
"PAPERING OVER THE CRACKS"
BY THE HONOURABLE JUSTICE R.E. COOPER

**An introduction and commentary
by Sean J. Harrington**

Mr. Justice Cooper is a good friend of the Federal Court of Canada, and is well known to many members of the Canadian Maritime Law Association, having spoken at our 1995 Seminar. Unfortunately, I missed that Seminar and so did not have the pleasure of meeting him and his wife, Penny, until the CMI Conference in Antwerp this past June.

I first heard the Honourable Mr. Justice Michael Black, Chief Justice of the Federal Court of Australia, use the term "cross-vesting" during the festivities marking the 25th Anniversary of our Federal Court in 1996.

The Federal Court of Canada has two great advantages over the provincial courts which have concurrent jurisdiction to administer *Canadian Maritime Law*. The Federal Court's writ runs nation-wide and the action *in rem* provides far better pre-judgment security than the Mareva Injunction or the Quebec Seizure before Judgment. Unfortunately, however, the brief history of the Federal Court has been plagued with uncertainty. What are the statutory limits on its jurisdiction? What, exactly is the content of *Canadian Maritime Law*? What do we do if the Court has jurisdiction over one defendant, or over part of a cause of action, but its overall jurisdiction is in jeopardy?

In order to avoid accusations of negligence, practitioners sometimes must fragment a cause of action into its component parts, and file suit in several jurisdictions. This leads to the risk of conflicting judgments, and to an overall rise in the cost of the administration of justice.

I recently had the honour of serving as Chairman of the Association of Average Adjusters of Canada. As a result, for a while I was part of an incredible banquet circuit, and had the opportunity of meeting a number of times with Jim Moseley, President of The Maritime Law Association of the United States. In passing, I mentioned some of these problems to him. He replied that in the United States the concept of "pendant jurisdiction" had developed. I reported back to Mr. Justice Stone that it might be interesting to take a look at how other federal states have dealt with admiralty jurisdiction. He agreed. Mr. Moseley has been kind enough to come to Ottawa to present a paper, notwithstanding this is the United States Thanksgiving weekend.

Mr. Justice Stone and I then set our eyes on Australia, and had the opportunity of discussing "cross-vesting" with Mr. Justice Cooper in Antwerp. He was kind enough to send us a huge package of background material.

As circumstances would have it, Mr. Justice Cooper's wife, Penny, who is an accomplished lawyer in her own right, was presenting a paper at the Université de Montréal shortly after the CMI Conference, and Mr. Justice Cooper acted as moderator during one of the other sessions. This gave the members of the Montreal Admiralty Bar who had not been at the CMI Conference, and the Bâtonnier of the Barreau de Montréal, to meet the Coopers, and to discuss cross-vesting a little more.

Another benefit of that meeting is that the Bâtonnier, Pierre Fournier, and I serve on a Barreau de Montréal committee dealing with Access to Justice, a subject very dear to the hearts of the Coopers. The Barreau is currently considering the Australian experience; all of which goes to show how important it is to avoid parochialism, and to embrace good ideas wherever they may be found.

Cross-vesting is a good idea. Although the specific language of the Australian statutes differ somewhat from ours, the admiralty experience was quite similar to ours. It is to be hoped that the national cross-vesting scheme introduced in 1987 by means of parallel federal and state legislation will reduce, if not entirely eliminate, jurisdictional issues. As Mr. Justice Cooper says:

"The scheme involves Complimentary State and Common Law of legislation which provides for the mutual cross-vesting of original and appellate jurisdiction between The Federal Court of Australia -- and the Supreme Courts of the States and Territories. No proceeding which comes within the scheme can fail because the court in which the proceeding is commenced does not have jurisdiction over the subject matter of the suit."

The cost of litigating claims on the merits has become so high that parties are looking for alternate means of dispute resolution. That cost has been exacerbated in Canada by waste of time and money on jurisdictional points, as a review of the jurisprudence under Section 101 of the Constitution Act readily shows.

In August I explained our problems to Mr. Justice Cooper as follows:

" By way of background, the following is a very brief summary of the current Constitutional and judicial limits placed on the Federal Court of Canada's Admiralty jurisdiction.

Sections 91 and 92 of the *Constitution Act* distribute legislative powers between the federal Parliament and provincial legislatures. The federal Parliament may enact legislation, *inter alia*, in respect of the regulation of trade and commerce; beacons, buoys, lighthouses and Sable Island, navigation and shipping, quarantine and the establishment and maintenance of marine hospitals; seacoast and inland fisheries; and ferries between a province and any British or foreign country or between two provinces. (Emphasis added.)

Under Section 92, each province may legislate with respect to, *inter alia*, local works and undertakings, property and civil rights in the province and the administration of justice in the province, including the constitution, maintenance and organization of provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts, and generally all matters of a merely local or private nature in the province. (Emphasis added.)

Thus, the general rule is that the provincial Courts administer all applicable law, be it federal or provincial in origin. However, Section 101 of the *Act* goes on to provide:

"The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

The Supreme Court of Canada is the general Court of appeal, while the Federal Court of Canada, which replaced the Exchequer Court in 1971, is an additional Court for the better administration of the laws of Canada.

The *Federal Court Act* conferred a wider jurisdiction on the Court than the Exchequer Court enjoyed, particularly in non-maritime areas. The key maritime section of the *Federal Court Act* is Section 22, which confers jurisdiction:

"in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned."

Canadian maritime law is defined in Section 2 as meaning:

"The law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act*, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by its Act or any other Act of Parliament."

Section 23 of the *Act* gives the Court jurisdiction over "works and undertakings connecting a province with any other province or extending beyond the limits of a province".

It had been widely thought that if the dispute fell within a federal legislative class of subject, and if jurisdiction was conferred on the Federal Court by either Section 22 or 23, that Court had jurisdiction even if there was no federal law in place. It was assumed that the general law otherwise applicable, usually being provincial law as being a matter of property and civil rights, would be applied. However, in *Quebec North Shore Paper Co. v. C.P. Ltd.* (1977), a case which was characterized as one relating to an inter-provincial work or undertaking, the Supreme Court held that, in addition to the above two mentioned tests, there must be actual existing pertinent federal law to administer. There was said to be no relevant federal law relating to inter-provincial works or undertakings and so the action was dismissed on the grounds of lack of jurisdiction.

This caused a great commotion within the admiralty bar. Federal legislation such as the *Carriage of Goods By Sea Act*, the *Canada Shipping Act*, the *Bills of Lading Act*, the *Navigable Waters Protection Act*, and others, are certainly not all-encompassing. For instance, the *Carriage of Goods By Sea Act* which then gave force to the *Hague Rules*, and now the *Hague-Visby Rules*, only applies to bills of lading covering shipments from a Canadian port. However, the Supreme Court in short order held in *Tropwood A.C. v. Sivaco Wire and Nail Co.* (1979) and *Antares*

Shipping Corp. v. The CAPRICORN (1980) that Canadian maritime law is a body of statutorily recognized law coextensive with the federal Parliament's legislative authority over navigation and shipping. However, the Court did not find it necessary in either of those cases to say what that law was. For instance, there was quite a debate in *The TROPWOOD* as to whether the *lex non scripta* portion of Canadian maritime law drew from the laws of the province with the closest contact with the case, or from English admiralty and English common law.

It was finally held in *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc. (The BUENOS AIRES MARU)* (1986) that Canadian maritime law is uniform throughout the country and encompasses the principles of English admiralty law and English common law as they were in 1934, the year one of our Admiralty Acts was enacted. The Court went on to hold that provincial law did not form part of Canadian maritime law except:

"Where a case is in "pith and substance" within the Court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties --."

The limitations on the Federal Court's jurisdiction and its ability to administer provincial law have given rise to a number of difficult cases, both in the Federal Court and in the various provincial Courts which have concurrent admiralty jurisdiction. For example, England did not pass its Contributory Negligence Statute until 1947, and although Canada has given effect to the proportionate fault rule in the Collision Convention of 1910, that rule does not apply in non-navigational issues. The Newfoundland Court of Appeal held that the Newfoundland contributory negligence statute applied to a fire on board an oil rig, which fell within federal jurisdiction as being "incidentally necessary". That case, which was followed by the Ontario Court of Appeal, was argued before the Supreme Court of Canada in June. The Ontario Court of Appeal has held that various Ontario statutes likewise form part of Canadian maritime law as being "incidentally necessary" while the Quebec Court of Appeal has refused to give any effect to provincial statutes in the Canadian Maritime Law context.

Section 22(2)(f) of the *Federal Court Act* gives the Federal Court jurisdiction over "any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading--for loss or damage to goods occurring at any time or place during transit". In an action by cargo interests against the ocean carrier and its sub-contractor trucker for damage which allegedly occurred when the trucker had custody of the cargo, the Federal Court of Appeal held that it had jurisdiction over the claim against the ocean carrier, but not over the claim by cargo interests against the trucker or the claimover proceedings instituted by the ocean carrier against the trucker. This is very inconvenient.

This is the muddle in which we find ourselves. Although the provincial Courts have concurrent Admiralty jurisdiction, it is often very difficult for any one

provincial Court to take effective jurisdiction over all potential defendants. For the most part, liner ships call at ports in British Columbia, Quebec and Nova Scotia, with the point of origin or destination often being somewhere else, such as Ontario or Alberta."

Parliament and the provincial legislatures cooperated in 1986 by passing parallel legislation giving effect to the Uncitral Model Law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Why not cross-vesting?

Unfortunately, Mr. Justice Cooper's duties do not permit him to be with us today. It is my great privilege to present this paper on his behalf. I will try to do him justice.

Let us begin. "G'DAY MATES!"



**PAPERING OVER THE CRACKS:
ATTEMPTS AT COMPLETE AND FINAL DISPUTE
RESOLUTION IN ADMIRALTY AND RELATED MATTERS IN
AUSTRALIA**

**The Honourable Justice R E Cooper
Federal Court of Australia
November 1997**

Introduction:

The functioning of any body politic involves the exercise of executive or administrative power, legislative power, and judicial power. The extent to which any of these powers are exercised and by whom depends upon the sophistication of the society constituting the body politic and the ideological model underpinning the distribution and exercise of all or any of the powers.

If the object of the exercise of judicial power is to avoid a multiplicity of proceedings and to do final and complete justice as between all persons interested in a subject of controversy, discrete fragmentation of the totality of the jurisdiction and the judicial power between courts or tribunals of limited jurisdiction is antithetical to the achievement of such an object. An example of such fragmentation is the evolution of the Courts of Chancery, Common Law, Admiralty and Exchequer in the United Kingdom. The Judicature Acts of 1873 and 1875 ("the Judicature Acts") were a legislative response to the problem¹. The effect of the Judicature Acts was not to create any new jurisdiction in the High Court of England, but to ensure that each division of it could exercise to the full the jurisdiction of any court which was made a member of the High Court by the Judicature Acts and exercise all of the powers which previously were exercised by one or more of those courts².

¹ See s 24(7) *Judicature Act 1873* (UK); *In the Goods of Tharp* (1878) 3 PD 76 at 81

² *The James Westoll* [1905] P 47 (CA) at 51; *R v Scott* (1993) 42 FCR 1 at 27 - 28

Where there is a unitary system of government in a nation state, the ability to provide a complete jurisdiction and a complete array of powers to finally hear and determine matters of controversy is, in theory, straightforward and capable of achievement. Where the nation state is comprised of a compact between otherwise independent bodies politic, the potential for fragmentation of both judicial jurisdiction and judicial power, and the extent of it, is dependent upon the terms of the compact. Canada, the United States of America and Australia as federations have divided as between the nation state and its constituent parts (the states and provinces) the power to make, administer and enforce laws by reference to specific heads of power on subject matter. The legislative competence of each State or Territory constitutes it "a separate law area enforcing its own laws"³. With the division of legislative and executive power the attendant jurisdiction to exercise judicial power is distributed and thereby diminished along the lines of the divide. Although each jurisdiction may have provisions similar to s 24(7) of the *Judicature Act 1873* (UK) requiring a court to do complete and final justice to avoid a multiplicity of proceedings, those provisions confer powers to be exercised within the jurisdiction, but subject always to the limits of the jurisdiction; they do not in themselves provide a mechanism to overcome the deficits of the jurisdiction.

This paper examines the Australian experience in admiralty and related matters in a nation where judicial power is divided between the Commonwealth on the one hand and the States and Territories on the other.

³ *Breavington v Godleman* (1988) 169 CLR 41 at 85; *Commonwealth of Australia v Mewett*; *Commonwealth of Australia v Rock*; *Commonwealth of Australia v Brandon* (1997) 146 ALR 299 at 302; 327 (hereafter cited as *Commonwealth of Australia v Mewett*)

Historical Background:

Continental Australia was developed as a series of colonies commencing in 1788 with the foundation of the colony of New South Wales. A Vice Admiralty Court was established for the new colony by letters patent issued under the Great Seal of the High Court of Admiralty on 30 April 1787. The statutory jurisdiction of the Vice Admiralty Courts was first provided under the *Vice Admiralty Courts Act 1832* (UK) and later expanded by the *Vice Admiralty Courts Act 1863* (UK). The Act of 1863, in part, reflected the expansion of the jurisdiction of the Admiralty Court in England provided under the *Admiralty Court Act 1861* (UK). The Vice Admiralty Courts in the Australian colonies were separate courts from the Supreme Courts of the colonies.

In 1890 the *Colonial Courts of Admiralty Act 1890* (UK) ("the 1890 Act") was enacted. That Act provided (s 2(1) and s 15) that every court in a British possession declared in pursuance of the Act to be a court of Admiralty, or which if no declaration was in force had original unlimited civil jurisdiction, was to be a court of Admiralty with the jurisdiction given by the 1890 Act. The jurisdiction of the Colonial Courts of Admiralty was over the like persons, matters and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of statute or otherwise (s 2(2)). Importantly, a Colonial Court of Admiralty could, for the purposes of its admiralty jurisdiction, exercise all the powers which it held for the purpose of its other civil jurisdiction (s 2(1)). In this way the reforms of the Judicature Acts in the United Kingdom, so far as they impacted on the Admiralty jurisdiction of the High Court in England, were introduced into the colonies, provided the Court was one of original unlimited civil jurisdiction with a general common law and equity jurisdiction.

Each of the Supreme Courts of the colonies in Australia became a Colonial Court of Admiralty. The Vice Admiralty Courts ceased to exist in Queensland, South Australia, Tasmania and Western Australia on 1 July 1891 on commencement of the 1890 Act (s 17) and in New South Wales and Victoria on 1 July 1911 as the commencement was delayed in these two colonies (s 16(1) and First Schedule to the Act).

The Commonwealth of Australia was formed by the *Commonwealth of Australia Constitution Act 1900* (UK). The former colonies became States under the Constitution. Section 5 of the *Constitution Act* provided :-

“5. This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen’s ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.”

The judicial power of the Commonwealth is vested in a Federal Supreme Court called the High Court of Australia and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction (s 71). By s 76 the Parliament is empowered to make laws conferring original jurisdiction in any matter *“of Admiralty and maritime jurisdiction”*. By Part V of Chapter 1 the legislative powers of the Commonwealth Parliament are set out. So far as is relevant for present purposes the powers which impact most directly on shipping and navigation and the adjudication of maritime claims and controversies are the powers under s 51 with respect to trade and commerce with other countries and amongst the States (s 51(i)), naval and military defence of the Commonwealth and of the States (s 51(vi)), lighthouses, lightships, beacons and buoys (s 51(vii)), quarantine (s 51(ix)), fisheries in Australian waters beyond territorial limits (s 51(x)), service and execution of process

throughout the Commonwealth (s 51(xxiv)), external affairs (s 51(xxix)) and matters incidental to the execution of any power vested by the Constitution in the Parliament, the Federal Judicature or any department or officer of the Commonwealth (s 51(xxxix)). The Commonwealth power to make laws with respect to shipping and navigation is specifically included within the trade and commerce power (s 98).

The creation of the Commonwealth and the establishment of the High Court of Australia, a court of unlimited civil jurisdiction as defined by s 15 of the 1890 Act, raised doubts as to where the admiralty jurisdiction lay in Australia: whether it was with the High Court or with the Supreme Courts of the States or Territories of Australia. The difficulty arose from the definition of "*British Possession*" under s 18 of the *Interpretation Act 1889* (UK). That definition provided that a British possession was "... *any part of Her Majesty's dominions exclusive of the United Kingdom and where parts of such dominions are under both a central and local legislature, all parts under the central legislature shall, for the purposes of the definition be deemed to be one British possession*".

The High Court in 1924 held that it was a Colonial Court of Admiralty with jurisdiction under the 1890 Act⁴. That decision left in doubt the jurisdiction in admiralty of the State courts on the basis that the States and Territories were no longer British possessions⁵.

The doubt as to the admiralty jurisdiction of the State and Territory Supreme Courts was resolved by the High Court in *McIlwraith McEacharn Ltd v Shell Co of Australia Ltd*⁶. The Court held that the Commonwealth of Australia was the "*possession*" within the meaning of

⁴ *John Sharp & Sons Ltd v The Katherine Mackall* (1924) 34 CLR 420

⁵ *McArthur v Williams* (1936) 55 CLR 324 at 340, 358 - 360

the definition and therefore the unit of jurisdiction for the purposes of the 1890 Act. As each of the High Court and State and Territory Supreme Courts was a court of unlimited civil jurisdiction "*in a British Possession*" each was a Colonial Court of Admiralty⁷. The Court also rejected the notion that the 1890 Act actually created new courts holding that a new jurisdiction was given to existing courts. Albeit a new jurisdiction limited to that of the Admiralty Division of the High Court of England in 1890⁸.

The limitations imposed by the Privy Council in *The Camosun* did not impact in Australia as they did in Canada on the Exchequer Court of Canada. Whereas the Exchequer Court of Canada was a court of limited statutory jurisdiction, having no general common law or equity jurisdiction (it having been declared by the Canadian Parliament to be an Admiralty Court pursuant to s 3 of the 1890 Act), the State and Territory Supreme Courts and the High Court enjoyed a general common law and equity jurisdiction. This jurisdiction was unaffected and the powers exercisable in that jurisdiction were also exercisable for the purposes of the admiralty jurisdiction (s 2(1) of the 1890 Act). Thus, subject to the limitation of the subject matter fixed as at 1890 and the territorial limitations of the States and Territories, the Australian courts exercised a like jurisdiction with like powers to the Admiralty Division of the High Court in England. This they did as Colonial Courts of Admiralty. However, the only court capable of acting across the entire country was the High Court of Australia.

⁶ (1945) 70 CLR 175

⁷ 70 CLR at 204 - 205

⁸ *Bow, McLachlan & Co v Ship "Camosun"* [1909] AC 597 at 608; *The Yuri Maru and The Woron* [1927] AC 906 at 915 - 916

Admiralty Reform

In 1982 a joint committee of the Law Council of Australia and the Maritime Law Association of Australia and New Zealand produced a joint report on "*Admiralty Jurisdiction in Australia*" and a draft Admiralty Jurisdiction Bill⁹. The report called for substantial reform of the Australian law of admiralty.

On 23 November 1982 the Commonwealth Attorney-General referred to the Australian Law Reform Commission all aspects of admiralty jurisdiction in Australia and directed it to report and recommend provisions for an Australian Admiralty Act and to report on the need to amend or repeal other Commonwealth and Imperial legislation.

The Law Reform Commission reported in 1986¹⁰. It recommended a federal Act based on s 76(iii) of the Constitution. That jurisdiction was to be federal jurisdiction exercised concurrently by the Federal Court of Australia and the State and Territory Supreme Courts in *in rem* proceedings, and, all State or Territory civil courts subject to their territorial and monetary limitations in *in personam* proceedings.

The Law Reform Commission recommended that admiralty jurisdiction *in rem* was to be conferred with respect to :-

- disputes relating to the ownership, possession or title to a ship or a share in a ship;
- disputes as to co-ownership;

⁹ See note (1982) 56 ALJ 617

¹⁰ "*Civil Admiralty Jurisdiction: Report No 33*"

- mortgages, including foreign mortgages or hypothecations, whether or not registered, with the Federal Court given concurrent power to rectify the register under the *Shipping Registration Act 1981*;
- claims for towage and pilotage;
- all claims relating to salvage, but not including under this head claims for negligent salvage or liability salvage;
- general average claims;
- claims for wages, broadly defined, of masters and crew members; "crew members" defined as in the *Navigation Act 1912* (Cth) s 6 but apprentices to be crew members for this purpose;
- claims for disbursements made by masters, shippers, charterers or agents on behalf of a ship;
- claims for damage done by a ship;
- personal injury claims occurring in the operation of a ship for which the ship owner, operator or charterer was liable;
- claims for loss of or damage to goods carried by ship;
- claims for carriage of goods by ship;
- claims arising from agreements for the use or hire of a ship;
- claims for the construction, repair, alteration or equipping of a ship (including claims for construction before the ship was launched);
- claims for goods, materials or services supplied to a ship;
- claims for unpaid insurance premiums or protection and indemnity club calls;
- dock, harbour, light and similar dues and charges;

- claims for pollution damage under the *Protection of the Sea (Civil Liability) Act 1981* (Cth); the jurisdictional limits in Art IX of the International Convention on which that Act is based to be given effect to;
- claims for damages arising in the operation of a ship for which the ship owner, operator or charterer was liable; this head of jurisdiction to include the innominate torts then within the inherent jurisdiction of the Admiralty Court;
- claims for the enforcement of arbitral awards in respect of maritime claims;
- claims for the enforcement of local and foreign admiralty judgments *in rem*; such claims to be treated as proprietary in character.

It also recommended that *in personam* jurisdiction be conferred with respect to :-

- claims for damage done to a ship;
- claims to limit liability under any of the International Conventions applicable in Australian law allowing for limitation of liability in relation to ships;
- ancillary matters of admiralty and maritime jurisdiction associated with matters in respect of which the court's jurisdiction was invoked;

The recommendations of the Law Reform Commission were accepted and passed into legislation as the *Admiralty Act 1988* (Cth) ("the 1988 Act") which came into force on 1 January 1989. Prior to that date the Federal Court of Australia did not exercise admiralty jurisdiction¹¹.

The 1890 Act was repealed by s 44 of the 1988 Act as part of the law of the Commonwealth as were other imperial Acts commencing with *13 Richard II, Statutes 1, Chap 5* which had

¹¹ As to whether it had such a jurisdiction see: B H McPherson "*Admiralty Jurisdiction and the Federal Court*" (1981) 55 ALJ 71

given jurisdiction to the Admiralty Court in England and which had been part of the received admiralty jurisdiction of the Vice Admiralty Courts and then the High Court and State and Territory Courts as Colonial Courts of Admiralty.

The investing of State courts with federal jurisdiction is a long-standing feature of the exercise of the federal judicial power; at least until the creation of the Federal Court of Australia in 1976. The power to invest federal courts, other than the High Court and State and Territory courts with federal jurisdiction comes from s 77 of the Constitution.

The 1988 Act made specific provision for cross-vesting the jurisdiction of each of the courts invested with federal admiralty jurisdiction.

Section 39(1) and s 39(2) provides :-

“39(1) Subject to any Proclamation made under subsection 11(2), where a court of a State is invested with jurisdiction in relation to a proceeding commenced as an action in rem, or such jurisdiction is conferred on a court of a Territory, by or under this Act, then:

- (a) in the case of a court of a State - the court is invested with the jurisdiction within the limits of the jurisdiction of that court as to the amount claimed and as to remedies, but not otherwise; and*
- (b) in the case of a court of a Territory - the jurisdiction is conferred on the court only so far as the Constitution permits and within the limits of the jurisdiction of that court as to the amount claimed, as to locality and as to remedies, but not otherwise.*

(2) Where a court of a State is invested with jurisdiction in relation to a proceeding commenced under section 9 [actions in personam] or such jurisdiction is conferred on a court of a Territory, the jurisdiction is invested or conferred within the limits of the jurisdiction of the court concerned and, in the case of a court of a Territory, only so far as the Constitution permits.”

The effect of the provision is to invest in all other admiralty courts a jurisdiction co-extensive with that of the court in which a proceeding is commenced.

By s 40 all courts having jurisdiction under the 1988 Act, the judges of those courts and the officers of those courts are to act in aid of each other in all matters arising under the Act. Common rules of court have been made under the 1988 Act to eliminate cross-jurisdictional problems of practice and procedure. The ordinary rules of the courts exercising admiralty jurisdiction continue to apply provided that they are not inconsistent with the *Admiralty Rules*.

The question of the constitutional power of the Commonwealth to legislate to support the heads of jurisdiction arose in 1991 when the ambit of the jurisdiction as to ownership, possession or title to a ship or share in a ship was challenged in the Federal Court of Australia¹².

The claim was for specific performance of a joint venture agreement to enforce re-transfer of the vessel to a third party. The plaintiff sought to enforce the claim by an *in rem* action in the Federal Court of Australia. The jurisdiction of the court was denied upon the basis that a proprietary maritime claim was one where the plaintiff asserts or relies upon its own right to possession, title, ownership or the like against the particular ship and not one for enforcement of a joint venture agreement which would see the ship transferred to a third party. The Court upheld both the jurisdiction and availability of the claim to relief.

¹² *Empire Shipping Co Inc v Owners of the Ship "Shin Kobe Maru"* (1991) 32 FCR 78; on appeal (1992) 38 FCR 227

On appeal to the High Court, the constitutional power in s 76(iii) of the Constitution to confer jurisdiction as to matters “*of Admiralty and maritime jurisdiction*” was in issue. As to the approach to the constitutional grant, the High Court said¹³ :-

“Ordinary principles of constitutional construction, which require constitutional provisions to be interpreted liberally according to their terms without imposing limitations that are not found in the express words (see Reg v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd (1964) 113 CLR 207 at 225) compel the conclusion that ‘maritime’ in s 76(iii) serves to extend jurisdiction beyond Admiralty jurisdiction as it existed in 1901. And quite apart from the course of constitutional interpretation of Art III, s 2(1) of the United States Constitution, and notwithstanding what was said by Isaacs J in John Sharp & Sons Ltd v The Katherine Mackall (1924) 34 CLR 420 at p 428 to the effect that s 76(iii) was predicated on ‘established English precedent’, those same ordinary principles direct an approach which allows that s 76(iii) extends to matters of the kind generally accepted by maritime nations as falling within a special jurisdiction, sometimes called Admiralty and sometimes called maritime jurisdiction, concerned with the resolution of controversies relating to marine commerce and navigation.”

The Court also held that the nature of the claim and the remedy, as a matter of construction and as a matter of appropriate relief in a like court, for example that of a claim as to title, possession or ownership extended to a claim for specific performance¹⁴, were properly brought and available under the 1988 Act.

The grant of federal admiralty jurisdiction and the powers provided under the 1988 Act are additional to the jurisdiction of the Federal Court of Australia has under other Commonwealth legislation and additional to the ordinary jurisdiction of the courts of the States and Territories. To the extent that it is sought to deal with controversies or issues which do not fall within the admiralty jurisdiction, however broadly interpreted, it is necessary to find a jurisdiction, if possible, with power to do so.

¹³ *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co Inc (1994) 181 CLR 404 at 424*

Federal Jurisdiction

Taking firstly the position of the Federal Court of Australia. This Court is a statutory court and its jurisdiction comes specifically from statute. Its ability to give final and complete justice in respect of all issues arising out of a controversy requires a brief examination of the relevant statutes.

The original jurisdiction of the Federal Court of Australia is such jurisdiction as is vested in it by the laws made by the Commonwealth Parliament. In addition to the jurisdiction under the 1988 Act there are other specific grants of jurisdiction which have a maritime content. More importantly, since 17 April 1997, the Federal Court of Australia has had unlimited original jurisdiction in any matter arising under any laws made by the Commonwealth Parliament¹⁵. The importance of a grant in such terms is that it carries with it the pendant or accrued jurisdiction in respect of non-federal matters which is discussed below.

The Judicature Acts requirement to hear and determine completely and finally all matters in controversy between parties so as to avoid a multiplicity of proceedings is contained in s 22 of the *Federal Court of Australia Act 1976* (Cth) ("the Federal Court Act"). The section, like the Judicature Acts, grants no new jurisdiction, but operates in respect of matters properly within the court's jurisdiction¹⁶. The original jurisdiction of the court was sought to be extended to hear non-federal issues in certain circumstances. Section 32 of the Federal Court Act provides :-

¹⁴ *Antares Shipping Corp v The "Capricorn"* [1980] 1 SCR 553

¹⁵ Section 39B(1A) *Judiciary Act 1903* (Cth)

¹⁶ *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 489

“32(1) To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked.

(2) The jurisdiction conferred by subsection (1) extends to jurisdiction to hear and determine an appeal from a judgment of a court so far as it relates to a matter that is associated with a matter in respect of which an appeal from that judgment, or another judgment of that court, is brought.”

The High Court has held that the Constitution does not permit federal legislation to authorise the Federal Court of Australia to hear matters which are non-federal in origin and separate and distinct from matters within the original jurisdiction of the court, notwithstanding that the non-federal matters are loosely associated with the federal matters¹⁷. Accordingly, in relation to matters which are non-federal in origin, s 32 of the Federal Court Act is read down to the limit of the constitutional grant. That limit includes a jurisdiction to hear all matters whether of federal or non-federal origin which are attached to or are accrued by the “*matter*” giving rise to the jurisdiction. The defining feature is that “*matter*” is not limited to a cause of action as such but represents the facts pleaded upon which the plaintiff or applicant relies and the remedies sought as a consequence of those facts considered as matters of substance and not of form. If the matter does in substance attract the federal jurisdiction, then the entire matter, including the elements of non-federal origin, are accrued and justiciable as part of the federal jurisdiction¹⁸.

The High Court in *Fencott v Muller*¹⁹ affirmed the jurisdiction of the Federal Court to determine the whole controversy or matter of which an issue under a federal law constituted

¹⁷ *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457

¹⁸ 148 CLR 473 - 475; 507; 512 - 515; 520 - 521

¹⁹ (1983) 152 CLR 570

part. As to the recurrent problem of identifying what it is that falls within the accrued jurisdiction, the High Court said²⁰ :-

“... What is and what is not part of the one controversy depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships. The scope of a controversy which constitutes a matter is not ascertained merely by reference to the proceedings which a party may institute, but may be illuminated by the conduct of those proceedings and especially by the pleadings in which the issues in controversy are defined and the claims for relief are set out. But in the end, it is a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter.”

The decision to exercise the accrued jurisdiction is a discretionary one. However, the power to vest the jurisdiction given by the Constitution in federal or State courts has as its object the effective disposition of justiciable controversies by the means chosen by Parliament. In exercising the power to vest jurisdiction by either means, Parliament does so with the object of achieving a final and complete disposition of all matters arising in the matter and the discretion is to be exercised against that background²¹.

The State courts are invested with federal jurisdiction by s 39 of the *Judiciary Act 1903* (Cth) (“the Judiciary Act”). Subject to certain exceptions not presently relevant, State courts are invested, within the limits of their jurisdiction, with federal jurisdiction in all matters in which the High Court of Australia has original jurisdiction or in which original jurisdiction can be conferred upon it. State courts may also be invested with federal jurisdiction under specific Commonwealth legislation, for example admiralty jurisdiction under the 1988 Act.

²⁰ 152 CLR at 608

²¹ *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 293 - 294

The Judiciary Act also makes provision for the choice of law rules which are to apply when federal jurisdiction is being exercised. Section 79 provides :-

“79. The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.”

Section 80 provides :-

“80. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.”

Prior to 1988 the reference in s 80 to the common law was *“the common law of England”*.

The law to be applied by a court exercising federal jurisdiction is federal law, that is, law derived directly or indirectly from the Commonwealth Parliament as the principal source of federal law²². To have any operation in the exercise of federal jurisdiction, a State or Territory law must be made *“surrogate Commonwealth law”*²³ by the operation of another Commonwealth law²⁴. Section 79 and s 80 of the Judiciary Act are Commonwealth laws which render State and Territory law surrogate Commonwealth law in the circumstances provided for in those sections.

²² *Maguire v Simpson* (1977) 139 CLR 362 at 369

²³ *Maguire v Simpson* at 408

²⁴ *Commonwealth of Australia v Mewett* at 350

The law of a State or Territory upon which s 79 operates includes its choice of law rules²⁵. The effect of s 79 and s 80 is to apply to each proceeding the whole body of law including the common law in the relevant State or Territory, except to the extent to which it is inconsistent with the Constitution and the laws of the Commonwealth²⁶.

The operation of s 79 and s 80 of the Judiciary Act in a maritime context may be illustrated by reference to the decisions in *Commonwealth of Australia v Mewett*, *Commonwealth of Australia v Rock*, *Commonwealth of Australia v Brandon*. Mewett, Rock and Brandon were former members of the Royal Australian Navy. Mewett alleged that he suffered acute traumatic stress disorder when his ship, HMAS Kembla, was swamped by waves as it proceeded out of Port Philip in the waters of the State of Victoria. Rock and Brandon alleged that they suffered physical injury from exposure to gas and vapours while serving on HMAS Stalwart, which at the time was proceeding on the high seas between Sydney and Surabaya. At issue was the operation of any limitation period to bar the plaintiffs' claims. As claims against the Commonwealth, the actions when filed in the High Court of Australia were in the original diversity jurisdiction of the court under s 75(iii) of the Constitution. The writs were filed in the Sydney, New South Wales Registry of the High Court and remitted by the High Court²⁷ to the New South Wales District Registry of the Federal Court of Australia for hearing by the Federal Court of Australia. The Commonwealth pleaded, amongst other things, that the causes of actions, if any, were extinguished due to the passage of time by the operation of the *Limitation Act 1969* (NSW).

²⁵ *Musgrave v the Commonwealth* (1937) 57 CLR 514; *Commonwealth of Australia v Mewett* at 350

²⁶ *Commonwealth of Australia v Mewett* at 308, 312

²⁷ *Judiciary Act 1903* (Cth) s 44

There is no Commonwealth statute of limitations. Because the matter was heard in the Federal Court in New South Wales, the High Court, by a majority, held that in each case s 79 of the Judiciary Act operated, once the federal jurisdiction was exercised in that State, to apply the limitation periods in the *Limitation Act 1969* (NSW), together with the remedial provisions of that Act, which allowed for extension of the limitation period in certain circumstances. The court further held that the plaintiffs' substantive rights against the Commonwealth, if any, were to be determined by the common law. In Mewett's case the choice of law rules involved, in part, a test of actionability of his claim under the law of Victoria.

In the case of Brandon and Rock, the injury having occurred on the high seas on an Australian ship, liability was to be determined in accordance with the common law in Australia as picked up by s 79 and s 80 of the Judiciary Act²⁸. Although there is no common law of Australia, as s 80 now recognises, there is a common law in Australia which is uniform throughout the States and Territories and which is by s 79 and s 80 picked up and made surrogate Commonwealth law. In a dissenting judgment, Gaudron J expressed the view that s 80 required the common law in Australia be applied before recourse was had to s 79²⁹. Her Honour was of the opinion that if the common law in Australia, including the common law choice of law rules for matters within federal jurisdiction, provided a solution to the legal question, for example what was the relevant limitation regime, if any, then recourse to s 79 was unnecessary. Following this approach, her Honour held that in the case of Mewett, the relevant limitation statute was that of Victoria and not New South Wales. Her Honour would also have applied the New South Wales limitation statute to Rock and Brandon, because the jurisdiction having the closest connection was New South Wales, the last port of call of

²⁸ *Parker v Commonwealth of Australia* (1965) 112 CLR 295 at 306

²⁹ 146 ALR at 328

HMAS Stalwart, and not because of the operation of s 79. Gummow and Kirby JJ, while acknowledging that there was much to be said for the approach taken by Gaudron J as to recourse to s 80 and the development of common law choice of law rules for application in a federation, as opposed to application between nation states, left open the issue for further argument at a later time³⁰.

The National Cross-Vesting Scheme

In 1987 the Commonwealth and the States and Territories introduced a co-operative scheme to cross-vest the jurisdiction of the superior courts of Australia³¹. Of the scheme, Street CJ said in *Bankinvest AG v Seabrook*³² :-

“The introduction of this scheme is a significant move towards providing throughout our nation the services of an integrated court system transcending the boundaries, both geographic and jurisdictional, that have in the past obstructed the courts in meeting the requirements of the Australian public.”

Nearly a decade after its introduction, Black CJ said of the scheme³³ :-

“The legitimacy of the cross-vesting of jurisdiction in civil matters as the subject of legislation in furtherance of co-operative federalism is underlined by the fact that despite there being, in the Australian judicial system, the Federal Court of Australia, the Family Court of Australia, the six Supreme Courts of the States and the two Supreme Courts of the internal territories, jurisdictional disputes are now virtually unknown. The problems for litigants arising from the existence of separate systems of federal and State courts, predicted as inevitable in some of the debates about federal courts in the 1970s, simply do not occur.

The history of federal, state and territory superior courts in Australia over nearly a decade since the general cross-vesting scheme was established shows that co-operation can avoid jurisdictional conflict and that conflict is not the

³⁰ 146 ALR at 351

³¹ For a detailed history of the genesis of the scheme and its intended operation, see Mason and Crawford *“The Cross Vesting Scheme”* (1988) 62 ALJ 328; Griffith, Rose and Gageler *“Further Aspects of the Cross-Vesting Scheme”* (1988) 62 ALJ 1016

³² (1988) 14 NSWLR 711 at 713

³³ *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451 at 454

inevitable consequence of the existence, in a federation, of more than one system of courts. Since Ch III of the Constitution contemplates the creation of federal courts in a federal Commonwealth in which there would also be State courts, it would be surprising indeed if the Constitution prohibited co-operative schemes which, whilst in no way compromising the integrity of the courts, avoided disputes arising from the existence within the one nation of both federal and State courts. ..."

The scheme involves complementary State and Commonwealth legislation which provides for the mutual cross-vesting of original and appellate jurisdiction between the Federal Court of Australia, the Family Court of Australia, the Family Court of Western Australia and the Supreme Courts of the States and Territories³⁴. No proceeding which comes within the scheme can fail because the court in which the proceeding is commenced does not have jurisdiction over the subject matter of the suit. The scheme also provides for the transfer of cross-vested and non-cross-vested proceedings between courts where there is a related proceeding being heard or where it would be more appropriate for the matter to be heard in another court or where it is in the interests of justice that the proceedings be transferred to that other court³⁵. The decision to order transfer is not appealable.

Provision is made in s 11 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) for the choice of law consequences of the scheme :-

"11(1) Where it appears to a court that the court will, or will be likely to, in determining a matter for determination in a proceeding, be exercising jurisdiction conferred by this Act or by a law of a State relating to cross-vesting of jurisdiction -

- (a) *subject to paragraphs (b) and (c), the court shall, in determining that matter, apply the law in force in the State or Territory in which the court is sitting (including choice of law rules);*

³⁴ *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) and cognate State and Territory legislation

³⁵ Section 5 of the Cross Vesting Acts of the Commonwealth and the participating States and Territories

- (b) *subject to paragraph (c), if that matter is a right of action arising under a written law of another State or Territory, the court shall, in determining that matter, apply the written and unwritten law of that other State or Territory; and*
- (c) *the rules of evidence and procedure to be applied in dealing with that matter shall be such as the court considers appropriate in the circumstances, being rules that are applied in a superior court in Australia or in an external Territory."*

The effect of s 11 is to bring into operation between two participating State courts the same rules as apply by virtue of s 79 and s 80 of the Judiciary Act to courts exercising federal jurisdiction. Section 11 was not intended to be a perfect solution to the problem of choice of law rules in a federation. Rather it was a compromise to achieve a workable solution until uniform choice of law rules were adopted in Australia³⁶. In 1992 the Australian Law Reform Commission reported on the question of uniform choice of law rules and provided a draft uniform State and Territory Choice of Law Bill together with consequential amendments to federal legislation to give effect to the report³⁷. To date the report has not been implemented.

A constitutional challenge to the scheme was made in *BP Australia Ltd v Amann Aviation*³⁸. The contention was that Chapter III of the Constitution did not allow the conferral on federal courts of the judicial power of the States. That contention was rejected by a Full Court of the Federal Court of Australia. A subsequent appeal to the High Court has been heard and the decision of the court reserved. There is some concern that the High Court will uphold the contention and strike down this aspect of the cross-vesting scheme. Such a result, at a practical level, would be lamented. As Chief Justice Black said in the extract quoted above,

³⁶ For a detailed discussion of choice of laws under the scheme see: Kelly and Crawford "Choice of Law Under the Cross-vesting Legislation" (1988) 62 ALJ 589; Griffith, Rose and Gageler "Choice of Law in Cross-vested Jurisdiction: A reply to Kelly and Crawford" (1988) 62 ALJ 698.

³⁷ ALRC "Choice of law" Report No 58 (1992)

³⁸ (1996) FCR 451

the scheme has worked extremely well. The merit of the scheme principally lies in the fact that there is a complete jurisdiction for the final and complete determination of all issues arising out of any controversy between parties across the whole of Australia rather than in the movement of cases between jurisdictions. In fact, there has been little movement of cases between courts. For example, in 1995 - 1996 forty-nine cases were transferred into the Federal Court from State and Territory Supreme Courts, and twenty-five were transferred out.

The scheme has been independently reviewed by the Australian Institute of Judicial Administration³⁹. A commentary on the review in the Australian Law Journal⁴⁰ summarises the AIJA Report :-

"The Report concludes that the cross-vesting scheme has operated quite successfully in its first four years. The authors believe that, leaving aside the fact that the philosophy expressed in the Bankinvest case (Bankinvest AG v Seabrook (1988) 14 NSWLR 711) has not been universally adopted, it would be fair to say that the scheme has worked effectively and efficiently in the course of its short life. They conclude that the scheme has gone a considerable way in overcoming many of the jurisdictional problems which previously beset litigants in Australian courts. The authors also believe, that on a less tangible level, the cross-vesting scheme has also brought the participating courts closer together. In transcending State and Territory borders, judges and practitioners have become more aware of the legal systems and procedures operating in other Australian jurisdictions. Helping to break down parochial tendencies has been a more subtle but equally important benefit of the scheme and one which may become more important through its influence on the direction of the continuing debate on the establishment of a national courts system.

On a practical level, the scheme appears to have had little or no adverse effect on the case-load or status of any participating courts arising from a transfer of proceedings among those courts. The number of cases transferred annually has been small."

³⁹ "Cross Vesting of Jurisdiction: A Review of the Operation of the National Scheme" AIJA (1992)

⁴⁰ (1993) 67 ALJ 248; see also 62 ALJ 289; Moloney "Cross Vesting of Jurisdiction - Nationalism versus Robust Individualism" (1994) 3 J.J.A 229

Conclusion

The jurisdictional contests between the State Supreme Courts on the one hand and the Federal Court and the Family Courts as federal courts on the other in the late 1970's and early 1980's, did not relate to admiralty jurisdiction. They concerned matters of general commercial law, intellectual property, domestic relations and real property law. By the early 1980's this issue had been resolved by the High Court in favour of an expansive view of federal jurisdiction. A potential issue of jurisdiction in respect of the accrued non-federal elements remained. At the same time, as between the States and Territories, limitations as to sovereignty and territorial jurisdiction created problems in respect of ordinary commercial litigation which had interstate or transnational elements. The national cross-vesting scheme was the practical solution to these jurisdictional deficits or concerns.

The decision to exercise federal power under the Constitution to legislate for a national admiralty jurisdiction was taken intentionally and with a view to overcoming the problems of a fractured jurisdiction in a federation. The federal jurisdiction, with the accrued non-federal jurisdiction, covers most factual circumstances likely to arise in non-complex litigation. It is the writer's view that issues of causation in the chain of transportation come within the accrued federal jurisdiction. That jurisdiction operates to the benefit of both the federal and State or Territory Courts and attaches non-federal issues which arise outside the State or Territory where the court, whether State or federal, is sitting to the issues arising in the federal admiralty jurisdiction. The existence of the cross-vesting scheme means that no question of lack of jurisdiction will arise in cases which have associated but severable aspects, for example rights to indemnity under policies of marine insurance where the principal issue is one of

collision or cargo damage. The existing national cross-vesting scheme was therefore the safety net over which the 1988 Act was introduced.

Although the State courts have the same jurisdiction as the Federal Court, the "acting in aid" provisions operating at the intersection of State areas of influence and the service and execution of process beyond the limits of a State involve the interaction of different administrations and personnel. Because the Federal Court has a unified operation across the whole of the country, provides a complete jurisdiction (on the assumption that the cross-vesting scheme remains) and operates a system of case management, filings in admiralty now show the Federal Court as the preferred admiralty jurisdiction in this country. If the cross-vesting scheme was altered to deny the Federal Court jurisdiction in relation to all non-federal associated matters, State courts may be chosen as the preferred jurisdiction depending upon the extent and severability of the non-federal issues from the admiralty or maritime issue.

Although the issues of jurisdiction may have been resolved in Australia, the issue of a consistent result in all jurisdictions by the operation of uniform choice of law rules is the next challenge. The judgments of the High Court are moving towards a reconsideration of whether the existing common law choice of law rules applicable between nation states are adequate or appropriate to internal law areas within a federated nation state. Uniform choice of law rules would produce a consistent result wherever within the nation a case was heard by whichever court heard the case. In the final result, consistency of outcome is just as important as certainty and finality in the resolution of disputes if public confidence in the exercise of judicial power is to be maintained.