

AUSTRALIAN FOREIGN AFFAIRS RECORD

NOTE

REFERENCE ON FOREIGN STATE IMMUNITY AND THE COMMONWEALTH OF NATIONS

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In January 1983, the Chairman of the Australian Law Reform Commission, Mr. Justice Kirby, made a statement concerning the Reference given to the Commission on the subject of Australian law on Foreign State Immunity. The Reference was given to the Commission on behalf of the Attorney-General of Australia, Senator the Honourable P.D. Durack, Q.C. The following is Mr. Justice Kirby's statement:

Terms of Reference on Foreign State Immunity

On 11 November 1982 the Acting Attorney-General gave the Australian Law Reform Commission a reference on the subject of Foreign State (Sovereign) Immunity. The Commission is required to prepare a report to the Attorney-General and the Australian Parliament reviewing Australian law on the subject. The subject was discussed at the meeting of Commonwealth Law Ministers in Winnipeg, Canada in 1977. It is understood that some work on the topic has been undertaken in the Commonwealth Secretariat. It has also been the subject of work in the United Nations Organisation (International Law Commission) and in the International Law Association.

The problem for Australian law raised by the reference to the Commission is probably common to most countries of the Commonwealth of Nations which have not reviewed and reformed their law on this topic. Some countries (the United Kingdom, Singapore and Canada) have already done so. The review exercise by the Australian Law Reform Commission in its report could be of value to other Commonwealth countries. Most of them would still apply the English common law which has now been replaced in the United Kingdom by the State Immunity Act 1978 (U.K.). The Australian Law Reform Commission will be keen to work co-operatively with colleagues in law departments and other law agencies throughout the Commonwealth of Nations. Though some political, economic and legal concerns would differ between Commonwealth countries, there is likely to be a good deal of similarity of views and needs on this subject. It is an area where, especially in Europe and North America, domestic as well as international law has advanced.

In due course when the report of the Commission is prepared, it will be available for distribution to Member countries of the Commonwealth of Nations. It is anticipated that a consultative document will be prepared by the Commission for distribution later in 1983. The Commissioner-in-charge of the reference is Dr. James Crawford, Reader-in-Law in the University of Adelaide. Dr. Crawford has an established reputation in public international law.

Nature of Problem

In Australia at present foreign States and their agencies and instrumentalities are subject to common law rules. These rules are in a state of flux and the degree of immunity which they afford is uncertain. One possible result of the Commission's study, which is expected to take a year, could be the replacement of common law principles by an Australian Federal statute defining rules and procedures for legal process against foreign countries and their agencies in Australia. Whether that statute should be comprehensive or limited to certain questions such as procedure and enforcement, leaving others to be dealt with on a case-by-case basis by the courts, is one issue that needs to be faced.

Examples of the problem

Distinguishing those cases in which foreign States their agencies and instrumentalities should be immune from local jurisdiction from those in which they should not presents difficulties, both for courts and legislatures. The Australian Law Reform Commission is already receiving helpful comments on some of the difficulties which have arisen under the legislation overseas. Examples of the problems which can arise include the following:

- * A government made a policy decision to break diplomatic relations and to impose an economic embargo with the direct result of the loss of contractual or property rights to people in trading relations with the government or its agencies: I. Congreso del Partido [1981] 1 All E.R. 1064.
- * A government sought to transfer a State owned trading vessel from general trade to government use - with consequent loss to persons having contracts for the use of the vessel in trade: The Canadian Conqueror [1962] Can.L.R. 598.

- * A person who had salvaged a helicopter which was then placed on a United States naval vessel was held unable to detain the vessel even temporarily in order to obtain rights of salvage against the helicopter in its hold: Buckingham v The Aircraft Hughes 500D Helicopter, unreptd., N.Z. High Court, 22 February 1982 (Hardie-Boys J.).

Respect for foreign countries and the principle of reciprocity make it sensible to preserve some degree of immunity. What is difficult is the precise definition and the application of the principle of immunity to particular circumstances and especially to trading agencies of foreign countries. These are not theoretical issues. They have arisen in a significant number of cases particularly in the United Kingdom and the United States. United Kingdom, United States, Hong Kong and recent New Zealand cases illustrate the need to clarify the laws on this subject.

International Developments

The Australian Law Reform Commission will be examining legislation and case-law in the United States, Britain, Canada and elsewhere. It will also be having regard to a number of recent international efforts to redefine the law on sovereign immunity. These efforts include:

- * The Convention of the Council of Europe on State Immunity, dated 1972 which adopts a more restricted definition and sets out a list of cases where the State is not immune.
- * The statement of the Law Ministers of the Commonwealth of Nations made in Winnipeg in 1977.
- * The work of the United Nations International Law Commission on State Immunity; and
- * The work by a committee of the International Law Association seeking to reconcile differences between European and United States approaches to reform.

Request for Co-operation

The reference given to the Australian Law Reform Commission on Foreign State Immunity is an initiative that will be of interest and relevance to many lawyers and others in Australia and also in countries of the Commonwealth of Nations. The reference is drawn to general notice. The Australian Law Reform Commission offers to exchange information and views with appropriate officers and to make available its consultative documents and final report, if so desired.