PART IV - IMPLEMENTATION

Introduction

I have been asked to address the question of Government implementation of the Law Reform Commission's Report No. 33, Civil Admiralty Jurisdiction.

I begin with two observations:

- first, a Law Reform Commission Report, like any other report to the Government, is not self-executing. The report is a recommendation to the Government. It is for the Government to decide whether to adopt that recommendation, in whole or in part, or to reject it.

- secondly, while Government consideration of the recommendations had reached an advanced stage, that consideration was interrupted by the elections held on 11 July 1987. At the time this paper was completed (late July 1987) the third Hawke Government (sworn in on 24 July 19987) had not yet addressed the Report or determined its legislative program.

In these circumstances I cannot, at this stage, inform you of the final decisions of the Government on the report.

What I can and will do is describe the procedures adopted in consideration of the report and some of the issues raised with the Government in the course of that consideration. It may be that, by the time of the October conference, I will be able to supplement this report with further information.

In addressing an expert group with such a long history of involvement with the subject matter of the Report, there is obviously no need to summarise its recommendations in the

Report. Nevertheless, one basic feature of those recommendations is so important that is merits special mention. The legislation proposed in the Report would, if enacted, for the first time place admiralty law and jurisdiction in Australia on an Australian basis. It is indeed remarkable that, so many years after federation, our admiralty law and jurisdiction is still based primarily on nineteenth century United Kingdom colonial legislation. It hardly accords well with Australia's status as a sovereign state, particularly after passage of the Australia Acts, for our admiralty jurisdiction to be dependant upon foreign law.

Hopefully this situation will not endure beyond our bicentennial.

Apart from considerations of national status, the existing jurisdiction is inefficient and inappropriate to present day Australian circumstances and economic interests, being constrained by the provisions of 19th century Imperial legislation that have long since been repealed in the UK. These points were made in the joint submission to the LRC from this Association and the Law Council of Australia. The legislation proposed by the LRC would also remove a number of uncertainties particularly as to which courts in Australia possess admiralty jurisdiction. The proposals of the LRC would also assist in the removal of doubts as to the validity of various provisions in the Navigation Act 1912 (see Report, paras.33, 37, 56, 273 and 276).

Procedures followed by the LRC in preparing the Report

In preparing the Report the LRC followed its by now well established practice of widespread consultation.

Its terms of reference required it, inter alia, to have regard to the 1982 Report of the Joint Committee of the Law Council of Australia and the Maritime Law Association of Australia and

New Zealand on Admiralty Jurisdiction in Australia, produced under the Chairmanship of Zelling J. of the Supreme Court of South Australia. Zelling J's long efforts to bring about reform of Australian admiralty law are of course well known and he was one of those consulted by the Commission.

The LRC also benefitted from discussions on admiralty jurisdiction at the 8th Australian Law Reform Agencies Conference in 1983, where papers were delivered by Zelling and and Ryan JJ. and Professor Crawford (the Commissioner in charge of the LRC Reference).

The Commission consulted a wide range of experts (judges, practitioners and academic and Government lawyers) both in Australia and overseas. Within Australia, those consulted also included Commonwealth Government Departments (particularly the Attorney-General's Department and the former Departments of Transport, Trade and Foreign Affairs), State Law Departments, the Chief Justices or Chief Judges of the High Court, the Federal Court and State and Territory Supreme Courts and a wide range of industry and legal professional bodies. Twenty two honorary consultants (representing a range of interests and experience) were appointed and six persons were nominated by State/Territory Governments.

To further the process of consultation, the LRC issued 3 Research Papers on civil admiralty jurisdiction:

. Ad RP 1 (S Curran and D Cremean), 'An Australian Admiralty Act: The Ambit of Admiralty Jurisdiction', November 1984;
. Ad RP 2 (S Curran), 'Admiralty Jurisdiction in Australia: The Courts Exercising Original and Appellate Jurisdiction', June 1984;
. Ad RP 3 (V Thompson and S Curran), 'Draft Legislation: Admiralty Procedure and Rules', September 1985.

These papers were made available to consultants and others interested in commenting in detail on the issues involved. In particular Research Paper 3, which included the texts of proposed draft legislation and draft uniform rules and the LRC's summary Discussion Paper 21('Admiralty Jurisdiction' (November 1984)), were widely distributed.

In addition to consultants meetings (and meetings of a sub-committee of consultants to consider the proposed Admiralty Rules), the LRC held a number of meetings and other discussions on the Reference. In February 1985 public meetings were held, in conjunction with this Association, in the 5 mainland capital cities. In May 1985 a similar meeting was held in Launceston in conjunction with the Australian Maritime College. A session of the MLAANZ Annual Conference in October 1985 was also devoted to the Reference and to discussion of the draft proposals. Eighty-six written submissions were made to the LRC.

The Report, which is, I believe, recognised as a thorough and scholarly document, displays the benefit of such wide consultation.

Procedures for Implementation

Whether the recommendations of the Report are accepted and, if they are, the timing for the introduction into the Australian Parliament of the necessary legislation are, of course, matters for the Government to decide. In the course of the decision-making process, the Attorney-General has sought the views of State and Northern Territory Attorneys-General. His Department has sought the view of other relevant federal Departments (Foreign Affairs, Trade, Transport (as they then were) and Prime Minister and Cabinet) and of the peak professional and industry bodies.

At the time of writing, the views of all those consulted have been received. There is strong general support for the LRC's Report. I note particularly the comments of this Association that there was nothing further to be said, other than to urge speedy implementation of the Report. Others commented to similar affect. As may be expected, some have expressed reservations about particular recommendations and these views will need to be considered.

Main issues raised in the comments received

I shall in the remainder of this paper refer briefly to some of the issues raised in these comments. The main issues raised related to:

- the Courts that should be invested with admiralty jurisdiction;
- whether Australian ships should be liable to arrest;
- the range of personal injury claims to be included within admiralty jurisdiction; and
- State statutory rights of detention.

Other comments referred to practical problems relating to:

- liability for pre-arrest charges;
- liability for crew after arrest;
- advances to meet the costs of execution;
- third party interests; and
- urgent directions.

Jurisdiction of Courts

This issue attracted considerable interest and strongly opposing views. On the one hand, views were expressed that civil admiralty jurisdiction should be vested <u>exclusively</u> in the Federal Court. On the other, opposition was expressed to the Federal Court having any admiralty jurisdiction.

Proponents of this view considered that the jurisdiction should be confined to State and Territory courts. Other comments supported the LRC proposal for concurrent jurisdiction of both Federal and State courts.

The option of exclusive Federal Court jurisdiction was explored in detail by the Commission (Report, para.231) and rejected for a number of reasons, including the delays and inconvenience which it was thought would result to litigants from the less widely dispersed Federal Court Registries. While the Commission may have overstated some of the arguments against exclusive Federal Court jurisdiction, (Report, para.231) it needs to be recognised that any decision to confine the jurisdiction to the Federal Court is likely to meet strong State opposition.

An alternative option of exclusive State and Territory court jurisdiction was also explored in detail (Report, paras.235-9).

The Commission's conclusion was that there was a clear case for concurrent in rem jurisdiction in Admiralty to be vested in State and Territory Supreme Courts and the Federal Court. This conclusion was overwhelmingly endorsed in submissions made to the Commission. The comments on the LRC recommendations, while confirming that views on this issue remain strongly held, do not appear to raise any considerations not considered by the Commission.

Exclusion of Australian ships from arrest

The view was expressed that Australian ships (including surrogate ships) should be exempt from arrest or at least that leave should first have to be obtained.

The main reason advanced for exempting Australian ships was that the rationale for the action in rem - the need to ensure that there are assets of a foreign defendant within the

jurisdiction against which judgment can be satisfied - is missing in the case of local shipowners.

While this argument has some superficial attraction, it seems that no other country with in rem jurisdiction exempts its own flag ships from that jurisdiction. Admiralty jurisdiction at present allows the pursuit of claims against wrongdoing ships throughout the world largely regardless of nationality. Substantial reasons would be necessary to justify a departure from international practice that involved Australia giving its own vessels greater protection than foreign vessels.

The principles of admiralty jurisdiction provide a special basis for bringing claims before the courts. For a variety of reasons, including the international acceptance and recognition of admiralty jurisdiction and the international business expectations and practices that rely upon the assertion of jurisdiction over ships in special ways, the Commission proceeded on the basis that the prime need was to clarify traditional admiralty jurisdiction rather than abolish it and attempt a restructuring of the general remedial powers of the courts (Report, para.85). The proposed legislation and rules are based on that approach, an approach which received overwhelming endorsement in submissions to the Commission. The existing inclusion of local ships within admiralty jurisdiction was therefore continued.

In addition to these considerations, exemption of Australian ships from arrest would undoubtedly make it less attractive for foreign plantiffs to litigate in Australia disputes with Australian shipowners. Moreover, there is a risk of 'retaliation'. If other countries were to follow a lead from Australia and also exempt their own ships, the inconvenience to Australian shippers or shipowners who found it necessary to litigate in those other countries disputes involving the vessels of those countries could outweigh any local advantages to Australian shipowners.

An alternative proposal, if Australian ships are not excluded from arrest, is to require the leave of the court for the arrest of an Australian ship. This approach gives rise to two difficulties. The first is that there seems to be a need for an alternative means of acquiring in personam jurisdiction, since the basic incentive for the shipowner to appear in an action in rem is to avoid arrest. The second is that a ship that is the subject of an action in rem would, even without arrest, be burdened by the statutory lien and could not be sold, mortgaged etc. It appears the proposal would not achieve the aims sought.

Personal injury claims

Objection was made to the inclusion of the wider range of personal injury claims in Admiralty jurisdiction including actions in rem for the reason that this would 'give a substantial weapon to unions who are already powerful enough before the law'. It was suggested that at least Australian ships should be excluded from such claims, since the rationale for admiralty jurisdiction is to provide redress against foreign shipowners. It was conceded that perhaps the personal injury claims permitted under existing legislation should remain.

The proponents of this view conceded that a decision to exclude the proposed wider range of personal injury claims from Admiralty jurisdiction lacked logic. It is difficult to tell which personal injury claims are within admiralty now, and the distinction between the ship as active agent and passive location on which the present law is based (Report, para.43) is unsatisfactory. As pointed out in the Report (para.166) exclusion of personal injury claims would give an unjustified preference to property damage over personal injury claims - even where both claims arise out of the same accident. Shipowners would still be able to limit liability with respect to personal injury claims, but not be liable to

admiralty proceedings with respect to those claims. Such a distinction would also place Australia out of step with the United Kingdom, Canada and New Zealand.

No evidence has been presented that the equivalent provisions in other countries have resulted in increased union disputation. It is difficult to see how they could. The right to arrest the ship in connection with a personal injury claim provides the claimant with a means of obtaining security for the payment of the claim: at worst, it is unlikely that it would bring about greater disruption to the shipowner than industrial action aimed at ensuring similar security and, at best, it may provide a more efficient alternative for settlement of the dispute. The draft legislation and rules provide penalties for abuse of the arrest procedure as well as a caveat procedure for ensuring in advance that the ship will not be arrested. If, as was suggested might happen, a union commenced in rem proceedings primarily for industrial purposes and without a genuine legal basis for its action, that union would face the same obstacles (including risk of costs and damages being awarded against it) as any other litigant. For these reasons the case for denying to personal injury claimants remedies available to other claimants does not appear strong.

The proposal that Australian ships be exempted from arrest on personal injury claims except in the limited circumstances presently allowed appears untenable for the same reasons. There is no greater reason to exempt Australian ships from this head of claims than from any other head.

State statutory rights of detention

Objection was made to s.36 of the draft Admiralty Bill on the grounds first that the provision was not necessary and secondly that there was doubt as to its constitutional validity. Section 36 defines the relationship between the

admiralty power of arrest and statutory powers of detention to enforce the civil claims of, for example, port authorities. Paragraph 266 of the report points out that the common law authorities conflict. There is a need to resolve this uncertainty. In practice, where a ship is arrested after a statutory right of detention has been exercised (which is the usual situation), the State authority will have maximum security for its claim since it will have priority over all claimants (after Marshal's costs) (s.36(5)).

The question of constitutional power to enact proposed s.36 was addressed in the Report. The conclusion reached (see para.266, particularly footnote 131) was that to specify the relationship between an action in rem in admiralty and other powers of detention that might exist in relation to a civil claim falling within that jurisdiction was clearly incidental to a conferral of admiralty and maritime jurisdiction under s.76(iii) of the Constitution. At the time of writing, no reasons have been advanced for rejecting that view.

Practical Problems

Comments have also raised the following practical questions:

(1) Liability for pre-arrest charges.

Charges that have accrued prior to the arrest of a ship will be the responsibility of those who have incurred those charges - the owner or operator of the ship - not the Marshal. The Marshal's responsibility in executing an arrest warrant is simply to take the ship or cargo into custody. If port or other charges are outstanding at that time then the relationship between any statutory right of detention that the port or other authorities might enjoy and the Marshal's power of arrest is expressly regulated by proposed s.36.

(2) Liability to maintain the crew after arrest.

No express provision has been included on liability for the sustenance and welfare of the crew after arrest of a ship. The range of possible situations was felt to be too great to enable a simple rule to be formulated. Proposed r.48 permits the Marshal or a party to 'at any time apply to the court for directions with respect to the ship or property'. The Commission considered a provision allowing the Marshal to feed and otherwise provide for the crew of an arrested ship. But the view strongly taken by admiralty practitioners was that such a provision was undesirable. There is no legal liability on the Marshal to feed the crew after arrest. The Marshal should not, it was strongly argued, have the discretion to convert his charity into a claim against the ship having priority over all others (i.e. as Marshal's costs). Of course arrest does not terminate a contract of sea service, and the crew will have claims (with the status of maritime liens) against the ship. On this basis the matter is one to be resolved by the court itself, on application by the Marshal or a party. Accordingly, if a ship is arrested, the need to provide for the sustenance and welfare of the crew must be borne in mind by practitioners since these items are not affected by the legislation proposed by the LRC.

(3) Advances to meet costs of execution.

The need to ensure that the person issuing the writ makes sufficient advances to meet the Marshal's costs of execution is provided for in proposed rules 41 and 78.

(4) Third party interests.

Express provision is made in the rules for some of the indirect consequences of the execution of an arrest warrant. Rule 47 enables the Marshal, in maintaining custody of the ship or property, to remove and store cargo, dispose of perishable goods and move the ship itself. More importantly, rule 49 permits the Marshal to discharge cargo from an arrested ship (or arrested cargo from a ship that is not arrested) where a person is entitled to immediate possession of that cargo (or ship). This together with the court's general power to discharge cargo (r.49(3)) should avoid undue interference with third party rights in this area.

(5) Urgent directions.

Under proposed r.80(1)(a) the court is authorised, on application or of its own motion, to give any appropriate direction with respect to a proceeding. The Marshal can obtain directions under this provision or, when the ship or property has been arrested, under proposed r.48(1).

Retention of right of action in rem against foreign State vessels

A further matter is worth noting. The United States Foreign Sovereign Immunities Act 1976 eliminated the right of a claimant for maritime services to a foreign State-owned vessel to sue that ship in an in rem proceeding and obtain a pre-judgment attachment of that ship as security for the claim. In an attempt to harmonize admiralty concepts with other fields of law, that right was replaced by an in personam right of action against the foreign State with the same requirements for jurisdictional nexus (viz. presence of the

res within the jurisdiction) as for in rem proceedings, and the same rule that recovery is limited to the value of the res. The foreign State is not immune in such an in personam action where the maritime lien 'is based upon a commercial activity of the foreign State' (US Foreign Sovereign Immunities Act 1976, ss 1330(a) and 1605(b)). It seems that serious friction had been experienced in the United States prior to 1976 due to indiscriminate attempts to arrest foreign State owned vessels. The United States legislation attempted to balance foreign State interests and private interests by recasting maritime in rem actions in an in personam guise, although still limited to in rem recovery. However, this change has been strongly criticized since the plaintiff may be severely disadvantaged in that there will be no res available to satisfy any judgments obtained. Because indiscriminate attempts to arrest State owned ships had not occurred in other countries, the LRC recommended that the United States legislation not be followed on this point. Under s.18 of our Foreign States Immunities Act 1985, a foreign State is not immune in in rem proceedings concerning a ship used for commercial purposes or a commercial cargo. It is interesting to see that ini the United States draft legislation designed to restore the right to proceed in rem in such circumstances is now before the Congress. Accordingly it seems the LRC approach has been fully justified (see LRC Report No. 33 para 200; LRC Report No. 24 on Foreign State Immunity at paras. 139-144 (particularly para. 141)).