

SOVEREIGN IMMUNITY: AUSTRALIAN LEGISLATION — THE FOREIGN STATES IMMUNITIES ACT 1985

A memorandum by the Government of Australia

Australia has enacted the Foreign States Immunities Act 1985, which came into force on 1 April 1986 (apart from s.18(2) which concerns sister-ship arrest, an action not currently available under Australian law).

2. The Act implements the recommendations of the Australian Law Reform, Commission made after comprehensive study of the approaches of other countries to foreign state immunity and in particular the legislation enacted during the last decade by the United States, Canada and the United Kingdom. (The latter Act is closely followed by the legislation of Singapore, Pakistan and South Africa). The Australian Act follows the general approach of these Acts. However, the thorough study of their operation by the Law Reform Commission has enabled Australia to make improvements in some areas.

3. The Act follows the general international trend by adopting the restrictive doctrine of sovereign immunity. Foreign states are immune from jurisdiction except in proceedings concerning:

- (i) commercial transactions;
- (ii) tort resulting in death, physical injury or damage to tangible property;
- (iii) employment contracts with locally recruited staff;
- (iv) real property disputes;
- (v) industrial and intellectual property;
- (vi) the supervisory jurisdiction of a court where the parties have agreed to submit a dispute to arbitration; and
- (vii) membership of a body corporate, an un-incorporated body or a partnership where at least one member is not a state.

A foreign state may also waive its immunity.

4. "Commercial transaction" is defined as 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 and as including:

- "(a) a contract for the supply of goods or services;
- (b) an agreement for a loan or some other transaction for or in respect of finance; and
- (c) a guarantee or indemnity in respect of a financial delegation".

This specific description of the transactions covered avoids the uncertainties of concepts such as "commercial" and "non-governmental"

5. Consistently with the approach taken to immunity from jurisdiction, the property of foreign states is immune from execution, subject to specified exceptions. Commercial property is not immune from execution regardless of whether it was used in the activity from which the claim arose. "Commercial property" is defined as property other than diplomatic or military property, that is in use by the foreign state concerned substantially for commercial purposes. The Australian Act thus utilizes separate definitions of "commercial transactions" and "commercial property" for the purpose of jurisdiction and execution respectively, the latter taking "purpose" into account. Immovable property and property acquired by succession or gift s not immune from execution if a successful suit is brought against the particular property. There is no requirement that this be commercial property. A foreign state may also, of course, waive its immunity from execution with respect to any property.

6. The Act also provides expressly for service of process. Process for service on foreign states is to be through the diplomatic channel or in accordance with any agreement between the party or Australia and the foreign state.

7. In developing this legislation, Australia was of course mindful of the work of the ILC and the AALCC on this subject. The Australian Act is generally in accordance with the ILC work to date on a draft international convention. The enactment of legislation on foreign state immunity in other common law countries such as the United Kingdom, Singapore, and Pakistan means that Australian courts can no longer look to decisions of the courts of those countries for elaboration of the common law. Since there is very little litigation on this subject within Australia, it was necessary for us to legislate, to clarify the provision, in advance of the completion by the ILC of its work. As stated by the Attorney-General when presenting the Bill to the Australian Parliament, Australia will of course reconsider the Act in the light of any Convention resulting from the ILC work.

8. A more detailed discussion of the key provisions of the Act is attached.

FOREIGN STATES IMMUNITIES ACT 1985 (AUSTRALIA) DISCUSSION OF KEY PROVISIONS

Immunity of Foreign States from Jurisdiction

Subject to specified exceptions, foreign states are immune from the jurisdiction of Australia courts in a proceeding.

Exceptions to Immunity from Jurisdiction

These specific exceptions are as follows:

- (a) Submission to jurisdiction: A foreign state may waive its immunity expressly either in the face of the court at the time of court proceedings or by prior written agreement, including by a treaty, or by unilateral declaration. An agreement to waive immunity cannot be withdrawn except in accordance with the terms of the agreement. While pre-dispute waivers were not recognized by civil law courts and by the recent U.S., Canadian, and UK legislation. A foreign state also waives its immunity by implication if it initiates court proceedings, or subject to certain safeguards, if it intervenes in court proceedings.

Submission to the jurisdiction also renders the state open to a claim made in the

proceeding, such as a set-off or counter-claim, arising out of and relating to the transactions or events to which the proceedings related. Such a claim is not limited to relief of the same amount or kind as that sought by the foreign state. This is consistent with the UK and Canadian legislation and the draft provisionally approved by the ILC (Article 10). It is in contrast, however, to the approach of the United States legislation which, in addition, allows counterclaims not connected to the subject matter of the initial action, if the relief sought does not exceed in amount nor differ in kind from that sought in the initial action (s.1607).

- (b) Commercial Transactions: A foreign state is not immune insofar as a proceeding concerns a commercial transaction, except where all parties are states or have otherwise agreed in writing, or the proceeding concerns a payment such as a grant, scholarship, or pension. The principle that, when a foreign state acts in a commercial manner which would otherwise be within the ordinary jurisdiction of local courts, it should be subject to that jurisdiction is of course the central argument behind the shift from absolute to restrictive immunity. The distinction between commercial and other transactions or between governmental and non-governmental transactions has however proved difficult to apply to particular facts. The widely accepted doctrine is that one should look to the nature, not the purpose of the transaction. On this basis, a contract for the purchase of boots for a state's army can be characterized as by nature a contract and thus a commercial and non-governmental transaction, notwithstanding the purpose of maintaining the army. This test, however, has not provided a coherent dichotomy in practice.

The Australian Act avoids uncertainty by defining a commercial transaction as 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" and as including:

- " (a) a contract for the supply of goods or services;
- (b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and
- (c) a guarantee or indemnity in respect of a financial obligation".

(The latter does not include a contract of employment or a bill of exchange as these are the subject of separate provisions).

This approach follows the UK Act and contrasts with the U.S. Act and the ILC Draft which utilize the nature/purpose distinction.

The Australian Act in contrast to the U.S. and Canadian Acts, but like the U.K. Act, deals separately with some aspects of commercial activity, namely, contracts of employment, industrial and intellectual property, membership of bodies corporate, arbitration, local taxes, and bills of exchange. (The last is not dealt with separately under the U.K. Act). This enables the Act to make clear provision as to the various considerations governing whether immunity is to be withheld.

- (c) Contracts of Employment: A foreign state as employer is not immune in so far as a proceeding concerns the employment of a person where the contract of employment was made in Australia or was to be performed wholly or partly in Australia. This includes proceedings both concerning entitlements under the contract and rights or obligations under an Australian law. Australia considers that it has an interest

in seeing that employees in Australia are able to use local courts to resolve disputes. However it recognises the special interests of foreign states in certain employment contracts. For this reason, the provision does not apply where, at the time the contract was made, the employee was a national of the employer state and not a permanent resident of Australia, or was an habitual resident of the foreign state; not does it apply to the employment of diplomatic and consular officers or to administrative and technical staff of a mission and consular employees unless they were Australian nationals or permanent residents when the contract was made. By so specifying the contracts for which a foreign state remains immune the Act avoids the difficulties of applying a general exclusion of contracts for employment of a governmental character. (Contrast ILC Draft Article 13). Like the provision removing immunity with respect to commercial transactions, it is possible to contract out of the operation of this provision. However, this does not permit contracts purporting to negative rights and duties, from which it is not otherwise permissible to "contract out" under Australian law.

- (d) Industrial and Intellectual Property: This provision follows the U.K. Act by providing that a foreign state is not immune in proceedings concerning the ownership registration or protection in Australia of an invention, trade mark, or design, but also adds proceedings concerning the ownership of a copyright. Like the U.K. Act, the Australian Act also denies immunity in proceedings concerning an alleged infringement of any of these and concerning the right to use a trade or business name.
- (e) Arbitrations: Where a foreign state is a party to an agreement to submit a dispute to arbitration, the foreign state is not immune in a proceeding for the exercise of the supervisory jurisdiction of a court. This does not apply to arbitrations between states or between states and international organisations. The Australian Act also provides for the enforcement of arbitration awards. This issue is not expressly dealt with in the U.S. Act. Awards, whether Australian or foreign, are subject to court enforcement if there was an agreement to submit the dispute to arbitration and the foreign state would not have been immune under the Australian Act in a proceeding concerning the transaction or event which is the subject of the arbitral award. This enforcement provision is subject to any inconsistent provision in the agreement.
- (f) Membership of bodies corporate, partnerships etc: A foreign state is not immune in proceedings between members of a body corporate, an incorporated body or a partnership of which at least one member is not a state and which was established under Australian law or is controlled from or has its principal place of business in Australia, in so far as the proceedings concern its membership or a right or obligation relating to its membership. This provision closely follows the U.K. Act (s.8).
- (g) Bills of Exchange: Where a foreign state gives a bills of exchange in connection with a non-immune transaction or event it is not immune if it is sued on the bill of exchange rather than on the underlying transaction or event. This prevents any possible argument that a bill is a "commercial transaction" and thus that proceedings concerning a bill are not immune even if the underlying transaction is immune. There is no equivalent provision in any treaty or the legislation of any other country.
- (h) Taxes: If Australian law imposes a taxation obligation upon a foreign state, which will of course be a matter of interpretation of the relevant tax law, it is considered proper that the foreign state not be immune in proceedings to recover the tax. The Act denies immunity accordingly. However, as under Australia's

federal system taxes are imposed not only by the federal government but also by States and local authorities, the Act only operates to deny immunity in respect of Acts prescribed by the Governor-General. This enables the federal government to ensure a consistent approach is achieved.

- (i) Personal Injury and Damage to Property: Like the U.S., Canadian and U.K. Acts, the Australian Act provides that a foreign state is not immune in a proceeding in so far as it concerns the death or personal injury of a person or the loss or damage of tangible property. Like those Acts, also, the Australian Act makes no distinction between acts which might be described as governmental and other acts. The Act follows the U.K. Act providing for non-immunity by reference to the place of the act or omission causing the damage, as opposed to the place where the damage occurred, which is the approach of the U.S. and Canadian Acts.
- (j) Ownership, Possession and Use of Property: Consistently with the view generally accepted internationally, a foreign state is not immune in a proceeding concerning its ownership, interest in, or possession of immovable property in Australia. This is of course subject to the inviolability of diplomatic and consular premises under the Vienna Conventions. Likewise a foreign state is not immune in a proceeding in so far as it concerns property acquired by way of gift or succession. Also, based on the view that where a local court is administering, or supervising the administration of property it is appropriate that it should be able to adjudicate on all conflicting claims to such property, foreign states are not immune in a proceeding insofar as it concerns bankruptcy, insolvency or the winding up of a body corporate, or the administration of a trust, the estate of a deceased person or a person of unsound mind.

Execution

10. Consistently with the approach taken to immunity from jurisdiction, the property of foreign states is made immune from execution to satisfy judgments made against the foreign state, subject to specified exceptions. Like the U.K., Canadian and U.S. legislation the Australian Act allows execution against property used for commercial purposes, leaving governmental property immune. Again the problem arises of the imprecision of this dichotomy.

11. The Australian Act defines commercial property as property other than diplomatic or military property, that is in use by the foreign state concerned 'substantially for commercial purposes. There is also a statutory presumption that property that is apparently not in use in being used for commercial purposes unless the court is satisfied that it has been set aside for other than commercial purposes. The Australian Act thus utilizes separate definitions of "commercial transaction" and "commercial property" for the purposes of jurisdiction and execution respectively.

12. This approach differs from all other recent legislation. Australia considers such a division appropriate because while, as discussed, it is generally said that the purpose of a transaction is irrelevant to the question of jurisdiction, the purpose of holding property is relevant to the question of execution.

13. The express exclusion of diplomatic and military property from the definition of commercial property is not found in any other legislation and which probably unnecessary, avoids all possible doubts. Another feature not found in any other recent legislation on sovereign immunity is the express provision for property used for mixed purposes where such property cannot be severed according to the type of use. The Australian Act allows execution against property used "substantially for commercial purposes".

14. Unlike the U.S. Act, but like the U.K. and Canadian Acts, execution is not restricted to property used in the activity from which the claim arose. Such a restriction would prevent execution for non-commercial torts and also give rise to difficult problems in deciding whether on any given facts a sufficient nexus exists between the property and the claim. Furthermore, as a matter of policy there appears to be no reason why all commercial property belonging to the foreign state in the jurisdiction should not form a common fund against which judgment creditors may execute. Consistently with the lack of immunity of immovable property and property acquired by succession or gift, such property is not immune from execution if a successful suit is brought against it. There is no requirement that the property be commercial property. In this the Australian Act follows the Canadian in contrast to the U.S., approach. While there is probably very little immovable property that is neither commercial nor protected under the Vienna Conventions (which the Act, of course, does not override) Australia wishes to avoid as far as possible leaving a person who has won a judgment in respect of such property without a remedy. With respect to property acquired by succession or gift, Australia considers that where a judgment is obtained that a gift or legacy should not have gone to a foreign state, there is no reason to allow the foreign state to retain such a windfall, even if it has been put to non-commercial purposes.

15. A foreign state may of course waive its immunity from execution with respect to any property.

16. The Australian Act also allows remedies other than the seizure of property, such as injunctions. However a penalty by way of fine or committal cannot be imposed for failure to comply with a court order and specific performance is not available for breach of a contract of employment.

Service of process

17. The Act also provides expressly for service of process. Like all other recent legislation on sovereign immunity, provision is made for service on foreign states through the diplomatic channel, or in accordance with any agreement between the party or Australia and the foreign state. No other means of service within Australia is effective. However, where a foreign state enters an appearance in a proceeding without making an objection in relation to the service of the initiating process, it may not subsequently question the validity of the service.