Before the High Court

Admiralty Jurisdiction and the Constitution: The *Shin Kobe Maru* Case

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1. *Introduction*

Can a foreign person with a mere beneficial interest in a foreign ship apply to an Australian court to have that ship arrested, with all of the incidences of arrest such as the disturbance and loss of income incurred by the shipowner, in circumstances in which that person's connection with the court is nothing other than the presence of the ship in an Australian port? That is the question that falls to be resolved by the High Court of Australia in this case. The matter obliges the High Court to consider the content to be ascribed to s76(iii) of the Constitution, by which the Commonwealth Parliament is empowered to confer "Admiralty and maritime jurisdiction" upon the High Court. In 1988, the Commonwealth sought to utilise this constitutional head of power by enacting the *Admiralty Act* 1988. This statute effectively sought to codify civil jurisdiction with respect to admiralty causes and actions in Australia. In particular, the Act established (by s4) the criteria upon which an action "in rem"[1] may be brought. The High Court must decide whether an action in rem may be prosecuted by a party with a mere *beneficial* interest in the ship — and in so doing the Court will be obliged to settle some outstanding questions as to whether, at general maritime law as it has been developed over many centuries, such an action is available, and whether it is warranted as a matter of construction of the *Admiralty Act*. The most exciting aspect of the case is that it squarely raises the question of the limits of the jurisdiction postulated by s76(iii), a question deftly evaded by the High Court to date, and in addressing itself to this issue the Court may clarify the presently somewhat quixotic status of s76(iii) in Australian constitutional theory. The Court may find US constitutional jurisprudence illuminating in this regard. Before offering an analysis both of the law and of some theoretical options open to the Court, I will provide a brief synopsis of the Australian history of this esoteric and tortuous but commercially vital body of law, and outline the facts of the case facing the High Court.

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1 That is, a suit which has no connection with the forum other than the presence of the vessel within the jurisdiction.

2. *History of Admiralty Jurisdiction in Australia*

An understanding of the history of admiralty jurisdiction is vital to an understanding of the issues raised by the case. Admiralty courts in England date from the fourteenth century. From this time until the nineteenth century there was an ongoing jurisdictional conflict between the Admiralty courts and the common law courts. During this period the common law courts gained the upper hand, and the work of the Admiralty courts came largely to be confined to criminal admiralty jurisdiction and prize law. It was only during the nineteenth century, with the passing of two very important statutes — the *Admiralty Court Acts* of 1840 and 1861 (UK) — that the Admiralty court was given back most of its original jurisdiction, to which was also added much new jurisdiction. The period saw the reascendance of the Admiralty court. Of particular interest for our purposes was the vesting in Admiralty courts of jurisdiction over questions of ownership of vessels.

Admiralty jurisdiction in the UK was subsequently restated and enlarged in 1920, and again enlarged in 1956, partly to give effect to the 1952 *Arrest Convention*,[2] to which the UK was a signatory. Admiralty jurisdiction in the UK has since been updated again and is now conferred under the *Supreme Court Act* 1981 (UK).[3]

How does Australia fit into this history? Initially, a Vice Admiral to deal with civil maritime actions, and a court of Vice Admiralty to deal with piracy, were appointed pursuant to Royal Letters patent in 1787. The jurisdiction of the Vice Admiralty Court was brought into line with the expanded jurisdiction of the English Admiralty courts by the *Vice Admiralty Courts Act* 1863 (UK). It should be noted that during this period, the Vice Admiralty Courts were Imperial courts external to the local court system within the colonies. This situation was finally revoked with the *Colonial Courts of Admiralty Act* 1890 (UK), which replaced the system of Vice Admiralty Courts with a new system of non-Imperial courts called "Colonial Courts of Admiralty". The Act provided that, in a British possession, every court of law in that possession declared under the Act was to be a Court of Admiralty, or (if no such declaration was made) every court having original unlimited civil jurisdiction was to become a Colonial Court of Admiralty with the jurisdiction specified in the 1890 Act.[4] The High Court held that the reference to "British possession" was to the Commonwealth and not to each of the constituent States.[5] However, State courts also qualified as Colonial Courts of Admiralty because they were "in" a British possession, the Commonwealth.[6] The *Colonial Courts of Admiralty Act* remained in force and constituted the principal source of civil jurisdiction in admiralty in Australia, until its repeal by the *Admiralty Act* in 1988.

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2 *The International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships*, 1952.

3 See report of the Australian Law Reform Commission *Civil Admiralty Jurisdiction* Report No 33 (1986, Commonwealth of Australia) (hereinafter referred to as the "ALRC Report"), at paras 8-13.

4 Sections 2, 16 and 17.

5 *John Sharp & Sons Limited v The Ship "Katherine Mackall"* (1925) 34 CLR 420.

6 Section 2(1) of the *Colonial Courts of Admiralty Act: McArthur v Williams* (1936) 55 CLR 324; ALRC Report, para 24.

Section 2(2) of the *Colonial Courts of Admiralty Act* vested in Colonial Courts of Admiralty the admiralty jurisdiction of the High Court in England "whether existing by virtue of any statute or otherwise". The effect of s2(2) was considered by the Privy Council in *The Yuri Maru: The Woron*[7], where it was held that the jurisdiction of Colonial Courts of Admiralty was fixed as at 1890 rather than being ambulatory, and that statutory enlargement of the jurisdiction of the High Court in England in 1925 did not therefore enlarge the jurisdiction of courts of admiralty abroad.[8] The admiralty jurisdiction exercisable by Australian courts under the *Colonial Courts of Admiralty Act* was thus stuck in the year 1890 — a conclusion affirmed by the High Court in *Bistricic v Rokov*.[9]

Effectively, the *Colonial Courts of Admiralty Act* and subsequent domestic legislation conferred Australian courts with admiralty jurisdiction in a range of matters. These can be divided into three categories: jurisdiction conferred or extended by the 1840 and 1861 Acts; the "inherent" jurisdiction of the Admiralty Court unaffected by statute; and jurisdiction conferred by subsequent statutes. For our purposes the first of these categories is relevant. In the nineteenth century admiralty jurisdiction was extended to claims or questions arising: "as to the title or ownership of a ship or vessel or its proceeds in any cause of possession, salvage, damage, wages or bottomry" (s4 of 1840 Act); or "between all or any of the co-owners of a ship registered at a port [in Australia] concerning the ownership, possession, employment or earnings of the ship or of a share thereof" (s8 of the 1861 Act).

3. *Facts of the Present Case*

In 1975 the appellant, Yamashita Shinnihon Steamship Co Limited ("YSL"), and the respondent, Empire Shipping Co Inc ("Empire") entered into a Joint Venture Agreement ("JVA"). By virtue of the JVA another company, United Transport Investment Inc ("UTI"), in which Empire and YSL held one half of the issued shares, was established. A wholly owned subsidiary of UTI, Seven Seas Transport Inc ("Seven Seas") was subsequently set up to enter a contract for the construction and purchase of a vessel. The vessel, previously called "Seven Seas Conqueror", now named "Shin Kobe Maru", was registered under the Liberian flag. The intention of the JVA was that YSL and Empire were to be joint owners of the ship.

The JVA provided that during the first 15 years of the agreement YSL would time charter the ship from Seven Seas.[10] It provided that for the 15 years, neither party could cause Seven Seas to sell the ship at its own discretion.[11] It also provided that after 15 years elapsed, YSL had the power to cause Seven Seas to sell the ship "at its own discretion", and that any amount obtained from this sale "shall be shared equally between both parties".[12] Pur-

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7 [1927] AC 906.

8 See above n3, paras 35, 36.

9 (1976) 135 CLR 552 at 559-60.

10 Article 6 of JVA.

11 Article 4 of JVA.

12 Article 4(3) of JVA.

suant to the JVA, on 15 June 1976 a time charter was entered between Seven Seas and YSL for a 15 year period.

Some time thereafter YSL considered it advantageous to have the vessel registered under the Japanese flag. Consequently in 1984 YSL and an agent of Empire, Van Shipping Co Limited ("Van"), entered an agreement to change the vessel's flag state from Liberia to Japan. Although the 1984 agreement provided for the purchase of the vessel by YSL for US$13.2 million, with YSL becoming the registered owner of the vessel under Japanese law, the agreement also provided that YSL was engaging in a "nominal" purchase of the vessel, and that "eventual ownership of [the ship] still remains" on a "50/50 basis between YSL and Van and that any rights, obligations and liabilities of both parties under the [JVA] also still remains as if [JVA] dated 18 July 1975 remains as it is" [sic].[13] It provided further that in or around July 1987, when the original loan was to be repaid, Seven Seas or another company jointly owned by the Defendant and Van would repurchase the vessel from YSL at book value.[14]

The loan was repaid on 24 July 1987 by Empire. Empire claims that this operated to bring Clause 4 of the 1984 Agreement into operation, and that, in breach of an expressed or implied term of the JVA and the 1984 Amendment Agreement, YSL had wrongfully refused to re-transfer ownership of the vessel to Seven Seas or another joint venture company. Empire commenced proceedings as an action in rem against the vessel in the Federal Court, which is vested with jurisdiction in respect of Admiralty actions in rem by s10 of the *Admiralty Act* 1988.

4. *The Lower Court Decisions and Appeal*

Empire claimed that the matter constituted a "proprietary maritime claim" under s4(2)(a) and/or (b) of the *Admiralty Act* 1988, thus grounding jurisdiction to proceed in an action in rem under s16 of the Act. Section 4(2) of the Act, which finds its provenance in the nineteenth century statutes discussed above, states in part:

> 4(2) A reference in this Act to a proprietary maritime claim is a reference to
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> (a) a claim relating to:
>
> (i) possession of a ship;
>
> (ii) title to, or ownership of, a ship or a share in a ship;
>
> (b) a claim between co-owners of a ship relating to the possession, ownership, operation or earnings of a ship;

Empire asserted that there was a joint activity carried out through the medium of joint beneficial ownership of an asset, the legal title to which was, pursuant to the JVA, retained in Seven Seas. Its argument, which has been accepted by both Gummow J[15] and a full bench of the Federal Court (Davies, Lockhart

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13 Clause 2 of 1984 Agreement.

14 Clause 4 of 1984 Agreement.

15 *Empire Shipping Co Inc v Owners of the Ship "Shin Kobe Maru"* (1991) 104 ALR 489.

and French JJ),[16] was that even though the ship was transferred to the Japanese flag and YSL acquired legal or registered title pursuant to the 1984 Agreement, nevertheless the joint "beneficial ownership" between YSL and Empire continued. The question was whether a claim asserting a mere beneficial interest was one "relating to" possession, title or ownership of the ship,[17] or "relating to" a claim between co-owners of a ship relating to possession or ownership, etc.[18]

The issues were, essentially, twofold. The first was the significance of the words "relating to".[19] In the UK, the Admiralty jurisdiction of the High Court of Justice confers jurisdiction to hear and determine "any claim to the possession or ownership of a ship or to the ownership of any share therein".[20] The wider expression "relating to" is not used to qualify "claim". However, the expression "relating to" is used in s20(2)(h) of the UK Act, which confers jurisdiction in "any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship". Both Gummow J[21] and Lockhart J[22] cited English authority for the cautious proposition that the phrase grants additional reach to the provisions.[23] Certainly the ALRC thought that to be the case in relation to s4(3)(g), in which jurisdiction was granted to "a claim relating to salvage".[24]

The second issue, apart from any expansion of the legislation provided by the words "relating to", is whether the assertion of equitable interests against the legal owner constituted a valid claim under s4(2). Gummow J held that a claim may relate to possession, title or ownership of a ship[25] where the source of the entitlement upon which the claim rests is found in a beneficial interest in the ship which is asserted by the claimant.[26] Davies J in the Full Court held that the enforceability of equitable interests by a Court exercising Admiralty jurisdiction is further justified by the use of both of the terms "title" and "ownership" in s4(2)(a). The ordinary meaning which is ascribed to these terms "suggests a distinction between a registered title on the one hand and ownership in the sense of proprietary rights on the other. If a ship be held on trust, the legal ownership being vested in one person and equitable interest being vested in others, a dispute as to title may concern itself with the registration of the vessel and a dispute as to ownership may concern itself with the legal and equitable interests therein".[27]

Moreover with respect to s4(2)(b) it was held by Gummow J that where, as

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16 *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1992) 110 ALR 463.

17 Under s4(2)(a) of the Act.

18 Under s4(2)(b) of the Act.

19 Used in s4(2) of the *Admiralty Act* 1988 (Cth).

20 Section 20(2)(a) of the *Supreme Court Act* 1981 (UK).

21 Above n15 at 504-5. Followed in *Port of Geelong Authority v The Ship "Bass Reefer"* (1992) 109 ALR 505 at 512.

22 Above n16 at 476-7.

23 See *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] AC 255 at 270-1 per Lord Keith of Kinkel. Followed in *Petrofina SA v AOT Ltd; The "Maersk Nimrod"* [1991] 3 All ER 161.

24 Above n3 at para 156.

25 Under s4(2)(a) of the *Admiralty Act* 1988.

26 Above n15 at 507.

27 Above n16 at 469.

in the present case, the beneficial interest in a ship is divided between two parties, one of whom is also the registered owner, a dispute between them also may give rise to a claim between "co-owners". It will then be an issue, in each case, whether the claim sought to be litigated has a sufficiently direct connection with (that is "relates to") the possession, ownership, operation or earnings of the ship.

YSL disputed this (unsuccessfully) on the narrow basis that there was no claim relating to possession of the ship within the meaning of s4(2)(a)(i) because Empire had no claim to possession (only Seven Seas had); and that there was no claim to title or ownership (under s4(2)(a)(ii)), nor a claim between co-owners (under s4(2)(a)) because Empire sought the revesting of ownership in Seven Seas, not itself.

There are two aspects to the argument in YSL's appeal before the High Court.[28] Firstly, that this type of claim is not within the scope of the Admiralty and maritime jurisdiction conferred by s76(iii) of the Constitution. Secondly, irrespective of whether the matter falls within the content of s76(iii), the action is outside s4(2) as a matter of construction of the *Admiralty Act* 1988.

5. *Summary of Argument*

I consider it arguable that even if the order sought in this case does go beyond that traditionally available (and this is not supported by the limited case law on this point), the *Admiralty Act* purports to repeal the *Colonial Courts of Admiralty Act* 1890 and to codify an extended (though still limited and circumscribed) admiralty and maritime jurisdiction. Whether the particular relief sought is available thus becomes a question of statutory construction, and to a lesser extent, of the availability of the order sought at general maritime law. Both questions involve constitutional issues. What if, as a matter of general maritime law as defined by courts, specific performance of a contract is not available in favour of a party with only a beneficial interest, yet is available as a matter of construction of the *Admiralty Act* 1988? This may well result from a finding that s76(iii) of the Constitution does not include jurisdiction to grant the remedy sought. Consequently, the content accorded by the Court to s76(iii) is of crucial significance to the case. I will conclude this comment with an analysis of existing law on the remedy sought to be enforced in the present case, which as indicated I believe is available as a matter of construction of the provisions of the *Admiralty Act*, and is consistent with the availability of the remedy at general law. Obviously the availability of a remedy at general law will colour the Court's interpretation of the statutory provisions, especially in borderline cases such as the present one. But first, it is necessary to canvas some hermeneutic strategies available to the Court with respect to s76(iii) of the Constitution. What follows includes a summary of the reasoning of the Federal Court judges in this matter and the way in which they rec-

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28 Interestingly, despite the fact that both parties are foreign, that the vessel is foreign registered, and more importantly that the matter's connection with Australia is tenuous in the extreme, YSL did not argue either before the Federal Court or the High Court on the leave application that, even if jurisdiction exists, the Court should, in its discretion, decline to exercise the jurisdiction on the basis of *The "Jupiter" (No 2)* (1925) 21 Lloyd's List Law Reports 116, and *The Courageous Coloctronis* [1979] WAR 19.

onciled s76(iii) with established conventions of constitutional interpretation; the assertion that there is a the tension between admiralty law's Imperial roots, and its modern utilisation in an international sphere which is increasingly less dependent upon the law of English-speaking nations; and finally, an anlysis of the issue of separation of powers, not raised before the Federal Court, but nonetheless a theoretical issue which has occasioned much angst to the United States Supreme Court in relation to admiralty and maritime jurisdiction.

6. *Section 76(iii) of the Constitution*

A. *Interpreting Section 76(iii)*

The Appellant argues that the action is outside s76(iii). Sections 76 and 77 of the Constitution state:

> 76. Additional original jurisdiction. The Parliament may make laws conferring original jurisdiction on the High Court in any matter —
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> (ii) Arising under any laws made by the Parliament:
>
> (iii) Of Admiralty and maritime jurisdiction:
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> 77. Power to define jurisdiction. With respect to any of the matters mentioned in the last two sections the Parliament may make laws —
>
> (i) Defining the jurisdiction of any federal court other than the High Court;
>
> (ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is vested in the courts of the States;
>
> (iii) Investing any court of a State with federal jurisdiction.

The *Admiralty Act* 1988 relies on these sections for its constitutionality. Section 13 of the Act expressly states that it "does not confer jurisdiction on a court, or invest a court with jurisdiction, in a matter that is not of a kind mentioned in paragraph 76(ii) or (iii) of the Constitution". If a matter falls within s4(2) it would seem difficult to argue that it nonetheless contravenes s76(ii) or (iii), but it has been suggested that "the possibility cannot be excluded that a particular dispute, apparently within the scope of the Act, has such a remote or tangential connection with maritime commerce as to fall outside the Constitutional power".[29]

A brief comment should be made about s76(ii) of the Constitution. The relevance of s76(ii) to this area derives from the potential extension of the Parliament's legislative power as a result of the combined effect of s51(i) (empowering the Federal Parliament to legislate with respect to interstate and international trade and commerce) and s98, which provides that the "[t]he power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping ...". Prima facie then, s76(ii) may provide a method by which any "gaps" in s76(iii) could be filled. However, the proposition that s98 of the Constitution is merely "explanatory of the trade and commerce powers", and does not extend the ambit of the power to confer jurisdiction was held authoritatively in *Owners of the ss Kalibia v Wilson*,[30]

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29 Crawford, J and Hetherington, S, draft "Admiralty" subtitle for forthcoming Transport title, *Laws of Australia*, to be published by The Law Book Company Ltd at para 21.

30 (1910) 11 CLR 689 at 697 per Griffith CJ, 707 per O'Connor J, and 713 per Isaacs J.

and has not since been impugned. Perhaps the time has come for the High Court to reconsider this restriction.

Leaving aside for the moment the potential of the above propositions to augment the ability of Parliament to legislate to confer admiralty and maritime jurisdiction on Federal courts, s76(iii) is unique in that prima facie it confers merely jurisdictional, and not substantive legislative power over matters within the jurisdiction of the High Court.[31] In the words of one commentator: "s76(iii) is unique among the nine heads of Federal judicial power in that it is the only one with a named subject-matter delimited by reference to an existing jurisdictional content, nebulous though it may be".[32]

That the "jurisdiction" under s76(iii) is somehow ontologically antecedent, and cannot be defined or altered by the Parliament, was first decided in *Kalibia*. Isaacs J held that "Section 76 relates solely to original judicial jurisdiction and enables Parliament to confer it on the High Court. Whatever is incidental to that it likewise has power to enact (sec 51(xxxix)). But beyond that it cannot go."[33] Since the decision in the Kalibia, the judges of the High Court have been singularly coy in refraining from attempting to define the scope of s76(iii).[34] The law that does exist, at least up until the Federal Court decisions in this case, suggests that the content of s76(iii) falls somewhere between the most narrow approach by which the jurisdiction, by analogy with the restricted jurisdiction of the Colonial Courts of Admiralty under the 1890 Act, is frozen at the turn of the century, and the far more expansive meaning under US law.[35]

It has never been seriously asserted that the promise of admiralty and maritime jurisdiction contained in s76(iii) has been frozen in the form conferred by a nineteenth century Imperial statute. Indeed as early as 1924, Isaacs J in the High Court stated that although it,

> is not conceivable that, in framing the Australian Constitution, the content of "admiralty and maritime jurisdiction" was intended by the people of Australia and the British Parliament, with reference to a subject so Imperial in character, to follow American doctrine in direct opposition to established English precedents, [nonetheless it] is not therefore to be supposed that the constitutional power to confer jurisdiction on this Court in matters of admiralty and maritime law is a power in respect of merely a stereotype common law admiralty jurisdiction, which at the date of the Constitution had already been extended for more than 40 years in England.[36]

This interpretation of s76(iii) finds confirmation in the Explanatory Memorandum accompanying the Admiralty Bill. It states: "At present, Admiralty jurisdiction in Australia derives from the *Colonial Courts of Admiralty Act* 1890 (UK), an Imperial statute which limits Admiralty jurisdiction to that possessed

31 Above n29 at para 21.

32 Ying, C A, "Colonial and Federal Admiralty Jurisdiction", (1981) 12 *Federal LR* 236 at 264.

33 Above n30 at 715, also at 707 per Barton J.

34 See for example, Stephen J in *China Ocean Shipping Co v State of South Australia* (1979) 27 ALR 1 at 44.

35 See above n32 at 262-3.

36 *John Sharpe & Sons Limited v The Ship Katherine Mackall* (1924) 34 CLR 420 at 428. See to the same effect *McIlwraith McEachern v Shell Co of Australia Ltd* (1945) 70 CLR 175 at 208 per Dixon J; and *China Ocean Shipping Co v State of South Australia* (1979) 27 ALR 1 at 25 per Gibbs J.

by the English courts in 1890".[37] The implication is that admiralty jurisdiction under the Bill would not be so restricted. Indeed, the Memorandum acknowledged that cl4(3) of the Bill, which defined "general maritime claims", involved a substantial extension of existing jurisdiction under the *Colonial Courts of Admiralty Act*, bringing Australia "fully into line with comparable overseas jurisdictions".[38]

The ALRC Report made it clear that the intention of its proposed Admiralty legislation was both to condense the various causes of action in the nineteenth century Imperial statutes, and to "*extend existing heads* and (where necessary) to add new heads to bring admiralty jurisdiction into line with Australian interests and requirements, viewed in the light of international acceptability as indicated by legislation in comparable jurisdictions".[39] The highlighted text manifestly refers to the more expansive wording of traditional statutory rights of action in rem in s4 of the *Admiralty Act*, in particular to the words "relating to" in that section. Moreover, in interpreting the heads of admiralty jurisdiction in English legislation, the courts give the words used "their ordinary wide meaning".[40] The ALRC Report suggests that it "can be assumed that Australian courts will interpret the proposed provisions in the same broad way".[41]

Nevertheless, it was submitted by YSL that Australian admiralty jurisdiction is to be identified by the 1890 Act, an argument which was rejected by Gummow J at first instance, with whom the Full Court agreed. Gummow J gave three reasons for rejecting the submission. Firstly, the jurisdiction of the English Admiralty Court had been the subject of incremental statutory extension during the nineteenth century:

> It would be an odd result if, under the Constitution, the power of the parliament to legislate was limited by reference to the state of the legislation of another parliament at a particular date, thereby entrenching in the Constitution the consequences of *The "Yuri Maru"* in circumstances where the authority of Westminster to legislate for Australia has now been terminated. Section 76(iii) should be construed as conferring upon the Parliament a power expressed in a general proposition "wide enough to be capable of flexible application to changing circumstances": *Australian National Airways Pty Limited v Commonwealth* (1945) 71 CLR 29.[42]

Secondly, Gummow J held that the words "of maritime" in s 76(iii) should be understood as words of extension to the word "Admiralty".[43] And thirdly, he considered it to be of significance that s76(iii) in its terms resembles Article III s2 cl 1 of the US Constitution. This clause states: "The judicial power [of the United States] shall extend to all cases of admiralty and maritime jurisdiction". The content of the United States admiralty and maritime jurisdiction found its most eloquent and resonant expression in the words of Story J in *De Lovio v*

37 "Explanatory Memorandum" to the Admiralty Bill 1988, in Hetherington, S, *Annotated Admiralty Legislation* (1989) at 10.

38 Id at 7.

39 Above n3 at para 145 (emphasis added).

40 *The Eschersheim* [1976] 1 All ER 920 at 926 per Lord Diplock.

41 Above n3 at para 146.

42 Above n15 at 516.

43 Ibid.

Boit,[44] who regarded the narrow and formalistic compass of English admiralty law with an American breezy insouciance worthy of Henry James. He said:

> At all events, there is no solid reason for construing the terms of the constitution in a narrow and limited sense, or for ingrafting upon them the restrictions of English statutes, or decisions at common law founded on those statutes, which were sometimes dictated by jealousy, and sometimes by misapprehension, which are often contradictory, and rarely supported by any consistent principle. The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorise us to believe that national policy, as well as judicial logic, require the clause of the constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutory restriction.[45]

Gummow J found attractive this restoration by Story J of admiralty jurisdiction to its original breadth of scope. What Story J had done "was not so much to redefine the content of the jurisdiction of the English Admiralty Court, as to construe the United States constitutional grant as to embrace all proper subject matter including that admiralty had from time to time claimed, but which the common law courts had successfully wrested from it by writs of prohibition addressed to it as a superior court of limited jurisdiction".[46] Gummow J elected to follow US law and interpret Admiralty and maritime jurisdiction broadly.

Gummow J (followed by the Full Court) augmented this finding by effectively overturning authority to the effect that s76(iii) bestows mere jurisdictional, and not substantive, legislative power. Adopting this approach facilitates the introduction of well-established canons of interpretation of legislative powers under the Constitution. In the words of Lockhart J, s76(iii) "must be construed broadly and liberally and as ensuring that the grant of power which it confers upon the Parliament is capable of adjustment to the constantly changing forces and conditions in Australia".[47]

As a result, the scope of the section accorded by the Federal Court was very broad: s76(iii) empowers "the Parliament to make laws conferring jurisdiction with respect to 'matters' arising out of controversies relating to or dealing with commerce or navigation of the sea, including the means by which or with the assistance of which those activities are or may be conducted";[48] or s76(iii) bestows upon Parliament "a power to confer federal jurisdiction with respect to matters arising from disputations relating to or dealing with commerce and navigation on the sea".[49]

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44 (1815) 7 Fed Cas 418.

45 Id at 442-3; quoted above n15 at 519.

46 Above n15 at 519.

47 Above n16 at 480. See also *Jumbunna Coalmine NL v Victorian Coalminers Association* (1908) 6 CLR 309 at 367-8 per O'Connor J; *R v Coldham; ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 314; *Commonwealth v Tasmania* (1983) 158 CLR 1 at 128 per Mason J and at 220-1 per Brennan J.

48 Above n15 at 521 per Gummow J (emphasis added).

49 Above n16 at 482 per Lockhart J.

B. *Section 76(iii) and "international practice"*

An additional basis for finding that admiralty and maritime jurisdiction is not limited to English jurisdiction at 1900, which as earlier stated has never been seriously contemplated by the High Court, is by reference to current international practice and contemporary usage.[50] This submission was made before Gummow J by the Commonwealth Attorney General (intervening) but was rejected as unhelpful on the basis that it is indeterminate and circular. That is, reference to the laws of other countries only displaces but then revivifies the question of what constitutes "admiralty and maritime jurisdiction" for the purposes of s76(iii). The argument was not considered before the full bench of the Federal Court. This is unfortunate because admiralty and maritime jurisdiction has a uniquely international character. It was one of the arguments of YSL before the High Court on the leave application that in rem jurisdiction under s76(iii) gives Australian courts jurisdiction over matters entirely unrelated to Australia other than that the vessels sailed into Australian waters and the plaintiff was able to arrest the vessel.[51] Jurisdiction is obtained by service of the writ on the vessel and it does not matter that the cause of action arose in another jurisdiction. It thus has international relevance in that it is important that the ambit of claims under the *Admiralty Act* be internationally accepted.

Moreover, the orientation of Gummow J and the Full Court was towards disproving the proposition that Australian admiralty and maritime jurisdiction was frozen at the year 1900. They went on to define admiralty and maritime jurisdiction by reference to American and English authority. Indeed, Gummow J expressly endorsed the submission of Owen Dixon KC (as he then was) before the High Court in *John Sharpe & Sons Limited v The Ship "Katherine Mackall"* to the effect that s76(iii) grants "power to confer jurisdiction with respect to all matters which were known among English speaking lawyers as matters pertaining to admiralty or maritime law".[52] There are two potential problems with this formulation. Firstly, American and English precedent may be inconsistent. This was the case in the Canadian decision in *Antares Shipping Corporation v The Ship "Capricorn"*[53], in which the Supreme Court of Canada declined to follow American authorities on admiralty jurisdiction excluding actions for specific performance. Ritchie J held: "This adoption of the American doctrine appears to me to run contrary to the English practice which, as I have indicated, forms the foundation of Canadian maritime law".[54] Secondly, the formulation is "originary" and backward looking rather than forward looking, with each new case requiring the perusal of perhaps ancient precedents to discern whether the case constitutes "proper subject matter" of admiralty jurisdiction. Shipping, trade and commerce are dynamic and increasingly sophisticated activities. In his second reading

50 See, for example, above n32 at 264.

51 There is of course no right to seek leave to serve process of a writ in rem out of jurisdiction in Australia: see *Aichhorn & Co KG & Anor v The Ship M V "Talabot"* (1974) 132 CLR 449. The *Service and Execution of Process Act* 1901 (Cth) does not apply to writs in rem: s23 *Admiralty Act* 1988.

52 Above n5 at 423.

53 (1979) 11 DLR (3d) 289.

54 Id at 296.

speech before Parliament, the Attorney General in 1988, Lionel Bowen, stated that because of Australia's dependence on foreign shipping, it is "in Australia's interest to support a broad Admiralty jurisdiction, which is dependent principally on the presence in the jurisdiction of the ship or sister [that is, surrogate] ship in relation to which a maritime claim arises. The proposed legislation, therefore, asserts a broad Admiralty jurisdiction but at the same time it takes account of international trends and remains within internationally acceptable limits".[55] The ALRC Report also supports this argument:

> Despite the absence of decisions on the scope of s.76(iii) it is probable, if not certain, that the High Court will take a broad view of the power. This does not necessarily mean that all matters which now fall within admiralty jurisdiction in other comparable countries would be held to fall within s.76(iii) in Australia — though that result is quite likely.[56]

Consistent with the above, it should not be overlooked that the ALRC emphasised that its recommendations, which ultimately became the *Admiralty Act* 1988, were only moderately innovative and overall conservative and restrained. Unlike the US which treats all rights of arrest as granting a maritime lien to the claimant and thus providing a far superior form of security to maritime claimants than their counterparts elsewhere in the world, and unlike South Africa which extends the right to a claimant to arrest an "associated ship" (a wider concept than "surrogate ship" under the *Admiralty Act* 1988), the ALRC strived not to expand Australian admiralty jurisdiction beyond what it perceived to be reasonable and acceptable internationally. For example it resisted attempts to persuade it to extend the right to arrest to time chartered vessels in particular.[57] The *Admiralty Act* 1988 has many similarities to the *Arrest Convention*,[58] the *Supreme Court Act* 1981 (UK) and the *Admiralty Act* 1973 (NZ).

More generally, it is arguable that in the context of the *Statute of Westminster Act* 1931 (Cth) (adopted in 1942), the *Australia Act* 1986, and the repeal of the *Colonial Courts of Admiralty Act* 1890,[59] Australian admiralty jurisdiction should take international norms as its touchstone, rather than English Admiralty jurisdiction.[60]

C. *Section 76(iii), separation of powers and United States doctrine*

Another issue with respect to s76(iii) (especially in the context of the submissions made by the appellant at the application for special leave in the High Court), is that of the relation between s76(iii) and the doctrine of separation of powers. Recent US judicial authority on the "Admiralty and maritime jurisdiction" clause of the US Constitution has held that, on the basis of the separation of powers doctrine, where the legislature has acted to confer jurisdiction pursuant to the Constitution, admiralty courts are not free to go be-

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55 Hetherington, above n37 at 1.

56 Above n3 at para 70. See also Zelling J "Constitutional Problems of Admiralty Jurisdiction" (1984) 58 *ALJ* 8 at 22.

57 Above n3 at para 128-39.

58 See above n2.

59 In so far as it is part of the law of the Commonwealth by s44 of the *Admiralty Act* 1988.

60 See also Zelling J "Of Admiralty and Maritime Jurisdiction" (1982) 56 *ALJ* 101; and Zelling, above n56.

yond or outside the limitations of the statute.[61] This doctrine has been criticised for the subservient role that it postulates for the United States Supreme Court.[62] Scholars critical of the doctrine have highlighted an alternative tradition of US constitutional theory on the scope of Federal admiralty and maritime jurisdiction. The *De Lovio* case supports a broad interpretation of the scope of admiralty and maritime jurisdiction and a vigorous role for the courts in the maintenance of it. Furthermore, the Supreme Court has formulated a quasi-legislative role for itself in the area of general maritime law:

> A narrow exception to the limited law-making role of the federal judiciary is found in admiralty. We consistently have interpreted the grant of general admiralty jurisdiction to the federal courts as the proper basis for the development of judge-made rules of maritime law.[63]

One academic has argued that this principle is reconcilable with the doctrine of separation of powers on the basis that Congress clearly has authority to legislate in all areas of maritime law and, in doing so, modify or supplement existing rules. However, the Supreme Court "has always reserved to itself the authority to rule on the constitutionality of any law passed by Congress to ensure that it does not violate the uniformity in maritime law mandated by the Constitution".[64] It is a role arguably forsaken by the Supreme Court in the *Miles* case, where the Court eschewed its capacity to strike down laws inimical to the uniformity of, or which restrict rights recognised by, general maritime law. Kimball cites extensive Supreme Court authority prior to *Miles* as support for the proposition that notwithstanding Federal legislation purporting to codify maritime law, the presumption (flowing from the doctrine of separation of powers) that the law has been "pre-empted", or exhaustively defined by Congress, does not apply in the case of maritime law. On the contrary, it seems that in the case of Federal statutes "enacting" maritime jurisdiction, whilst considerable deference must be shown to the Federal statutes, the court is free to apply pre-existing judge-made maritime law.[65]

The doctrine (problematic since the *Miles* decision) that the role of the courts with respect to admiralty and maritime jurisdiction is an activist one of maintaining consistency and uniformity of general maritime law, is unique to United States constitutional exegesis and has found no articulation in Australia. This is partly because in Australia admiralty jurisdiction is seen as remedial or procedural, and not as facilitating the exercise of substantive rights.[66] On the other hand, with the *Admiralty Act*, Federal Parliament has, for the first time, acted upon its mandate to legislate in admiralty and maritime jurisdiction. It is possible that the High Court will find favour in a conceptual explanation of the relationship between the courts and Parliament that accounts for the unique nature of the grant of constitutional power in admiralty and maritime ju-

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61 *Miles v Apex Marine Corporation* 498 US 19 (1990).

62 See Kimball, J D ,"*Miles*: This Much and No More . . ." unpublished version, 1993.

63 *Northwest Airlines v Transport Workers* 451 US 77 (1981) at 95-6 (citations omitted).

64 See Kimball, above n62 at 5.

65 Id at 7-8.

66 See above n3 at para 80; also, with respect to the US doctrine that judicial responsibility for admiralty and maritime jurisdiction under the US Constitution carried with it a power over substantive maritime law, see *The Lottawanna* 88 US 558 (1874), *Panama Railroad Co v Johnson* 264 US 375 (1924).

risdiction, and the otherwise uncertain relationship that it postulates between Parliament and the courts in fashioning or defining the content of maritime law.

7. *Defining "Proprietary Maritime Claim"*

A. *Meaning of "owner"*

The argument of YSL is essentially that an order for specific performance of a contract in favour of a third party, who at most holds an equitable interest in the relevant property, has no precedent. As a matter of strict construction, the reasoning of both Gummow J and the Full Court in rejecting this assertion is very persuasive. On the question as to whether an equitable interest is sufficient to ground a proprietary maritime claim, neither of the terms "possession" nor "ownership" is defined by the *Admiralty Act*. Interestingly, "mortgage" is defined to include "a hypothecation or pledge of, and a charge on, [a] ship or share, whether at law *or in equity* and whether arising under the law in force in a part of Australia or elsewhere".[67]

Overseas case law also points to the conclusion reached by the Federal Court. The decision of the English Court of Appeal in *The Evpo Agnic*[68] to the effect that "owner" in s21(4)(b) of the *Supreme Court Act* 1981 (UK) meant "registered owner" only, was peculiar to its context and is distinguishable from the present facts. In that case an action was being brought in relation to a "claim for loss or damage to goods carried in a ship" under s20(2)(g) of the 1981 Act (the equivalent of a general maritime claim under s4(3)(c) of the *Admiralty Act* 1988). To bring a claim in rem in such a case required an identifiable "relevant person", against whom an action in personam would be successful, who was the "owner" of the ship at the time the cause of action arose, and who was the "beneficial owner" at the time the action was brought. The court held that "owner" at the time the cause of action arose did not include someone who merely had an equitable interest in the ship. The reason for this was obvious in the context of the statutory provision — the English Parliament's use of "beneficial owner" in respect of the interest that needs to be demonstrated at the time the action is brought suggests that its use of the term "owner" does not include mere beneficial ownership. By contrast, the corresponding provisions of the *Admiralty Act* 1988 refer not to a "beneficial owner" at the time the action is brought, but merely an "owner". Moreover, *The Evpo Agnic* is further distinguishable from the situation in the present case where the action is based on a proprietary maritime claim which is in the property itself and so the concept of relevant person is not applicable. That *The Evpo Agnic* is not fatal for the present case is further demonstrated by a recent decision of the Singaporian Court of Appeal[69] in which the question arose as to whether a defendant was, at the time the cause of action arose, the "owner" of the ship for the purposes of s4(4) of the *High Court (Admiralty Jurisdiction) Act* 1985, in circumstances in which the plaintiff was the regis-

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67 Section 3(1) *Admiralty Act* (emphasis added).

68 [1988] 1 WLR 1090.

69 *Pacific Navigation Co Pte Ltd v The Owners of the Ship "OHM Mariana" Ex "Peony"* (31 May 1993).

tered owner of the vessel but the beneficial ownership remained vested in the defendant. It was held that the word "owner" meant a person who was vested with such ownership as to have the right to sell, dispose of or alienate the ship. This might or might not include a registered or legal owner depending on the circumstances, and clearly included a beneficial owner.

B. *Other Arguments*

YSL argues that even if s4(2) of the *Admiralty Act* does include claims of an equitable nature, it nonetheless does not include the right for an order for specific performance. The contrary argument is that s4(2) merely creates a cause of action, and the availability of admiralty and maritime jurisdiction should not be coloured by the nature of the remedy sought. At least in the case of disputes between co-owners under s4(2)(b), the Act makes specific provision for relief in s33. This section provides as follows:

> 33. In a proceeding on a maritime claim between co-owners of a ship relating to the possession, ownership, operation or earnings of the ship, the orders that the court may make include:
>
> (a) orders for the settlement of accounts outstanding and unsettled; and
>
> (b) an order directing that the ship, or a share in the ship, be sold.

Although not described as orders for specific performance, that is in effect what the prescribed remedies in s33 may achieve in many instances. Moreover, the use of the word "may" suggests that the list of orders that can be made by the courts is non-exhaustive, implicitly allowing latitude to make an order for specific performance in favour of a beneficial owner such as that sought in this case.

Fundamental to the problem, and why the decision has been appealed all the way to the High Court, is that there is no precedent "on all fours" with the facts in this case. It has been stated that jurisdiction under s4(2) "is not limited to possessory or proprietary claims in the strict sense, although of course it includes these. It extends to in personam claims which relate to future entitlements to ownership or possession of a ship".[70] The authors cite as evidence of this proposition a decision of the Canadian Supreme Court, *Antares Shipping Corporation v The Ship "Capricorn"*.[71] It is also cited by Gummow J[72] as evidence that there may be a claim relating to title, possession or ownership of a vessel where equitable interests are asserted against a legal owner. In *Antares*, the Supreme Court of Canada was held to be "clothed with jurisdiction to entertain an action for the enforcement of a concluded contract for the sale of a ship by delivery and by the execution of a bill of sale thereof".[73]

Another case is *The "Bineta"*,[74] in which the plaintiff sought a declaration that he was entitled to be registered as the owner of a ship in circumstances in which the registered owner had sold the ship to a purchaser who had defaulted and then, exercising the rights of an unpaid seller, had resold the ship to the plaintiff. The plaintiff successfully obtained a declaration that he was the

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70 Above n29 at para 50.

71 Above n53.

72 Above n15 at 506.

73 Above n53 at 292.

74 [1966] 3 All ER 1007.

owner of the ship and entitled to be registered in place of the defaulting purchaser. The equitable claim of the plaintiff was held to answer the description of "a claim to the possession or ownership" of a ship, even without the assistance of the wider words "relating to" in the Australian *Admiralty Act.* As Lockhart J suggests, the cogency of this conclusion is *a fortiori* where the words "relating to" are present.

Nonetheless, neither of these cases is strictly analogous to the facts in the present case, and YSL's assertion is that even the law embodied in these very similar cases cannot automatically be extrapolated to cover the facts of the present case, which YSL argues do not involve enforcement of a "maritime contract", but merely enforcement of a "commercial contract" which incidentally is concerned with maritime subject matter. YSL may find favour in some US precedents to the effect that a court of admiralty will not enforce an independent equitable claim merely because it pertains to maritime property. Last century the US Supreme Court held unanimously:

> While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. I cannot entertain a bill or libel for specific performance ...; or declare or enforce a trust or equitable title ... The jurisdiction embraces all maritime contracts, torts, injuries or offences, and it depends, in cases of contract, upon the nature of the contract, and is limited to contracts, claims and services purely maritime, and touching rights and duties pertaining to commerce and navigation.[75]

This was followed in *Swift & Company Packers v Compania Columbiana Del Cariba*,[76] which held that a court exercising admiralty jurisdiction could only look beyond the face of legal ownership, and consider the derivative issue of equitable rights and relief, if there was a pre-existing claim cognisable by admiralty jurisdiction, in this case a breach of a contract for carriage of goods.

This is arguably a highly artificial approach, in which the recognition of equitable title and the availability of equitable remedies depends upon the rather arbitrary existence of a concomitant legal right. Gummow J points to US writings in which these decisions "have been criticised as stating a rule that is an aberration ..."[77] Gummow J also refers to the US decision *Everett A Sisson v Burton B Ruby*,[78] a maritime tort case in which Scalia J observed of the "maritime contract" cases:

> The impossibility of drawing a principled line with respect to what in addition to the fact that the contract relates to a vessel (which is by nature maritime) is needed in order to make the contract itself "maritime" has brought ridicule upon the enterprise.[79]

Moreover, the "maritime contract" cases have not been followed in Canada.[80]

One commentator has also identified precedent in favour of the recogni-

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75 *The Steamer Eclipse* (1890) 135 US 599 at 608.

76 (1950) 339 US 684.

77 Above n15 at 506 — citing Robertson, *Admiralty & Federalism* (1970) at 120-1; Gilmore, G and Black, C L *The Law of Admiralty* (2nd edn, 1975) at 27; and *Richard Bertram v Yacht "Wanda"* [1971] AMC 1841.

78 (1990) 111 L Ed 2d 292.

79 Id at 305.

80 See above n53.

tion of joint venture agreements, such as that in the present case, by admiralty jurisdiction:

> In matters of contract, jurisdiction is governed by the maritime nature of the transaction irrespective of locality. This was extended to claims in quasi-contract by the decision in *P & O Steam Navigation Co v Overseas Oil Carriers Inc* (1977) 553 F 2d 830. One form of contract recognised in America as a maritime contract within Admiralty jurisdiction is a consortship or joint venture of ships pursuing a common goal. This idea is likely to grow and should be kept in mind in this country: see *Benedict* [*on Admiralty* Vol II (1982) para 244].[81]

Also, in the area of tort law there have traditionally been two views on whether a tort comes within admiralty and maritime jurisdiction. The wider view has been that the tort need only have occurred on the high seas to come within admiralty jurisdiction, and on the other hand the narrow view is that the tort must have a "maritime character". Australian Courts have favoured the wide view expressed by Lord Herschell in *The Zeta*.[82] By analogy, it is difficult to see why a similar broad view should not be taken of "maritime contracts".

8. *Conclusion*

I can only echo the plea of Zelling J in his seminal article on Australian admiralty law, in which he reflects upon Australia's slowly crystallising status as a major trading power in the world, increasingly independent of the Imperial yoke, and finds evidence of the High Court's recognition of this fact in its expanded construction of the companies power under the Constitution.[83] He continues: "One can only hope that the Justices of the High Court will have similar breadth of vision when legislation based on s76(iii) of the Constitution ultimately comes before them".[84]

81 Zelling, above n56 at 12.

82 *The Mersey Docks and Harbour Board v William H Turner; The "Zeta"* [1893] AC 468 at 485-6.

83 Placitum (xx) of s51 of the Constitution. The decision referred to is *Strickland v Rocla Pipes* (1971) 124 CLR 468, in which the High Court dismissed the earlier restrictive interpretation of the placitum in *Huddart Parker v Moorehead* (1908) 8 CLR 330.

84 Zelling (1982), above n60 at 106.