

police forces and NSW Drug Crime Commission.

extension to serious offences? The Committee agreed with the broad thrust of a number of submissions made to it, in particular a submission made by ALRC, reported in the last issue of *Reform*. It considered that a case had been made out for law enforcement agencies to have access to information from telephone taps for serious offences beyond serious drug trafficking offences. However, contrary to the views put by ALRC and others, it considered that serious offences should not be defined in a general way, by reference to the penalty prescribed, but should be listed in the Telecommunications (Interceptions) Act. Here again, the Committee noted surprise at a lack of public interest in the subject and in particular lack of a strong positive response from State Governments.

A list of offences selected by the Committee include murder, kidnapping and organised crime associated with offences –

- (a) that involved two or more offences and substantial planning and organisation;
- (b) that involved, or of a kind that ordinarily involved, the use of sophisticated methods and techniques;
- (c) that are committed or are of a kind that are ordinarily committed in conjunction with other offences of a like kind, and
- (d) that involved kidnapping, murder or serious drug trafficking offences and associated financial dealings in each case;

or which relate to conspiracy to commit any of the above offences.

import controls. Building on recommendations made in the ALRC's *Privacy Report* (ALRC 22) the Committee recommended that devices designed only for tapping phones should be declared prohibited im-

ports and licensed for special law enforcement purposes only.

extension beyond telephone taps. A key point made in the ALRC submission to the Committee was the need for an overall consideration of the problems of secret surveillance. The suggestion made by ALRC to the Committee was that the opportunity should be taken for the Commonwealth to ensure that State listening devices laws are covering areas of increasing interception of communications which for constitutional reasons the Commonwealth could not deal with should be brought into line with the principles underlying the ALRC recommendations and the Bill before the Committee.

ALRC had suggested to the Committee that this could be done as a condition of granting correction of authorising access by the State offices to telephone taps.

The Committee, while acknowledging the need to ensure uniformity in this area and extended coverage of secret surveillance, decided against recommending this mechanism as a means of achieving reform. It opted instead for the Commonwealth to enact model legislation for the ACT to regulate the use of listening devices and to encourage uniformity of approach and standards between the States.

quick report, quick action. The Committee met for the first time on 17 July 1986. Its Report was tabled in November 1986. Its final recommendation was that the Report's recommendations be implemented as quickly as possible. The federal Government has not yet indicated its intentions in relation to the Report.

civil admiralty jurisdiction

A collision at sea can ruin your whole day.

Anon

alrc 33. The Australian Law Reform Commission's Report: *Civil Admiralty Jurisdiction*

(ALRC33) was tabled in Federal Parliament on 2 December 1986. The Report makes detailed recommendations for updating the powers of Australian courts over commercial shipping disputes and proposes a uniform Australia-wide system for dealing with those disputes.

The Commission was asked in November 1982 to review and report on all aspects of admiralty jurisdiction in Australia, following widespread criticism from the courts, legal profession and commercial groups of the existing position in this country. This Report represents the completion of the greater part of that task. The Commissioner in charge of the reference was Professor James Crawford, Challis Professor of International Law in the University of Sydney. A further Report will follow on the separate questions of criminal admiralty jurisdiction and prize law.

admiralty jurisdiction. Jurisdiction over maritime and shipping disputes has long existed separately from jurisdiction over other civil matters. This has partly been due to historical factors but has also reflected the special difficulties frequently created by these types of disputes, particularly the difficulties associated with commencing proceedings against and executing judgment upon foreign defendants with no assets within the jurisdiction of the court.

the action in rem. The key feature of admiralty jurisdiction, developed in response to these difficulties, has been the right to commence proceedings against property rather than against the person: the action *in rem*. These actions can be commenced by service of initiating process upon a ship or cargo in respect of which the claim arises rather than upon the wrongdoer, avoiding the difficulty and delay of personal service upon a defendant overseas. The ship or cargo can be seized or 'arrested' at the commencement of the action rather than only upon judgment, ensuring the existence of assets within the jurisdiction (either the ship or cargo or security put up to secure their release) against which

judgment can eventually be executed. Moreover, service *in rem* within the territorial jurisdiction of the court is accepted as conferring jurisdiction wherever the dispute may have arisen.

Jurisdiction in admiralty also includes actions *in personam* to enforce maritime claims, but as most such actions already fall within the ordinary civil jurisdiction of Australian courts, this aspect of admiralty jurisdiction is (with certain exceptions) of considerably less significance. The focus of the jurisdiction is the action *in rem*.

the need for reform. This century has seen the gradual expansion in many countries of the limited class of maritime claims for which an action *in rem* will lie. It has also seen the extension of the scope of the action to permit the arrest of other ships owned by the person liable personally on the claim, rather than just the ship in respect of which the claim arose (the 'wrongdoing ship'). These and other developments in the exercise of jurisdiction over maritime disputes have largely passed Australia by. The reason lies in the principal source of jurisdiction over maritime disputes for Australian courts: the Colonial Courts of Admiralty Act 1890 (UK). That Act, which applies to Australia by paramount force, effectively restricts jurisdiction over maritime disputes in this country to the 'Admiralty jurisdiction' of the English High Court in 1890. Besides isolating Australia from overseas developments, the effect of this has been to envelop the Australian jurisdiction in uncertainty. Not only is the precise extent of English admiralty jurisdiction in 1890 uncertain, but the distribution of that jurisdiction under the Act among Australian courts is far from clear.

the principles of reform. As a starting point for reform the Commission accepted the need for the continued existence of a separate admiralty jurisdiction. The long history of admiralty as a distinct jurisdiction has created international business expectations, arrangements and practices that rely on the

fact that jurisdiction will be asserted over ships and shipowners in special ways. Despite the attractiveness of the argument that the real problem was that of dealing generally with foreigners with assets overseas rather than just one relating to ships, therefore, the Commission decided upon a clarification within the broad framework of admiralty jurisdiction rather than an abolition of that jurisdiction and a general restructuring of the remedial powers of the courts.

In carrying out that task, the Commission accepted that Australia has distinct interests in admiralty and maritime jurisdiction, in view of its position as a nation of shippers rather than shipowners, and as a country dependent on foreign shipping for much of its import and export trade. Rules appropriate elsewhere could not be automatically accepted here. At the same time the Commission accepted that Australian admiralty jurisdiction needed to remain within generally acceptable limits, to ensure international recognition of judgments and judicial sales in admiralty and to maintain the position of admiralty as an exceptional and special jurisdiction.

reform proposals. Some of the main recommendations for the reform of the jurisdiction are set out below. The Commission recommends the repeal of the Colonial Courts of Admiralty Act 1890 (UK) and its replacement with Federal legislation containing a complete and concise statement of the admiralty jurisdiction seen as most suited to Australia's current needs. The Commonwealth Parliament has ample authority under s76(iii) of the Constitution (which gives legislative authority with respect to matters 'of Admiralty and maritime jurisdiction') to legislate in this fashion.

expanded scope of jurisdiction. The Commission recommends that the action *in rem* be available for a wider and more clearly defined range of claims. These will include (either for the first time or for the first time in a comprehensive form) the following:

- claims for pollution damage;
- claims for loss or damage (including loss of life or personal injury) arising from the operation of a ship for which the ship owner, charterer or operator is responsible;
- claims for the enforcement of arbitration awards arising from maritime claims;
- claims for unpaid insurance premiums or P and I club calls.

A key feature of the Commission's proposals is that the list of maritime claims in the proposed legislation be exclusive. No reference will be made to any jurisdiction that the English Court of Admiralty may or may not have had in the past. This should eliminate much of the current uncertainty as to the limits of the jurisdiction.

demise charterers. The Commission proposes that the existing right to arrest a wrongdoing ship owned by the person liable personally on the claim at the time the action is commenced be extended to demise charterers in the case of the broadest class of actions *in rem*, known as statutory rights of action *in rem*. This reflects changes that have already been made in the United Kingdom and elsewhere.

surrogate ships. In Australia the right to arrest is currently restricted to the arrest of the wrongdoing ship, that is to say the ship in connection with which the cause of action arose. In the United Kingdom and elsewhere it has been long been possible to arrest any ship owned by the person liable *in personam* on the claim. The Commission proposes the adoption of this extended right of arrest in Australia.

courts. At present the High Court, State and Territory Supreme Courts and probably the Federal Court can exercise admiralty jurisdiction in Australia under the 1890 Act. The extent to which other courts can do so is unclear. For the future exercise of jurisdiction, the Commission proposes that:

- the High Court's original jurisdiction in admiralty be removed, in line with the current emphasis upon that Court's role as a constitutional and final appellate court;
- jurisdiction *in rem* be exercised concurrently by the Federal Court and the Supreme Courts for each State and Territory, with appropriate provision for the transfer of proceedings between courts;
- superior courts be given power to remit the hearing of actions *in rem* to inferior courts in appropriate cases, to avoid the present situation in which even minor actions *in rem* are heard by superior courts;
- all Australian civil courts exercise admiralty jurisdiction *in personam* within the ordinary limits of their civil jurisdiction (except, for technical reasons, in the case of actions to limit liability);
- appeals in admiralty actions follow ordinary channels.

protection against abuse. The action *in rem* is an effective means of overcoming the problems associated with suing foreign ship-owners with assets overseas. The proposed expansion of its availability in line with other relevant countries is fully justified. The Commission recognises in its Report, however, that the procedure provides considerable scope for abuse in the hands of an unscrupulous plaintiff. Even a brief delay to a ship's sailing schedule can be very costly and an arrest can therefore put considerable pressure on the owner of the ship to settle a claim. For that reason care has been taken to build substantive and procedural safeguards against abuse into the Commission's recommendations.

- **liability to pay damages.** At present the plaintiff is only liable to pay damages for what is eventually shown to be an ill-founded arrest if there was bad faith or gross negligence, something that is very rarely proven. The Commission proposes that there should in-

stead be a liability to damages for any arrest that is 'unreasonable and without good cause'.

- **caveats against arrest.** A procedure is proposed under which an undertaking (in appropriate form) can be given to the Federal Court to provide security for claims that may be made against a ship during its visit to Australia. Such an undertaking — a 'caveat' against arrest — will prevent the arrest of the ship without leave of the court. This will provide an effective means for ship owners and operators to guarantee that their ships will not be delayed in Australia through civil actions. A system of caveats against arrest does exist in Australia at present but it does not effectively guarantee non-arrest and is not a national system, requiring separate caveats to be entered in each jurisdiction. The new proposal is considerably more effective and efficient.

other issues. In carrying out its task of a thorough review of admiralty jurisdiction in Australia, the Commission examined and reported on a wide range of issues in addition to those already mentioned. These include the special admiralty rules on priorities; time limits in admiralty actions; the need for multiple arrests and the relationship between actions *in rem* and Mareva injunctions. They also include procedural issues such as the need for 'preliminary acts' in collision cases; the need for the existing practice of notification of foreign consuls in certain actions; the need for nautical assessors and juries in admiralty actions and the need for specific limitation action procedures.

draft legislation and rules. The Report contains comprehensive draft legislation and rules of court implementing the Commission's proposals. The proposals and that legislation are currently under consideration by the Attorney-General's Department. The Report is available to the public through the Australian Government Publishing Service.