originally developed by Sir Francis Jeune in *The Dictator*.⁹⁰

In concluding that a statutory right in rem is procedural, Gummow J effectively accepted the correctness of the procedural rights theory, although he actually cited *The Monica S*⁹¹ as opposed to *The Dictator* in support of that conclusion.⁹² It is submitted that this is the case even though Gummow J does not go so far as to unequivocally embrace *The Dictator*, he does conclude that a statutory right in rem merely confers procedural rights, and to this extent adopts *The Dictator* and cases following it.

What is interesting about this conclusion, is that Brandon J's judgment in *The Monica S* is in no sense the strongest argument in support of the procedural rights theory of the action in rem.⁹³ Indeed, it is quite the opposite. As Wiswall observes, *The Monica S* is one of the few modern decisions that does not wholeheartedly embrace the procedural rights theory.⁹⁴ In fact *The Monica S* expressly states that in rem procedures do have substantive effects in many cases, contrary to Juene P's theory in *The Dictator*.⁹⁵ This is because the action in rem allows the plaintiff to arrest the owner's vessel, even though they may not necessarily be liable for the claim in personam, and have the vessel sold prior to that claim being determined.⁹⁶ Further, in

⁹⁰ [1892] P 304.

⁹¹ Supra n 30.

⁹² Supra n 27, at 86.

⁹³ Wiswall, supra n 86, notes at 162 that the historical accuracy and coherency of the procedural theory were questioned by Brandon J in the *Monica S*, supra n 30, and in this sense that case is not really an authority for the proposition that statutory rights in rem are procedural.

⁹⁴ Id, at 169.

⁹⁵ *The Monica S*, supra n 30, 741 and 768-769

⁹⁶ See Cremean, supra n 2, at 115, 136 for contemporary arrest and sale procedures in Australia. Also see E Roscoe A *Treatise on the Admiralty Jurisdiction and Practice of the High Court of Justice and on the Vice-Admiralty Courts and the Cinque Ports* (Stevens & Sons, London, 1903) for a historical description.

addition to citing *The Monica S*, Gummow J also cited paragraph 126 of the ALRC Report which refers to the constitutional consequences that arise where a substantive right is attempted to be conferred pursuant to section 76 (iii) of the Constitution as a consequence of the High Court's decision in *The Kalibia*⁹⁷. For these reasons it appears puzzling that Gummow J referred to *The Monica S* as authority for the procedural theory of actions in rem he propounds for constitutional purposes.

The Procedural Rights Theory in a Wider Context

As mentioned above, the procedural rights theory was first articulated by Sir Frances Jeune in *The Dictator*. There his Honour expressly acknowledged that what he was doing was to graft an action in personam on to an action in rem. Jeune P stated his theory as follows:

I cannot help thinking that the fallacy lies in considering that to enforce a judgment beyond the value of the res, against the owners who have appeared and against whom a personal liability, enforceable by Admiralty process, exists, is the grafting of one form of action onto another. The change, if it be a change, in the action, is effected at an early stage, namely, when the defendant, by appearing personally, introduces his personal liability.

The procedural theory attempts to alter the nature of the proceeding in rem in a number of important respects. Under this theory, following the appearance of the owners, the action proceeds both in rem and in personam, and the judgment can therefore be enforced in excess of the value of the res and against the owners personally. Previously, an action in rem was an action against the vessel, the vessel had a personality such that it could enter contracts, commit torts and be sued. As a result, a judgment in rem could only be enforced to the value of the res (with the exception of costs) and a judgment in rem did not merge with a judgment in personam.

⁹⁷ See ALRC Report, para 126.

Jeune P's formulation of the procedural rights theory in *The Dictator* has been recently followed by the House of Lords, although in a modified form, in *The Indian Grace*.⁹⁸ In that decision, the House of Lords considered whether a judgment in personam would preclude a later proceeding in rem, which consequently necessitated a determination of whether there are two different causes of action, one arising out of a claim in personam and another against the ship. The House of Lords held that an action in rem is an action against the owners from the moment that the court is seized of admiralty jurisdiction.⁹⁹ This conclusion was based on Lord Steyn's historical analysis of the development of admiralty jurisdiction and was a development of Jeune P's argument in *The Dictator*. As such, Lord Steyn's argument portrays the development of the modern action in rem as merely a consequence of the jurisdictional disputes with the common law courts in the 18th and 19th centuries, and no more. However, the House of Lords went further than Jeune P. Rather than stopping at grafting an action in personam onto an action in rem at the moment of the owner's appearance, the House of Lords concluded that a proceeding in rem is always an action in personam, whether or not the owners appear.¹⁰⁰ As a result, on the House of Lords' analysis, the admiralty action in rem is rendered meaningless. It is merely a means of providing security for a claim against the owners similar to a Mareva injunction, and not an action against the ship.¹⁰¹

Notwithstanding the continued application of the procedural rights theory, it is respectfully submitted that the above theory is incorrect. Both *The Indian Grace* and *The Dictator's* formulations misunderstand the development of the action in rem and the effect of

⁹⁸ [1998] 1 Lloyd's Rep 1.

⁹⁹ Id, at 7.

¹⁰⁰ Id, at 10. Also see B Tamberlin "Current Issues in Admiralty" (MLAANZ Conference, 13 September 1999).

¹⁰¹ B Davenport "End of an Old Admiralty Belief" (1998) 114 LQR 169; N Teare "The Admiralty Action in rem and the House of Lords" (1998) LMCLQ 33.

the Judicature Act on its substantive characteristics. The procedural rights theory ignores the civil law tradition of the Admiralty Court.¹⁰² Instead, that theory focuses on the conflict between the courts of common law and admiralty and the effect of the Judicature Acts of 1873.¹⁰³ It is submitted that admiralty developed from a civilian tradition and that the merger of administration of the courts of common law and admiralty cannot justify the creation of a new cause of action in personam.¹⁰⁴ But further and most importantly, the procedural rights theory can never explain maritime liens, which were the essence of admiralty jurisdiction.

The first point to note about the procedural theory, and accordingly its acceptance by Gummow J, is that it misunderstands the historical development of the Court of Admiralty. As Wiswall observes, in Jeune P's decision in *The Dictator* his Honour was expressly grafting a common law action in personam onto an admiralty action in rem. This desire emanated from his training as a common law lawyer, such that in the *Dictator* he was concerned that the court should be providing complete relief.¹⁰⁵ Further, his historical analysis ignores the existence of the Court of Admiralty's jurisdiction in personam, the Privy Council decision in *The Bold Buccleugh*¹⁰⁶ and a number of important texts such as the *Black Book of Admiralty* which demonstrate the development of the action in rem as an action against the res from the civil law.¹⁰⁷ Instead, Jeune P over-emphasises the significance of the writs of prohibition issued by the courts of common law during the 18th century, which, whilst relevant to the scope of admiralty jurisdiction, did not affect the nature of the action in rem. In saying this, Jeune P does quote *The*

¹⁰² Wiswall, supra n 86, at 75-6.

¹⁰³ Id, at 170-2.

¹⁰⁴ Id, at 176.

¹⁰⁵ Ibid.

¹⁰⁶ (1851) 7 Moo PC 267; 13 ER 884.

¹⁰⁷ Wiswall, supra n 86, at 177-8.

*Dundee*¹⁰⁸ as authority for his procedural theory. However, Lord Stowell's decision in that case was not authority for the merger of common law principles advanced by Juene P. *The Dundee* is a decision that turns on the wording of the limitation of liability statute of 1813 and does not in any sense support the procedural theory propounded by Jeune P.¹⁰⁹

It is submitted that the correct construction of the action in rem is the personification theory applied by the Court of Admiralty prior to *The Dictator* by Dr Lushington in a number of cases, particularly *The Volant*,¹¹⁰ *The Hope*¹¹¹ and *The Kalamazoo*.¹¹² These decisions give effect to the established principle that "the bail represents the ship and when a ship is once released from arrest upon bail she is altogether released from that action".¹¹³ As a result, the enforcement of a judgment in rem cannot exceed the value of the res, with the exception of legal costs.¹¹⁴ This aspect of the action in rem, that the res is the defendant and has a personality as such, is the basis for the substantive characterisation of the action in rem, which is markedly different from common law seizure. In terms of this theory, the action in rem is not merely a procedure to bring the owner before the court and allow enforcement against their asset, but a substantive right against the res and where the procedural component is the sale of the res pendent lite. As such, the plaintiff's remedy is limited to the value of the res. In this sense, the jurisdiction provides a right against the vessel, independent of the action in personam, which is properly characterised as a substantive right to proceed against the res and have it alone sold to satisfy any future in rem judgment.

¹⁰⁸ *The Dundee* (1823) 1 Hag 109; 166 ER 39.

¹⁰⁹ Wiswall, supra n 86, at 177-178.

¹¹⁰ (1842) 1 W Rob 383; 166 ER 616.

¹¹¹ (1840) 1 W Rob 154; 166 ER 531.

¹¹² (1851) 15 Jur 885.

¹¹³ *Id* at 886.

¹¹⁴ See Wiswall, supra n 86, at 180 on the justification for this in the context of the personification theory.

Whereas previously under the personification theory the judgment in rem was limited to the value of the proceeds of sale of the vessel, under the procedural theory the sale of the vessel is no longer the sole means of enforcement of the judgment. It is therefore submitted that *The Dictator* and *The Indian Grace* import notions of complete relief from the common law without justification. This attempt to provide the plaintiff a complete remedy by reference to common law doctrines effects a substantive merger of the principles of common law (complete relief) and admiralty (action against the vessel limited to the vessel) that is not warranted by the wording or intent behind the Judicature Acts.¹¹⁵ In this sense, the decision in *The Dictator*, and those cases that follow it, including *The Indian Grace* and *The Shin Kobe Maru* are effecting a substantive fusion of common law and admiralty, as opposed to merely their concurrent administration. In a true action in rem the owner, mortgagee, master or other interested person's appearance in a proceeding in rem to protect their interest in the vessel does not import an in personam element into the proceedings. The only relevance of the appearance can be in relation to costs.

In Australia it is not entirely clear whether the procedural rights theory of actions in rem has been wholeheartedly adopted with all its common law trappings. Certainly, in *Caltex Oil v The Dredge "Willemstad"*¹¹⁶ the High Court accepted that, where the owners appear to an action in rem, "judgment may be enforced against them personally". In the same context, Gibbs CJ also recognised that:¹¹⁷

"An action in rem is an action against the ship itself: see *Aichhorn & Co. K.G. v The Ship "Talabot"* ... After appearances have been entered the action proceeds as if it were an action in personam although it does not cease to be an action in rem."

¹¹⁵ Ibid.

¹¹⁶ (1976) 136 CLR 529. Also see ALRC Report, para 192.

¹¹⁷ Id, at 538 (citation omitted).

As a result, whilst the High Court adopts *The Dictator's* conclusion that it is possible to enforce the judgment in personam in excess of the value of the res, the Court maintains that the proceedings are still an action in rem against the res. As a result, on one view, the fusion fallacy effected by *The Dictator* in the United Kingdom, i.e. the merger of common law and admiralty, has not been completely followed in Australia.

Notwithstanding the comments made above in relation to *The Willemstad's* partial adoption of *The Dictator*, it is my submission that the correct view is that the Admiralty Act amends the nature of the action in rem. On this argument, I suggest that *The Willemstad* is in error to the extent that it recognises enforcement in personam of an in rem judgment to any extent, with the exception of costs. In this regard I note that the ALRC Report expresses the view that they were codifying the position at common law in *The Willemstad* by inserting section 31 into the Admiralty Act.¹¹⁸ Section 31(1) in relation to the "Effect of Appearance", which is a codification of *The Willemstad*, provides as follows:

Where judgment is given for the plaintiff in a proceeding on a maritime claim commenced as an action in rem against a ship or other property, the extent to which the defendant in the proceeding who has entered an appearance and is a relevant person in relation to the claim is personally liable on the judgment is not limited by the value of the ship or property.

Subsection (2) similarly codifies the common law rule that where the person who appears, is not liable for the enforcement of the judgment unless they would also be liable in personam.

As a consequence, section 31(1) of the Admiralty Act does what Jeune P's decision in *The Dictator* purported to do, although on the basis of a statutory amendment of the cause of action and not a merger of substantive principles. In essence, section 31 modifies the effect of appearance in an action in rem, which to a limited degree

¹¹⁸ ALRC Report, para 143.

amends the nature of the action in rem. Rather than ascribing common law notions of complete relief as a result of the Judicature Acts (as Jeune P did), section 31 merely provides for the consequences of appearance, and as a result the action in rem is still an action against the res. If I am correct in relation to the action in rem being limited to enforcement in rem, Gummow J's conclusion that the statutory right in rem conferred by the Admiralty Act is procedural is, on one view, arguably correct, although for different reasons to those given.

Maritime Liens, the Procedural Rights Theory and the Constitution

Notwithstanding the correctness of the above analysis of the action in rem and the statutory right in rem conferred by the Admiralty Act, which is contrary to the judgments of the House of Lords and High Court's adoption of *The Dictator* in *Caltex Oil v The Dredge "Willemstad"*¹¹⁹ it is further submitted that the procedural theory can never explain the entirety of admiralty actions.¹²⁰ Most importantly for our purposes is that the procedural rights theory can never explain maritime liens. In this regard, Thomas observes that the procedural theory can never explain:¹²¹

the fact that a maritime liens travel with the res into the hands of a transferee, and the fact that in certain circumstances the value of the encumbered res represents the limit of the maritime lienee's entitlement and will accordingly defeat any defense by a bona fide purchaser for value.

¹¹⁹ Supra n 116, at 538 per Gibbs CJ. Also see the High Court decision in the *Owners of the Ship Iran Amanat v KMP Coastal Oil Pte Limited* (1999) 161 ALR 434 where the Court adopted Justice Menzies' formulation in *Shell Oil Co v The Ship "Lastrigoni"* (1974) 131 CLR 1 that the action in rem is "intended to facilitate the enforcement of liabilities" and Cremean, supra n 2, at 13-17.

¹²⁰ ALRC Report, para 17 to the effect that neither the personification theory nor the procedural rights theory can explain every aspect of Admiralty procedure.

¹²¹ Thomas, supra n 53, at 40.

Further, the procedural theory cannot explain why a maritime lien in some sense confers a proprietary right that encumbers the res independent of any in personam liability against the owner, as a result of the exercise of admiralty jurisdiction not another cause of action. For example, a master or crew's claim for wages or a bottomry bond are independent of the owner's in personam liability. Those rights attach to the vessel as proprietary rights. Such a lien is:¹²²

inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached.

In this sense, to confer jurisdiction with respect to a maritime lien creates the plaintiff's proprietary right, because the right over the vessel only attaches with the commencement of an action in rem. Further, the lien can only be enforced in an action in rem and only attaches to the vessel where the forum recognises such a maritime lien. For example, consider a plaintiff who repairs a vessel in New Zealand, and assume that New Zealand would recognise a lien for the supply of necessary services to a vessel. If the plaintiff repairer sought to enforce its lien in Australia against a subsequent purchaser it would have no lien because the Australian court does not recognise such a lien. The lien only exists, and encumbers the vessel, where the forum seized of jurisdiction recognises the lien. Thus, conferring jurisdiction with respect to a maritime lien is to confer a substantive right against the vessel that would not otherwise exist but for the conferral of jurisdiction.

For constitutional purposes, this pre-eminence of maritime liens in admiralty jurisdiction generally, and the substantive aspects of that jurisdictional right, must have been contemplated by the Constitution's drafters, and for this reason demonstrates why section

¹²² *The Bold Buccleugh*, supra n 106, at 284.

76(iii) must have intended a substantive construction. The maritime lien's inherently jurisdictional nature (attachment via exercise of jurisdiction and satisfaction by judicial sale of the vessel or by provision of bail) means that to confer jurisdiction with respect to a maritime lien is to confer a substantive right distinct from mere jurisdiction. Without such a construction of section 76(iii), the Commonwealth could not confer jurisdiction with respect to maritime liens. Hence, when one recalls that the maritime lien has always been the essence of admiralty jurisdiction, it must be supposed that when the Constitution refers to the word "Admiralty", it intended the Commonwealth have power to confer jurisdiction for maritime liens. Accordingly, it is necessary for a substantive legislative power to be implied from the text of section 76(iii) of the Constitution.

Maritime Liens and Conflict of Laws

By way of an aside, there is a small issue regarding whether the maritime lien is a jurisdictional right or a separate cause of action. As mentioned above, Gummow J was of the view that, even though he did not have to decide the issue, a maritime lien is proprietary such that conferring jurisdiction with respect to the same creates a substantive right. However, it has been suggested that the substantive character of maritime liens is a consequence of conflict of laws issues, and not the jurisdictional nature of the lien.¹²³ This view suggests that the characterisation of a maritime lien as procedural or substantive is a remedial issue, and as such it is governed by the *lex fori*; whereas, if a maritime lien were a substantive right, it would be governed by the *lex causae*.

This view misconceives the nature of the right conferred when a court seizes jurisdiction with respect to a maritime lien. There is more to a maritime lien than the priority that attaches to that right as between maritime claimants. A maritime lien creates a proprietary right that attaches to the vessel upon the conferral of jurisdiction against the *res*. This right is independent of any *in personam* liability against the owners. Similarly, other substantive rights, such as certain equitable rights and interests, are also governed by the *lex fori*, notwithstanding their inherently substantive nature.¹²⁴ For these reasons, the maritime lien must be conceived of as a substantive right over the *res* that relates back to jurisdiction, and to confer jurisdiction with respect to the same is to legislate to create a substantive right. Thus, when Parliament confers jurisdiction with respect to a maritime lien claim in section 15 of the Admiralty Act, it does more than allow an existing claim to proceed; it also creates substantive rights against the vessel which are distinct from the right to proceed on an existing cause of action.

¹²³ Thomas, *supra* n 53, at para 28.

¹²⁴ *National Commercial Bank v Winborne* (1978) 5 BPR 11,958.

CONCLUSION: RIGHTS IN ADMIRALTY AND SECTION 76(iii) IN A WIDER CONSTITUTIONAL CONTEXT

Whether or not one accepts the argument advanced above regarding the substantive nature of the action in rem, there can be no suggestion that the exercise of jurisdiction with respect to a maritime lien is anything other than the creation of a substantive right over the res. As such, to confer jurisdiction with respect to a maritime lien is to create a substantive right, independent of any other cause of action in personam and in addition to the jurisdiction conferred (for example pursuant to section 15 of the Admiralty Act), which can only be valid if *The Kalibia's* construction of section 76(iii) is not followed.

As mentioned above, the enforcement of maritime liens in the Court of Admiralty has continued from the 18th century up until 1988. Indeed, during the period of Lord Stowell and prior to the Admiralty Court Act 1849 (Imp), maritime liens were the most common form of maritime claim in the Admiralty Court.¹²⁵ The maritime lien has thus been the essence of admiralty jurisdiction prior to and since the statutory reform of the Admiralty Court's jurisdiction, in the United Kingdom in 1861 and 1956, and in Australia in 1890. It is therefore submitted that, when the Constitution uses the word "Admiralty", that word must be read to presuppose the continued enforcement of maritime liens. In this regard, it must be supposed that the Constitution intended that the Commonwealth's power to confer jurisdiction would be substantive, because without such a substantive power it would not be possible for the Commonwealth to confer admiralty jurisdiction, particularly with respect to maritime liens. It is therefore necessary to imply a substantive power from the text of section 76(iii) of the Constitution, such that substantive rights in admiralty can be conferred. Indeed, on the above argument, such a power is necessary for all actions in rem per se, including statutory rights in rem.

¹²⁵ Wiswall, supra n 86, at 24-5.

The question then becomes: what is the limit of this implied substantive admiralty power? In part, does the Commonwealth have a power equivalent to Congress in the United States? As argued above, Australia's implied admiralty power cannot be construed in identical terms to the United States power because the considerations giving rise to the implication are different in each jurisdiction. In Australia there is no federal maritime common law to the extent that the Commonwealth would be able to legislate with respect to all admiralty and maritime matters – section 76(iii) was not included in section 75 of the Constitution and section 77(iii) was included in the Constitution to permit the conferral of that jurisdiction on the States.

It is conceded that such an implication is certainly novel, even if it is framed in different terms from the United States power. However, this implied admiralty power is consistent with other constitutional implications. Whilst the admiralty power is not pre-eminently the concern of the national government,¹²⁶ as it would need to be to be within the implied nationhood power, its constitutional implication is consistent with the process of reasoning used to support the implication of the nationhood power. Further, this implied admiralty power does have the requisite degree of necessity to justify a constitutional implication and that necessity is textually linked to the express words of the Constitution. In this sense, the implication of a substantive admiralty power is consistent with the High Court's recent approach to Constitutional implications in *Lange v Australian Broadcasting Corporation*.¹²⁷ Further, this implication is also consistent with the High Court implied substantive choice of law rule in *Sueble v Commonwealth*.¹²⁸

It is therefore submitted that the substantive admiralty power can be implied from the text of sections 76(iii), particularly the word

¹²⁶ See *Davis v Commonwealth* (1988) 166 CLR 79 and *Re Wakim*, supra n 12, per Kirby J at para 221.

¹²⁷ Supra n 73, at 560-1; A Mason "Trends in Constitutional Interpretation" (1995) 18 UNSWLJ 237.

¹²⁸ Supra n 79.

“Admiralty”, and 51(xxxix) of the Constitution. The incidental power combines with the substantive nature of admiralty jurisdiction in a manner analogous to the implied nationhood power. This implication focuses not on extending the power to confer jurisdiction,¹²⁹ but on the consequences of the ability to confer admiralty jurisdiction. This jurisdiction being by its very nature substantive, it requires both a substantive element to exist and that substantive character is a necessary precondition to the implication of that substantive power.¹³⁰ As a result, this implication would empower the Commonwealth Parliament to legislate with respect to the substantive elements of admiralty law which are reasonably and appropriately¹³¹ adapted to the exercise of admiralty and maritime jurisdiction pursuant to section 76(iii).

Such a construction would provide the Commonwealth Parliament with power to legislate with respect to statutory rights in rem (section 18 of the Admiralty Act), maritime liens (section 15 of the Admiralty Act), unjustified arrest including the substantive element of that cause of action (section 34 of the Admiralty Act) and legislation such as the Seaman’s Compensation Act 1909 held invalid in *The Kalibia*. In relation to the later two uses, where the relevant legislation provides for the conferral of jurisdiction and the elements of the substantive cause of action, it is submitted that there is no reason why the implied admiralty power should not apply to “all ships” where that substantive law is sufficiently proximate to the exercise of

¹²⁹ Such an implication would be inconsistent with the High Court’s approach to Chapter III of the Constitution in *R v Kirby; ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 and later applying the same *Re Wakim*, supra n 12.

¹³⁰ For instance, consider the maritime lien. Clearly such a right is encompassed within the meaning of “Admiralty” within s 76(iii), but it is also a substantive right which requires a substantive legislative power to create it.

¹³¹ The reason for the words of limitation “appropriate and adapted” become clear when the admiralty power is compared with both other implied powers and implied limitations.

jurisdiction. However, it may be that this power does not apply to legislation such as the Navigation Act 1912 (Cth), as that Act does not have a sufficient link with the exercise of jurisdiction, and would not therefore be an appropriate and adapted way of administering admiralty and maritime jurisdiction.

Therefore it is submitted that the implied admiralty power should be recognised properly to found the constitutional validity of the Admiralty Act, and any other legislation that has a sufficient relationship with the exercise of admiralty jurisdiction. It is not appropriate or desirable to limit the Commonwealth's power with respect to admiralty and maritime law by reference to unjustified distinctions in relation to jurisdiction.