FOREIGN PROCEEDINGS (EXCESS OF JURISDICTION) BILL 1983

Date Introduced: 7 December 1983
House: Senate

Short Digest of Bill

Purpose

To consolidate and expand Australian laws which protect Australian national and trading interests against the extra-territorial enforcement of foreign judgements.

Background

All States in Australia, as well as the ACT and the N.T. have enacted similar legislation for the direct enforcement by registration in the Supreme Court of foreign civil judgements. Once the foreign judgement is registered, the Supreme Court has the same control over execution as it has over its own judgements. However, because an anti-trust suit in the United States Supreme Court (the Westinghouse case[1]) threatened to award damages amounting to billions of damages against four Australian companies, the then Commonwealth government intervened by passing blocking legislation[2]. Briefly, the legislation empowered the Attorney-General to prohibit the gathering of certain evidence and the enforcement of certain foreign judgements. The Bill, among other things, consolidates the old legislation and although a settlement was finally effected in the Westinghouse case, the Attorney-General has indicated that the Bill will protect the national interest from such contingencies in the future. The Bill will align the law in Australia with that in the United Kingdom.

The new legislation should be viewed against the backdrop of the Australian-US Anti-trust Co-operation Agreement of June 1982. The Agreement was a direct response to the deterioration of Australian-US relations over the extra-territorial operation of U.S. laws during the Westinghouse case. The Agreement is designed to provide a framework for the resolution of conflicts by providing for notification of, consultation over and the intervention in,
civil suits. It is proposed that the Agreement will operate side-by-side with the new legislation, the latter being used as a last resort by the Attorney-General.

Main Provisions

Clause 7 of the Bill empowers the Attorney-General to make orders to prohibit the production of, or the giving of evidence related to documents located in Australia, but sought to be used in a foreign court. For the purposes of the Bill, the Privy Council is excluded from the definition of a foreign court. Before the Attorney-General may make an order, however, he must be satisfied that the order is desirable for the protection of the national interest, or satisfied that the foreign court has assumed or exercises its jurisdiction contrary to international law or inconsistently with international comity and practice. (Clause 6) The orders may be enforced by an injunction granted by the Federal or High Courts. (Clause 8)

Clause 9 of the Bill empowers the Attorney-General to give certain directions in relation to foreign anti-trust judgements. That is, foreign anti-trust proceedings or proceedings related to the maintenance of business competition in which a final judgement has been given. (Clauses 3(1) and 4(1)). Before the Attorney-General can so direct, he must be satisfied on the same grounds as set out in Clause 7. By his direction, the Attorney-General may specify that a foreign judgement will not be enforced in Australia, or enforced only up to a specified amount. Any amount recovered outside of Australia under a judgement shall be deemed to be an amount recovered in Australia in satisfaction of the judgement (clause 9(5)). If, however, the Attorney-General has issued a direction that a foreign judgement will not be enforced or enforced up to a specified amount and judgement moneys have been paid by an Australian citizen, company or government authority, then the amount paid, or paid in excess of the specified amount, may be recovered back. (Clause 10) Clause 11 of the Bill also provides that the defendants may, subject to an order of the Attorney-General, recover their reasonable costs and expenses before or after judgement has been given.

Clause 12 of the Bill retains, subject to an order of the Attorney-General, the law relating to the execution of foreign judgements of countries who have entered reciprocal enforcement agreements with Australia, notwithstanding that the foreign judgement in operation may arise from an anti-trust suit.

By clause 13 of the Bill, the Attorney-General may, if satisfied that it is in the national interest to do so,
make an order prohibiting an Australian citizen or company from performing an obligation imposed on them by a foreign law, government or instrumentality.

Clause 14, likewise, allows the Attorney-General, if satisfied on the same grounds, to make an order prohibiting an Australian citizen or company from performing the non-pecuniary requirements of foreign judgements.

For further information, if required, contact:

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References
