INTERNATIONAL PRIVILEGES AND IMMUNITIES IN AUSTRALIA—THE LEGISLATIVE FRAMEWORK

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In recent years the Commonwealth Government has passed legislation implementing international conventions on diplomatic and consular relations. Australia now has a legislative framework regulating the grant of privileges and immunities to diplomatic missions, consular posts, international organizations and the personnel of all of them. In this article Mr O'Keefe describes this legislation, explains how it operates and examines the relationship between the various Acts.

The Commonwealth of Australia came into being in 1901. However, the first ambassador was not received until 1941. This reflects the fact that in her early years Australia was only gradually acquiring the status of an international person separate from the United Kingdom. Today there are 60 diplomatic missions established in Australia and consular posts of some 67 states. In addition there is a permanent office of the United Nations in Sydney. Conferences of international organizations have been held in Australia with delegates of many countries in attendance. Officials of these organizations pay regular visits to Australia in the course of their duties.

The Applicable Law

What is the municipal law in Australia that specifically regulates the conduct of these diplomatic missions, consular posts, international organizations and the personnel of all of them? Here we refer to what is known colloquially as the "privileges and immunities" law.

> The term 'privileges' is commonly used to describe the concessions, often of a fiscal nature, which countries traditionally accord to foreign consular posts and their staffs, while the term 'immunities' describes the jurisdictional immunities which international law confers on them.[1]

In other respects the local law is applicable and it is expected that this will be respected by those enjoying these concessions.

Prior to 1948 the law on privileges and immunities was largely the common law of England which embodied the relevant rules of customary international law. There was a possibility that certain English legislation—the Diplomatic Privileges Act 1708—was in force in Australia. The relevant fiscal legislation—income tax, customs *etc.*—

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[1] H.R. Deb. 1972, Vol. 78, 3008.

granted some privileges. Then, in 1948, the Commonwealth Parliament passed the International Organizations (Privileges and Immunities) Act. It was the first Commonwealth legislation directly on the subject. However, since that time the Commonwealth has created a legislative framework to cover nearly all aspects of privileges and immunities. This framework is based on a number of international Conventions and other instruments on privileges and immunities. The following article discusses how Australia has proceeded to incorporate these into municipal law.

Commonwealth Parliamentary Powers

The Commonwealth of Australia is a federal state. Legislative power is divided between the six State Parliaments and the Commonwealth Parliament. Under the Constitution the latter has power to make "laws for the peace, order and good government of the Commonwealth with respect to . . . (xxix) External affairs".[2] The precise extent of this power has not been set by the High Court. What cases there have been "establish the proposition that the power with respect to external affairs authorizes legislation to give effect to obligations undertaken by Australia under an international convention, at least dealing with a subject properly or indisputably of an international character, or of international concern, to which Australia is a party".[3] All the existing Commonwealth legislation on the topic of privileges and immunities is designed to give effect to Australia's obligations under international conventions or other international instruments. The subject itself is surely one "indisputably of an international character, or of international concern". Moreover, the "external affairs" power is not limited to implementation of treaties; it "extends to authorize legislation with respect to all matters which come within the expression 'external affairs' "[4] which expression itself is considered to be wider than "foreign affairs".

> "External affairs" is a larger expression than "foreign affairs", though the expressions are often used interchangeably. In my opinion, the description "external affairs" covers a larger area of legislative power than would the description "foreign affairs".[5]

Lane concludes that various judicial expressions of opinion "all focus on a *mutuality or reciprocity of international interest and concern* in what is to be described as an 'external affair' ".[6] He then gives as an

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[2] Commonwealth of Australia Constitution, s. 51.

[3] Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed. 1976) 297-298.

[4] *Id.* 300.

[5] *New South Wales* v. *The Commonwealth* (1976) 50 A.L.J.R. 218, 221 *per* Barwick C.J.

[6] Lane, *The Australian Federal System* (1972) 145.

example of a subject satisfying the "mutual interest" requirement "a convention on diplomatic immunities and privileges".[7] The conclusion seems indisputable that the Commonwealth legislation discussed in the following pages is validly within power.

If the above be so then any State law which is inconsistent with the Commonwealth legislation is invalidated under section 109 of the Constitution:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

The Commonwealth Parliament cannot itself render a State law inoperative. There must be a court finding that an inconsistency exists between the Commonwealth and State laws.

Inconsistency may be proven in a number of ways; one of which is by applying the "covering the field" test. If the Commonwealth has evinced an intention to completely provide the law governing a matter it is inconsistent for the law of a State to apply to the same matter. Some of the relevant factors in applying the test are width and detail of the Commonwealth law together with the need for uniformity of regulation.[8] The privileges and immunities legislation is of great detail. It deals with a subject that must be uniform throughout the Commonwealth both to ensure equality of treatment and observance of Australia's obligations under the various international Conventions. Indeed, one of the relevant pieces of legislation—the Diplomatic Privileges and Immunities Act 1967—states:

> 6. It is hereby declared to be the intention of the Parliament that this Act shall operate to the exclusion of—
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> (a) any Imperial Act, law of the Commonwealth or rule of the common law in force in a State or in a Territory immediately before the commencement of this Act; or
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> (b) any law of a State or of a Territory made after the commencement of this Act,
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> that deals with a matter dealt with by this Act.

This Act thus excludes the common law and English legislation mentioned above to the extent that it deals with a matter dealt with by the Act. Section 6(b) declares that it is the intention of the Commonwealth Parliament only to exclude future laws of a state. Existing laws are not mentioned. This is probably due to excessive caution on the part of the Commonwealth not to seem to be manufacturing an inconsistency and thus possibly rendering the Act ultra vires.[9] Existing State

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[7] *Id.* 146.
[8] *Id.* 716.
[9] *Id.* 702.

law on the subject at that time dealt mainly with such matters as rates and taxes. These were all amended to take account of the new Commonwealth legislation. In any case it would still be a matter for the High Court to determine whether an inconsistency arose or not. The Parliamentary expression of intention is merely designed to provide assistance to the Court in doing this.

LEGISLATION RELATING TO DIPLOMATS AND CONSULS

The Commonwealth Act dealing with foreign representation at the diplomatic level is the Diplomatic Privileges and Immunities Act 1967.[10] This states in section 7(1) that the provisions of Articles 1, 22 to 24 (inclusive) and 27 to 40 (inclusive) of the Vienna Convention on Diplomatic Relations "have the force of law in Australia and in every external Territory". The full text of the Vienna Convention referred to is set out in the Schedule to the Act. Australia ratified the Convention on 26 January 1968.

Consular representation is covered in the Commonwealth legislative framework by the Consular Privileges and Immunities Act 1972.[11] Under this the following Articles of the Vienna Convention on Consular Relations have the force of law in Australia and every external Territory: 1, 5, 15 and 17; paragraphs 1, 2 and 4 of Article 31; 32, 33, 35 and 39; paragraphs 1 and 2 of Article 41; Articles 43 to 45 (inclusive) and 48 to 54 (inclusive); paragraphs 2 and 3 of Article 55; paragraph 2 of Article 57; paragraphs 1, 2 and 3 of Article 58; Articles 60 to 62 (inclusive), 66 and 67; paragraphs 1, 2 and 4 of Article 70; 71.[12] The full text of the Vienna Convention on Consular Relations is set out in the Schedule to the Act. Australia ratified the Convention on 12 February 1973.

The Articles of the two Vienna Conventions given the force of law in Australia are identical with those given the force of law in the United Kingdom by the corresponding legislation: the Diplomatic Privileges Act 1964 and the Consular Relations Act 1968. The remaining Articles of the respective Conventions did not require municipal legislation for their implementation. In the main they deal with administrative matters. To quote a United Kingdom memorandum on the subject:

> The Articles of the Convention not included in Schedule 1 to the Act do not give rise to rights and obligations enforceable in domestic courts and hence were not apt to be given the force of law in the United Kingdom. It is however to be expected that courts in the United Kingdom will consider the scheduled Articles

[10] The Act of 1967 was amended in 1972 and further amended by the Statute Law Revision Act 1973.

[11] The Act of 1972 was amended by the Statute Law Revision Act 1973.

[12] S. 5(1).

> in the context of the Convention as a whole and in the light of customary international law whenever it is necessary to do so in order to give effect to a particular provision.[13]

As a point of interest the Australian practice is to reproduce the full text of the Conventions in the Schedule to the Act while British draftsmen include in the Schedule only those Articles specified as being given the force of law.

The Consular Privileges and Immunities Act is now the only Commonwealth legislation on the topic. It does not include provisions for increasing the extent of consular privileges and immunities beyond that set out in the Convention.[14] It is thus impossible without a further Act of Parliament for Australia to give effect to an agreement on consular relations which requires more extensive privileges and immunities than laid down in the Act. As will be seen later, the Minister for Foreign Affairs has the power to reduce the privileges and immunities available in particular circumstances. However, the effect is to make it extremely difficult for Australia to become party to bilateral consular agreements where these require privileges and immunities to be accorded which are different from those in the Vienna Convention on Consular Relations. In fact this may not be regarded by the Government as undesirable.

> If the Bills at present before Parliament are enacted into law and Australia ratifies the Vienna Convention on Consular Relations, we shall have a system of privileges and immunities based on internationally accepted standards covering the entire field of diplomatic and consular relations.[15]

Australia has succeeded to a number of early treaties entered into by the United Kingdom. The one most directly in point is the 1856 Convention between Great Britain and The Netherlands for the reciprocal Admission of Consuls of the one Party to the Colonies and Foreign Possessions of the other.[16] There are also articles pertaining to the reciprocal appointment of consuls in some nineteenth century United Kingdom commercial treaties. An example is article 7 of the 1855 Treaty of Friendship, Commerce and Reciprocal Establishment between the United Kingdom and Switzerland.[17] This reads in part:

> The consuls of each of the contracting parties in the dominions of the other shall enjoy whatever privileges, exemptions, and immunities are, or shall be, granted there to consuls of the most favoured nation.

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[13] "Memorandum on Diplomatic Privileges and Immunities in the United Kingdom" British Practice in International Law (1966) 126.

[14] *Cf.* Consular Relations Act 1968 (U.K.), s. 3(1).

[15] H.R. Deb. 1972, Vol. 78, 3008.

[16] *Hertslet's Commercial Treaties* (1859) Vol. X 476.

[17] *Handbook of Commercial Treaties 1931* 667.

The 1856 Convention with The Netherlands provides to similar effect. The consular officers of all States now enjoy in Australia exactly the same "privileges, exemptions, and immunities" based on the Vienna Convention. There is no "most favoured nation" in this regard. Thus, the treaties referred to above do not require any departure from the Convention.

Common Features of the Legislation

As the Diplomatic and Consular Privileges and Immunities Acts deal with similar subject matter it is not surprising that they contain similar provisions[18] regulating the implementation of their respective Conventions. The most important of these identical provisions are discussed below.

Both Acts are expressed to extend to every external territory of Australia *i.e.* Norfolk Island, Heard and McDonald Islands, Australian Antarctic Territory, Cocos (Keeling) Islands, Christmas Island, Coral Sea Islands, Ashmore and Cartier Islands.

The Conventions in a number of the articles given the force of law refer to "national of the receiving State". This is to be read as a reference to an Australian citizen. The status of "Australian citizen" can be attained by birth, descent or grant in accordance with the provisions of the Australian Citizenship Act 1948. For present purposes it is important to note that a person, although born in Australia, does not become an Australian citizen by birth if, at the time of his birth, his father was:

(i) a person who was entitled in Australia to any immunity from suit or other legal process by virtue of any law relating to diplomatic privileges and immunities (including any law relating to privileges and immunities attaching to persons connected . . . with international organizations); or

(ii) a consular officer of a foreign sovereign power.[19]

Under the Diplomatic Privileges and Immunities Act Australian "agents" are forbidden to enter "the premises of the mission" (Article 22(1)) or the "private residence of a diplomatic agent" (Article 30(1)). The head of the mission may grant permission for them to do so. In the case of consular premises the position is slightly more complex. Australian "authorities" shall not enter "that part of the consular premises used exclusively for the work of the consular post". Consent to do so is "assumed in case of fire or other disaster requiring prompt protective action" (Article 31). The premises are defined in similar terms for both cases: "buildings or parts of buildings and the land

[18] Diplomatic Privileges and Immunities Act, s. 7; Consular Privileges and Immunities Act, s. 5.

[19] Australian Citizenship Act, s. 10(2)(c).

ancillary thereto, irrespective of ownership, used (exclusively) for the purpose of the mission (consular post)". In the case of diplomatic missions the premises include "the residence of the head of the mission".

"Agent" and "authorities" include Commonwealth Police, "members of the Police Force of a State or of a Territory and persons exercising a power of entry to premises".[20] The last covers a wide variety of officials under state legislation *e.g.* health inspectors under the Public Health Act 1902 (N.S.W.).

Both diplomats and consuls have immunity from the jurisdiction of Australian courts. Diplomatic agents have complete immunity from the criminal, and qualified immunity from civil and administrative, jurisdiction (Article 31). Consular officers and employees including honorary consular officers enjoy immunity in respect of acts performed in the exercise of consular functions (Articles 43(1) and 58). In both cases the immunity may be waived by the State sending the diplomat or consul—not by the person himself. As was said by Fox J. in *The Queen* v. *Turnbull*[21] immunity from suit is "granted in the interests of preserving diplomatic relationships and the freedom of diplomatic intercourse and exist[s] for the benefit of the country whose representatives the diplomats are". For the purpose of action in Australian courts, waiver is deemed to be made by an overseas country (a country other than Australia *i.e.* the sending State) if it is made by the head of the diplomatic mission of that country, or the person performing the functions of the head of mission or, in the case of a consular post of a country which does not maintain a mission in Australia, the head of that post (Articles 32 and 45 respectively). Waiver must always be express. In respect of civil or administrative proceedings, waiver of immunity from jurisdiction does not entail waiver of immunity from any measures of execution in implementing the judgment. A separate waiver is necessary for this.

Under both Acts the provisions of the respective Conventions given the force of law in Australia are subject to any law of the Commonwealth or of a Territory "relating to quarantine, or prohibiting or restricting the importation into, or the exportation from, Australia or that Territory, as the case may be, of any animals, plants or goods".[22] Of immediate relevance is the Quarantine Act 1908. To a country such as Australia, relatively free of major disease harmful to either humans or livestock, this is a matter of great importance. For example, the introduction of foot and mouth disease even in a slight form would have a major impact on the Australian beef export trade. Also obviously covered by this sub-section is legislation prohibiting the

[20] S. 7(2)(c); s. 5(2)(c).
[21] (1971) 17 F.L.R. 438, 441.
[22] S. 7(3); s. 5(3).

importation of such things as absinthe, explosive cigars, crystal balls for clairvoyant gazing, silencers for firearms *etc.* and the exportation of flora and fauna.[23] Less obviously covered would be economic legislation, for example, setting up a quota in a particular line of goods. Although the clause is thus widely drafted its impact is indirect. The laws referred to are indeed applicable but this does not prejudice the immunity from suit and from civil and criminal process already referred to. Thus, the sanction does not lie in the penalties provided under that legislation. In both Conventions persons enjoying privileges and immunities are enjoined to "respect the laws and regulations of the receiving State" (Articles 41(1) and 55(1) respectively). Breach of any provision of the legislation referred to would thus constitute good grounds for the Department of Foreign Affairs declaring the person concerned *persona non grata.* Furthermore, application of the prohibitions contained in this legislation entitles Australian authorities to inspect the personal baggage of the diplomatic agent or consular officer.

Section 38(a) of the Judiciary Act 1903 makes matters arising directly under any treaty exclusively the jurisdiction of the High Court. However, any matter which arises under either the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations as having the force of law by virtue of the respective Acts is deemed not to be a matter arising directly under a treaty. This means that actions involving matters of the type referred to do not have to be begun in the High Court. Moreover, under the Commonwealth Constitution, matters "affecting consuls or other representatives of other countries" come within the original jurisdiction of the High Court.[24] State courts, subject to certain conditions and restrictions, have been invested with federal jurisdiction in all matters in which the High Court has original jurisdiction.[25] The result is that matters arising under the provisions of the Conventions given the force of law can be heard in the appropriate state courts.

The Constitution, as noted above, refers to consuls "or other representatives of other countries". This is commonly taken to include diplomatic agents.[26]

The Vienna Convention on Consular Relations prohibits arrest and imprisonment of consular officers "except in the case of a grave crime and pursuant to a decision by the competent judicial authority" (Article 41). The Consular Privileges and Immunities Act in section 5(2)(d) states that any reference to a "grave crime" is to be read "as a reference to any offence punishable on a first conviction by imprisonment for a period that may extend to five years or by a more severe sentence".

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[23] Customs (Prohibited Imports) Regulations.
[24] S. 75(ii).
[25] Judiciary Act 1903 (Cth), s. 39(2).
[26] Lane, *The Australian Federal System* (1972) 469.

Income Tax, Customs Duties, Excise, Sales Tax

The Vienna Conventions on Diplomatic and Consular Relations grant diplomatic agents and career consular officers exemption from "all dues and taxes, personal or real, national, regional or municipal" (Articles 34 and 49 respectively). There are certain specified exceptions to the exemption; the most important being "indirect taxes of a kind which are normally incorporated in the price of goods or services". The diplomatic agent and the career consular officer are also entitled to exemption from customs duties in respect of articles for their personal use and for their establishment (Articles 36(1)(b) and 50(1)(b) respectively).

The privileges mentioned above are to be enjoyed by the family of the agent forming part of his household if they are not nationals of the receiving State (Article 37(1)). Members of the family of a career consular officer forming part of his household are also entitled to them provided they are not nationals of or permanently resident in the receiving State (Articles 49, 50(1)(b) and 71(2)).

Members of the administrative and technical staff of a diplomatic mission and members of their families forming part of their households, if they are not nationals of or permanently resident in the receiving State, have the right to exemption from dues and taxes under Article 34. Consular employees and members of their families forming part of their households have the same exemption under Article 49 provided they are not nationals of or permanent residents of the receiving State. In respect of exemption from customs duties, this applies to members of the administrative and technical staff of the mission and to consular employees only in respect of articles imported at the time of first installation. Members of the family of a member of the administrative and technical staff of the mission, provided they are not nationals of or permanently resident in the receiving State, are entitled to the same customs privileges but not members of the family of a consular employee.

Members of the service staff of a diplomatic mission and private servants of members of the mission are entitled to exemption from dues and taxes on the emoluments they receive by reason of their employment provided they are not nationals of or permanently resident in the receiving State (Article 37(3) and (4)). Members of the service staff of a consular post are also entitled to exemption from dues and taxes on the wages they receive for their services provided they are not nationals of or permanently resident in the receiving State (Article 49(2)).

Articles for the official use of a diplomatic mission or of a consular post are to be granted exemption "from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services" except in the case of a consular post headed by an honorary

consular officer (Articles 36(1) and 50(1) respectively). Here the exemption is applicable only to the following articles: "coats-of-arms, flags, signboards, seals and stamps, books, official printed matter, office furniture, office equipment and similar articles supplied by or at the instance of the sending State to the consular post" (Article 62).

All the above provisions are among those given the force of law in Australia by the Diplomatic Privileges and Immunities Act and the Consular Privileges and Immunities Act respectively. Passage of the Diplomatic Privileges and Immunities Act in 1967 involved a major alteration to the scheme of privileges and immunities applicable to the various classes of officials. In the first place there was a considerable reduction in the scope of privileges accorded. For example, administrative and technical staff had previously had more extensive customs privileges than mere exemption at the time of first entry. As for the form of legislation, for the first time provisions dealing with these matters were all incorporated in the one Act. At the same time the appropriate legislation was amended to reduce the privileges of consuls generally to those found in the Vienna Convention on Consular Relations. This foreshadowed implementation of that Convention five years later and brought the privileges of the consular officer into correspondence with those of the diplomat. If this had not been done they would in some cases have been in excess of the diplomatic agent's entitlement. The process was completed by passage of the Consular Privileges and Immunities Act in 1972 and further amendment of the legislation dealing directly with those privileges. The situation now is that these privileges are granted directly in the Diplomatic Privileges and Immunities Act and the Consular Privileges and Immunities Act.

As previously stated the exemption from dues and taxes does not apply to "indirect taxes of a kind which are normally incorporated in the price of goods or services". Such taxes include sales tax and excise dues. However, in respect of these Australia was prepared to go beyond the Convention requirements. The present system is to allow persons who purchase goods from bond free of customs duties to also obtain those goods free of excise and sales tax. This means, in effect, that a diplomat is not entitled to purchase goods at a retail store and expect "a reduction in price by taking the sales tax or excise from the retail price".[27]

Both the Diplomatic and Consular Conventions, in requiring a state to grant exemption from customs duties, permit it to do so "in accordance with such laws and regulations as it may adopt". This has been interpreted by Australia to allow the imposition of quantity limitations. Under the Diplomatic Privileges and Immunities Act and the Consular Privileges and Immunities Act the exemptions from customs duty—as

[27] H.R. Deb. 1967, Vol. 54-55, 506.

also those from excise and sales tax—are stated not to apply in certain circumstances.[28] This occurs when articles of the same, or similar, kind have previously been entered for home consumption and the Minister for Customs and Excise (the Treasurer in the case of sales tax) declares that those articles meet the reasonable requirements of the mission, post or person.

Australia imposes a further limitation on the exemption in that the person or head of the mission or post for the use of which the articles are intended must agree to make a payment if the goods are sold within two years of the date of entry for home consumption. The amount of payment is "an amount equal to so much (if any) as the Minister of State for Customs and Excise determines of the customs duties, taxes and related charges" that would have been payable but for the exemption. The Minister thus has power to waive payment, require payment in full or on a *pro rata* basis. A similar agreement is required in order to obtain exemption from excise and sales tax. However, in respect of these the Minister concerned does not have the power to make a determination for *pro rata* payment—the full amount must be paid or it must be waived entirely. The agreement in question must extend to any sale or other disposition "in Australia or in an external Territory". A person breaking one of these agreements will find difficulties in obtaining exemption from duties and taxes on future clearance of articles. The Minister concerned is empowered to impose such conditions as he determines—this may include the giving of security.

The Rights of Citizens and Permanent Residents of Australia

Under the Vienna Conventions on Diplomatic and Consular Relations a diplomatic agent or consular officer who is a national of or permamently resident in the receiving State is entitled only to immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions (Articles 38 and 71 respectively). Consular officers are also under no obligation to give evidence concerning "matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto" (Article 44(3)). The receiving state may if it wishes extend additional privileges and immunities to these classes of officials.

Members of the mission or post, apart from agents or officers respectively, depend for any privileges or immunities they may receive on the generosity of the receiving State. The Conventions leave the matter entirely to that State. There is only one qualification—the State must not exercise its jurisdiction over these persons so as to hinder or interfere unduly with the performance of the functions of the mission or post.

[28] Ss. 8, 9, 10 and ss. 6, 7, 8, respectively.

In implementing these provisions Australia has extended additional immunities to various categories of officials. The immunity from jurisdiction and inviolability that the diplomatic agent referred to above enjoys is granted also to the following in respect of acts performed in the course of their duties: (a) members of the administrative and technical staff and members of the service staff who are Australian citizens or ordinarily resident in Australia; and (b) private servants of members of such a mission.[29]

Thus, the Australian chef to the head of mission has, in Australia, immunity from jurisdiction, and inviolability, in respect of acts performed in the course of his duties. One wonders what this might include?

It should be noted that this section of the Act also extends immunity from jurisdiction and inviolability to private servants, including those who are not Australian citizens or permanently resident in Australia. Under Article 37(4) these people have the right to exemption from taxes on their wages but other privileges and immunities only to the extent admitted by the receiving State.

Corresponding to (a) above, consular employees who are Australian citizens or ordinarily resident in Australia are entitled to "immunity from jurisdiction in respect of official acts performed in the exercise of their functions".[30] They have no entitlement to inviolability.

Inviolability?

What is inviolability? The term is referred to often in these Conventions. The premises of a diplomatic mission are inviolable as is the person of a diplomatic agent and his residence, papers, correspondence (Articles 29 and 30). Consular premises are inviolable to the extent provided by the Convention (Article 31). The consular officer is not said to have inviolability but the receiving State must "treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity" (Article 40). This provides a guide as to one aspect of the meaning of "inviolable". Similar injunctions to the receiving State appear regarding the person of the diplomatic agent and the premises of a diplomatic mission or consular post *e.g.* "The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission (consular premises) against any intrusion or damage and to prevent any disturbance of the peace of the mission (consular post) or impairment of its dignity" (Articles 22(2) and 31(3) respectively). In the case of diplomatic missions and agents the term "inviolability" connotes that agents of the receiving State may take no action in relation to them.

[29] Diplomatic Privileges and Immunities Act 1967, s. 11.
[30] Consular Privileges and Immunities Act 1972, s. 10.

How does Australia fulfil its international obligations in this regard? In the first place all the Articles referred to have received the force of law in the relevant legislation. Article 22 of the Vienna Convention on Diplomatic Relations was referred to in *The Queen* v. *Turnbull*.[31] There the defendants were charged under the Crimes Act 1900 with throwing gelignite near the Chancery of the U.S.S.R. in Canberra. It was argued that there was no offence committed within the Australian Capital Territory because the premises of the Chancery were on foreign soil. The Court held that the premises of a foreign embassy in a State receiving the diplomatic mission are not outside the territory to which the criminal law of the receiving State is applicable. Fox J. said that Article 22 suggested "rather strongly that the view of the law submitted by counsel for the applicants was not that of the parties to the treaty".[32]

However, the phrases used in the two Conventions are very general with little specific content. For example, what is meant by "impairment of its dignity"? Kerr J. made some comments on this in *Wright* v. *McQualter*[33] in relation to Article 22(2):

> If there were in the last analysis no more in this case than a quite peaceful gathering on the lawn of persons shouting slogans and carrying placards of the kind in question here, with no risk of intrusion or damage to the premises, I would have some doubt whether there was any basis for believing that such action in such a place could reasonably amount to impairing the dignity of the mission, which is, after all, a political body. As such it must presumably accommodate itself to the existence of strong disagreement with some of the policies of its government and to the direct and forceful verbal expression of such disapproval. I appreciate that something may turn on the closeness of those concerned to the premises and on the extravagance or insulting nature of the language used, but, for myself, I would like to keep this whole subject open until, if ever, it arises for decision.

In providing for inviolability the Conventions enjoin States to take "appropriate steps" to ensure protection. In a practical sense, the determination of "appropriate steps" must rest with the receiving State. This is the only authority capable of assessing accurately the extent of the danger posed by any threat and the response necessary to thwart it. The cost to the Commonwealth in providing special protection to embassies in Canberra during the financial year 1971-1972 was $339,299.[34] In spite of this protection there was some damage to mission and consulate premises in Australia in the years 1968 to 1974. An apology was usually offered and in many cases repairs were made.

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[31] (1971) 17 F.L.R. 438.
[32] *Id.* 444.
[33] (1970) 17 F.L.R. 305, 321-322.
[34] H.R. Deb. 1972, Vol. 81, 3257.

In the financial year 1971-1972 the cost of these amounted to $50,633.[35]

In addition to these aspects, although the Articles referred to are given the force of law, neither the Diplomatic Privileges and Immunities Act nor the Consular Privileges and Immunities Act provides any sanction for infringement. There are available a number of provisions under the general law which could be used for dealing with any offenders. However, any offence would arise independently of the special status of the person or the premises. In 1971 the Articles of the Conventions were expressed more expansively in the Public Order (Protection of Persons and Property) Act 1971. Part III of this Act relates to diplomatic and consular premises and personnel.

> 14. The provisions of this Part are intended to assist in giving effect, on the part of Australia, to the special duty imposed by international law on a state that receives a diplomatic or special mission, or consents to the establishment of a consular post, to take appropriate steps to protect the premises of the mission or post against intrusion or damage, to prevent any attack on the persons, freedom or dignity of the personnel of the mission or post and to prevent disturbance of the peace, or impairment of the dignity, of the mission or post.

The Act deals with what it calls protected premises and protected persons. The former are defined to include premises occupied for the purposes of a diplomatic mission or a consular post or used as the residence of a protected person. The protected person category includes a member of the diplomatic staff (including the head) of a diplomatic mission; a member of the staff (including the head) of a consular post who is entrusted with the exercise of consular functions; in neither case does it include a person who is an Australian citizen or permanently resident in Australia.[36] The Act then creates certain offences in respect of actions towards protected persons and premises. These include taking part in assemblies involving violence or apprehension of violence, causing actual bodily harm or damage to property, refusal to disburse after a direction is given, obstruction and assault. A further example of the type of offence created follows:

> 20. (1) A person who, without reasonable excuse, trespasses on protected premises is guilty of an offence, punishable on conviction by a fine not exceeding One hundred dollars or imprisonment for a term not exceeding one month, or both.
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> (2) a person who—
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> (a) engages in unreasonable obstruction in relation to the passage of persons or vehicles into, out of or on

[35] *Ibid.*
[36] S. 4.

protected premises, or otherwise in relation to the use of protected premises;

(b) while trespassing on protected premises, behaves in an offensive or disorderly manner; or

(c) being in or on protected premises, refuses or neglects, without reasonable excuse, to leave those premises on being directed to do so by a constable, by a protected person residing or performing duties on the premises, or by a person acting in accordance with authority conferred on him by such a protected person,

is guilty of an offence, punishable on conviction by a fine not exceeding Two hundred and fifty dollars or imprisonment for a term not exceeding three months, or both.

Australia has implemented the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, in the Crimes (Internationally Protected Persons) Act 1976. Under the Act an "internationally protected person" has the same meaning as in Article 1(1)(b) of the Convention. It thus includes an "official of a State . . . who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household". As has been pointed out "the enjoyment of special protection is limited in time and place".[37] Officials covered are those entitled to the benefit of Article 29 of the Vienna Convention on Diplomatic Relations and Article 40 of the Vienna Convention on Consular Relations.[38]

The Act applies both within and outside Australia to all acts and persons. It creates the following offences against internationally protected persons: murder or kidnapping—imprisonment for life; attack upon the person or liberty—maximum of fourteen years imprisonment for grievous bodily harm and seven years in other cases; violent attack upon official premises, private accommodation or means of transport, being an attack likely to endanger the person or liberty—maximum of fourteen years imprisonment; threats to do anything that would constitute one of the above offences—maximum of seven years imprisonment.

Withdrawal of Privileges and Immunities

The privileges and immunities granted under both the Diplomatic and Consular Privileges and Immunities Acts may be withdrawn by the

[37] Wood, "The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents" (1974) 23 International and Comparative Law Quarterly 791, 800.

[38] *Id.* 801.

Minister for Foreign Affairs.[39] All or any privileges enjoyed by a mission or consular post or persons connected with either can be withdrawn. In making such a withdrawal the Minister must be satisfied that the State of the mission or post accords Australian representation in that country a lesser standard of privileges and immunities than its mission, post or personnel receive in Australia under the relevant legislation. International approval of such reciprocal action is to be found in Articles 47(2)(a) and 72(2)(a) of the Vienna Conventions on Diplomatic and Consular Relations respectively. A reduction in these circumstances is not to be taken as constituting discrimination which is prohibited by the Conventions.

Evidence and Ministerial Certificates

The constitutional form of government in Australia provides for a division of power between the executive, the legislature and the judiciary. In the area we are discussing, the establishment of diplomatic missions and consular posts, the reception of diplomatic agents, the admission of consular officers *etc.* is a function of the executive branch. On the other hand, the courts have the duty to interpret and apply legislation enacted by the legislature. In doing this in relation to the Diplomatic and Consular Privileges and Immunities Acts the court may well require guidance as to what the executive has done. This is provided by means of a ministerial certificate. The format of this is usually as follows:

> I, ... Minister of State for Foreign Affairs of Australia DO HEREBY CERTIFY that X has been as from the ..... day of ..... One thousand Nine hundred and ..... and as at the date hereof continues to be recognised by the Australian Government as (a member of the administrative and technical staff) of the ..... Embassy of ..... in Australia.
> IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Minister of State for Foreign Affairs.
> Dated this ..... day of ..... One thousand Nine hundred and .....
>
> Minister of State
> for Foreign Affairs.

Both Acts authorise the Minister for Foreign Affairs to issue "a certificate in writing certifying any fact relevant to the question whether a person is, or was at any time or in respect of any period, entitled to any privileges or immunities by virtue of this Act" or by any regulations made under the Act.[40] A certificate given under these Acts

[39] S. 12 and s. 11 respectively.
[40] S. 14 and s. 12 respectively.

is stated to be "evidence of the facts certified". The Minister has a discretion as to whether or not he issues a certificate.

The fact that the certificate is only "evidence of the facts certified" means that argument concerning those facts is allowable. There could be a conflict of evidence. The court would then be called upon to rule on the relative merits. Not too much should be made of this point because in practice great weight will be given to the certificate. However, there does exist a potential for diplomatically embarrassing cross-examination of the person claiming immunity as to the precise nature of his duties.

Representation Outside the Seat of Government

The seat of government of the Commonwealth of Australia is Canberra—a city established for that purpose in 1926. A state establishing a diplomatic mission in Australia must set it up in Canberra. However, for many years it was the custom for a number of states—mainly members of the British Commonwealth—to maintain offices with diplomatic status in cities other than Canberra. In April 1971 the Commonwealth Government decided that this practice should cease. The heads of foreign diplomatic missions and consular posts were notified that the maintenance of diplomatic offices outside Canberra could not be continued and that diplomatic status and designation would, in future, be accorded only to missions and personnel respectively situated in, or resident in, Canberra. They were also informed that the highest status representation of foreign States located elsewhere than Canberra could expect would be under the consular regime. The actual grant of that status would depend on the type of functions performed by the representation and accepted by Australia.[41]

In relation to this matter it is necessary to look at Article 12 of the Vienna Convention on Diplomatic Relations:

> The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.

Australia found that it was unusual for this consent to be given. The diplomatic representation in many cities other than Canberra presented an anomalous situation.

A major problem in introducing the new system arose from the "host country convention" of the British Commonwealth. This phrase referred to an unwritten understanding between countries of the British Commonwealth whereby each provided the equivalent of consular facilities for citizens of the other. In other words, there was no system of consular relations between these countries.

[41] H.R. Deb. 1972, Vol. 78, 3011.

Accordingly, it was necessary to provide for specific legislation to grant the equivalent of consular privileges and immunities to those offices and their personnel which were to lose their diplomatic status. This was done in section 9 of the Consular Privileges and Immunities Act.

> Clause 9 deals with the position of posts established by Commonwealth countries in cities other than Canberra. . . . This clause enables regulations to be made conferring on such posts all or any of the privileges and immunities conferred by the Act on a consular post. Provision is also made to cover the various classes of personnel attached to the post in a similar fashion.[42]

The only regulations made to date under section 9 relate to Malaysia and refer to the Malaysian Education Offices established in Melbourne and Perth.

By mutual agreement the "host country convention" has largely been abandoned. The establishment of consular relations is now quite common among the countries of the British Commonwealth although the old system is still used where the need does not warrant the more formal relationship. In Australia, faced with the Government decision of 1971 and section 9 of the Act, the other Commonwealth countries opted for normal consular status for their offices outside Canberra. For this reason, it has not been necessary to make regulations under section 9.

LEGISLATION RELATING TO INTERNATIONAL ORGANIZATIONS

The Commonwealth Act dealing with the privileges and immunities of international organizations and persons associated with them is the International Organizations (Privileges and Immunities) Act 1963. It enables regulations to be made conferring privileges and immunities on a named international organization. It also continues in force similar regulations made under preceding Acts which it repealed. These regulations may be repealed themselves by regulations under the 1963 Act. Therefore, to ascertain the current position in Australia we must go back to the earlier Acts and see what international organizations are covered by the regulations continued in force and the nature of the privileges and immunities they confer.

Early Legislation

The first piece of Commonwealth legislation dealing with the privileges and immunities of an international organization was the International Organizations (Privileges and Immunities) Act 1948. This

[42] *Ibid.*

Act gave parliamentary approval for Australia's accession to the Convention on the Privileges and Immunities of the United Nations. Australia became a Party to that Convention in 1949. It was set out in the Schedule to the Act.

Section 4 of the Act provided a £20 penalty for any person who, without the consent of the Minister, assumed or used "in connexion with any trade, business, calling or profession the name, official seal or emblem of the United Nations or of any other prescribed international organization, or any seal or emblem so nearly resembling any such seal or emblem as to be likely to deceive". Section 5 of the Act gave the Governor-General power to make regulations in particular:

(a) for giving effect to the provisions of the Convention; and
(b) for giving effect, in relation to any international organization, to the provisions of any convention on the privileges and immunities of that international organization to which Australia has acceded.

In 1960 the Act was amended to give the Governor-General additional power by adding to the above

(c) for conferring on an international organization of which Australia or the Government of the Commonwealth is a member juridical personality and such legal capacity as is necessary for the exercise of the functions, and the fulfilment of the purposes, of the organization.

At the same time the Act was expressed to extend to every Territory of the Commonwealth. We will examine the regulations passed under the International Organizations (Privileges and Immunities) Act 1948-1960 and still continued in force.

International Organizations (Privileges and Immunities) Regulations

1. *The United Nations Organization*

The first set of regulations made under the Act came into force in 1959. Regulation 2 established the United Nations as a "body corporate with perpetual succession"; gave it the capacity to contract; and rendered it "capable, in its corporate name, of acquiring, holding and disposing of real and personal property and of instituting legal proceedings". All courts and judges in Australia are required to take judicial notice of the seal of the United Nations.

More important is regulation 3(1):

> The United Nations or a person in relation to whom the Convention applies has, in Australia, the privileges and immunities applicable under the Convention to the United Nations or that person, as the case may be.

This is qualified by sub-regulation (2) whereby (1) is said not to confer any privileges and immunities in relation to matters arising under any Act, other than the International Organizations (Privileges and Immunities) Act 1948, which makes provision for the privileges and immunities of the United Nations or a person to whom the Convention applies. Thus, if the Income Tax Assessment Act 1936 makes provisions for the privileges and immunities of the United Nations you have to look at that Act to see the range and extent of the privilege granted. Section 23 of the Act exempts from Australian income tax:

(x) the income of any prescribed organization of which Australia and one or more other countries are members;

(y) the official salary and emoluments of an official of a prescribed organization of which Australia and one or more other countries are members, to the prescribed extent and subject to the prescribed conditions.

The United Nations is a prescribed organization under regulation 4AB(1) of the Income Tax Regulations. Under regulation 4AB(2) the official salary of an official of the United Nations is exempt from income tax "to the extent that Australia is bound by an international convention or agreement to exempt from taxation his official salary and emoluments". In becoming Party to the Convention on the Privileges and Immunities of the United Nations Australia is bound to exempt "officials of the United Nations . . . from taxation on the salaries and emoluments paid to them by the United Nations" (section 18).

Who are officials of the United Nations? Under section 17 of the Convention the Secretary-General was required to specify "the categories of officials to which the provisions of this article and article VII shall apply". He was then required to submit those categories to the General Assembly. This was done at the second part of the first session of the General Assembly which adopted resolution 76(I) of 7 December 1946. In this the General Assembly approved the granting of privileges and immunities referred to in articles V and VII of the Convention "to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates". The category was expanded slightly by resolution 3188 (XXVIII) of 18 December 1973 to include members of the Joint Inspection Unit and the Chairman of the Advisory Committee on Administrative and Budgetary Questions. Those officials were not "members of the staff of the United Nations". The criteria the Secretary-General adopted in proposing these for inclusion were:

(a) The official in question must be engaged on a full-time or substantially full-time basis to the point where he is effectively precluded from accepting other employment.

(b) The official must be a member of a body responsible directly to the General Assembly.[43]

Provision is made in the 1948 Act for the Minister to issue a certificate which is evidence of the matter certified *e.g.* as to whether a specified country is a member of the United Nations, whether a specified person comes within the category of officials of the United Nations *etc.*

The effect of these regulations then is to accord to the United Nations in Australia all the privileges and immunities set out in the Convention on the Privileges and Immunities of the United Nations. The United Nations in the sense used here means the entire organization of the United Nations. This includes the various organs of that body *e.g.* the economic commissions, United Nations Conference on Trade and Development, United Nations Children's Fund, Office of the United Nations High Commissioner for Refugees, United Nations Development Programme, United Nations Industrial Development Organization, United Nations Environment Programme, United Nations University, United Nations Special Fund, World Food Council, United Nations Institute for Training and Research.

2. *Other Organizations*

The International Organizations (Privileges and Immunities) Regulations were amended in 1961 to grant specified organizations juridical personality and such legal capacity as necessary for the exercise of their functions and the fulfilment of their purposes. The organizations so specified and still covered by these Regulations are:

Food and Agriculture Organization of the United Nations.
Intergovernmental Maritime Consultative Organization.
International Bank for Reconstruction and Development.
Intergovernmental Committee for European Migration.
International Development Association.
International Hydrographic Bureau.
International Institute of Refrigeration.
International Labour Organisation.
International Monetary Fund.
International Telecommunication Union.
International Tin Council.
International Union for the Protection of Industrial Property.
International Union for the Protection of Literary and Artistic Works.
United Nations Educational, Scientific and Cultural Organization.
Universal Postal Union.
World Health Organization.
World Meteorological Organization.

[43] *United Nations Juridical Yearbook 1973* (1975) 165.

International Organizations (Privileges and Immunities of Specialized Agencies) Regulations

These Regulations were made in 1962 to give effect to the Convention on the Privileges and Immunities of the Specialized Agencies. As regulation 4(1) states:

> Each Specialized Agency and each person in relation to whom the Convention applies has, in Australia, the privileges and immunities applicable under the Convention (other than those referred to in section 11 of the Convention) to that specialized agency or that person, as the case may be.

For the purposes of the Regulations the term "Specialized Agency" is defined to mean the following bodies:

> International Labour Organisation.
> Food and Agriculture Organization of the United Nations.
> International Civil Aviation Organization.
> United Nations Educational, Scientific and Cultural Organization.
> International Monetary Fund.
> International Bank for Reconstruction and Development.
> World Health Organization.
> Universal Postal Union.
> International Telecommunication Union.
> World Meteorological Organization.
> Inter-Governmental Maritime Consultative Organization.
> International Finance Corporation.
> International Development Association.

The Preamble to the Regulations states that Australia has acceded to the Convention on the Privileges and Immunities of the Specialized Agencies and has, "subject to certain specified considerations, undertaken to apply to the Specialized Agencies specified in the following Regulations the provisions of the Convention". The Convention is listed in the *Australian Treaty List* as a multilateral treaty to which Australia is a party: the instrument of accession being deposited (with reservations) on 20 November 1962.[44] It is most surprising to find Australia is not listed by the Secretary-General of the United Nations as having acceded to the Convention. There is no mention of Australia under the relevant Convention in the United Nations publication *Multilateral Treaties in Respect of which the Secretary-General Performs Depository Functions—List of Signatures, Ratifications, Accessions, etc. as at 31 December 1976.*[45]

Perhaps an answer to this puzzle may lie in the qualification "subject to certain specified considerations". In other words, Australia was not prepared to grant the full range of privileges and immunities set out in

[44] *Australian Treaty List as at 31 December 1970* (1971) 217.
[45] UN. Doc. ST/SEG/SER. D/10.

the Convention. To accede on this basis Australia would have to do so subject to the reservations mentioned. It may be that the beneficiaries of the Convention—the Specialized Agencies—were not prepared to countenance these reservations.

What is the nature of the reservations? Regulation 4(3) of the Regulations envisages a situation where another Act or regulations make provision for the privileges and immunities of a Specialized Agency. Where this occurs regulation 4(1) quoted above does not confer any privileges and immunities in relation to matters arising under that other Act or regulations as the case may be. Another Act making provision for the privileges and immunities of Specialized Agencies is the Income Tax Assessment Act 1936. With the exception of the International Finance Corporation all the Specialized Agencies are prescribed organizations under the Income Tax Regulations. This means their income is exempt from Australian tax. However, the Income Tax Regulations do not allow exemption from taxation for the salary of an official of an international organization (other than the United Nations) who is an Australian citizen resident in Australia where that salary is for services rendered in Australia. As we will see later all regulations under the 1963 Act are to similar effect when they deal with exemption from taxation. The Convention on the Privileges and Immunities of the Specialized Agencies requires officials to "[e]njoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the specialized agencies and on the same conditions as are enjoyed by officials of the United Nations" (section 19). The Specialized Agencies are quite firm in maintaining this exemption.[46] On the other hand, it was an exemption which could not be granted under the existing Australian legislation. Consequently, when the Australian instrument of accession was deposited on 20 November 1962 it indicated that the accession was subject to the following consideration:

> The Australian Government wishes to reserve the right to levy taxation on the salary and emoluments paid in respect of services performed in Australia to an official of a specialized agency who is a resident of Australia within the meaning of the Australian legislation relating to income tax, other than—
>
> (a) an official entitled under the Convention or the Annexes thereto to the additional immunities and privileges specified in Article VI, section 21, of the Convention; or
>
> (b) an official who is not an Australian citizen and has come to Australia solely for the purpose of performing his official duties.[47]

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[46] *E.g. United Nations Juridical Yearbook 1973* (1975) 167.
[47] *Australian Treaty Series 1962* No. 13, 12.

This could well constitute a major source of conflict between Australia and the Specialized Agencies in the event of Australia's acceding to the Convention. None of the other eighty States—including New Zealand and the United Kingdom—party to the Convention have entered a reservation on taxation.

The International Organizations (Privileges and Immunities) Act 1963

There were a number of reasons underlying the passing of this Act. For example, the previous legislation had proved to be unduly restrictive in its operation. For one thing, there had to be a Convention, to which Australia had acceded, on the privileges and immunities of the organization before regulations could be made under the 1948-1960 Act. The privileges and immunities of some organizations were not dealt with in a Convention. A second reason for passing the Act was to give the Commonwealth Parliament greater control over the range of privileges and immunities that might be granted. The proposal was that "the Parliament should lay down very clearly the upper limits, so to speak, of the privileges and immunities which might be conferred by the regulations upon international organizations and persons connected with those organizations . . .".[48] Thirdly, there was a desire to "cover the whole field of the privileges and immunities of international organizations in the one piece of legislation".[49]

The 1963 Act grants the Governor-General power to make regulations for giving effect to it. The regulations may declare an organization to be an international organization to which the Act applies provided (a) Australia and a country or countries other than Australia are members or (b) the organization is constituted by persons representing Australia and persons representing other countries.[50] Regulations (Statutory Rules—S.R.) currently in force under the Act provide privileges and immunities for the following organizations:

South East Asia Treaty Organization (S.R. 1967, No. 50).
International Court of Justice (S.R. 1967, No. 80).
Asian Development Bank (S.R. 1967, No. 175; 1969, No. 50; 1972, No. 181).
South Pacific Commission (S.R. 1970, No. 171).
International Atomic Energy Agency (S.R. 1971, No. 30).
Organizations Associated with the Asian and Pacific Council (S.R. 1972, No. 52).
Commonwealth Secretariat (S.R. 1972, No. 175).
South Pacific Bureau for Economic Co-operation (S.R. 1973, No. 114).

[48] H.R. Deb. (1962-1963) Vol. 38, 1161.
[49] *Id.* 1162.
[50] S. 5.

International Exhibitions Bureau (S.R. 1973, No. 174).
International Cocoa Organization (S.R. 1973, No. 198).
International Bauxite Association (S.R. 1976, No. 251).

The Act has five Schedules stating the type of privileges and immunities that may be granted to respectively; the organization; high officers; representatives accredited to, or attending conferences convened by the organization; officers other than high officers; persons serving on a committee or participating in the work of, or performing a mission on behalf of, the organization. With one exception each Schedule sets out a list of privileges and immunities. From what was said above, these represent the fullest extent of the range of privileges and immunities that may be accorded. Any privilege or immunity outside that range would require a further Act of Parliament. The exception referred to is the Second Schedule under which a high officer has "[t]he like privileges and immunities (including privileges and immunities in respect of a spouse and children under the age of twenty-one years) as are accorded to an envoy". Section 6 of the Act is the operative section which permits regulations to confer on an international organization to which the Act applies and to persons associated with it the privileges and immunities set out in the five Schedules.

How does this system work in practice? The Minister of State responsible for the legislation is the Minister for Foreign Affairs. Officers of his Department—the Department of Foreign Affairs—are responsible for advising on the drafting of the regulations. The actual drawing up or drafting is done by the Legislative Drafting Division of the Attorney-General's Department. In preparing drafting instructions the Department of Foreign Affairs has to align the international Convention or other instrument specifying the privileges and immunities required with the provisions of the Act. If it is found that the Convention, for example, requires the grant of a particular privilege to an officer of the organization and that privilege is not mentioned in the Fourth Schedule then the regulations will not be able to accord it. Australia would not have municipal legislation completely implementing the Convention. It could only become a Party to the Convention subject to a reservation that it would not be granting that particular privilege.

In addition, an administrative practice has developed whereby not all the privileges and immunities that may be granted under the Act actually are, although they are specified in the relevant Convention. For example, section 18 paragraph (a)(ii) of the Agreement on the Privileges and Immunities of the International Atomic Energy Agency[51] states that officials of the Agency shall:

[51] *(1960) 374 United Nations Treaties Series* 147.

> Enjoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the Agency and on the same conditions as are enjoyed by officials of the United Nations.

Paragraph 2 of the Fourth Schedule of the Act enables an officer of an international organization to be granted:

> Exemption from taxation on salaries and emoluments received from the organization.

The International Atomic Energy Agency (Privileges and Immunities) Regulations, in common with other sets of regulations which grant this privilege, qualify it. The exemption is stated not to apply to the salary of a resident of Australia for services rendered in Australia "unless the person is not an Australian citizen and came to Australia solely for the purpose of performing duties of the office in the Agency held by him".[52] In becoming party to this I.A.E.A. Agreement, Australia indicated that her acceptance of the Agreement was subject to the reservation that:

> The Government of the Commonwealth of Australia reserves the right to levy taxation on the salary and emoluments paid in respect of services performed in Australia to an official of the Agency who is a resident of Australia within the meaning of the Australian legislation relating to income tax, other than an official who is not an Australian citizen and has come to Australia solely for the purpose of performing his official duties.[53]

Once the regulations have been drafted and approved by the Minister they are forwarded to the Executive Council for approval. If approved they are then signed by the Governor-General. However, before becoming law notification of their making must be made in the Commonwealth Gazette. The regulations are valid from this time. However, all regulations must be laid before each House of Parliament within fifteen sitting days of each House after the making of the regulations. They may be disallowed by either House within this time; thereupon they cease to have effect. On their coming into force the regulations fulfil Australia's international obligation of being able to give internal effect to any Convention. Australia is thus in a position to ratify or accede to the Convention.

If we look at the privileges and immunities that may actually be granted under the 1963 Act we find nothing particularly unusual about them. In the main they are taken to represent what is required by a large number of international Conventions on privileges and immunities. By and large they are quite successful at this although the process of drafting and passing the regulations requires detailed examination of the Convention and the Act and is time consuming.

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[52] Regulation 8(2).

[53] *Australian Treaty Series 1973* No. 40, 8.

Although it is beyond the scope of this article to examine each set of Regulations in detail some general comments may be made. The term "high officer" in the Second Schedule is usually reserved for the Secretary-General, Director *etc.* of the organization; in other words, the senior executive officer and his deputy. This person then has privileges and immunities equivalent to those of a diplomatic envoy—that is, a diplomatic agent in the terminology of the Vienna Convention on Diplomatic Relations: " 'envoy' means an envoy of a foreign sovereign power accredited to the Queen in Australia".[54]

The Third Schedule lists the range of privileges and immunities that may be granted to a representative accredited to, or attending a conference convened by, the organization. Under the Act any such grant applies to such a representative both on his way to and on his return from the conference. A member of the official staff of such a representative is entitled to the same privileges and immunities for the same period. Certain persons are deemed to be members of the official staff: alternates or substitutes for the representative and advisers or experts assisting him.[55]

Certain privileges and immunities applicable to an officer of an international organization are set out in the Fourth Schedule. The only ones that require comment are the taxation and customs duties exemptions. The taxation privilege reads: "Exemption from taxation on salaries and emoluments received from the organization." This is always qualified in the Regulations. The exemption is stated not to apply to the salary of a resident of Australia for services rendered in Australia "unless the person is not an Australian citizen and came to Australia solely for the purpose of performing duties of the office in the Agency held by him". Thus, an Australian citizen who is an officer of an international organization working in Australia will not be able to escape Australian income tax on his salary. The customs duty exemption is that of importing furniture and effects free of duties when first taking up post in Australia and then of exporting it when leaving. The common practice is not to extend this right to officers who are Australian citizens.

The Fifth Schedule, covering persons serving on a committee or participating in the work of an international organization, is usually taken to refer to the category of experts often included in Conventions on privileges and immunities. For example, in the case of the International Court of Justice the Regulations give these privileges and immunities to an assessor of the Court; a witness or expert before the Court or a person performing a mission on behalf of the Court.[56]

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[54] International Organizations (Privileges and Immunities) Act 1963, s. 3(i).
[55] *Id.* s. 3(4).
[56] Regulation 7(1).

The Regulations usually make provision for waiver of privileges and immunities by the organization or, in the case of a representative attending a conference, the government he represents. A saving clause regarding quarantine laws *etc.* along the lines of that in the Diplomatic Privileges and Immunities Act is always included.

Special provision is made in the 1963 Act—section 7—for granting privileges and immunities to representatives attending an international conference in Australia or on a mission to Australia in circumstances where the normal scheme under the Act does not apply. The Governor-General may make regulations for this purpose if he is satisfied that diplomatic privileges and immunities should be applicable to the conference or mission. Regulations were made under section 7 in 1968 to cover "the conference known as the Third Ministerial Meeting of the Asian and Pacific Council". The Council was not an international organization but rather a periodical meeting of ministers of particular countries. Therefore, it was not a conference to which the other sections of the Act could apply.

Under section 7 representatives of countries other than Australia at the conference are entitled to "the privileges and immunities accorded to an envoy" while members of his official staff have those "accorded to a member of the retinue of an envoy". A member of the secretariat of the conference has "immunity from suit and from other legal process in respect of acts and things done in his capacity as such a member".

The 1963 Act contains prohibitions against the unlawful use of the name, seal, emblem *etc.* of international organizations to which the Act applies. A number of the Regulations in force under the Act contain facsimiles of the respective organization's seal and emblem. One point of importance is that since the International Organizations (Privileges and Immunities) Act 1948 was repealed the name, seal and emblem of the United Nations now have no particular legislative protection in Australia. Although the Regulations granting the United Nations the privileges and immunities of the Convention are continued in force the provision regarding the name, seal and emblem was in the Act itself and this has now ceased to exist. However, registration of a business name suggesting a connection with the United Nations Organization will usually be refused under the State legislation on this subject *e.g.* section 9(1) of the Business Names Act 1962 (N.S.W.).

Protection of Officials

Certain officials of international organizations come within the purview of the Public Order (Protection of Persons and Property) Act 1971 and the Crimes (Internationally Protected Persons) Act 1976 already referred to. Thus, a "protected person" under the former Act includes "a high officer of an international organization" but does not include a person who is an Australian citizen or is permanently

resident in Australia. An "internationally protected person" under the latter Act means any "official . . . of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household". The only persons usually entitled to this special protection are the officials whose privileges and immunities are equated to those of "diplomatic envoys" *e.g.* section 19 of the Convention on the Privileges and Immunities of the United Nations; section 21 of the Convention on the Privileges and Immunities of the Specialized Agencies.[57] It seems that "internationally protected person" in relation to an international organization is equivalent to "high officer" under the Public Order (Protection of Persons and Property) Act. The Crimes (Internationally Protected Persons) Act is more extensive in its coverage than the Public Order (Protection of Persons and Property) Act in that it also covers members of the family forming part of the household and extends to high officials who are nationals of or permanently resident in Australia while they are performing official acts in the exercise of their functions. This last statement is based on Article 38(1) of the Vienna Convention on Diplomatic Relations as representing international law.

The Public Order (Protection of Persons and Property) Act includes as a "protected person" "a representative of a member of an international organization at a meeting of, or under the auspices of, the organization" provided he is not an Australian citizen or permanently resident in Australia. Such a person may be a Head of State, a Head of Government or a Minister for Foreign Affairs in which case he, as well as members of his family accompanying him, will be "internationally protected persons" under the Crimes (Internationally Protected Persons) Act. Other representatives of member States will only come within the definition where they are entitled "pursuant to international law to special protection" from any attack on their person, freedom or dignity.

"Protected premises" under the Public Order (Protection of Persons and Property) Act include premises "occupied by an international organization, or used for the purposes of a meeting of, or under the auspices of, an international organization" or "used as the residence of, or otherwise for the private accommodation of, a protected person".

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[57] Wood *op. cit.* 801. Przetacznik would appear to go too far in his list of entitled officials: "Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons" (1974) 52 Revue de droit international de sciences diplomatiques et politiques 208, 218.