

### **Maritime and Transport Law in Australia**

#### **General**

Australia consists of six States and two Territories all of which have independent legislatures and court systems. The senior appellate court is the High Court of Australia. Each State or Territory has a Supreme Court and appeals lie from them to a Court of Appeal or Full Court in the case of the States or to the Federal Court in the case of the Territories. The Federal Court is a court at first instance jurisdiction which has admiralty and other specialised jurisdictions. The Supreme Courts also have admiralty jurisdiction. Appeals lie from a single Judge of the Federal Court to a Full Bench of the Federal Court and thereafter to the High Court with leave. Appeals lie from the Courts of Appeal or Full Courts of the States to the High Court with leave.

#### **Admiralty**

The *Admiralty Act* 1988 (Cth) brought Australian Admiralty Jurisdiction into the 20th Century. It had remained unamended since the 19th Century. The Act gives admiralty jurisdiction to the States Supreme Courts in addition to the Federal Court and permits the arrest of ships and other property.

The *Admiralty Act* 1988 is modelled on the Arrest Convention 1952 but with some significant differences.

The Heads of Jurisdiction in Section 4 bear many similarities to the Supreme Court Act 1981 (UK) and the *Admiralty Act* 1973 (NZ). There is a head of jurisdiction which gives a right to arrest a ship for an insurance premium or a mutual insurance call. It also permits arrest to enforce arbitration awards.

The Act gives a right to arrest a "surrogate ship" (known in some jurisdiction as sister ship arrest). This only arises when the "relevant person" was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship and that person is, when the proceeding is commenced, the owner of the ship to be arrested.

The Act did not create any new maritime liens and did not seek to change the common law rules of priorities.

The right to arrest only arises when the "relevant person" was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property and is, when the proceeding is commenced, the owner of the ship or property to be arrested (section 17). This right is extended to the situation in which the "relevant person" is the demise charterer of the property to be arrested when the proceeding is commenced (section 18). The Act also gives a statutory right of damages where property has been

arrested or excessive security has been demanded unreasonably and without good cause (section 34). Despite the passage of almost 20 years since the Act's introduction, section 34 remains untested. There have, however, been a large number of cases testing the limits of the jurisdiction conferred by this legislation and Australia now has a considerable body of its own admiralty law.

### Carriage of Goods by Sea

The current law in Australia is contained in the *Carriage of Goods by Sea Act 1991* which gives effect to a modified version of the Hague-Visby Rules. Australia's liability regime for the carriage of goods by sea is therefore best described as a hybrid model.

Essentially the Hague-Visby Rules have been modified:

- to provide for the coverage of a wider range of sea carriage documents (including documents in electronic form)
- to provide for the coverage of contracts for the carriage of goods by sea from places and countries outside Australia to places in Australia in situations when the contracts do not incorporate, or do not otherwise have effect subject to, a relevant international convention
- to provide for increased coverage of deck cargo to extend the period during which carriers may incur liability, and

- to provide for carriers to be liable for loss due to delay in circumstances identified as being inexcusable.

Pursuant to section 11 of the *Carriage of Goods by Sea Act 1991*, it is provided that parties to a sea carriage document relating to the carriage of goods from Australia to a place outside Australia, or to a non-negotiable document, are taken to have intended to contract according to the laws in force at the place of shipment. It is also provided that an agreement which purports to contradict that position, or preclude or limit the jurisdiction of a court of Australia or of a State or Territory in respect of a sea carriage document or a non-negotiable document, or which precludes or limits the jurisdiction of a court of Australia or of a State or Territory in respect of a sea carriage document or a non-negotiable document relating to the carriage of goods from any place outside to Australia to any place in Australia, is of no effect.

Section 11 also provides that an agreement or a provision of an agreement that provides for the resolution of a dispute by arbitration is not thereby made ineffective if the arbitration is required to be conducted in Australia.

Cases in Australia have upheld the validity of Himalaya clauses and also the Supreme Court of New South Wales, in a series of cases in the early 1980's, has upheld the validity of circular indemnity clauses in bills of lading.

### Aviation

Pursuant to the *Civil Aviation (Carriers' Liability) Act 1959*, Australia has given effect to the Warsaw Convention and subsequent Conventions and Protocols, including the Guadalajara Convention, the Guatemala City Protocol, the Hague Protocol, and the Montreal Protocols No. 3 and 4.

### Rail and Road Transportation

Australia is not a party to any international conventions covering such modes of transport.

### Marine Insurance

Australia enacted the *Marine Insurance Act 1906* (UK), although a number of the sections are to be found in a different order, in its *Marine Insurance Act 1909* (Cth). Insofar as non-marine insurance is concerned, the *Insurance Contracts Act 1984* (as amended) (Cth), governs most other areas of insurance law, although not reinsurance. It does, however, apply to pleasure craft which are no longer covered by the *Marine Insurance Act*.

### Oil Pollution

Australia has given effect to the major international conventions, including the CLC, Fund, Marpol, Dumping and Intervention Conventions.

### Arbitration

Australia has given effect to the New York Convention 1958 and also the UNCITRAL model law. Both the 1958 Convention and the Model Law are contained in schedules to the *International Arbitration Act 1974* (Cth).

### Mareva Injunction

The High Court of Australia has confirmed that a Mareva Injunction can be granted where there is a danger of a defendant absconding or of its assets being removed from or disposed of within the jurisdiction or otherwise disposed of so as to prejudice the plaintiff's ability to satisfy any judgment: *Jackson v Sterling Industries Limited* [1987] 61 ALJR 332.

### Limitation of liability

Australia has given effect to the 1976 Limitation Convention in the *Limitation of Liability for Maritime Claims Act 1989* (Cth). Australia has also given effect to the 1996 Protocol to amend that Convention. Pursuant to section 6 of the Act paragraphs 1(d) and (e) of Article 2 (that is claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship and claims in respect of removal, destruction or the rendering harmless of the cargo of the ship have been excised from the Convention as permitted under Article 18 of the Convention.

Australia has also given priority, pursuant to Article 6 paragraph 3 of the Convention, to claims in respect of damage to harbour works, basins and waterways and aids to navigation over other claims, other than claims for loss of life or personal injury, in section 8 of the Act.

### Time Limitation

Unless specifically otherwise provided in Commonwealth, State or Territory legislation, the time limitation for bringing a claim within the Admiralty jurisdiction has been set at three years. There is, however, a two year limitation for claims relating to collision actions and salvage services under the *Navigation Act 1912* (Cth).

Some State legislation imposes a limitation period of six or three years for claims for seamen's wages and two years for claims arising from damage or loss to a vessel, a cargo or freight or claims for salvage services or loss of life or personal injury.

Some States and Territories have a three year limitation period for personal injury actions and six years for other claims.

### Shipping Registration

The *Shipping Registration Act 1981* (Cth) created the Australian Register of Ships. It requires all Australian owned ships to be registered unless they are operated by a foreign resident under a demise charter, when the Minister's consent can be obtained to exclude it from registration (section 12). Australian

ships are those which are owned by Australian nationals, those owned by three or more persons as joint owners where the majority are Australian nationals, or by two or more persons as owners in common, when more than half of the shares in the ship are owned by Australian nationals (section 8). Ships on demise charter to Australian based operators may also be registered (section 14).

### Trade Practices

The *Trade Practices Act 1974* (as amended) (Cth) contains consumer oriented provisions which imply certain warranties, which cannot be excluded by private contract, in contracts for the provision of services (other than for the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored) and the sale of goods. In addition this legislation contains provisions which give rise to independent causes of action against persons and corporations engaging in misleading or deceptive conduct in trade or commerce and also prohibits restrictive trade practices.

Most States also have similar legislation as well as legislation specifically aimed at assisting consumers to avoid harsh and unconscionable provisions in contracts and to bring smaller claims before tribunals that are not required to take account of the ordinary rules of Contract Law.

Section 45D of the *Trade Practices Act* has been used successfully by shipowners and others to obtain injunctions to prevent secondary boycotts rather than the more traditional common law remedies. At its simplest, a shipowner who is prevented from performing a contract with another party by the concerted action of two other parties has the possibility of obtaining injunctive relief, under this provision.

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