FOREIGN STATES IMMUNITIES BILL 1985

Date introduced: 21 August 1985
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P., Deputy Prime Minister and Attorney-General

DIGEST OF BILL

Purpose

To update and clarify the law with respect to Australian courts' jurisdiction over foreign States and their agencies, and the enforcement of decisions against such bodies.

Background

The immunity of foreign States from the jurisdiction of local courts has a long history. The doctrine was originally conceived to restrict local courts' powers with regard to the sovereigns of foreign countries and their property. Although the full extent of the immunity remained in some doubt, the doctrine was stated by the House of Lords, in 1938, to have two parts:

"The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control".[1]

This doctrine gave very wide immunity from the jurisdiction of the local courts and became known as the theory of absolute immunity. It was the accepted theory in the 19th and early 20th centuries.
The absolute immunity theory came into doubt following the Second World War as international trade increased and States increasingly acted through independent State agencies or corporations. These bodies operated as normal commercial ventures while, it would appear, still maintaining immunity from the local courts' jurisdiction.

These problems led to the development of the theory of restrictive immunity which sought to remove foreign States' immunity from the jurisdiction of local courts for trading, commercial and certain tortious actions. This theory was quickly adopted by several European countries, including Austria, the Federal Republic of Germany, France and the Netherlands. In 1952 the United States of America announced that in future it would follow the restrictive immunity theory.

English common law countries have been slower in adopting this approach and the law has developed in an ad hoc manner. It was not until the late 1970s that it could be said with certainty that common law followed the restrictive immunity theory. The problems and uncertainty in this area led the United Kingdom to pass the State Immunity Act 1978 which classified and codified the application of the restrictive immunity theory. This Act has been followed by a number of other countries, including Singapore, Pakistan and South Africa. Canadian legislation adopting the restrictive immunity theory was passed in 1982.

The position in Australia remains unclear. There have been very few cases on the subject, especially in recent years. However, it appears likely that the courts would follow the English, pre-legislation common law which, although adopting the restrictive immunity theory, remains unclear as to the precise extent of immunity. As most other common law countries have legislated in this area, there will be few overseas cases to give guidance to Australian courts in the future. This, and a desire to clarify the law in this area, led to the Law Reform Commission being asked to review the law and to make recommendations for changes in this area. Its report (Foreign State Immunity, Report No. 24, 1984) recommended that the Commonwealth should legislate and suggested the form of legislation. This Bill implements those recommendations.
Outline

The Bill sets out the circumstances in which foreign States will not be immune from the jurisdiction of Australian courts; how successful judgments against foreign States may be enforced, and the procedure for bringing foreign States to court.

Main Provisions

A foreign State is defined to include any country outside Australia which is an independent sovereign State, a province or other political sub-division of the State, the head of the State and the executive government of a State or a political sub-division of the State. It does not include corporations or persons acting as agents or instruments of the State (clause 3).

Foreign States are granted immunity from the jurisdiction of Australian Courts (clause 9) except in the following circumstances:

- where the foreign State submits to the jurisdiction (clause 10);
- where proceedings concern 'commercial transactions'. However, immunity will remain where the proceedings are between the Commonwealth and foreign States; between foreign States; where the parties so agree in writing; or where proceedings concern a grant, scholarship, pension or similar payments (clause 11);
- where proceedings concern a contract of employment. However, immunity will remain where the employee is a national or resident of the foreign State; the employee is a member of diplomatic or consular staff or is a member of the administrative or technical staff and not an Australian national or resident (clause 12);
- in cases of personal injury or property damage caused by an act or omission in Australia (clause 13);
- the proceedings concern immovable property (e.g. land) or property acquired by gift or under a will (clause 14);
the breach of copyright, patents, trade mark etc. law in the course of a commercial transaction (clause 15);

actions in rem against ships used for commercial purposes (clause 18);

actions regarding Bills of Exchange (clause 19);

proceedings relating to taxation (clause 20).

Enforcement of judgments against Foreign States

Foreign States will be immune from the execution of judgments (clause 30) except in the following cases:

- the foreign State waives immunity (clause 31);
- the execution concerns commercial property (clause 32);
- execution against immovable property or property acquired under a will or as a gift (clause 33).

Service on foreign States and judgment for non-appearance are dealt with by clauses 23-29. In summary, documents initiating an action are to be delivered to the Attorney-General's Department, and then forwarded to the Foreign Affairs Department which will arrange for service through normal diplomatic channels (clause 24). If the foreign State fails to appear within the time stipulated in the originating documents and the Court is satisfied that it has jurisdiction, default judgment may be entered against the foreign State (clause 27). However, before this judgment may be enforced, a copy of the judgment must be served on the foreign State and, unless the Court gives leave to proceed sooner, the successful party must wait for 2 months after service of the judgment before it can be enforced (clause 28).
For further information, if required, contact the Law and Government Group.

12 September 1985

Reference


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