IV. Jurisdiction

Jurisdiction - Australian reaction to trial in United States of person abducted from another country

On 18 June 1992 the Minister representing the Attorney-General in the House of Representatives, Senator Tate, responded to a question without notice concerning a decision of the United States Supreme Court on 15 June 1992 (*United States v Alvarez-Machain* 112 S Ct 2188 (1992)). In his response, Senator Tate said the following (Sen Deb 1992, Vol 153, p 3957):

> I became aware yesterday that the United States Supreme Court in a six to three majority decision decided that it was lawful for the United States Government to seize suspects in a foreign country and forcibly return them to the United States for trial, notwithstanding that the United States has an extradition treaty with the foreign country concerned. I think that decision is a deeply disturbing one for the international community. It makes the question of proceeding under an extradition treaty something which is optional as far as the United States Executive is concerned if it wants to bring a person before a United States court for trial on some alleged offence.
>
> I would have thought that honourable senators would find the notion of government sponsored kidnapping of persons overseas to bring them back for trial a deeply disturbing one. It certainly requires reflection by the Australian Government. The Attorney-General's Department is having a look at the implications as far as they may affect the structure of our extradition arrangements with the United States.
>
> The Supreme Court seems to have taken the view that, in the absence of a specific provision in the United States-Mexican extradition treaty prohibiting the unilateral abduction of a suspect from the territory of one party by the other party, such abductions are permitted. As Australia does not have a clause in its extradition treaty with the United States expressly prohibiting kidnapping, it obviously raises at least the theoretical possibility of the United States exercising the option now sanctioned by the United States Supreme Court of abducting a person from Australia to face trial in the United States.
>
> It has to be said that that would involve a breach of Australia's sovereignty and expose the United States personnel, or anybody else who committed such a kidnapping within Australia, to criminal sanctions under Australian law. Therefore, it requires a very deliberate reflection by the Australian Government on this judgment, and that will occur.
>
> It is worth stating that this was a six to three opinion, which is a very substantial majority. Nevertheless, it may be of interest to honourable senators if I quote the dissenting judgment, which states that legal opinion: "... throughout the civilised world will be deeply disturbed by the monstrous decision the Court announces today".

This is the three dissenting judges. They went on to say: "It is shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party's territory. ... (It would make the treaty) into little more than verbiage."

As I say, there is a lot within both the majority and dissenting judgments for us to reflect on.

The general questions of international law, the rule of law and the status of extradition treaties which have been very painstakingly negotiated between nations in order to ensure the civilised presentation before courts of those who have sought safe haven in a foreign jurisdiction away from the ordinary law enforcement processes of the country in which it is alleged that a crime has been committed are all at risk. Therefore, I can assure the Senate that this decision and its consequences will be subjected to the most thorough reflection by the Government.

It was also conveyed to the United States Ambassador by a Deputy Secretary of the Department of Foreign Affairs and Trade on 19 June 1992 that any assertion of competence to abduct from Australia fugitives from United States law would be regarded by Australia as contrary to international law and unacceptable.

In relation to the same matter, the Department of Foreign Affairs and Trade issued the following Diplomatic Note on 10 November 1992 in response to a Note received from the Indian High Commission:

The Department of Foreign Affairs and Trade presents its compliments to the High Commission of India and has the honour to refer to the High Commission's Note No. CAN/125/1/92 expressing its concern with the United States of America Supreme Court ruling that the abduction in Mexico in 1990 of a Mexican national, Dr Humberto Alvarez Machain, was legal for law enforcement purposes.

There has not been a similar case in Australia and Australia is of the view that the assertion of competence to abduct Australian nationals from foreign countries, or to abduct foreign nationals from Australia, is contrary to international law and unacceptable.

The Department of Foreign Affairs and Trade avails itself of this opportunity to renew to the High Commission of India the assurances of its highest consideration.

Jurisdiction - Unlawful acts at sea - Legislation enabling Australian accession to convention and protocol

On 25 November 1992, Mr Hollis (member for Throsby) said in the course of the second reading debate on the Crimes (Ships and Fixed Platforms) Bill 1992 (HR Deb 1992, Vol 185, p 230):

This legislation will enable Australia to become a party to two international instruments relating to the prevention of maritime terrorism: the Convention for the Suppression of Unlawful Acts Against Maritime Navigation, and the Protocol for the Suppression of Unlawful Acts Against Fixed Platforms Located on the Continental Shelf. The convention and the protocol, made in

March 1988, came into force on 1 March this year. This Bill will make the changes which are necessary to our domestic law for Australia to become party to them.

Once the Bill is passed, Australia will accede to the convention and the protocol. As has been stated earlier, the impetus for the convention and the protocol was the hijacking of the *Achille Lauro* in the Mediterranean Sea, during which an American tourist was murdered.

That incident exposed deficiencies in international law which were fatal to attempts to bring most of the terrorists to justice. This was due, at least in part, to uncertainties about the legal position of each of the parties involved. ...

Much of the uncertainty which characterised the handling of the affair arose because of the special position of terrorism with respect to criminal liability. There are now many international conventions dealing with aspects of terrorism. Until 1 March 1992, however, when the convention on maritime safety and the protocol on fixed platforms came into force, there was nothing specifically dealing with the question of terrorism at sea. The nations involved, therefore, had to try to sort out jurisdiction on the basis of existing international law, such as hostage taking and piracy. The *Achille Lauro* incident did not fit neatly into any such law and this was the cause of great difficulties between the countries involved.

If this convention had been in force between the parties when the incident occurred, Italy, as the flag State, and Egypt, as the State in whose territory the offenders were found, would each have had jurisdiction. Each would have had two options: initiate prosecutions themselves or grant extradition to another State with jurisdiction under the convention. The USA, as the State of the victim's nationality, could have established jurisdiction under the non-compulsory jurisdictional provisions of the convention. Any party in whose State any of the offenders were present would have been obliged to ensure that the alleged offenders did not escape prosecution.

Jurisdiction - Lockerbie incident - Australian call for Libyan compliance with Security Council Resolution

On 23 January 1992 the Acting Foreign Minister, Senator Robert Ray, issued a news release which read as follows:

The Acting Foreign Minister, Senator Robert Ray, today added Australia's voice to the Security Council's call for Libya to provide a full and effective response to requests for cooperation with the legal procedures related to terrorist attacks on civilian airliners.

British and US investigators announced on 14 November 1991 that they had evidence of Libyan responsibility for the bombing of Pan Am Flight 103 over Lockerbie in Scotland on 21 December 1988, in which 270 people were killed - among them an Australian woman, Ms Nicola Hall. Warrants were issued by the respective authorities for the trial of two Libyan officials. On 30 October 1991, a French investigating magistrate issued international arrest warrants for four Libyan officials in connection with the bombing of UTA Flight 772 over Niger on 19 September 1989, in which 171 people were killed.

The Security Council this week voted unanimously to strongly deplore Libya's failure to respond effectively to international requests for full co-operation in establishing responsibility for the bombings. The Secretary-General of the United Nations has been asked by the Council to seek the Libyan government's co-operation.

"Libya should comply with the Security Council Resolution immediately and assist in bringing the accused to trial", Senator Ray said. "While Australia does not prejudge the issue, we do not believe that a full and impartial judicial hearing of the charges is possible in Libya, in view of the claims in the indictments implicating the Libyan government.

"Australia deplores all terrorism and would find any government complicity in it especially repugnant. This matter has serious implications for international peace and security."

Jurisdiction - Child custody disputes - Abduction of children

On 24 June 1992 the Minister for Justice, Senator Tate, said in the course of an answer to a question without notice (Sen Deb 1992, Vol 153, p 4449):

Australia has recently made arrangements with New Zealand, Austria and Mexico to deal with the question of the removal of children, maintenance orders and the enforcement of access orders. This adds to a list of about 22 countries with which we have such arrangements. In this respect, certain provisions of the international Hague Convention were effected with New Zealand only a few weeks ago - in early June. ...

In a situation in which children are snatched away, kidnapped, there is obviously an obligation on governments to assist the custodial parent. In relation to New Zealand, for example, it is now the case that if a custodial parent is of the view that the child has been spirited away to New Zealand, on contacting the Attorney-General's Department we are able to deal with our counterparts in New Zealand.

Media releases concerning the removal from Australia of "the Gillespie children" in breach of an order of the Australian Family Court were issued by the Minister for Foreign Affairs and Trade (24 and 25 July 1992) and by the Minister for Justice (24 July 1992). For details and 1993 developments refer to 1993 Digest.

Jurisdiction - Extradition - Australian practice

On 21 September 1992 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, signed the following first person note, which was addressed to the Ambassador of the United States of America, in response to a note from the American Embassy:

Your Excellency,

I refer to your first person note of 20 May 1992 expressing your Government's disagreement with and concerns about the Attorney-General's determination not to extradite an Australian national [name deleted] to the United States of America. Since decisions relating to extradition are matters solely for the

decision of the Attorney-General, it was necessary for me to consult him before replying. I regret the delay.

Australia's practice remains that it will not refuse extradition on the ground of nationality alone. Australia agrees with the United States understanding that the parties will exercise the nationality criterion in the extradition treaty to refuse extradition only in exceptional circumstances.

Further Australia agrees that the treaty provides no limitation period within which a request for extradition should be made. A mere lapse of time between the commission of an offence and a request for extradition of the offender will not, of itself, be regarded as unduly oppressive to the offender, thereby constituting exceptional circumstances, even where the lapse of time is substantial.

I am advised that the Attorney-General's finding in the [name deleted] case was not that the "interval [from April 1988 to December 1989] could properly be characterised as 'unduly oppressive'", but rather that, on the evidence before him, the personal effect on [name deleted] of the delay – in the end still unexplained – was, in all the circumstances, unduly oppressive.

You also asked whether the Government of Australia intends to prosecute [name deleted] for offences committed in the United States. It should be noted that no element of the criminal conduct alleged by the United States occurred in Australia; nor is the Australian Government aware of any action taken by [name deleted] in Australia related to that alleged conduct which might constitute an offence in Australia. Unlike foreign States with code law systems, Australia does not, in general, adopt nationality as a basis of jurisdiction. Australian courts are therefore not competent to prosecute [name deleted] for an offence committed outside Australia.

There is provision in the Australian extradition legislation which makes an Australian court competent in certain circumstances to prosecute an offence committed extraterritorially provided the Attorney-General consents. I am advised by the Attorney-General that the preconditions for his consent are not all satisfied in the [name deleted] case.

In the [name deleted] case the Attorney-General exercised the discretion allowed to a party by the treaty, in the context of the existence of special circumstances in this particular case. Such a combination of circumstances is likely to be rare. The Attorney-General's decision should not be seen as setting some kind of benchmark or "de facto limitation period" on US requests for extradition from Australia.

Jurisdiction – Extraterritorial application of Australian legislation – Trade Practices Act and Trade Practices Amendment Bill

The following is extracted from Australia's 1991-92 Annual Report to the OECD Committee on Competition Law and Policy, p 12:

As discussed in previous Annual Reports, section 5 of the TPA [Trade Practices Act] currently provides for a limited extraterritorial operation of the Act in the circumstances set out in that section. It is recognised that this extraterritorial application of the TPA may impinge upon foreign laws or policies in operation in the country where the conduct took place. In the case of

Government initiated proceedings under the Act, it is possible for the Government to take account of the foreign country's interest and to engage in consultations with the foreign government if necessary. However, in the case of private proceedings, such government consultations would be most unlikely to take place. To remedy this, ss 5(3) and (4) provide that a person may neither rely on extraterritorial conduct not seek an order in relation to that conduct without the prior consent of the Attorney–General.

The Department processed a number of "section 5" requests during the year for the Attorney–General's consent to the use of extraterritorial conduct by private litigants in proceedings under the TPA. The Attorney–General bases his decision on whether the conduct allegedly contravening the TPA was required or specifically authorised by the law of the relevant foreign country and on whether it is in the national interest for the consent to be given.

In the main, the alleged conduct has been misrepresentation (misleading or deceptive conduct under s 52 of the TPA), and not conduct prohibited by the restrictive trade practices provisions of the TPA.

On 24 June 1992, the Minister for Consumer Affairs, Ms Jeannette McHugh, said in the course of the second reading debate on the Trade Practices Amendment Bill 1992 (HR Deb 1992, Vol 184, p 3704):

There are some other matters which I want to refer to. First of all, honourable members may be aware that, when this Bill was before the other place on 3 June, the Opposition made the claim that, despite undertakings by this Government that the provision which was to have allowed overseas consumers to take action under this regime had been removed from the Bill, the proposed amendment to section 6 of the Trade Practices Act included in the Bill would have that effect. That claim was based on a letter from the law firm Clayton Utz which apparently received confirmation of this opinion by Mr R.J. Ellicott, QC. On the basis of this opinion, the Opposition sought to have the proposed amendment to section 6 of the Trade Practices Act removed from the Bill.

At that time, Senator Tate told the Senate that his advice was that the conclusion by Clayton Utz and Mr Ellicott, QC, was incorrect. He also undertook to seek definitive legal advice from the Chief General Counsel of the Commonwealth, Mr Dennis Rose, QC, as a matter of urgency and to amend the Bill should Mr Rose agree with Mr Ellicott's conclusion.

I have now received the advice from Mr Rose, who, I should mention, has an enviable reputation as an eminent constitutional lawyer. He has concluded that the proposed amendment to section 6 will not have the extraterritorial effect claimed by the Opposition. This advice confirms that the Bill, as it is now before the House, does reflect the Government's intention, as stated in Senator Tate's second reading speech in the Senate, and will not have the effect of allowing consumers in overseas countries who purchase Australian made goods to take action against Australian manufacturers in Australian courts. ... It reads:

1. I refer to your request for urgent advice on the question whether the provisions proposed to be inserted in the Trade Practices Act 1974 ("the Act") by the Trade Practices Amendment Bill 1992 ("the Bill") would have extra–territorial operation in the sense of conferring on persons outside

Australia a right to sue in Australian courts for injuries or losses suffered by reason of defects in goods manufactured in Australia.

2. I have been provided with a copy of an Opinion by Mr R.J. Ellicott QC in which he concludes that there is a "strong argument" for the view that the Bill in its present form would give the proposed Part VA an extra-territorial effect of that kind "in relation to contracts made or the supply of goods in the course of overseas trade and commerce".

3. I respectfully disagree with that conclusion.

4. Mr Ellicott argues that, but for section 5, the provisions of the Act that "on their face apply to the conduct of corporations and persons anywhere in the world would probably have been read down to relate to conduct within Australia". On the other hand, he argues, the provisions relating to trade and commerce with other countries (including section 6(2), which gives various provisions an operation to trade and commerce with places outside Australia) "need no reading down". It appears that his reason for drawing this distinction is that a provision relating to overseas trade or commerce is a provision that "relates to a clear subject of legislative power", thus implying that provisions dealing with extra-territorial conduct without limitation exceed the Commonwealth's legislative powers and therefore need to be read down.

5. My first difficulty with that argument is that it seems clearly inconsistent with the decision of the High Court in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, which establishes that (subject to constitutional limitations not relevant here) the Commonwealth's external affairs power under section 51(xxix) of the Constitution extends to laws dealing with conduct of any kind outside Australia (whether or not it is related to overseas trade or other subjects of Commonwealth legislative powers such as defence). Secondly, I see no reason in principle why a provision relating to overseas trade should be regarded as exempt from the general presumption that legislation is limited to conduct and things within the enacting jurisdiction (see also the statutory version of this presumption in section 21 of the Acts Interpretation Act 1901; also, on a related presumption, I note *Meyer Heine Pty Ltd v The China Navigation Co Ltd* (1966) 115 CLR 10).

6. There are, however, other arguments for the view that Part VA would have some extra-territorial effects in the sense relevant here.

7. For instance, first take the proposed section 75AD read without the alternative effects given by section 6(2). It should, in my opinion, be construed in accordance with the general presumption mentioned above and with the natural inference that can be drawn from the fact that section 5 contains no reference to Part VA. On that basis I think that paragraph (a) of section 75AD would probably be limited to the "supply" of goods by a corporation in Australia, including "supply" here by way of export. As read in accordance with section 6(2)(c), I think that section 75AD would similarly be construed as limited to "supply" within Australia.

8. However, it is by no means entirely clear that section 75AD(c) would be limited to cases where the relevant injury was suffered in Australia. (In relation to the interpretative presumption referred to above, it has been said

judicially that "not every aspect of every sentence or clause of legislation ... must be given the local connotation".

References follow. The advice continues:

9. In resolving these questions, I think that section 75AI is important. That provision would prevent double recovery where, for instance, an amount had been recovered under a Commonwealth, State or Territory workers' compensation law. If, for example, section 75AD had been intended to apply where the relevant injury had been suffered outside Australia, I think that double recovery under a foreign workers' compensation law would also have been precluded. It is true that such double recovery is not precluded in the case of a foreign worker in Australia who suffers injury in circumstances occurring wholly within Australia. However, I do not think that this limited anomaly is sufficient to preclude an inference from section 75AI that the main provisions (sections 75AD to 75AG inclusive) were intended to apply only to injury, loss, destruction or damage occurring in Australia. In my opinion, those provisions would be construed by the courts as limited in that way. Parliamentary references to "Australian consumers" (Senate *Hansard*, 3 June 1992) support this conclusion.

Jurisdiction - Assertions of extra-territorial jurisdiction on antitrust issues - OECD Committee on Competition Law and Policy

The following is extracted from the "Review of Developments in International Trade Law" prepared by the Commonwealth Attorney-General's Department in November 1992 (p 25):

International Competition: OECD Committee on Competition Law and Policy

The committee is the most important international forum for the discussion of competition and antitrust issues. Australia's *Trade Practices Act* has proved to be one of the most sophisticated and effective means of controlling anti-competitive practices in the world. As a result, Australia (through [the Attorney-General's] Department) has taken an active role in the work of the Committee. ...

The Committee may also provide a useful forum for nations to discuss international problems relating to competition in a reasonably informal non-confrontational setting. For example earlier this year Australia informed the United States of its concerns about recent developments in United States antitrust policy which reverts to an interpretation under which enforcement action could be taken by the Department of Justice in relation to overseas conduct that might be said to harm United States exports.

The following is extracted from Australia's 1991-92 Annual Report to the OECD Committee on Competition Law and Policy, pp 11-12:

During 1992 Australia raised its concerns with the United States Government (through the OECD Competition Law and Policy Committee and via diplomatic channels in Washington) about recent developments in US Antitrust

policy which reverts to an interpretation under which enforcement action could be taken by the Department of Justice in relation to overseas conduct that has an adverse effect upon United States exports. The concerns raised are consistent with the view Australia has taken previously in relation to the enforcement of United States antitrust laws internationally: in our view, questions of impediments to US export trade are best addressed through appropriate trade negotiations rather than through unilateral assertion of the application of US antitrust law.

It is noted that the Department of Justice will continue its policy of considering principles of international comity when making antitrust enforcement decisions that may significantly affect another government's legitimate interests. While this is appreciated, it will not have a bearing on non-Government parties who may be encouraged to pursue treble damages actions on the strength of the changed policy.

We are confident that the United States will continue to notify and consult with Australia in accordance with OECD guidelines and the 1982 Agreement between Australia and the United States relating to cooperation on Antitrust matters, should the Department of Justice or the Federal Trade Commission decide to initiate any action or investigation in pursuance of the new policy.

Jurisdiction - Mutual assistance in business regulation

The following is extracted from the "Review of Developments in International Trade Law" prepared by the Commonwealth Attorney-General's Department in November 1992 (p 23):

The *Mutual Assistance in Business Regulation Act 1992*, which came into operation on 12 May 1992, allows prescribed Australian business regulatory agencies, such as the ASC [Australian Securities Commission] and the Trade Practices Commission, to use compulsory information gathering powers to collect information, evidence and documents on behalf of overseas business regulatory agencies. As a result of the powers made available to them under this legislation, such Australian agencies will be better placed to seek reciprocal assistance from foreign agencies. The approval of the Attorney-General is required in each case before the Australian agency can assist the foreign agency. The first of such arrangements is a memorandum of understanding signed with the UK on 28 October 1992, which provides for mutual assistance and exchange of information between the ASC and the British Securities and Investment Board.

Jurisdiction - Enforcement of foreign judgments in Australia - Australian legislation

The following is extracted from the "Review of Developments in International Trade Law" prepared by the Commonwealth Attorney-General's Department in November 1992 (p 18):

Enforcement of Foreign Judgments in Australia

The Commonwealth *Foreign Judgments Act* 1991 replaces existing State and Territory legislation and streamlines the arrangements for reciprocal

enforcement of foreign judgments in Australia. The Act has the effect of terminating existing arrangements for reciprocal enforcement of judgments from 26 June 1993. Australia is currently in the process of negotiating new arrangements under the Act with the countries which had arrangements under the State and Territory legislation.

The Act sets out the circumstances where the jurisdiction of a foreign court will be recognised and provides for the registration of final money judgments given by the superior courts of a foreign counry to which the legislation applies. Before Australia can enter into an arrangement with another country, substantial reciprocity of treatment of judgments from Australian superior courts in that country must be assured. Where that is the case and Australia has received the relevant request from that country, regulations under section 5 of the Act will have the effect that the judgments of nominated superior courts of the particular country will be enforced in Australia in the circumstances provided by the Act.

Types of judgments which will be enforced are final money judgments of foreign superior courts, final money judgments of foreign inferior courts where the foreign country provides reciprocal treatment for Australian inferior court judgments and interim or final non-money judgments (eg. injunctions) on the basis of reciprocity and by registration in the same manner as money judgments.

The Act also sets out the types of cases in which the jurisdiction of the foreign court will be recognised, where it will not be recognised and where courts of a foreign country will not be taken to have jurisdiction.

Jurisdiction - Reciprocal recognition and enforcement of judgments - New Zealand and United Kingdom

The following is extracted from the "Review of Developments in International Trade Law" prepared by the Commonwealth Attorney-General's Department in November 1992 (p 19):

Australia/UK Agreement Providing for Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters

Australia and the United Kingdom concluded an Agreement on 23 August 1990 for the reciprocal recognition and enforcement of judgments in civil and commercial matters. The Agreement provides for:

(a) reciprocal enforcement of money judgments in accordance with existing arrangements;

(b) enforcement of money judgments of the High Court of Australia, Federal Court of Australia, and Family Court of Australia;

(c) enforcement of Australian and UK intermediate court and some lower court judgments;

(d) enforcement of each country's recovery back judgments in respect of sums paid under a judgment of a court of a third State given in proceedings (usually antitrust) involving an exorbitant assertion of jurisdiction or multiple damages; and

(e) an undertaking by the UK not to enforce judgments of European Community ("EC") courts given in an exorbitant assertion of jurisdiction over Australian residents and corporations. The UK is permitted by the EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters to give this undertaking.

The main features of the Agreement are the extension of the current arrangements to include judgments of Australian federal courts, District and County courts and some lower courts, and UK County and Sheriff courts.

The undertaking referred to in (e) will protect Australian assets against execution pursuant to some judgments of courts of other EC countries. An example of exorbitant jurisdiction is that based on nationality of the plaintiff under French law.

It has proved to be very difficult to get the UK to make an Order in Council to implement the Agreement. Implementation on the Australian side will be by regulations under the *Foreign Judgments Act* 1991.

Arrangements with New Zealand

As a result of passage of the *Foreign Judgments Act* 1991 (Aust), the *Reciprocal Enforcement of Judgments Amendment Act* 1992 (NZ) and the making of the Foreign Judgments Regulations 1992 (Aust) and the Reciprocal Enforcement of Judgments (Australia Inferior Courts) Order 1992 (NZ), New Zealand and Australian revenue judgments (including penalties included in such judgments) are enforceable in Australia and New Zealand by registration in the same manner as other civil money judgments, and New Zealand and Australian inferior court judgments are enforceable in Australia and New Zealand by registration in the same manner as superior court judgments.

It has been agreed that most non-money judgments will be enforceable by registration in the same manner as money judgments. Work is continuing on the details of which non-money judgments are to be enforceable. The arrangement will not apply to orders made in some kinds of proceeding and some kinds of orders in other proceedings.

Jurisdiction - Convention on Taking of Evidence Abroad in Civil or Commercial Matters 1970 - Australian accession

The following is extracted from the "Review of Developments in International Trade Law" prepared by the Commonwealth Attorney-General's Department in November 1992 (p 17):

Hague Conference on Private International Law: Convention on Taking of Evidence Abroad in Civil or Commercial Matters 1970

The Hague Evidence Convention is intended to provide a uniform procedure in relation to the taking of evidence for use in civil or commercial judicial proceedings, whether commenced or contemplated. It covers not only evidence obtained by examination of persons or the inspection of documents or property but also requests for the performance of other judicial acts. The expression "other judicial act" refers to any act which has legal effect, such as the ordering

of medical examinations or blood tests or obtaining an official consent to a marriage from a party residing abroad.

The Convention provides for a procedure whereby contracting States must designate a central authority to receive requests for the taking of evidence coming from abroad and may also designate and determine the competence of additional authorities to receive and deal with such requests.

Parties and their representatives may be present at the proceedings for the taking of evidence. The requested authority is to apply its own law as to compulsion. In specified cases, and subject to certain declarations of the host State, a diplomat or consul may take the evidence of nationals of the State represented by him, or of other persons.

The action under the Convention is initiated by a letter of request from a judicial authority. The letter of request must contain certain information prescribed in the Convention.

A number of Australia's major trading partners are now parties to the Convention.

Australia's instrument of accession to the Convention was lodged at the Hague in October 1992. Accession will occur sixty days after the lodgement of the instrument. As Australia was not represented at the session of the Hague Conference on private international law which drew up the Convention, Australia's accession will only have effect as between it and those States party to the Convention which accept our accession.

Uniform legislation has been enacted by the States and Territories.

Jurisdiction - UN Sixth Committee discussion of Convention on Jurisdictional Immunities of States and their Property - Joint statement by Canadian, Australian and New Zealand delegations

The joint statement of the Canadian, Australian and New Zealand delegations (CANZ statement) concerning the draft articles on jurisdictional immunities of States was delivered before the UN Sixth Committee on 10 November 1992 by the Australian representative, Ms Caroline Seagrove. It read in part as follows:

Mr Chairman,

Let me underline at the outset that I am also speaking on behalf of Canada and New Zealand. ...

We have before us, in the draft articles on the jurisdictional immunities of States and their property, a useful basis for the codification of an important area of international law. We believe that it is vital to use this opportunity to secure a widely supported convention, and consider that this should remain a primary objective for delegations. We need to ensure that a set of stable and predictable rules will be applied by as many countries as possible, thus bringing into the arena of international commercial transactions the degree of certainty that businesses and agencies increasingly demand. For this reason, we welcome the detailed and considered discussions that have taken place in the working group by many delegations. ...

In this intervention we would like to focus on three issues, namely:

(1) the liabilities and property of separate State enterprises, dealt with in Article 10(3);

(2) the provisions relating to execution of judgments, in particular draft Article 18; and

(3) a mechanism for the settlement of disputes.

As to the first issue, draft article 10(3) makes the basic point that the immunity of a State itself is not abrogated because a separate State corporation enters into a commercial transaction. It follows from this also that it would not be possible to attach the assets of a State, or of other State entities, in respect of the liabilities of the particular State entity that has entered into the transaction in question. Strictly speaking, that is not an issue of State immunity, but an issue of the recognition of the separate existence of State corporations under the relevant law. However, as Australia has pointed out in the Sixth Committee debate in the last two years, it is important to include some provision dealing with this issue, both because it is of great practical importance and because misunderstanding about it might otherwise prejudice the acceptance of the draft articles as a whole.

Our delegations believe that draft article 10(3) states a principle which is generally applicable in the area of State immunity, and is not limited to the topic of commercial transactions. For this reason, we would strongly support the proposal of the Chairman, referred to at paragraph 31 of his report, that article 10(3) be stated as a generally applicable principle in Part II, or as a savings clause in Part V of the draft articles.

We also believe that this principle should extend to encompass the constituent units of a federal State. That is, it should not be possible to sue the State itself in respect of the transactions of a constituent federal unit. Nor should it be possible to sue a constituent federal unit in respect of the transactions of the central government or in respect of the transactions of another constituent federal unit.

Mr Chairman, let me now turn to Part IV of the draft articles which deal with measures of constraint.

We consider Part IV to be the least satisfactory part of the draft articles. The purpose of the draft articles – which is to give effect to a regime of limited immunity from jurisdiction – would be rendered ineffectual in practice unless there is sufficient assurance that there will be compliance with judgments duly given pursuant to the draft articles. The provisions of Part IV, as currently drafted, fail to strike an adequate balance by making enforcement of final judgments too difficult. In this context, our delegations welcomed the substantive discussions in the Working Group on this topic.

We note in particular, the Chairman's proposal referred to at paragraphs 21 and 22 of the Working Group report that a distinction be made in article 18 between interim or prejudgment enforcement on the one hand and postjudgment execution on the other. We fully endorse such a distinction. In the view of our delegations, considerably more protection is justified at the level of interim measures, where both the jurisdiction of the local court to deal with the merits of the case, and the merits themselves, may be contested. This

contrasts with the case of postjudgment execution where the State's immunity from execution must not be so extensive as to be virtually complete.

In terms of the possibility of postjudgment enforcement, our delegations note with interest the proposal of the chairman to remove the restriction that the property needs to have a connection with the underlying claim or the agency involved. We note however that even with this restriction removed, the conditions for execution would still be such that the possibility of enforcement will be excluded in many cases.

The third issue on which we wish to comment is that of an appropriate mechanism for the settlement of disputes. Our Governments consider that it is desirable, if the draft articles are embodied in an international convention, that the convention should contain some mechanism for the resolution of disputes between States Parties concerning its proper interpretation and application. As some doubts were raised in the Working Group when preliminary views were expressed on this issue, let me briefly outline why we consider such a clause to be necessary.

Although the provisions of the draft articles are concerned with the jurisdiction of domestic courts, these provisions would, if embodied in a convention, give rise to obligations between States in international law. In any case in which a domestic court assumed jurisdiction over a foreign State, a genuine disagreement could arise between a foreign State and the forum State as to whether the foreign State was entitled to immunity or to particular privileges under the convention. If it is not possible for the dispute to be resolved by negotiation between the States concerned, there is a likelihood that the foreign State might boycott the proceedings and refuse to recognise any judgment given against it. If the foreign State has no assets in the territory of the forum State, the judgment might remain unsatisfied. If execution were levied against commercial property of the foreign State situated in the territory of the State of the forum, the defendant State might take retaliatory action against assets of the forum State located in the defendant State's territory. This would defeat the purpose of the convention.

We do not wish to comment here on the specifics of a dispute settlement clause, but note as a general point that it is essential that the dispute settlement mechanism be speedy and effective, and that any such clause should permit disputes to be solved where possible at a preliminary stage, before determination of the merits or the giving of judgment. On the other hand, the situation should be avoided in which every domestic proceeding under the convention is preceded by proceedings on the international plane to determine the effect of the draft articles. One possibility which Australia has raised for consideration would be to refer disputes to the Chamber of Summary Procedure established under article 29 of the Statute of the International Court of Justice. It is the view of our delegations that this issue should also be considered by the Working Group, rather than, as suggested by the International Law Commission, be left for consideration by a diplomatic conference.