a 'ripple effect' of claims throughout the nation.

Mr. Justice Kirby reminded the audience that Sir John Latham, when he retired as Chief Justice of Australia in 1952, had said that he was 'ashamed' to refer to the law on conciliation and arbitration which he had described as 'legalistic in the extreme despite its importance to modern life and political and economic questions':

> The essential question I want to ask is how much longer we can continue with this ramshackled arrangement of the 1890's? As times get harder and as the economic and social problems proliferate and bite, is it reasonable to force the solutions to today's problems through machinery designed for very different economic and political circumstances nearly a century ago. This is no academic concern of a professional law reformer. It is a practical problem that arises from industrial dislocation, promoted or aggravated, by inter-union disputes and by inter-jurisdictional differences'.

Detailing the problems of what he termed 'the dispute syndrome', the 'ambit exaggeration', artificial interpretations, the 'bifurcated institution' and the dangers of the 'leap frog' and the 'demarcation dispute', the ALRC Chairman came back to the principle:

> Ultimately it comes back to democracy and responsibility. All too often in Australia responsibility is shirked. All too often we are ready to pass our problems over to unelected judges and other officials, absolving the responsive and elected arms of government from answerability, even for major social and economic decisions. Australia is one of the few countries where the national government does not have direct substantial power and responsibility to so vital a facet of economic policy as industrial relations. It is the only country – including the only Federal country – where the power is constitutionally forfeited from politically responsible officials to an elected independent tribunal, whose decisions can be castigated by all with the sweet knowledge that electoral accountability is not required.

getting perspectives. The economic recession shows no sign of abatement. The Federal Minister for Employment and Industrial Relations, Mr. Ian Macphee declared on 30 September 1982 that the difficulties inherent in the operation of a Federal system of industrial relations were 'generally recognised'. But he pointed out that a number of 'useful short term measures' had already been agreed upon including legislative provision for members of Federal and State industrial tribunals to sit together or to exchange relevant jurisdiction. Let the last words, like the first, be had by Sir John Moore, President of the Australian Conciliation and Arbitration Commission for the past 9 years and for 23 years a member of the Federal industrial tribunal. In a thoughtful article by Gaye Davidson 'Philosophy of Balance Guides Sir John Moore' published in the *Canberra Times* (19 October 1982) he is reported as saying that change in this area is not something that will happen easily in Australia. Comparing the German system he said:

> It could not happen in this country with the present institutional framework. I don't see how it could possibly happen, given our background and beliefs. I am not talking about it as a question of principle – I am talking about it as a pragmatic situation...The institution itself is changing, perhaps imperceptibly, but if you have been on it as long as I have, which is 23 years, there is quite a change in the way matters are dealt with.

For those who want to see the past, a useful monograph by Chris Fisher 'Innovations and Industrial Relations: Aspects of the Australian Experience 1945-1980' has just been published by the Research School of Social Sciences of the Australian National University. For those who want to see the future, keep reading.

foreign state immunity

> We are handicapped by foreign policies based on old myths rather than current realities.
>
> James William Fulbright, U.S. Senator, 1964

new reference. A further new reference has been given to the ALRC. It relates to the law of foreign State immunity. This is the first time that a national Law Reform Commission has been asked to examine this topic. Dr. James Crawford, full-time Member of the

ALRC and a Reader in Law in the University of Adelaide has been appointed to take charge of the project. Dr. Crawford's involvement with the ALRC and his expertise in this area of the law, is, no doubt, one of the reasons why the Commission has been given responsibility and opportunity to develop proposals on the topic.

The Terms of Reference, signed by the Acting Federal Attorney-General, Mr. Neil Brown, Q.C., require the Commission to enquire into and report on the law in Australia of foreign State immunity, sometimes called sovereign immunity. The Commission's remit requires it to examine the position of the law in Australian courts of:

- foreign States;
- their agences, instrumentalities (including State-owned corporations) and subdivisions (such as provinces and states); and
- foreign Heads of State

In examining the position of these persons and legal persons, the Commission is asked to scrutinise:

- substantive immunity from the jurisdiction of Australian courts and tribunals;
- procedural immunities with respect to the service of process, discovery, joinder of parties, counterclaims, set offs and cross demands; and
- immunities from interim and final enforcement of judgments and orders of Australian courts and tribunals.

The ALRC is asked to report whether there is a need for Federal Australian legislation with respect to foreign State immunity and, if so, the principles upon which legislation should be based.

a puzzle . Professor David Johnson, Professor of International Law in the University of Sydney has agreed to accept appointment as an honorary consultant to the ALRC. Invitations have also been issued to other Australian experts in this field. Writing in the *Australian Year Book of International Law* (Vol 6, 1974-5) Professor Johnson tackles 'The puzzle of sovereign immunity'. He quotes the view expressed by Sir Ian Sinclair, legal adviser to the British Foreign and Commonwealth Office that 'few topics in the field of general international law have given rise to more extended analysis in recent years than the topic of State immunity'. The reason?

> According to Sir Ian, this is not surprising since 'the well known dichotomy between those States which recognise and apply the concept of absolute immunity (of which the United Kingdom is now the leading exponent) and those States which recognise and apply concepts of relative immunity invariably give rise to problems. (1973) 22 *ICLQ* 254

Since this view was stated, the position in the United Kingdom has changed. The position in Australia remains unregulated by a modernising statute. The ALRC is asked to indicate whether such a statute should now be proposed.

restrictive immunity. The law of foreign State or sovereign immunity has been going through a process of change and development in recent years. For a long time it was thought, particularly in English speaking countries, that a foreign State and its agencies were completely immune from the jurisdiction of the courts, no matter what the subject of the action, unless they expressly waived their immunity from jurisdiction. Even an agreement to accept the exercise of local jurisdiction was not enough. The courts have refused to exercise jurisdiction over a foreign State which breached such an agreement. However, in recent years, courts and legislatures have been developing a restrictive rule of immunity from jurisdiction. They have attempted to distinguish:

- actions by a foreign State and its agencies which are essentially public or governmental transactions, where the immunity should be granted out of reciprocal respect for a foreign sovereign; and
- actions in the nature of 'private law' commercial or non-governmental transactions where the cloak of immunity should not be available.

Although it is easy to state the above general principles of limited or restrictive immunity and although in such terms of generality it is fairly well settled, its precise definition and its application to particular circumstances may raise many practical difficulties, especially where there is no statutory clarification. Take a few examples from recent actual cases:

- A Government makes a policy decision (e.g. breaking diplomatic relations or imposing an economic embargo) which has as a direct result the loss of contractual or property rights to persons in trading relations with the Government.
- A Government seeks to transfer a State-owned trading vessel to public use, with consequent loss to persons using the vessel in trade.
- A salvor attempts to detain a foreign public ship to bring a claim against privately owned cargo in its hold. This happened in New Zealand where an operater who had salvaged a helicopter which was being carried in a United States naval vessel unsuccessfully sought to detain the vessel. See *Buckingham* v. *The Aircraft Hughes 500D Helicopter*, New Zealand High Court, 22 February 1982, Hardie-Boys J. (now on appeal).
- A State-owned newspaper publishes an official commentary which it is claimed is defamatory. Would an occasional lapse by *Reform* be examinable in a foreign court?

international efforts. A number of international efforts have been proceeding with a view to clarifying and defining the law on sovereign immunity.

- The Council of Europe developed the European Convention on State Immunity which was opened for signature at Basle in May 1972 on the occasion of the Seventh Conference of European Ministers of Justice. The Convention adopts a version of relative immunity by setting out a list of cases where the state is not immune.
- At a meeting of the Law Ministers of the Commonwealth of Nations held in Winnipeg, Canada, in August 1977, the topic of sovereign immunity was raised by the United Kingdom. The Commonwealth Secretariat was requested by the Law Ministers to examine the matter further but there is so far no public word of action in this field by the Commonwealth Secretariat.
- The United Nations International Law Commission (ILC) is working in the codification and development of the international law of State immunity. The Terms of Reference to the ALRC specifically require it to have regard to the work of the ILC – the first occasion in which the national and international law reform agencies will be working together in Australia. Through the Australian Department of Foreign Affairs, links with the ILC are now being established.
- The International Law Association has for some years been considering the subject of State immunity. An international working group appointed in May 1979 was set the task of preparing a draft convention on sovereign immunity, preferably to seek a reconciliation between the approaches taken by domestic laws in several countries. The working group

submitted a preliminary report to the Belgrade meeting of the International Law Association in August 1980, and a final report to the Montreal meeting in August 1982. The preparation of that report included a meeting in London in March 1982 hosted by Sir Ian Sinclair. The Australian representative at that meeting was Dr. James Crawford who subsequently had discussions in Washington with the ILA rapporteur Mr. Monroe Leigh. There is now being circulated both the report of the committee on State immunity and the draft convention to effect that report. The convention deals with:

- definitions
- the principle of immunity
- exceptions to immunity from ajudication
- service of process
- default judgements and several other topics.

foreign statutes. The ALRC, apart from having the leadership of Dr. Crawford and the participation of a team of top experts from the Australian public and private sectors, will have before it a numer of models in the overseas legislation which have been enacted to define and clarify the law on this topic. Principal available models include:

- Foreign State Immunities Act 1976 (U.S.A.)
- State Immunity Act 1978 (U.K.)
- State Immunity Act 1981 (Canada)
- Foreign States Immunities Act 1981 (South Africa)
- State Immunity Ordinance 1981 (Pakistan)

The legislation and international instruments on the subject frequently adopt different views of approaches. A number of problems have arisen in applying them. As examples, take the following issues that have been raised:

- the extent to which agreements to arbitrate a claim or to submit to the jurisdiction of courts of a particular State, amount to a waiver of immunity from execution in courts of other States;
- the extent of the procedural privileges of foreign States;
- the extent to which a party can seek to execute a judgment against assets of a foreign State (especially bank accounts not designated for a particular purpose); and
- the extent to which interim attachment of State property, or its equivalent should be available, as for example, under a *Mareva* injunction.

These are not theoretical issues. They have arisen in a substantial number of cases, particularly in the United Kingdom and the United States. These cases have involved, for example, Iranian state corporations or the Nigerian Central Bank. The closest the High Court of Australia came in recent years to the subject of foreign State immunity was the decision of *Chang v Registrar of Titles* (1976) 8 ALR 285 where consideration was given to certain consequences of Australia's change in the recognition of the Government of China. British, United States, Hong Kong and recent New Zealand cases illustrate the need to clarify and modernise Australian law. It is an ironic fact that the Australian law on this topic must be searched for amongst the case books of the United Kingdom courts, whereas the United Kingdom has now itself embraced a more limited doctrine of State immunity, with its adherence to the European Convention and with the passage of its 1978 reforming Act.

an abstruce topic? Perhaps. But an illustration of the likely growing role of international

law in a smaller world. Furthermore, if the ALRC can get it right, its report could be useful throughout the Commonwealth of Nations at least, where many of the countries are in the same legal position as Australia: looking backwards to English legal principle, developed in earlier times, for different needs and now significantly modified in their place of origin.

freedom day?

> But the privilege and pleasure
> That we treasure beyond measure
> Is to run on little errands for the Ministers of State
> Sir Wm Gilbert, *The Gondoliers*

predicted armageddon? The Australian Federal Freedom of Information Act came into force on Wednesday 1 December 1982 with a herald of editorial comments which could be described as hopeful rather than optimistic. Take the *Canberra Times* (1 December 1982):

> Emasculated or not, enough of the fundamental idea remains for things never to be the same for bureaucracy or for Government. The Australian system of Government now has firmly set in place legislation which makes the process of decision an open one. Citizens have a right to know and to challenge. A new type of accountability takes its place beside the old idea of ministerial responsibility -- an ideal which, as events in the past six months have shown, has not been working, which arguably cannot work when government administration is spread so wide, and when no minister can hope to keep abreast of what is happening even if, so rare these days, he is prepared to take responsibility. Open government is, of course, as much an attitude of mind as a matter of law.

Labelling the Freedom of Information Act a 'bold attempt to bring accountability into more routine areas of government' the *Canberra Times* pointed out that each year a full report would be given to Parliament on how it was operating and whether 'the much predicted Armageddon' had occurred.

The *Sydney Morning Herald* on the same day under the banner 'Foot in the Door' pointed out that it was nine years since the promise had been made of a Freedom of Information Act:

> But once launched, proposals like this assume a momentum that any amount of bureaucratic restraint cannot stop. . . . To be sure the legislation falls a long way short of its original intentions . . . The repeated sniping from bureaucrats and politicians has ensured in the end that there are too many exemptions and qualifications . . . The motivation behind this resistence is clear enough. Secrecy has been seen all too often as a convenient shield against accountability. Life is much easier if information on what is being done (and sometimes not done) is kept from the public.

Singled out for special concern by the *Sydney Morning Herald* was the exemption for so called 'internal working documents'; described a 'no go' area involving 'the most important workings of government'.

Speaking at the opening of a conference of Australasian Ombudsmen on 25 October 1982, the Prime Minister, Mr Malcolm Fraser, said with heavy irony that the public service was looking forward to the legislation with 'joy and elation'. He praised the Ombudsman as an institution helping government administration to be responsible and adaptive and sensitive to the needs of average citizens. And he conceded:

> It is also worth noting that freedom of information legislation is not the answer to all requests for information. I don't think one of those telephone book-thick sets of papers that John Howard tabled the other day would have got through if you had applied a freedom of information test. So, some things being tabled still will depend on the attitudes of governments rather than on the law itself.

slow learners. Numerous news items accompanied the enactment of the legislation, with wry comments from hard bitten journalists:

- Jack Waterford in the *Canberra Times* (25 November 1982) suggested