FOREIGN STATE IMMUNITY IN AUSTRALIA

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I. INTRODUCTION

The restrictive theory of foreign state immunity, according to which a sovereign state may in limited circumstances be subjected to the adjudicatory and enforcement jurisdiction of the municipal courts of another state, now commands widespread acceptance in international law. Its development in the second half of this century has reflected the growing complexity and diversity of modern state involvement in the international economy.

In jurisdictions which have followed the common law tradition, the development of the restrictive theory from the traditional absolute theory of sovereign immunity was initially undertaken by the courts. More recently, it has become the subject of national legislation. The United States first codified its law in the *Foreign Sovereign Immunities Act* of 1976. This was followed by the *State Immunity Act* 1978 in the United Kingdom and by similar legislation in other countries.

In Australia the law concerning foreign state immunity has now also been codified with the enactment of the *Foreign State Immunities Act* 1985. Although modelled in part on the United States and United Kingdom precedents, the Australian legislation introduces significant innovations which repay careful evaluation.

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II. Background to the legislation

The absolute theory of sovereign immunity, which had in the past been accepted in Australian courts,[1] had its origins in notions of territorial sovereignty, reciprocity and the equality of sovereign states. Courts exercising jurisdiction within the territory of one sovereign state generally considered themselves incompetent to assume the function of judging the actions of another state exercising equal sovereign jurisdiction within another territory: *par in parem non habet jurisdictionem*. Remedies against a foreign state lay, if at all, in the realms of diplomacy.

Although appropriate in the economic and political circumstances of the nineteenth century from which it arose, the absolute theory could not survive the pressures created by the rapid growth in state trading which occurred in the years following the Second World War.[2] As states and state agencies assumed an increasingly important role in the expanding international economy, their immunity from suit in ordinary commercial transactions came to be seen as affording them an unfair advantage not available to private market participants.

Jurisprudence developed rapidly to accommodate commercial reality. The law in a number of jurisdictions following the civil law tradition had long distinguished between the public and private actions of foreign states, according immunity to the former but not to the latter. In the three decades following the Second World War, the majority of civil law countries adopted a similar approach. Only within the socialist bloc and within a small number of other countries has the absolute theory of immunity been rigidly maintained.[3]

The impetus for change in common law jurisdictions was felt first in the United States. The judiciary in that country had traditionally adopted the view that the constitutional doctrine of the separation of

[1] *Van Heyningen v. Netherlands Indies Government* [1948] Queensland Weekly Notes 22; *United States of America v. Republic of China* [1950]. *Queensland* Weekly Notes 6; *Grunfield v. United States of America* [1968] 3 New South Wales Reports 36. But *cf. Chang v. Registrar of Titles* (1976) 8 Australian Law Reports 285, p. 289.

[2] Schmitthoff & Wooldridge, "The Nineteenth Centure Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading" (1972) 2 *Journal of International Law and Politics* 199; Siewert, "Reciprocal Influence of British and United States Law: Foreign Sovereign Immunity Law from the Schooner Exchange to the State Immunity Act of 1978" (1980) 13 *Vanderbilt Journal of Transnational Law* 761.

[3] The Law Reform Commission of Australia, *Foreign State Immunity* (Report No. 24) (1984), 10.

governmental powers required judicial deference to the executive government in matters concerning foreign state immunity.

Accordingly, the courts looked to the United States Department of State for guidance in determining immunity claims. The courts would not "deny an immunity which our government has seen fit to allow or ... allow an immunity on new grounds which the government has not seen fit to recognise".[4] The Department of State had traditionally recommended immunity for all foreign friendly sovereigns, regardless of the nature of the activities in issue.

In the well-know 'Tate Letter' in 1952,[5] the United States Department of State announced its intention thereafter to adhere to the restrictive theory in determining whether or not to support claims of sovereign immunity in all suits before courts in the United States. This approach drew upon the civil law jurisprudential developments to deny the support of the executive government for claims of sovereign immunity which arose in an essentially private commercial setting. As courts in the United States subsequently came to assert a limited jurisdiction to determine for themselves claims of sovereign immunity, they also came to endorse the restrictive theory.[6]

A series of court decisions in the late 1970's and early 1980's applied a similar version of the restrictive theory within the United Kingdom. The first of these was the decision of the Judicial Committee of the Privy Council in *The Philippine Admiral* in 1977 which heald that merchant vessels owned by foreign states should no longer be considered immune in admiralty actions *in rem* arising from their use in trade. The Judicial Committee recognised the restrictive theory as being "more consonant with justice", stating

> In this country —and no doubt in most countries in the western world— the state can be sued in its own courts on commercial contracts into which it has entered and there is no apparent reason why foreign states should not be equally liable to be sued there in respect of such transactions.[7]

This was followed by an influential decision of the English Court of Appeal which applied the restrictive immunity rule in an action

[4] *Republic of Mexico v. Hoffman* 324 U.S. 30, 35 (1944).

[5] Letter of 19th May 1952 from Acting Adviser Jack Tate to Acting Attorney-General Philip Perlman, 26 Department of State Bulletin 984.

[6] E.g. *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes* 336 F. 2d 354 (1964).

[7] [1977] Appeals Cases 373, 402.

in personam against a foreign state bank arising from a commercial transaction.[8]

The development was consolidated in the leading decision of the House of Lords, in *I Congreso del Partido* in 1981. Lord Wilberforce summarised the modern common law position as follows

> The relevant exception, or limitation, which has been engrafted upon the principle of immunity of states, under the so-called 'restrictive theory', arises from the willingness of states to enter into commercial, or other private law, transactions with individuals. It appears to have two main foundations.
>
> (*a*) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts.
> (*b*) To require a state to answer a claim based upon such transactions does not involve a challenge to or enquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any intereference with its sovereign functions.
>
> When therefore a claim is brought against a state ... and state immunity is claimed, it is necessary to consider what is the relevant act which forms the basis of the claim: is this, under the old terminology, an act *jure gestionis* or is it an act *jure imprerii*: is it (to adopt the translation of these catchwords used in the 'Tate Letter') a 'private act' or is it a 'sovereign or public act' a private act meaning in this context an act of a private law character such as a private citizen might have entered into.[9]

Similar approaches were adopted, either independently or relying on the United Kingdom decisions, by courts in Canada,[10] South Africa[11] and Pakistan.[12]

The very speed with which this jurisprudential development occurred, combined with the uncertainty inherent in seeking to draw

[8] *Trendex Trading Corporation v. Central Bank of Nigeria* [1977] Queen's Bench 529.
[9] [1983] 1 Appeals Cases, 244, 262.
[10] E.g. *Zodiak International Products Inc. v. Polish People's Republic* (1977) 81 Dominion Law Reports (3d) 565.
[11] E.g. *Kaffraria Property Co. (Pty) Ltd. v. Government of the Republic of Zambia* [1980] 2 South African Law Reports 709.
[12] *A.M. Qureshi v. Union of Soviet Socialist Republics* [1981] P.L.D. (S.C.) 377.

any clear distinction between the public and private acts of a foreign state and the need to develop incidental procedures for the service of process and the execution of judgments, prompted increasing efforts at national codification. The United States *Foreign Sovereign Immunities Act* of 1976 grew directly out of the practical frustrations experienced by the Department of State in seeking to administer its policy expressed in the 'Tate Letter'.[13] The declared objectives of the Act were to codify the restrictive theory, to ensure its application by the courts free of intervention by the executive branch of government, to provide a procedure for serving process upon and obtaining jurisdiction over foreign states, and to alter the absolute immunity from execution of judgments against foreign states to a more restricted immunity.[14]

The prospect of the possible loss of the City of London's sovereign risk lending business to the United States placed considerable pressure on the government of the United Kingdom to take similar legislative action. The result was the *State Immunity Act* 1978 which clarified the law of foreign state immunity for the United Kingdom and extended the scope of municipal court jurisdiction and enforcement of judgments. That Act was subsequently adopted with minor modifications in Singapore,[15] Pakistan[16] and South Africa.[17] The Canadian *State Immunity Act* 1982 adopted elements of both the United States and United Kingdom Acts.

The reasons underlying the movement towards national codification, as well as inconsistencies between domestic laws, had also prompted efforts towards codification at the international level. In 1972 the European Convention on State Immunity entered into force. It remains, as yet, the only multilateral treaty in force which deals with foreign state immunity at a general level. The International Law Commission began a detailed consideration of foreign state immunity in 1978. Although the Commission's work appears now to be some way towards reaching completion, the complexity of the issues it was called upon to address, and sharply divided views between member countries on

[13] Feldman, "The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View" (1986) 35 International and Comparative Law Quarterly 302, 303-304.

[14] Legislative History of Foreign Sovereign Inmunites Act of 1976: House Report (Judiciary Committee) No 94-1487 (9 September 1976) [1976] *US Code Congressional and Administrative News* 6604, 6605-6.

[15] *State Immunity Act* 1979 (Singapore).

[16] *Foreign States Immunities Act* 1981 (South Africa).

[17] State Immunity Ordinance 1981 (Pakistan).

the central issue of the extent of, and rationale for, foreign state immunity led to protracted deliberations.[18]

It was in these circumstances that the Australian Law Reform Commission was instructed in 1982 to enquire and report on the law of foreign state immunity in Australia. While there appeared little reason to doubt that Australian courts would follow international developments favouring the adoption of the restrictive theory, the limited volume of litigation involving foreign states in Australia meant that the issue was rarely addressed. The legislative developments in other common law jurisdictions and the work to date of the International Law Commission had highlighted the need for a detailed domestic consideration of the issue.

The Foreign State Immunities Act 1985 is the direct product of the comprehensive report completed by the Australian Law Reform Commission in 1984.[19] In introducing the legislation in the Australian Parliament, the responsible minister of state noted that it would bring Australian law into line with the law in other major financial centres such as New York, London and Singapore and stated the government's view that provisions of the legislation were was an essential step if Australia was to develop as an international trading centre conducting sovereign risk lending.[20] The Act entered into force on lst April 1986.

III. Definition of a foreign state

A preliminary issue in any scheme of foreign state immunity is the determination and delineation of those entities which may be entitled to claim immunity. At international law "there is no generally accepted and satisfactory modern legal definition of statehood".[21] The definition of "foreign state" adopted in the *Foreign States Immunities Act* is broad and inclusive. It includes any country outside Australia that is an independent sovereign state or that is a separate territory (whet-

[18] The status of the International Law Commission's work at the time of the enactment of the Australian legislation is described in the Report of the Commission on the work of its 37th Session: 40 U.N. GAOR Supp. (No. 10) U.N. Doc A/40/10 (1985). The Commission has recently produced Draft Articles on the Jurisdictional Immunities of Foreign States and their Property.

[19] *Supra*, note 3.

[20] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 21 August 1985.

[21] Crawford, *The Creation of States in International Law* (Clarendon Press, Oxford, 1979), 31.

her or not self-governing) not forming part of an independent sovereign state.[22] The elusive concepts of sovereignty or international independence are therefore largely avoided. Imunity is extended to countries irrespective of their formal legal status. Similarly, recognition by the government of Australia is not a relevant criterion.

In cases of doubt as to the application of the definition to a particular entity, the courts are entitled to seek the assistance of the executive government. The Australian Minister for Foreign Affairs or his or her delegate may certify in writing to a court for the purposes of the Act that a specified country is a foreign state, a specified territory is or is not part of a foreign state or that a specified person is the head of or part the government of a foreign state. Such a certificate is admissible in a court as evidence of the facts and matters stated in it and is conclusive as to those facts and matters.[23] This accords with the general practice in Australia and other common law countries by which an executive certificate is generally treated by a court as conclusive on matters relating to foreign affairs.[24]

With regard to state agencies and instrumentalities, the *Foreign State Immunities Act* adopts the basic approach of the United Kingdom legislation in distinguishing between two broad categories. The first covers particular emanations of a foreign state which are treated by the Act as assimilated to the foreign state for all purposes. This includes a foreign head of state acting in his or her public capacity as well as the executive government or part of the executive government of a foreign state, including a department or organ of that government.[25] It also comprehends political subdivisions of foreign states. The inclusory provisions of the Act refer to "a province, state, self-governing territory or other political subdivision (by whatever name known) of a foreign State" and the head, executive government or part of the executive government of a political subdivision.[26] In this latter respect, the Act deviates from the United Kingdom model, which makes no special provision for political subdivisions, in favour of the United States approach.[27] The Canadian solution, which in terms distinguishes component units of federal states from those of

[22] Section 3(1), definition of "foreign state".
[23] Section 40.
[24] See generally: Edeson, "Conclusive Executive Certificates in Australian Law" (1976-1977) y Australian Year Book of International Law 1.
[25] Section 3(3).
[26] *Ibid.*
[27] *Foreign Sovereign Immunites Act* 1976 (US), section 1603.

non-federal states, had been considered by the Australian Law Reform Commission but rejected as unworkable.[28]

The second category covers entities, referred to as "separate entities", which must be considered in some respects as distinct from the organs of government of a foreign state. This category has been left deliberately imprecise in the Act. The definition of "separate entity" refers to the a natural person or corporation being "an agency or instrumentality of the foreign state" but not being a department or organ of the executive government of that state.[29] Its application in particular circumstances is left to be determined by the courts. It seems unlikely that the courts will require the existence of any formal or technical relationship of principal and agent but will look rather to a conglomerate of factors in determining the status of an entity as "an agency or instrumentality" of a foreign state. Those factors would include the degree of governmental control and whether the entity is exercising governmental functions on behalf of the foreign state.

Although assimilated to the foreign state for most purposes, separate entities enjoy a lesser immunity in a number of respects. In general terms, a separate entity is treated as a foreign state for most purposes of immunity from jurisdiction but is not treated as a foreign state for the purposes of service of process and enforcement of judgments.[30]

International organisations, as such, are not included in the Act, being governed by a separate regime of privileges and immunities.[31] However, a person or corporation that is an agency of more than one foreign state is treated by the Act as a separate entity of each of them.[32]

IV. The statutory scheme

In common with the legislation existing in the United Kingdom and the United States, the basic approach of the *Foreign States Immunities Act* is to confer absolute immunity upon foreign states subject to enumerated exceptions. Similarly, as in the case of the legislation of the United Kingdom, though to a lesser extent that of the United States, the exceptions take the form of specific rules for various categories of activity or transaction. The precise formulation of the specific

[28] *State Immunity Act* 1982 (Canada), section 2; Law Reform Commission of Australia, *supra* note 3, pp. 40-41.
[29] Section 3(1), definition of "separate entity".
[30] See particular y sections 22 and 35.
[31] *International Organisations (Privileges and Immunities) Act* 1963 (Australia).
[32] Section 3(2).

rules limiting immunity vary from category to category, reflecting the variety of policy motivations and practical considerations which underlie them.

In proceeding to develop formulations of the separate rules, the Australian Law Reform Commission had first identified three broad justifications for limiting foreign state immunity.[33] They are: the convenience of the forum, the orderly resolution of private law disputes and fairness to litigants. The weight to be attached to these justifications naturally varies in different circumstances as, of course, do the competing justifications for favouring the extension of immunity.

The approach of adopting a detailed legislative resolution to the problem has the benefit of providing certainty in an area in which both commercial and diplomatic relationships might be jeopardised by undue vagueness. The necessary cost in an absence of a certain degree of flexibility. The alternative of adopting a single criterion of immunity based on the distinction between the public and private acts of foreign states and leaving in to the courts to fashion specific rules on a case by case basis was considered by the Australian Law Reform Commission but rejected as not being a viable option in Australia. It would have left the Australian legislation to some extent in conflict with the codifications which had occurred in other countries. Moreover, except over a long period, Australia could not be expected to generate a sufficient body of case law for this purpose.[34]

The *Foreign States Immunities Act* does allow for flexibility in another respect, however, by allowing for the executive government to act from time to time to introduce variations of its regime with respect to particular countries. Although the Act is expressed to apply in relation to foreign states generally, it contains provision for the restriction or extension of immunities or privileges in two broad circumstances. The first is based on reciprocity. Where an immunity or privilege conferred by the Act in relation to a foreign state is not accorded by the law of the foreign state in relation to Australia, regulations may be made modifying the operation of the Act with respect to those immunities and privileges in relation to the foreign state.[35] The second is based on comity. Where an immunity or privilege conferred by the Act in relation to a foreign state differs from those required by a treaty, convention or other agreement to which the

[33] Law Reform Commission of Australia, *supra* note 3, pp. 25-26.
[34] *Id.* p. 32.
[35] Section 42(1).

foreign state and Australia are parties, the Act permits the making of regulations modifying the operation of the Act with respect to those immunities or privileges so that the Act so modified conforms with the treaty, convention or agreement.[36] Regulations so made are subject to the ordinary procedures of Parliamentary scrutiny and possible disallowance.

The substantive provisions of the *Foreign States Immunites Act* are divided into separate parts dealing with immunity from jurisdiction and the grant of remedies against a foreign state. The Act also contains detailed provisions dealing with procedural matters.

V. Immunity from jurisdiction

In conformity with the general scheme of the *Foreign States Immunities Act* outlined above, a foreign state is immune from the jurisdiction of Australian courts except in the limited circumstances provided for by the Act.[37] Those circumstances may be broadly characterised as falling within two basic categories. They are submission to jurisdiction and engagement in commercial activity.

The first, submission to jurisdiction, accords with the universally acknowledged qualification to the notion of foreign state immunity that jurisdiction may be exercised over a foreign state with the consent of that state. The Act specifically provides that a foreign state is not immune from jurisdiction in any proceeding in which it has submitted to the jurisdiction of an Australian court.[38] That submission may occur at any time, whether by agreement or otherwise. However, having once waived its immunity by agreement, the foreign state cannot thereafter withdraw that waiver except in accordance with the terms of the agreement.[39] In addition, a foreign state is taken to have submitted to the jurisdiction of a court in any proceeding where it institutes the proceeding or takes a step as party to the proceeding or as an intervener except where that step is merely to contest jurisdiction or apply or an order for the payment of its costs, or where the step was taken by a person who did not know and could not reasonably be expected to know of the existence of immunity and where immunity is subsequently asserted without unreasonable delay.[40] Subjet to any

[36] Section 42(2).
[37] Section 9.
[38] Section 10.
[39] Section 10(5).
[40] Section 10(6) - (9).

limitation, condition or exclusion specified in an agreement submitting to jurisdiction, the submission of a foreign state to jurisdiction in a proceeding applies to all claims against it by other parties to the proceeding which arise out of or relate to the transactions or events to which the proceeding relates.[41]

A particular form of submission to jurisdiction dealt with separately in the Act concerns agreements relating to arbitration. Arbitration is essentially a consensual process. However, its efficacy as a means of dispute resolution depends on the existence of national and international facilities for the supervision and enforcement of cultural agreements and awards. The Model Law on International Commercial Arbitration recently adopted by the United Nations Commission on International Trade Law illustrates both the importance of arbitration in the modern international economy and the recognition within the international community of the interest of the forum state in the supervision of the conduct of such arbitrations in accordance with basic standards of fairness. The Act provides that where a foreign state is a party to an agreement to submit a dispute to arbitration then, subject to any inconsistent provision in the agreement and except in the case of a public international arbitration, the foreign state is not immune in a proceeding for the exercise of the supervisory jurisdiction of a court in respect of the arbitration.[42] This includes a proceeding by way of a case stated for the opinion of a court, a proceeding to determine a question as to the validity or operation of the agreement or arbitration procedure or a proceeding to set aside an arbitration award. In so providing, the Act follows the stricter drafting style of the European Convention on State Immunity in preference to the United Kingdom legislation which merely removes immunity in respect of proceedings "which relate to the arbitration".[43] The Act also specifically addresses the dificult issue of the enforcement of international arbitral awards. Its approach, in the absence of express submission, is to allow Australian courts to entertain a proceeding concerning the recognition or enforcement of an arbitration award against a foreign state rendered anywhere in the world if, had the underlying dispute been brought before an Australian court for resolution, the foreign state would not have been immune.[44] The enforcement of

[41] Section 10(10).
[42] Section 17.
[43] *State Immunity Act* 1978 (U.K.), section 9; compare European Convention on State Immunity, article 12.
[44] Section 17(2).

arbitral awards therefore does not depend on the place of the arbitration.

The other basic category, commercial activity, reflects the primary concern with state trading which had provided the catalyst for developments in the restrictive approach to foreign state immunity in other countries and at the international level. As in the case of the United Kingdom legislation, it consists of a series of provisions dealing with different types of activities. The conclusion of the Australian Law Reform Commission was that

> A series of provisions can reflect more precisely the various considerations governing whether immunity is to be withheld. Greater guidance can be given to courts and the vagueness inherent in attempting to discover how international law might definde 'commercial activity' at any given time can be avoided.[45]

The necessity for drawing a general distinction between "private", "commercial" or *"jure gestionis"* activities on the one hand and "governmental", "sovereign" or *"jure imperii"* activities on the other was therefore deliberately avoided.

This contrasts with the aproach taken in the legislation of the United States and Canada. Each makes reference to "commercial activity" as a single composite expression, leaving it to the courts to develop more precise rules as to the application of the expression in defined circumstances.[46] The United States legislation contains the additional requirement of a finding that the commercial activity is "carried on in the United States". The complexity of the resulting litigation has prompted one federal judge to describe the *Foreign Sovereign Immunities Act* of 1976 as having been "a financial boon for the private bar, but a constant bane of the federal judiciary".[47]

The principal provision dealing with commercial activity removes the immunity of a foreign state in a proceeding insofar as the proceeding concerns a "commercial transaction".[48] The definition of "commercial transaction" closely follows the equivalent provision in the United Kingdom legislation, placing emphasis on the nature of a transaction

[45] Law Reform Commission of Australia, *supra* note 3, p. 50.

[46] *Foreign Sovereign Immunities Act* 1976 (U.S.), section 1605(a) (2); *State Immunity Act* 1982 (Canada), section 5.

[47] *Gibbons v. Udaras na Gaeltachta* 549 F. Supp 1094, 1105 (1982) *per* Judge Ward. See generally Feldman, "Foreign Sovereign Immunity in the United States Courts 1976-1986" (1986) 19 Vanderbilt Journal of Transnational Law 19.

[48] Section 11.

rather than its purpose or motivation. A "commercial transaction" is "a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged".[49]

This general definition is also expressed specifically to include contracts for the supply of goods or services, financing agreements and guarantees or indemnities in respect of financial obligations. No special jurisdictional links are required. Subject to the rules for the service of originating process, the provision applies to a commercial transaction wherever the relevant transaction or associated activity occurs. However, "contracting out" is permitted. The provision does not apply where all the parties to a proceeding have otherwise agreed in writing.[50]

Contracts of employment and bills of exchange are exempted from the general definition of "commercial transaction" and are dealt with separately in the *Foreign States Immunites Act*. A separate provision on contracts of employment was thought to be necessary because the special governmental interests involved could not adequately be protected without some modification of the operation of the general law.[51] The exemption from immunity here is linked to a variety of jurisdictional factors which seek to achieve a balance between Australian and foreign state interests in the just resolution of employment disputes. Subject to exceptions, a foreign state, as employer, is not immune insofar as a proceeding concerns the employment of a person under a contract of employment that was made in Australia or that was to be performed wholly or partly in Australia.[52] One exception applies where, at the time the contract of employment was made, the employee was a national of the foreign state but not a permanent resident of Australia or was a habitual resident of the foreign state.[53] Other exceptions relate to the employment of consular and diplomatic staff.[54] Contracting out is permitted if otherwise lawful under Australian law.[55]

The separate provision on bills of exchange links the claim of foreign state immunity to the transaction or event giving rise to the bill of exchange.[56] It makes clear that immunity can be claimed in a proceeding

[49] Section 11(3).
[50] Section 11(2) (a) (ii).
[51] Law Reform Commission of Australia, *supra* note 3, pp. 55-59.
[52] Section 12(1).
[53] Section 12(3).
[54] Section 12(5) - (6).
[55] Section 12(4).
[56] Section 19.

on a bill of exchange only where the transaction or event in relation to which the bill was made or endorsed was also subject to immunity. There is no equivalent provision in any treaty or legislation in other countries. It was included in the Australian legislation for the sake of clarity.

Other categories of commercial and related activity dealt with separately in the Act are the ownership and infringement of industrial and intellectual property,[57] the membership of corporations and associations[58] and immunity from taxation.[59] Naturally, separate provision is also made for the ownership, possession and use of property. In relation to immovable property, the Act follows the general trend of legislation in other countries in denying immunity in proceedings so far as they concern and interest or obligation in or arising out of its possession or use.[60] Immunity is also denied in relation to proceedings relating to movable property where the interest of the foreign state in the property arose by way of gift made in Australia or by succession.[61]

Admiralty actions *in rem* receive special treatment. Ordinarily, jurisdiction *in rem* is established merely by the presence of the relevant property within the territorial limits of a state. The Act follows the United Kingdom model in negativing foreign state immunity in an action *in rem* against a ship if, at the time when the cause of action arose, the ship (or, if the action was brought concerning a claim against another ship, that other ship) was in use for commercial purposes.[62] Similarily, a foreign state is not immune in an action *in rem* against cargo that was, at the time of the cause of action arose, commercial cargo.[63]

Finally, special provision is also made in the *Foreign States Immunities Act* for jurisdictional immunity in proceedings concerning personal injury and damage to property. Here the Act disposes entirely with the distinction between governmental and commercial activity and makes the jurisdiction of Australian courts dependant rather on the place of the alleged tortious activity. A foreign state is not immune where the acts or omission causing the injury or loss occurs within Australia.[64]

[57] Section 15.
[58] Section 16.
[59] Section 20.
[60] Section 14(1).
[61] Section 14(2).
[62] Section 18(1) - (2).
[63] Section 18(3).
[64] Section 13.

VI. Remedies against a foreign state

The assertion of jurisdiction is largely meaningless without provision for the enforcement of resultant judments. Although foreign states often voluntarily comply with the adverse judgments of municipal courts, it is generally acknowledged to be unfair for a private litigant to be forced to rely only on the good will of another party for the vindication of his or her adjudicated rights. On analysis, the arguments favouring the restriction of immunity from jurisdiction apply with equal force to the restriction of immunity from the enforcement of judgments. On the other hand, the arguments againts restrictive immunity are brought into sharper focus when applied to enforcement. The execution of a judgment againts the property of a foreing state has immediate practical consequences which are much moret likely to arouse sensitivities damaging to long term diplomatic and commercial relations than the mere assertion of jurisdiction.

The structure of the *Foreign States Immunities Act* reflects these considerations. The provisions dealing with immunity from enforcement largely mirror those dealing with immunity from jurisdiction. There is a general statement that the property of a foreign state is immune from the execution of the judgments of Australian courts.[65] This is subject to three exceptions. The two most important are waiver of immunity from execution and execution against commercial property.

Waiver of immunity from execution corresponds broadly to submission to jurisdiction. The Act provides that a foreign state may at any time by agreement waive its immunity from execution in relation to property.[66] Waiver may be either general or with respect to limited property or classes of property. Any property or class of property may be made the subject of a waiver. However, so as to minimise the possibility of diplomatic embarrassment, a waiver does not apply in relation to property that is diplomatic property or military property unless a provision in the agreement expressly designates the property as that to which the waiver applies.[67]

Unlike the legislation in the United States and Canada, no provision is made for implied waiver. The reason is that it was thought undesirable to leave a foreign state in a position of uncertainty either as to what conduct will imply waiver or as to what property might be affect-

[65] Section 30.
[66] Section 31.
[67] Section 31(4).

ed by such a waiver.[68] The Act specifically provides that a foreign state shall not be taken to have waived immunity from execution by reason only that it has submitted to jurisdiction.[69]

Execution against commercial property corresponds to the cluster of exceptions to immunity from jurisdiction based on participation in commercial activities. Subject only to any limitation or condition imposed under the terms of a submission to jurisdiction, the general rule of immunity from execution does not apply in relation to "commercial property".[70] "Commercial property" is defined to mean "property, other than diplomatic property or military property, that is in use by the foreign state concerned substantially for commercial purposes".[71] This approach broadly follows the United Kingdom rather than the United States model.[72] However, unlike the United Kingdom legislation, the Act does not seek to define "commercial purposes". The United Kingdom legislation defines "commercial purposes" to mean the purposes of such transactions or activities as fall within the definition of "commercial transaction" as that term is used in relation to immunity from jurisdiction.[73] In rejecting this approach, the Australian Law Reform Commission made the point that the considerations governing execution and jurisdiction are not entirely the same. The reason for defining "commercial" in the context of jurisdiction is to focus on the nature of the particular transaction. In that context "purpose" and "motive" are irrelevant. In the context of execution, "purpose" is intended to be the prime discriminator. The linking of terminology carries the danger of blurring this conceptual distinction.[74]

Property used for mixed purposes is treated as commercial property if it is used "substantially" for commercial purposes.[75] The application of any test of substantiality is unnecessarily one of degree, entailing a corresponding element of uncertainty. However, it was thought it to be easier to administer and more consonant with justice than the alter-

[68] Law Reform Commission of Australia, *supra* note 3, pp. 72-73.
[69] Section 31(1).
[70] Section 32(1).
[71] Section 32(3) (a).
[72] *The Foreign Sovereign Immunities Act* 1976 (U.S.), section 1610 (a) (2) allows execution againts the property of a foreign sovereign that "is or was used for the commercial activity *upon which the claim is based*". The *State Immunity Act* 1978 (U.K.), section 13(4) allows execution against property "which is for the time being in use or intended for use for commercial purposes".
[73] *State Immunity Act* 1978 (U.K.), section 17(1).
[74] Law Reform Commission of Australia, *supra* note 3, pp. 76-77.
[75] Section 32(3) (a).

natives of allowing for the severance of mixed property or attainting the whole if any part is used for commercial purposes.[76] Property that is apparently vacant or apparently not in use is taken to be used for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes.[77]

The third, and minor, exception concerns property which has been the subject of proceedings under the jurisdictional provisions of the Act dealing with the ownership, possession and use of non-commercial properties. Immunity does not apply where property has been acquired by gift or succession or is immovable property and a right in respect of the property has been established against a foreign state by judgment or order in such a proceeding.[78]

VII. Procedural matters

In addition to addressing the substantive issues of the scope of foreign state immunity from the jurisdiction and remedies of Australian courts, the *Foreign State Immunities Act* necessarily deals with a number of procedural matters involved in litigation against foreign states. These include the service of process and the entry of judgments against a foreign state.

The Act provides that the service of initiating process on a foreign state or on a separate entity of a foreign state may be effected in accordance with any agreement to which the state or separate entity is a party.[79] Service of process otherwise than in accordance with an agreement varies as between foreign states and separate entities. In relation to foreign states, the Act permits only one alternative mode of service: through the diplomatic channel. The initiating process may be served in this manner only be delivering to the Attorney-General for transmission by the Australian Department of Foreign Affairs to the equivalent department or organ of the foreign state.[80] This accords with the approach taken in legislation in other countries.[81] It has the advantage of providing a workable and certain method of bringing notice of the suit to the attention of senior officials of the foreign state, while

[76] Law Reform Commission of Australia, *supra* note 3, pp. 77-78.
[77] Section 32(3) (b).
[78] Section 33.
[79] Section 23.
[80] Section 24.
[81] E.g. *Foreign Sovereign Immunities Act* 1976 (U.S.), section 1608(a) (4); *State Immunity* Act 1978 (U.K.), section 12(1).

avoiding the risk of the potentian harrassment of diplomats or visiting state representatives if private service were to be effected in Australia. In relation to separate entities, the Act makes no provision at all beyond service in accordance with agreement. Service on a separate entity is effected in the ordinary way applicable to private litigants. This accords with the United Kingdom approach but differs from the United States appoach which gives the courts a discretion to fashion novel methods of service where the ordinary methods fail.[82] The United States approach was thought to give a litigant suing a foreign corporation that is an agency or instrumentality an unnecessary advantage over a litigant suing a private foreign corporation.[83]

Where a foreign state appears before an Australian court to contest the claim against it, the Act permits the trial to proceed in the usual way. However, under the ordinary rules of court judgment could be entered where a foreign state failed to appear. Consistently with the legislative approach in other countries, the Act modifies the rules relating to default judgments against a foreign state in two ways. First, it is made clear that the mere failure of the foreign state to appear before the court is not sufficient to allow the proceedings to continue in default. Default judgment may not be entered unless it is proved, in addition to proper service of the initiating process and the expiration of the time for appearance, that the foreign state is not immune.[84] This firts modification applies also to separate entities of foreign states. The second modification relates to notice of any default judgment once entered. A judgment in default of appearance is not capable of being enforced against a foreign state until notice of the judgment is served on the foreign state through the diplomatic channel and two months have expired. The foreign state is also given at least two months from the date of service to make application to the court to have the judgment set aside.[85]

VIII. Conclusión

Statute law, no less than judge-made law, develops through precedent and experience. The Australian *Foreign States Immunities Act* is an example of such a statutory development in a field of increasing

[82] *Foreign Sovereign Immunities Act* 1976 (U.S.), section 1608(b). See also *State Immunity Act* 1978 (Canada), section 9(4).
[83] Law Reform Commission of Australia, *supra* note 3, p. 93.
[84] Section 27.
[85] Section 28.

international significance. While drawing upon the concepts and procedures embodied in legislation in other countries, principally the United Kingdom and the United States, the Act has introduced numerous modifications and refinements. Some have been made in an attempt to overcome difficulties found to exist in the practical operation of the legislation in other countries. Others have been made more in keeping with Australian perceptions of justice and utility.

The Australian legislation provides neither the first not the last word on the subject of foreign state immunity. It takes its place rather as one of a series of enactments in a number of countries which is contributing to a growing body of judicial thought on the subject. Its study will no doubt contribute to future developments both nationally and internationally.