

Review of the *Shipping Registration Act 1981*

Submission by the Hon Steven Rares KC and the Hon Neil McKerracher KC

- 1 Each of us has had judicial experience of how the *Shipping Registration Act 1981* (Cth) (the **SR Act**) operates in respect of judicial sales.
- 2 Australia has not yet ratified the *Beijing Convention (United Nations Convention on the International Effects of Judicial Sales of Ships* (New York, 2022)) but there are 27 ratifying signatories to it, leaving 3 before it comes into force. Australia signed the Convention when it was finalised but has not ratified it.
- 3 The Convention establishes a sensible and practical regime for:
 - (a) giving notice to all persons whose interests may be affected by a proposed judicial sale (under Annex 1) so that they can take action either to protect themselves by appearing in the proceeding or to make a claim to the proceeds of the sale in the court of the forum when priorities are to be decided.
 - (b) the sale court to issue a certificate (under Annex 2) that the sale occurred in accordance with local law and the requirements of the Convention.
- 4 The Hon Neil McKerracher KC, when a judge of the Federal Court of Australia, represented the International Association of Judges and participated in the later stages of UNCITRAL's meetings to finalise the text of the Convention. We attach the following papers that he has delivered to further elucidate the operation of and need for the Convention:
 - (a) UNCCA UN Day Paper; and
 - (b) a power point presentation to the 5th Asia Pacific Judicial Summit 2023 held in Hong Kong.
- 5 The Hon Steven Rares KC had a case in his docket where the Australian purchaser of a fishing trawler under a judicial sale conducted by the Supreme Court of Singapore could not be registered under the Act because the Taiwanese registration authority would not remove its registration of the previous owner and mortgagee of the vessel. The non appearing owner and mortgagee had had prior notice of the Singapore sale but decided not to participate in that proceeding.
- 6 The Australian Registrar would not register the purchaser under the SR Act even though the common law of both Singapore and Australia treated the judicial sale as having "cleaned the hull" of all outstanding legal and beneficial interests, including maritime liens. Ultimately, to break the impasse, the purchaser had to go to the difficulty and expense of commencing court proceedings in Taiwan which eventually resulted in a settlement so that the ship's registration here could proceed.

- 7 This situation illustrates the current unsatisfactory position for persons with a lawful entitlement who seek to register their interest in respect of a ship on a register under the SR Act where a foreign authority refuses or fails to recognise a properly conducted judicial sale or its lawful equivalent.
- 8 It is unsatisfactory that a person with a previously registered interest in a ship on the register of a non-State Party can exploit its judicial or administrative system in circumstances where the person has had notice under the Convention of a proposed sale but has failed or refused to participate in the judicial sale process to establish or vindicate their asserted, but now defunct, interest in the ship.
- 9 The Convention would enable the purchaser to be registered as owner in a State Party, despite the failure or refusal of another State to recognise the effect of a judicial sale made in accordance with the Convention.
- 10 Obviously, if Australia gives effect to the Convention, there will still be situations, like the Taiwanese one above, where a ship can remain on another State's register contrary to the effect of a judicial sale made in accordance with the Convention. However, all States Party to the Convention will be likely to recognise the registration in another State Party of a judicial sale made in accordance with the Convention. The ability of Australia to do so, would give shipowners and financiers confidence that they can rely on properly conducted judicial sales in a State Party and have their new interests registered in that or another State Party without the need to take costly and potentially problematic proceedings in a non-State Party.
- 11 Once a properly conducted judicial sale under the Convention in a State Party has "cleaned the hull", a person who has chosen not to respond to the notice of the proposed judicial sale issued in the form of Annex I to the Convention should not be able to frustrate the registration in that or another State Party of the purchaser or a financier because of an entry of an extinguished interest on the register of a non-State Party which has no connection with the current or future ownership or financing of the vessel.
- 12 There is a current proposal, supported by a resolution of the Maritime Law Association of Australia and New Zealand at its October 2024 conference in Queenstown, New Zealand, that the Admiralty Rules Committee consider updating the *Admiralty Rules 1988* (Cth) to mirror the requirements of the Convention for giving notice of a proposed judicial sale and a certificate of sale in accordance with Articles 4(3),(5) and (7) and 5 and annexes 1 and 2. If that were adopted, it is more likely that any sale by an Australian Court will be recognised by a State Party that has ratified the Convention even if Australia has not because our judicial sale process would conform with the latest internationally recognised process of effecting a sale that can clean the hull.

- 13 In our view, Australia should ratify the Convention and amend the SR Act so as to give the Convention force of law here.