IX—INDIVIDUALS

Individuals—aliens—illegal immigrants—Australian policy

On 31 March 1985 the Minister for Immigration and Ethnic Affairs, Mr Hurford, and the Opposition spokesman on immigration and ethnic affairs, Mr Ruddock, issued a joint statement denying that there would be another amnesty for illegal immigrants (Comm Rec 1985, 378). On 17 October 1985 Mr Hurford tabled a new policy on illegal immigrants in Parliament, and issued the following statement (Comm Rec 1985, 1813–1814):

> Illegal immigrants who try back-door migration by applying for permanent residence after arriving in Australia have had the door closed. The tougher policy is set out in a statement drawing together all rules and practices regarding illegal immigration.
>
> The statement was tabled in Parliament today by the Minister for Immigration and Ethnic Affairs, the Hon Chris Hurford. He said:
>
> > This policy will be printed and widely disseminated. It will also be translated into several languages. The statement consolidates rules and practices, most of which have operated for many years. But two major changes have been made:
> >
> > - in view of the abuse of the provisions for granting of permanent residence while in Australia, in future it will be rare, indeed, that illegal immigrants will be granted permission to remain in Australia. They will have to apply overseas for permanent residence as they should have done in the first place
> > - the Immigration Review Panel will not review decisions refusing illegal immigrants temporary or permanent residence.
>
> It is estimated there are 50,000 or more illegal immigrants in Australia, mostly overstayed visitors. They are a burden on the community. More than 60 per cent are working in Australian jobs...

An extract from the statement tabled in Parliament on 17 October 1985 is as follows:

> WHO ARE ILLEGAL IMMIGRANTS?
>
> Illegal immigrants (those people described as 'prohibited non-citizens' in the Migration Act 1958) are people who are in Australia without lawful authority. They include:
>
> - people who entered Australia as tourists or to visit family or for other short-term purposes and who have stayed beyond their visitor-entry permit (they sign undertakings in visa applications overseas that they will not seek to stay or take unauthorised employment in Australia; when their undertakings are accepted in good faith as the basis of their entry as visitors, the Government expects them to honour those undertakings);
> - people who are permitted a temporary stay for a specific purpose (for example, for study or training, for business discussions, for medical treatment or for working holidays) and then remain (the Government expects that foreign nationals accorded concessions such as these on a specific understanding will abide by that understanding);
> - stowaways, ships' deserters and other clandestine entrants who by-pass immigration checks;

- persons who obtain visas and/or entry permits by false representations, fraudulent or forged documentation and by other means of deception;
- previous deportees and people with serious criminal records overseas who have concealed or failed to disclose these facts (although such people are not automatically banned from Australia, a special type of entry permit may be necessary);
- persons whose temporary entry permits were cancelled because they breached entry conditions (eg visitors found to be working illegally) and who have refused or failed to leave.

...

ILLEGAL IMMIGRANTS CONVICTED OF CRIME

Foreign visitors who are convicted and sentenced for crime in Australia, particularly those who have used a visit to Australia as an opportunity for crime, must expect to face cancellation of their Temporary Entry Permits. Foreign nationals who use the opportunity of a visit to carry illicit drugs into Australia should note that the Australian Government regards this as a serious crime. The Australian community would expect cancellation of their entry permits and enforced removal from Australia at the expiration of any prison sentence.

The interests and rights of the Australian community will be paramount in such cases. Any deportation ordered in these circumstances is not a further punishment, but an action to remove a foreign offender from Australia.

...

CONSULAR AND LEGAL ASSISTANCE

Any person in immigration custody may consult with a legal adviser or a consular representative. The Department of Immigration and Ethnic Affairs will take all reasonable steps to make the necessary arrangements when a detainee so requests. Otherwise, as far as possible, the privacy of detainees is preserved. For example, consular representatives of foreign Governments and relatives or friends of detainees are not ordinarily notified that one of their nationals has been detained unless the detainee specifically requests such notification.

In some cases where the detainees do not so wish, consultation with officials of the foreign government about travel documents or other administrative matters may be unavoidable.

Individuals—aliens—basis of Australian immigration policy

On 10 April 1986 the Minister for Immigration and Ethnic Affairs, Mr Hurford, said in the course of a statement in Parliament on immigration policy (HR Deb 1986, 1971):

> The Government reaffirms its commitment to immigration as a positive, needs-based, economically desirable and socially advantageous instrument of economic, population and social policy. It reaffirms Australia's sovereignty by maintaining non-discriminatory, but selective, universal selection principles. I reiterate that the Australian Government alone decides and will continue to decide who can enter and stay in Australia. It affirms its vision for the future, one of managed, gradual expansion of the migration program. It wants a better society for all Australians and sees

immigration, properly controlled, as a powerful weapon in achieving that objective.

On 1 April 1986 the Minister for Immigration and Ethnic Affairs, Mr Hurford, issued a statement denying that there was to be any amnesty for illegal immigrants. Part of the statement read (Comm Rec 1986, 465):

> Mr Hurford said this had been the message firmly repeated throughout 1985. It had the full support of the Opposition, which had introduced legislation in 1980 to ensure that parliamentary approval would be required for any amnesty.
>
> Mr Hurford said people who were in Australia illegally should board a plane or a ship and go home. If they did not come forward and were apprehended as a result of the Department's enforcement activities, they must expect to face the consequences of their own actions. This could include being disqualified from re-entering Australia for up to five years.

Individuals—human rights—deportation of aliens—relevance of international instruments in the deportation decision

In the case of *Kioa v West* (1985) 62 ALR 321: 159 CLR 550, decided by the High Court of Australia on 18 December 1985, a majority of the Court (Gibbs CJ, Wilson and Brennan JJ; Mason and Deane JJ did not consider the point) held that there was no legal obligation on the delegate of the Minister specifically to take into account the provisions of the International Covenant on Civil and Political Rights and the Declaration on the Rights of the Child in reaching a decision on the deportation of two aliens who were prohibited immigrants and yet who had a child, born in Australia, who was an Australian citizen. Gibbs CJ said (at 336; 570–571):

> The argument that the delegate should in some way have considered the provisions of the International Covenant on Civil and Political Rights and of the Declaration of the Rights of the Child is based on the fact that the preamble to the Human Rights Commission Act recites that "it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with the provisions of the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child...and other international instruments relating to human rights and freedoms". It is trite to say that treaties do not have the force of law unless they are given that effect by statute: *Simsek v Minister for Immigration and Ethnic Affairs* (1982) 148 CLR 636; 40 ALR 61. The words of the preamble to the Human Rights Commission Act did not have the effect of making the Covenant and the Declaration part of Australian municipal law. There was no legal obligation on the Minister's delegate to ensure that his decision conformed with the Covenant or the Declaration. However, this argument is quite academic, for in any case the only relevant provisions of the Covenant and the Declaration are those which declare that the family is entitled to protection by society and the State, and that this protection should inure for the benefit of a child who is a member of the family. To deport the parents of a child with the natural expectation that the child will accompany them is not in any way depriving the family or the child of the protection to which the Covenant refers. Nothing that the

delegate did failed to conform with the provisions of the Covenant or those of the Declaration.

Wilson J said (at 362; 604): "Even if the Declaration had the force of municipal law in Australia, which it does not, no conflict has been shown between its provisions and the decision. I agree with what is said on this subject by Northrop and Wilcox JJ in the decision under appeal." In the Federal Court of Australia, Northrop and Wilcox JJ had said (*Kioa v Minister for Immigration and Ethnic Affairs* (1984) 55 ALR 669 at 675 et seq) in relation to the Human Rights Act 1981:

> As its name suggests the purpose of this enactment was to constitute a body corporate, to be known as the Human Rights Commission. The Commission has functions, inter alia, to examine enactments and proposed enactments for the purpose of ascertaining whether they are, or would be, inconsistent with or contrary to any human rights and to report to the Minister the results of any such examination; to inquire into any Act or practice that may be inconsistent with or contrary to any human right and, where appropriate, to endeavour to effect a settlement of the matters that gave rise to the inquiry and, where it is of the opinion that the Act or practice is inconsistent with or contrary to any human right and the matter has not been settled, to report to the Minister the results of its inquiry; to report to the Minister as to the laws which should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights; upon request by the Minister to report as to the action that needs to be taken by Australia in order to comply with the provisions of relevant international instruments, including the International Covenant on Civil and Political Rights, the Declaration on the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons; to promote an understanding and acceptance, and the public discussion, of human rights in Australia and to undertake research and educational programmes on behalf of the Commonwealth for the purpose of promoting human rights.
>
> The Human Rights Commission Act does not, in terms, impose any obligation on Commonwealth officers as to their future conduct. It makes no express reference to the Migration Act or the making of decisions thereunder. However, counsel for the appellants draw attention to the Preamble and Schedules to the Act in support of their submission that the Commonwealth Parliament has, by the enactment of this legislation, adopted a policy which the delegate was bound but failed, to take into account when making the decisions of 6 October 1983. The Preamble, they say, expresses a policy of the Parliament that all persons administering Commonwealth laws should so administer them as to conform with the agreements included in the Schedules; thus adding to the matters relevant for consideration in this case. The position, they claim, is analogous to that arising in relation to s 12 deportations, in which the ministerial policy on the deportation of non-citizens, who have been convicted of criminal offences, [is] a relevant matter for consideration: see *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 588–591.

The Preamble reads: "Whereas it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with the provisions of the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration on the Rights of Disabled Persons and other international instruments relating to human rights and freedoms".

The term "human rights" is defined in s 3(1) as meaning: "the rights and freedoms recognized in the Covenant, declared by the Declarations or recognized or declared by any relevant international instrument".

Section 3(2) provides that in this definition: "The reference to the rights and freedoms recognized in the Covenant shall be construed as a reference to the rights and freedoms recognized in the covenant as it applies to Australia".

Schedule 1 to the Act contains the Covenant. Counsel referred to Article 23:1: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State" and Article 24:1: "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State".

After referring to the principles contained in Schedule 2, Northrop and Wilcox JJ continued (at 676 et seq):

Counsel argue that notwithstanding its limited substantive content, the Act disclosed a legislative intention that both the laws of the Commonwealth and the conduct of persons exercising functions under those laws should conform with the relevant provisions of the Covenant and the Declarations. The Covenant emphasized the importance of the family unit and the entitlement of every child to appropriate protection on the part, inter alia, of the State. The Declaration on the Rights of the Child included reference to his entitlement to special protection in his development (Principle 2), his entitlement to social security including health care (Principle 4), his need for love and understanding, growing up preferably in the care and under the responsibility of his parents (Principle 6) and entitlement of the child to education (Principle 7). They particularly emphasize the words in Principle 6, "a child of tender years shall not, save in exceptional circumstances, be separated from his mother".

We do not doubt that it was incumbent upon the delegate, in making his decisions, to give proper consideration to such material as was before him as related to the effect upon other members of their family of the denial of permits to, or the deportation of, Mr and Mrs Kioa. There is abundant authority for that proposition (see, for example, *Pochi v Minister for Immigration and Ethnic Affairs* (1982) 43 ALR 261 at 270–2; *Tabag v Minister for Immigration and Ethnic Affairs* (1982) 45 ALR 705 at 708–710, 717, 731; *Minister for Immigration and Ethnic Affairs v Tagle* (1983) 48 ALR 566 at 571–5 and the earlier cases cited therein). Counsel for the respondent Minister do not suggest otherwise. Their response is to assert that there is nothing to indicate that the delegate overlooked these considerations, that, on the contrary, he was clearly informed by the

departmental submissions that Elvina was an Australian citizen and that it was expected by the Department that she would leave Australia with her parents in the event of a deportation order being made. They say that the delegate must be taken as having understood that the consequence of a decision that Mr and Mrs Kioa, or either of them, should be deported would be to create the dilemma of disadvantage referred to by the appellants. We accept that submission. The reasons given by the delegate (para 23) indicate that in making his findings he had before him not only the departmental submission referring to Elvina's status but also the notes of the interview with Mr Kioa on 27 July 1983 and the letter of Mr Gardner to the Minister of 26 July 1983. In both the notes of interview and the letter the advantages to the family of remaining in Australia are set out and, as mentioned, the letter from Mr Gardner specifically drew attention to the special issue which arises where a child of a prospective deportee is an Australian citizen. In his reasons the delegate made specific mention of the fact that Elvina was an Australian citizen (para 4). He said (para 30) that he had considered the circumstances of the case of Mr and Mrs Kioa and, in particular, the matters stated by Mr Kioa in his interview. There is no reason for us to conclude otherwise. It is inconceivable that the delegate failed to appreciate that the effect of a deportation order against the parents would be that, in all probability, Elvina would be taken away from the country of which she was a citizen and deprived, at least during her childhood years, of such advantages as go with being an Australian citizen in Australia. It is equally unlikely that the delegate failed to appreciate that the only alternative to that fate would be the separation of the child from the parents upon whom she was dependent.

In *Smith v Minister for Immigration and Ethnic Affairs* (14 March 1984, unreported) Morling J dealt with the case of the deportation of two United States citizens, the parents of a baby girl born in Australia. In that case the recommendation to the delegate referred to the fact of the child's birth in Australia, but it failed to state that she was an Australian citizen or to spell out the consequences for her of the deportation of her parents. Morling J proceeded on the basis that the delegate must have realized both the status of the child and the problems as to her future welfare. That approach was approved on appeal to a Full Court: see *Smith v Minister for Immigration and Ethnic Affairs* (1984) 54 ALR 551. Lockhart J, with whom the other members of the court (Bowen CJ and Sheppard J) agreed, referred (at p 554) to the necessity to study decisions of government officers "carefully but sensibly, and not zealously in the pursuit of error". For us to attribute to the delegate, a senior officer of the Department, a failure to appreciate the disadvantageous dilemma which would be faced by Elvina if her parents were deported would be to depart from his precept.

The relevance to the making of a deportation order of the Human Rights Commission Act has been considered in two cases in this court. In *Tabag*, counsel for the appellant referred to the Human Rights Commission Act and the Covenant in support of an argument that family disintegration is such an evil that it must prevail to prevent deportation in all but the worst

of cases. Woodward J (45 ALR at p 710) after referring to the relevant provisions of the Covenant commented:

"Such provisions would act as a reminder, if one were needed, of the importance of the family and of the protection of children in our society.

However, I do not believe that such reminders are needed. Of the judicial statements on these matters referred to above, that of Lockhart J in *Nevistic's* case will suffice to illustrate my point. His Honour (34 ALR 639 at 652) said: 'One matter that caused special concern was whether the Tribunal sufficiently recognized that the effect of the deportation order would be that four young Australian children must either leave Australian soil and live in Yugoslavia—a land with a culture and language unknown to them—or remain here with their mother but without their father. However, I am not satisfied that the Tribunal failed to take this important consideration into account.' I take this to mean that, in the opinion of Lockhart J the Tribunal in that case had both taken the consideration into account and recognized its importance."

Jenkinson J (at p 732) commented that the material before the court did not justify a conclusion that the Tribunal failed to have regard to the Act or to the Covenant and that nothing in the proceedings before the Tribunal or in its decision or its reasons for the decision was in contravention of any provisions of the Act or of the Covenant. His Honour's approach was that, if the Covenant were relevant (a matter not decided) it was enough to check whether the course taken by the delegate was inconsistent with it; the delegate was under no obligation to make any express reference to the Covenant.

In *Sezdirmezoglu v Acting Minister for Immigration and Ethnic Affairs (No 2)* (1983) 51 ALR 575, a submission was made on behalf of the applicant to the effect that, Australia having acceded to the Covenant, the provisions of the Covenant were binding on the acting Minister so as to restrain him from making an order for deportation which would invade, or fail to protect, the family situation. Smithers J did not exclude the possibility that the Minister should take into account the principles expressed in the international agreements referred to in the Human Rights Commission Act and he did refer to the recital in the Preamble to that Act but (at p 577) he said:

"But of course such a recital stops short of enacting that the provisions of the Covenant are part of the law of Australia, and in fact those provisions are not part of the law of Australia.

The Migration Act 1958 is law in Australia on the subject of immigration. In that Act Parliament lays down, inter alia, the conditions according to which persons may be admitted to Australia and may be deported therefrom. It is to those provisions that regard must be had."

Turning to the facts of the case before him, Smithers J noted that the Minister had "in an indirect way" taken into consideration the provisions of the Covenant in giving consideration to the effect of a deportation upon the de facto wife of the applicant, an Australian citizen, and their unborn child.

At p 578 Smithers J summarized his view: "To my mind it is perfectly clear that nothing in the Human Rights Commission Act 1981 or the

Covenant so far as it is called in aid in that Act, is effective to modify in any way the powers of the Minister under ss 16 and 18 of the Migration Act. The only way in which the Act is relevant is that it makes clear that it is the desire of Parliament that the conduct of the Minister in performing his duties shall conform with the provisions of the Covenant, and the fact that the Covenant refers to the entitlement of the family to be protected, but it is a right for the family to be protected in the context of the law of the country concerned and, of course, subject to those qualifications which are to be found in the covenant itself."

In *Ashby v Minister of Immigration* [1981] 1 NZLR 222 the New Zealand Court of Appeal rejected an argument that the International Covenant affected the exercise of the powers given to the Minister to issue temporary entry permits to members of the Springbok Rugby team. Cooke J commented: "It is elementary that international treaty obligations are not binding in domestic law until they have become incorporated in that way"; ie by Act of Parliament: see also *Simsek v Macphee* (1982) 40 ALR 61 at 65–66; 148 CLR 636 at 641–2; *R v Chief Immigration Officer; Ex parte Bibi* [1936] 3 All ER 843 at 847; *Kaur v Lord Advocate* [1981] SLT 322 at 329.

Even if it be correct to say, as did Scarman LJ in *Ahmad v Inner London Education Authority* [1978] 1 QB 36 at 48, that the courts may have regard to international treaty obligations not yet adopted into domestic law in interpreting statutory language and applying common law principles—though we share the puzzlement of Lord Ross in *Kaur* as to how this is logically possible—that would not assist the appellants in relation to the range of matters relevant for consideration under the Migration Act. There is not there any ambiguity to be resolved by reference to an international agreement. To make good their argument the appellants need to find a legislative adoption of the treaty provisions. In that connection it is significant that, as a result, no doubt, of a deliberate decision to that effect, the Australian Parliament, in enacting the Human Rights Commission Act, refrained from providing, in the operative provisions of the Act, that the various international agreements which were included in the Schedule to the Act should have effect as part of Australian domestic law. It would be surprising if, under those circumstances, Parliament had intended the Preamble to have the effect of altering Commonwealth domestic law so as to widen the range of matters relevant for consideration by persons making decisions under the law. The function of a preamble is to indicate the purpose of a statute. It may afford guidance as to the meaning to be attributed to an operative provision in a statute: see *Wacando v Commonwealth* (1981) 37 ALR 317 at 333; 148 CLR 1 at 23; *Powell v Kempton Park Racecourse Co* [1899] AC 143 at 185, but there must first be some question about the meaning of the operative provisions. In *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 463, Viscount Simonds said: "...the context of the preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is a compelling reason for it. And I do not propose to define that expression except negatively by saying...that it is not to be found merely in the fact that the enacting words go further than the preamble has indicated. Still less can

the preamble affect the meaning of the enacting words when its own meaning is in doubt."

The converse must also be true, that a compelling reason is not to be found merely in the fact that the enacting words go less far than the preamble has indicated.

In this case the appellants do not contend that the Preamble casts light upon ambiguous operative provisions. They concede that the operative provisions of the Human Rights Commission Act fall short of the result they need, but they contend that this omission is supplied by the width of the Preamble. We know of no authority to support that approach, which we regard as being wrong in principle. We add that, in any event, we cannot construe the Preamble, even read alone as evincing an intention to impose an immediate, general rule that administrative conduct shall conform with the provisions of the scheduled international agreements. The recital merely says that it is "desirable" that there should be conformity. Moreover, administrative conduct is referred to after, but in conjunction with, "the laws of the Commonwealth". If in truth there were laws that did not comply, then Parliament not having taken the course of enacting operative provisions to amend those laws, the desirable situation would not immediately obtain. Similarly, we think, where conduct does not, for legal reasons, confirm with the terms of the relevant agreements. The main purpose of the Act was to establish a Commission to work, on a case by case basis, on the task of bringing non-conforming laws and conduct into conformity with the agreements. It did not, through the Preamble, establish an immediate obligation to conform.

It follows that we agree with Smithers J that the enactment of the Human Rights Commission Act could not, and did not, give rise to any new legal rights or derogate from any existing legal powers. In particular, the powers of the Minister and his various delegates under ss 6, 7 and 18 of the Migration Act were left unaffected. We would differ from Smithers J only to the extent that his Honour conceded any relevance at all to the terms of the Human Rights Commission Act, as such and divorced from the general humanitarian principles to which it refers and which are relevant in their own right.

We see no basis in law for the conclusion that, by reason of the Human Rights Commission Act, the delegate was obliged specifically to turn his attention to the various rights and principles enunciated in the relevant international agreements. He did have an obligation to consider the effect of the proposed deportations on the family. That subject matter happens to be similar to that of the relevant articles and principles in the agreements referred to in the Human Rights Commission Act. As we have already said, he did consider these matters by referring to the material before him which related to the effect upon the family of a deportation of Mr and Mrs Kioa. As Woodward J observed in *Tabag*, the provisions of the Covenant (and we would add the Declaration of the [R]ights of the Child) really only "act as a reminder, if one were needed, of the importance of the family and of the protection of children in our society".

Aliens—illegal immigrants—deportation—relevance of international human rights instruments

In the Federal Court of Australia in Brisbane on 25 July 1986, Pincus J handed down his decision in *Lebanese Moslem Association and Others v Minister for Immigration and Ethnic Affairs* (1986) 67 ALR 195. In the course of his decision the judge considered the argument for the appellant that the decision-maker in a deportation had failed to take into account the provisions of the International Covenant on Civil and Political Rights set out in a Schedule to the Human Rights Commission Act. His Honour said as follows (at 204–205):

> *Human Rights Commission Act*
>
> It was submitted on the authority of Smithers J's reasons in *Sezdirmezoglu v Acting Minister for Immigration and Ethnic Affairs (No 2)* (1983) 51 ALR 575 that the decisions are vitiated for the respondent's failure to take into account various articles of the International Covenant on Civil and Political Rights. In the later case of *Kaufusi v Minister* (unreported, 30 September 1985), the same judge dealt with the problem after the decision of the Full Court in *Kioa*, but before that of the High Court. His Honour then appeared to recognise that the Full Court's decision did not leave it open to him to take into account the terms of the Human Rights Commission Act as such.
>
> It is unnecessary, however, to pursue that point because it seems to me clear enough that a majority of the High Court in *Kioa* . . . has, on this aspect, taken a view adverse to the applicants...
>
> This is not to say that the kinds of matters with which the Covenants in question deal may safely be ignored by a decision-maker. Here, the practical result of the sheikh's deportation would be likely to be that the two children born in this country would leave with their parents, failing which the family would be broken up. It could hardly be pretended that the respondent failed to notice that; it was brought home to him by a threat by the sheikh to bestow responsibility for the two children in question on the respondent. The "general humanitarian principles", to use the expression adopted by the Full Court in *Kioa's* case (1984) 55 ALR 669 at 681; 4 FCR 40 at 53, which are embodied in the relevant Covenants, were not ignored. As to the Covenants themselves, it seems clear from the *Kioa* case that the respondent was not obliged to take them, or any provision of them, specifically into account and the submission to the contrary must be rejected.

Individuals—aliens—illegal immigrants—Irian Jaya

On 17 July 1985 the Minister for Immigration and Ethnic Affairs, Mr Hurford, issued the following statement (Comm Rec 1985, 1154):

> Five Irian Jayans who arrived illegally in northern Australia would not be given permanent residence in Australia, the Minister for Immigration and Ethnic Affairs, the Hon Chris Hurford, said today.
>
> In accordance with humanitarian principles always practised by Australia, the Government had decided that any who decide not to return from where they have come and who seek refugee status or political asylum will be properly processed by us. If they prove their case, they will be recognised as

refugees temporarily in this country until arrangements are made for a third country to resettle them. Mr Hurford said:

> We shall not prejudice the situation of any person recognised as a refugee. Such persons would not be sent back to their country of origin. This policy will apply not only to Irian Jayans but also to people from any country in our immediate neighbourhood from which people could arrive so easily.
>
> There are precedents for this all around the world. In many instances countries experiencing large numbers of border crossers seeking refuge are asking the international community through the United Nations High Commissioner for Refugees (UNHCR) to help these people settle elsewhere. We have a close association with the UNHCR and will be using that office to assist us to find a suitable country for resettlement, if that is needed, just as the UNHCR calls on us for assistance to resettle so many refugees from other countries of first asylum.

Mr Hurford said that there were a number of important reasons why the Government had taken this decision. He said:

> One is the 'draw' effect. We could be deluged with people crossing the short distance in small boats to the islands and other coastline of northern Australia. The 'grapevine' is a very potent one and news travels fast.
>
> Nor does Australia want to be a front line state for political dissidence or other grievances with our friendly neighbours. Many countries try to resettle this type of political activist outside their region.
>
> This Hawke Labor Government is determined to be in control of its immigrant intake.

Individuals—citizenship—Australian citizenship—applications from residents—legislative changes to the Australian Citizenship Act

On 7 June 1984 the Minister for Immigration and Ethnic Affairs, Mr Hurford, provided the following written answer in part to a question on notice in the House of Representatives (HR Deb 1984, 3187–3188):

> (6) The general situation is that permanent residents of Australia can apply for Australian citizenship after two and half years residence in Australia. Citizenship cannot however be granted until three years residence has been completed.
>
> The following are exceptions to the present three years residence requirement:
>
> The husband, wife, widow or widower of an Australian citizen may apply for citizenship at any time after coming to Australia to live permanently.
>
> Married couples who have come to Australia at different times and, as a matter of policy, be allowed to apply for citizenship together provided both are settlers and one of them has lived here for two and a half years.
>
> In special cases, the Minister may approve the granting of citizenship to a person under 21 who has not completed three years' residence in Australia. Anyone under 18 requires the consent of a responsible parent.

Children under 16 who are living in Australia normally become citizens when their parents do. Their names go on the certificate issued to one of the parents. If required separate documentary evidence of their citizenship can be arranged by the regional director of the Department of Immigration and Ethnic Affairs in their State.

Permanent residents who are serving, or have served, in Australia's Permanent Armed Forces may be granted citizenship after three months full time service.

(7) Australian citizenship law is based on the precept that dual citizenship is undesirable. For this reason, applicants for Australian citizenship are required to take an oath of allegiance or make an affirmation of allegiance and in so doing renounce all other allegiances. However, some countries do not recognise such renunciations and Australian citizens from these countries may have dual nationality.

(8) In the event of hostilities between Australia and another country, a dual national of both countries could legally owe full allegiance to both countries. Depending on the person's place of residence at the relevant time, a dual national would have one of his other nationalities dominant.

On 11 October 1984 the Minister for Immigration and Ethnic Affairs, Mr Hurford, issued the following statement (Comm Rec 1984, 2061–2062):

The Minister for Immigration and Ethnic Affairs, the Hon Stewart West, today welcomed passage of significant amendments to the citizenship laws through both Houses of Parliament. Mr West said that the amendments are the most significant changes to the Australian Citizenship Act since it came into force in 1949. He said:

> The Government has decided not to oppose an amendment by the Opposition which reintroduced reference to the Queen in the oath and affirmation of allegiance, as we are not prepared to sacrifice major reforms for the sake of one issue.
>
> The significant amendments in the Bill include:

- the qualifying period for citizenship by grant is reduced from three years to two years
- relaxation of the continuous residence requirement from twelve months immediately preceding the application to twelve months residence in the previous two years
- provision for an application for a grant of citizenship to be deferred for periods of up to twelve months, to enable the applicant to meet one or more requirements
- amendment of the requirement that an applicant for citizenship demonstrate an adequate knowledge of the English language. The requirement will now be that an applicant demonstrate a 'basic' knowledge of English, and applicants over fifty years of age will be exempted altogether
- consistent with the Government's reform of the Migration Act, repeal of the definition of British subject status
- right of determination appeal to the Administrative Appeals Tribunal on a number of grounds, for denial or deprivation of citizenship

- the removal of discrimination on the basis of sex or marital status; for example, a mother will have equal rights with a father in determining their child's citizenship
- automatic acquisition of citizenship by adopted children.

Mr West said:

> The amended Australian Citizenship Act will ensure equal treatment of all Australian citizens, regardless of ethnic origin. The reforms contained in the Act are a demonstration of the Government's commitment to end all forms of discrimination in legislation, and provide equality of opportunity to all people living in Australia.

Individuals—citizenship—changes to Australia's citizenship laws

On 19 February 1986 the Minister for Immigration and Ethnic Affairs, Mr Hurford, introduced the Australian Citizenship Amendment Bill 1986 to the House of Representatives, and explained the purpose of the Bill as follows (HR Deb 1986, 868–869):

> The Australian Citizenship Act provides the basis for the acquisition of Australian citizenship by birth in Australia, by descent through birth of a child to an Australian parent living overseas and by grant to persons who have come to Australia to settle. It also provides the basis for the loss, renunciation, deprivation and resumption of Australian citizenship. Amendment of the Act in 1984 gave effect to the Government's commitment to ensure that the Act does not discriminate between persons on the basis of their sex, marital status and present or previous nationality and to provide for review by the Administrative Appeals Tribunal of decisions made under the Act. These amendments came into effect on 22 November 1984.
>
> Australia is one of the few remaining countries which confers citizenship automatically upon a child born here, unless one of its parents was at the time of its birth a diplomat or a consular representative of a foreign country or an enemy alien. This generosity in our law can be exploited by visitors and illegal immigrants who have children born here in order to seek to achieve residence in Australia. It has become the source of increasing litigation, complaints to the Human Rights Commission and appeals to the media from people trying to avoid leaving Australia.
>
> The Human Rights Commission, in its reports numbered 10 and 15 on the Au Yueng and Yilmaz cases, commented that there was nothing in the International Covenant on Civil and Political Rights or in the Declaration of the Rights of the Child which required the children of illegal immigrants to become Australian citizens merely because they were born in Australia. The Commission further commented that it might be fairer in the long run to change the rule that birth in Australia automatically results in Australian citizenship for the children of illegal immigrants. It recommended that if any change were made to the law it should be such as to ensure that such a child, if it would otherwise be stateless, had Australian citizenship. The Government has accepted this approach.
>
> The Government will maintain the provision that children born to an Australian citizen or a permanent resident parent automatically acquires

> Australian citizenship at birth. It agrees that the children of illegal immigrants, visitors and others temporarily in Australia should not automatically become Australian citizens. However, the Government will ensure that no child born in Australia becomes stateless. Clause 4 of the Australian Citizenship Amendment Bill will restrict automatic citizenship to a child born in Australia who has one parent who is either an Australian citizen or a permanent resident at the time of the child's birth. Clause 8 of the Bill will ensure that a child born in Australia, who is not eligible to acquire Australian citizenship by birth, is an Australian citizen provided the child is not and never had been eligible to acquire the nationality or citizenship of another country. This will fulfil Australia's international obligations to prevent statelessness. A right to appeal to the Administrative Appeals Tribunal will be provided under clause 9 against decisions that the person had reasonable prospects of acquiring citizenship of another country.
>
> I propose to introduce an amendment to the Migration Act in the near future which will have the effect of conferring upon a new born non-citizen child the same immigration status as one of its parents. If their immigration status differs, the child will be given the status of the one with the longer unexpired period of permitted stay in Australia. The second significant change proposed by the Bill relates to the resumption of Australian citizenship under the provisions of section 23AA of the Act. When the Act was last amended it empowered the Minister to approve resumption of Australian citizenship in certain circumstances. Former Australians who lost their citizenship after 22 November 1984 by acquiring the citizenship of another country under some form of compulsion, economic necessity or without realising the consequences of their actions were able to have it restored.

The amendment to the Migration Act 1958 was introduced by the Minister for Immigration and Ethnic Affairs, Mr Hurford, on 16 April 1986, and part of the second reading speech was as follows (HR Deb 1986, 2418):

> The Bill will insert a new section 6AAA into the Migration Act which will determine the status of children born in Australia who, once the Australian Citizenship Amendment Act 1986 commences, will not be Australian citizens because neither of their parents is an Australian citizen or permanent resident. Under the amendment these children will be deemed to be included in the entry permit or to have the same immigration status as their parents or, if the entry permits or status of the parents differs, the children will be deemed to be included in the entry permit of the parent who is authorised to stay here the longest.

Individuals—citizenship—dual nationals —problems for dual nationals abroad

On 2 April 1984 the Minister for Foreign Affairs, Mr Hayden, said in answer to a question without notice in the House of Representatives (HR Deb 1984, 1170):

> There have been problems in the past in respect of some countries which have refused to recognise the naturalisation processes which former citizens of their countries have undergone in a new host residential country such as

Australia. That certainly was the experience in the case of Greece, but I believe that that has been rectified. It was the experience in the case of at least one Eastern bloc country—I will have to check to make sure I am right in the one I name—but that too has been checked. I think the only advice I can give people is to check on these facts before they depart this country. When they return to their former country, if the former country makes a claim as covering their citizenship certain liabilities are established and we are not in a position adequately to look after their interests. We do the best we can but it does present serious problems.

Individuals—citizenship—South African blacks—legislative changes

On 12 September the Minister representing the Minister for Foreign Affairs in the Senate, Senator Evans, said in part in answer to a question without notice (Sen Deb 1985, 506–507):

It is the case, according to reports to hand, that the South African President has announced, first, that blacks who lost their citizenship because of the independence of Bophuthatswana, Transkei, Venda and Ciskei and who are resident in South Africa will have their South African citizenship restored as soon as necessary legislative steps have been completed and, secondly, that the South African Government is prepared to negotiate with the four so-called independent homelands about the restoration of citizenship of people living within their borders with some form of dual citizenship being expected to be negotiated. According to the announcement South Africa is prepared to offer South African citizenship as a second citizenship to those homeland residents who wish to take it. The third element of the announcement is that citizenship, as well as ethnic identification, would in future be expressly stated on uniform identity documents to be issued to all races.

The Government's initial reaction to all this is that the South African Government has taken a significant step towards providing common citizenship to all South Africans, and this is to be welcomed. We do note, however, that citizenship will not in the case of blacks carry any political rights whatsoever. That means, of course, that when measured against what really is necessary to confer full civil and political rights upon black South Africans, Senator Jones's description of this measure as being cosmetic may well have some appropriate application. The economic sanctions announced by the Government on 19 August are designed to underscore our position that the South African Government ought to introduce universal adult suffrage. We hope that fundamental reform towards this objective could be made in negotiations with representatives of the black community and lead to peaceful change in that country. We also continue to hope, as Mr Hayden said yesterday, that bipartisan support will be maintained for the very strong position that Australia has adopted over the last decade in relation to South Africa.

Individuals—citizenship—registration of citizenship by descent—commencement of new legislation

On 28 November 1986 the Minister for Immigration and Ethnic Affairs, Mr Hurford, issued the following statement in part (Comm Rec 1986, 2212):

> Changes to the Australian Citizenship Act relating to the acquisition of citizenship by descent are now in force. The Minister for Immigration and Ethnic Affairs, the Hon Chris Hurford, said the changes have been introduced on 22 November at the end of a two-year transitional period which began when amendments to the Act were approved by Parliament in 1984.
>
> Prior to 22 November, those born overseas after 26 January 1949 to a parent who was an Australian citizen at the time of the birth were able to be registered (either overseas or in Australia) as an Australian citizen by descent. The only people who can now acquire citizenship in this way are those under eighteen.
>
> In addition, people are not now able to acquire Australian citizenship by descent from a parent who acquired citizenship in this way, unless the parent had lived in Australia legally for a total of two years at any time. Mr Hurford said the changes had been introduced because an increasing number of people without any Australian connections were becoming citizens. They then had the right to unrestricted entry to Australia and to all the other privileges of citizenship.
>
> In the opinion of his department, Mr Hurford said, the number of people affected by the implementation of the changes would be small, particularly in view of the two-year transitional period. Only those people who had not maintained any ties with Australia for more than eighteen years would be affected.
>
> Those who had not been registered and who were over eighteen could apply for citizenship by grant in their own right.

Individuals—aliens—position in Australia—citizenship

Following are extracts from Australia's Fifth periodic report to the Committee on the Elimination of Discrimination dated 5 July 1985 (CERD/C/115/Add 3):

> 144. The Australian Government has also achieved considerable progress in its programme of legal reform aimed at putting all migrants on an equal political footing. The Commonwealth Electoral Act 1918 has been amended to make Australian citizenship rather than British subject status the nationality requirement for enrolment to vote and to nominate for Parliament. The amendment came into force on 26 January 1984. The Public Service Reform Act 1984 which came into force on 1 November 1984, changed the prerequisite for permanent appointment to the Australian Public Service from British subject status to Australian citizenship. The Australian Citizenship Amendment Act 1984, passed in October 1984, will remove on a date to be proclaimed the concept of British subject status from the Australian Citizenship Act. Before proclamation, it is intended that all reference to the status of British subject be removed from Commonwealth and State legislation. The Government has amended the following Commonwealth Acts accordingly:
>
> Crimes (Overseas) Act 1964
>
> Marriage Act 1961

Norfolk Island Act 1979
Northern Territory (Self-Government) Act 1978
Christmas Island Act 1958
Cocos (Keeling) Islands Act 1955
Australian Institute of Marine Science Act 1972
Patents Act 1952
Defence Act 1903

The Government has identified the Navigation Act 1912 as still requiring amendment.

145. In addition, the Aliens Act 1947, which contained discriminatory provisions against non-British subjects entering Australia, was repealed by the Aliens Act Repeal Act 1984 of 18 November 1984. Amendments to the Migration Act 1958, which came into force in April 1984, removed the distinction between aliens and immigrants in relation to entry and deportation controls and put all non-Australian citizens on the same footing in relation to those controls.

146. The Citizenship Act sets out the requirements people have to meet to become citizens. The requirements are the same for everyone regardless of their sex, marital status or previous nationality. Following amendments to the Act in 1984, applicants must:

— have been permanent residents for at least 2 of the past 5 years, including 12 months in the past 2 years;
— understand the significance of acquiring Australian citizenship, including the responsibilities and privileges of being a citizen;
— be of good character;
— have a basic knowledge of English;
— intend to reside, or continue to reside in Australia, or to maintain a close and continuing association with Australia.

147. Exemptions from the English language requirement and the knowledge of what it means to become a citizen are available to spouses of Australian citizens, people with severe hearing, speech or sight impairments, and people over 50 years of age (60 years for knowledge of the responsibilities and privileges of citizenship). Minors (under 18 years of age) may be exempted by the Minister for Immigration and Ethnic Affairs from all but the good character requirement.

148. There were substantial amendments to the Citizenship Act in 1984. Many of the amendments were technical in nature. The main effect of the amendments included:

— removing previous provisions which discriminated between persons on the basis of their sex, marital status or nationality (it has been agreed that British subject status is to be repealed at a date to be proclaimed);
— reducing the residential and English language requirements for persons applying to be granted citizenship;
— providing for decisions under the Act to deny or deprive persons of citizenship to be reviewed on appeal by the Administrative Appeals Tribunal;

— providing for persons who lose Australian citizenship by acquiring another citizenship to have citizenship restored by the Minister if the other citizenship was obtained unwittingly or under duress or hardship.

149. The Australian Government encourages all migrants to apply for Australian citizenship when they have satisfied the eligibility requirements. Leaflets and publicity explaining the responsibilities and privileges of citizenship are widely distributed. There is however no compulsion on people to become citizens. The Government's view is that the decision to apply for citizenship is a personal one which should only be made when there is full acceptance of the duties and obligations involved.

150. Migrants who have not become Australian citizens have Permanent Resident status under the Migration Act. The 1981 census showed that over 1.1 million residentially eligible persons had not applied for Australian citizenship. Almost 800,000 of these were citizens of other Commonwealth countries.

Individuals—discrimination—sex and marital status—Australian legislation

On 28 February 1984 the Special Minister for State, Mr Young, introduced the Sex Discrimination Bill 1983 and explained the purpose of the Bill: see HR Deb 1984, 66–69.

Individuals—human rights—discrimination—sex discrimination—whether a man qualifies for payment of a "widow's" pension under the Social Security Act 1947 (Commonwealth)—International Covenant on Civil and Political Rights, Article 26—right to equality before the law without discrimination—Australia's reservation to Article 26—International Covenant on Economic, Social and Cultural Rights, Article 9—the right of everyone to social security—consideration by the Administrative Appeals Tribunal

In *Re Harley and the Director-General of Social Security* (6 Administrative Law Decisions N295), decided by the Administrative Appeals Tribunal in Melbourne on 5 October 1984, the Tribunal affirmed a decision by the Director-General not to grant a widow's pension to a man who had separated from his wife. In the course of its decision, the Tribunal took the view that the exclusion of men from eligibility for a widow's pension could be a breach of Article 26 of the International Covenant on Civil and Political Rights and of Article 9 of the International Covenant on Economic, Social and Cultural Rights. An extract from the reasons for decision of the Tribunal is as follows (6 ALD N297–N299):

12 The Tribunal has also considered the legislation concerned in the light of Australia's ratification of various international covenants The first of these covenants is the International Covenant on Civil and Political Rights[1] which was ratified by Australia and came into force on 13 November 1980. Article 26 of that covenant relates specifically to discrimination and states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law

1 999 UNTS 171.

shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

When Australia ratified this covenant it did so with certain reservations which included Art 26. The reservation referred to is contained in (Australian) Treaty Series 1980, No 23, and states as follows:

Discrimination and Distinction

The provisions of Articles 2(1) and 24(1), 25 and 26 relating to discrimination and distinction between persons shall be without prejudice to laws designed to achieve for the members of some class or classes of persons equal enjoyment of the rights defined in the Covenant. Australia accepts Article 26 on the basis that the object of the provision is to confirm the right of each person to equal treatment in the application of the law.

13 Further explanation of this reservation is contained in the Report to the Human Rights Committee of the United Nations pursuant to Art 40 of the Covenant, made in November 1981.[2] In relation to the Article the report states:

The requirement of Article 26, that all persons are to be equal before the law and entitled without discrimination to equal protection of the law, was extensively considered by Commonwealth and State Ministers prior to ratification of the Covenant. The question of concern was how precisely 'equal before the law' and 'equal protection of the law' are to be interpreted. It was noted that during the lengthy and detailed debates in the Third Committee of the United Nations General Assembly on Article 26, the same issue was considered—whether the purpose of the Article was to ensure equality before the law or was designed as a form of blanket prohibition against any form of discrimination. It was concluded that the words 'in this respect' at the opening of the second sentence qualify 'equality before the law' and 'equal protection of the law' and do not require a separate and comprehensive prohibition of any form of discrimination in legislation.

A paragraph was lodged with Australia's instrument of ratification to indicate its interpretation of the meaning of the two sentences in Article 26. In particular, the paragraph was designed to ensure that legislation embodying programs of action designed to assist less advantaged groups ('affirmative action') could not be regarded as inconsistent with Australia's obligations under the Covenant.

Discrimination as defined by the Article is understood to occur when considerations based on factors such as 'race, colour, sex...or other status' are brought into account, so that any particular law does not apply equally to persons in the class to which the law applies. The prohibition against discrimination is not, however, considered to preclude the law making distinctions (provided, of course, that the law is compatible with other Articles of the Covenant). Indeed, it is the very purpose of the law to define precisely the persons to which it applies. Thus, it is not necessarily

2 UN Doc No CCPR/C/14/Add 1 (11 December 1981).

a discrimination offensive to Article 26 to make a law with respect to Aboriginals (excluding non-aboriginals), or taxpayers (excluding non-taxpayers), or aged persons (excluding young people), or voters (excluding non-voters). A law is considered to be discriminatory for the purposes of Article 26 only if, in its application to a defined group, inappropriate criteria are used to discriminate against those to whom the law applies.

All Australian jurisdictions conform with the requirements of the Covenant in respect of equal protection of the law. If a court in any jurisdiction treated an accused person 'differently', because of his political opinion, for example, this would constitute grounds for appeal. The same position applies in relation to the requirement of the Covenant that 'the law' is to prohibit discrimination and guarantee effective protection against discrimination. While there is no constitutional or general legislative provision in any of the jurisdictions, discrimination on grounds mentioned in the Covenant, or any other grounds irrelevant to administration of the law, would be legally wrong and a remedy lies in the sense that the discrimination would vitiate a decision.

As Australia has ratified the Covenant with a reservation in relation to Art 26, it cannot be bound by that Article.[3]

14 However, Art 2.2 of the International Covenant on Economic, Social and Cultural Rights,[4] which was ratified by Australia on 10 December 1975, and came into force for Australia on 10 March 1976,[5] states:

The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

One of the operative Articles is Art 9 which states:

The State Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

As the Australian Government ratified this covenant with no reservations it is bound thereby.

15 In a report prepared by the Australian Government on the implementation of this Covenant (dated 17 March 1978)[6] reference was made to widow's pension in the following terms (at p 66):

This payment is made to assist women in particular necessitous circumstances. A broadly equivalent payment, the supporting parent's benefit, exists inter alia to assist men in comparable difficulties.

It would seem that in this statement an inconsistency becomes apparent. When the last child of a supporting father either attains the age 16 years or finishes full-time education, the father is no longer entitled to supporting parent's benefit under Pt IVAAA of the Act, but he is 'in comparable difficulties' to those of a woman in the same position. What benefit is he

3 Australia's reservation or declaration was withdrawn on 6 December 1984.
4 993 UNTS 3.
5 Australian Treaty Series 1976 No 5.
6 UN Doc No E/1978/8/Add 15.

entitled to? Not the widow's pension, as he cannot, it would seem, bring himself within the definition of widow. The age pension would only be payable if the man concerned had reached the age of 65 (s 21). This leaves the unemployment benefit of (at present) $78.60 per week. However, a woman in similar circumstances would qualify for the widow's pension of (at present) $89.40 per week *plus* fringe benefits, which include travel concessions, council and water rate reductions, reduced telephone rental and free pharmaceuticals. So the Social Security Act 1947 would appear to be discriminating between men and women in similar circumstances by attempting to assist a 'less advantaged group' (see para 13 above), namely, women, who had been left in 'necessitous circumstances', but ignoring the possibility that men might find themselves in similar circumstances.

16 In this context, we would note the amendment of Pt IVAAA of the Act which was effected in 1977. It was then recognized by the Commonwealth government that there were a growing number of fathers who were attempting to raise children on their own and because of the definition of 'supporting mother' contained in the Act were not able to receive a 'supporting mother's benefit' provided by the Act. Accordingly, the Act was amended to provide for 'supporting parent's benefit', available to supporting fathers as well as to supporting mothers. This amendment embodied a recognition by Parliament that circumstances had changed and that the legislation required amendment to accord with those changes. It was submitted by Mr Cavanough that this is so in the present case, when he said:

> We say there are these days policy reasons why perhaps a benefit of this sort ought to be extended to a man in Mr Harley's position. He has set out his story. He says that he, like many others, finds himself now having spent some six years full-time and many years before that part-time looking after the children unassisted, that that has had an effect on his ability to obtain a remunerative employment which would support him at this stage.

17 The Tribunal also notes the extension of the definition of 'widow' in s 59 by the inclusion of sub-s (5), effected by s 20 of the Social Security and Repatriation Legislation Amendment Act 1984 (assented to on 25 June 1984). This amendment was presumably made to overcome the unfortunate position of the applicant in *Baron v Director-General of Social Security* [(1983) 48 ALR 345; 5 ALN No 140].

18 Having said all this, we find, however, that Mr Harley is not a 'widow' as defined in sub-s 59(1) of the Act and, accordingly, s 60 cannot operate so as to allow payment of the widow's pension to him. Therefore, the Tribunal must affirm the decision under review.

19 While recognizing that the payment of this form of pension to members of one sex only reflects long-established social attitudes, the Tribunal would nonetheless note, in the light of the materials referred to in paras 11–16 above, that the time may be approaching when this policy should be reconsidered as those attitudes change with changing circumstances.

Individuals—discrimination—racial discrimination—International Convention on the Elimination of all forms of Racial Discrimination—Australian Reports to the Committee on the Elimination of Racial Discrimination

Australia's Fourth periodic report to the Committee (CERD/C/88/Add 3) was considered by the Committee on 7 and 8 August 1984 (CERD/C/SR 676-SR 677). For the full text of the speech of Australia's Deputy Permanent Representative to the United Nations in Geneva in presenting Australia's Fourth periodic report on 7 August 1984, see Department of Foreign Affairs, *Backgrounder*, No 443, 15 August 1984, Annex, 7–12.

Australia's Fifth periodic report dated 5 July 1985 (CERD/C/115/Add 3) was circulated on 2 September 1985. Following is an extract of paragraphs 18 to 29 of the report dealing with the decision of the High Court of Australia in *Gerhardy v Brown*. Extracts from the judgment are reproduced following these extracts from the Fifth periodic report:

> 18. On 28 February 1985 the Full Court of the High Court of Australia delivered judgment in the case of *Gerhardy v Brown* in which the Racial Discrimination Act 1975 had been invoked to invalidate a section of the South Australian Pitjantjatjara Land Rights Act 1981 (see Australia's fourth periodic report). Important issues were raised regarding what constitutes racial discrimination under the Racial Discrimination Act 1975 (and the Convention) and regarding the meaning of special measures in Articles 1.4 and 2.2 of the Convention. The Pitjantjatjara Land Rights Act 1981 vests in members of the Pitjantjatjara, Yunkutatjara or Ngaanatjara people—formally constituted as the Anangu Pitjantjatjaraku, the traditional owners of the land—freehold title to 102,000 sq kms of South Australia. The Act provides that a person who is not a traditional owner and who enters upon the land without the written permission of the Anangu Pitjantjatjaraku commits an offence.
>
> 19. Robert John Brown was charged with the offence of illegal entry upon Anangu Pitjantjatjaraku lands. (Brown was an Aboriginal person but this was quite incidental since he was not of the Pitjantjatjara peoples and entered the land without their permission.) At the trial of the charge Brown contended, inter alia, that the offence of illegal entry created under section 19 of the Act was invalid for inconsistency with the Federal Racial Discrimination Act 1975.
>
> 20. The Supreme Court of South Australia, to which questions of law had been stated for its opinion by the Magistrate hearing the charge, held section 19 to be invalid for inconsistency with section 9 of the Racial Discrimination Act 1975. (Section 9 makes unlawful any act of "racial discrimination" having the purpose or effect of nullifying or impairing "the recognition, enjoyment or exercise, on an equal footing of any human rights or fundamental freedom [in the field covered by Article 5 of the Convention]".) An appeal against the decision was removed into the High Court of Australia at the request of the South Australian Government in order to avoid delay in having a final decision on its legislation. In the High Court, argument tended to proceed more under section 10 of the Racial Discrimination Act 1975 which was regarded as perhaps a more appropriate provision under which a

law of a State Parliament (rather than the act of a person) might be dealt with.

21. Sub-section 10(1) of the Racial Discrimination Act provides:

> If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

22. Although most members of the High Court considered the question of whether section 10 and/or section 9 of the Racial Discrimination Act 1975 were inconsistent with Section 19 of the Pitjantjatjara Land Rights Act 1981, the decision on this issue was not determinative. The Court unanimously decided that the Pitjantjatjara Land Rights Act was a special measure of the sort described in paragraph 4 of Article 1 of the Convention. By operation of section 8 of the Racial Discrimination Act 1975 such special measures are exempt from the operation of Part II of that Act (which Part includes sections 9 and 10).

23. The Court held that the vesting of land rights in Australian Aboriginals can be identified as a special and concrete measure to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

24. The grounds of the decision (but not the decision to uphold the validity of section 19 of the Pitjantjatjara Land Rights Act 1981) has been the subject of some criticism. By way of background it should be mentioned that certain arguments presented to the High Court were directed to having the validity of section 19 upheld on the basis that the exclusion of non-Pitjantjatjaras from the traditional Pitjantjatjara lands was not discriminatory. These arguments had particular application to section 9 of the Racial Discrimination Act 1975. Since the Racial Discrimination Act 1975 is based so closely on the Convention this argument also encompassed the meaning of "racial discrimination" in the Convention.

25. These arguments on the meaning of racial discrimination are taken up in varying degrees in the judgments of some of the members of the High Court.

26. The basis of the criticism emerges clearly in the passage set out below taken from the keynote addressed delivered by Professor Ian Brownlie QC (Chichele Professor of Public International Law in the University of Oxford) at a Seminar on the "Rights of Peoples" held under the auspices of the Australian National Commission for UNESCO and the Australian Society for Legal Philosophy in Sydney on 28 and 29 March 1985:

> The issues raised by *Gerhardy v Brown* are familiar to the international lawyer and the international law materials have a particular value. No doubt the problems are to be examined very much in terms of

their own time and social setting. However, the international experience indicates certain points of general technique. The experience of international tribunals and other national jurisdictions justifies the following as such points of general approach or technique.

The most important point is this. The fact that a primary criterion involves a reference to race does not make the rule discriminatory in law, provided the reference to race has an objective basis and a reasonable cause. It is only when the reference to race lacks a reasonable cause and is arbitrary that the rule concerned becomes discriminatory in the legal sense.

...

(Two paragraphs of examples omitted)

Thus the first principle to apply is to ask whether the differentiation in the legal sense has a reasonable cause and relates to a legally relevant basis for different treatment.

The second principle is that the modalities of the different treatment must not be disproportionate in effect or involve unfairness to other racial groups. This is very much a factual issue but the facts must themselves reflect some delicate nuances as to what is in local terms reasonable. In the case of the recognition of land rights, the restriction on freedom of movement, linked with such recognition, raises the issue of proportionality. In other words, even when the different treatment is not discriminatory in a legal sense, the modalities, the method, or implementation may be unreasonable and hence discriminatory at the second level.

It is in the context of the principle of proportionality that the concept of affirmative action or reverse discrimination is to be seen. When a law prescribes for affirmative action, in effect the principle of proportionality is being explicitly set aside and normally this will only be done on carefully defined terms, one of which will be a time-limit or other conditions subsequently placed on the measures concerned. Article 1, para 4 of the Convention on the Elimination of All Forms of Racial Discrimination provides a justification for 'special measures' and stipulates that such measures 'shall not be continued after the objectives for which they were taken have been achieved'.

It was this clause in the Convention, as reflected in the Act of 1975, which was the basis of the reasoning of the High Court in *Gerhardy v Brown*. The difficulty is that the High Court appears to treat the 'special measures' clause as legitimating what would otherwise be discriminatory in law, since they view the legislation without the clause as being discriminatory. This approach is a further development of the original faulty premises, which is the assumption by the High Court that the protection of traditional land rights is discriminatory in the first place.

There are many reasons, both legal and non-legal, for not conducting the inquiry in terms of the category of discrimination but rather in terms of the reasonableness of the objectives, the proportionality of the means employed, and the question whether a special measure involves unfairness as between one group and another. The term 'discrimination'

should only be applicable when the measure either favours or discriminates against a racial group without reasonable cause.

(Reproduced from Bulletin of the Australian Society of Legal Philosophy Volume 9–Number 33, June 1985—pages 111–113.)

27. The criticisms raise important questions of principle in relation to the interpretation of the Convention and, if accepted, would have implications for the practical enforcement of the Racial Discrimination Act 1975 (it would be open to any person subjected to the inquiry procedures under the Act to raise arguments as to "objective basis" and "reasonable cause" in answer to allegations of racial discrimination).

28. Perhaps the key question is whether the principles mentioned by Professor Brownlie apply not only in considering questions of discrimination when included in broadly stated provisions (for some examples see Article 1.3 of the Charter of the United Nations, Article 2 of the Universal Declaration of Human Rights, Article 2.2 of the International Covenant on Economic, Cultural and Social Rights and Article 2.1 of the International Covenant on Civil and Political Rights) but also in the Convention where there is a somewhat more elaborate definition of "racial discrimination" (including a special exclusion for special measures) and more elaborate provisions for the repression of specific instances of racial discrimination (as defined). A reading of the preparatory work on the Convention has not given any clear indication as to the answer to the question.

29. The Court also found that special measures need not be subject to a time limit. The question of terminating special measures was left to a future time when equal rights may have been achieved.

Following are extracts from *Gerhardy v Brown* (1985) 57 ALR 472; 159 CLR 70. The question of what constitutes racial discrimination was most fully dealt with in the judgment of Brennan J, who said (at 505; 114–115):

The respondent, Mr RJ Brown, was charged before a court of summary jurisdiction at Oodnadatta with the offence that he, not being a Pitjantjatjara, on or about 27 February 1982 entered on the lands described in the First Schedule to the Pitjantjatjara Land Rights Act 1981 (SA) (the Land Rights Act) without the permission of Anangu Pitjantjatjaraku, contrary to the provisions of s 19 of that Act. The special magistrate who constituted the court stated a special case raising certain questions of law for the opinion of the Supreme Court. Millhouse J, answering the first question in the case, held that s 19 of the Land Rights Act is invalid by reason of the Racial Discrimination Act 1975 (Cth): see 49 ALR 169. An appeal from that judgment was removed into this court.

Section 19(1) of the Land Rights Act prohibits under penalty entry upon the lands described in the First Schedule to that Act by a person who is not a Pitjantjatjara unless that person has the permission of Anangu Pitjantjatjaraku. "Pitjantjatjara" is defined by s 4 to mean:

> a person who is —
>
> (a) a member of the Pitjantjatjara, Yungkutatjara or Ngaanatjara people; and
>
> (b) a traditional owner of the lands, or a part of them.

All Pitjantjatjaras have unrestricted rights of access to the lands (s 18). The general prohibition upon entry by non-Pitjantjatjaras contained in s 19(1) is subject to certain exceptions (sub-ss (8), (11)) which are not presently material. Anangu Pitjantjatjaraku is a body corporate, the members of which are all Pitjantjatjaras (s 5). Permits for entry by non-Pitjantjatjaras may be issued in writing by the Executive Board of Anangu Pitjantjatjaraku or its delegate on an application in writing lodged with the Executive Board (sub-ss (3), (5), (6)). One of the functions of Anangu Pitjantjatjaraku is to negotiate with persons desiring to use, occupy or gain access to any part of the lands (s 6(1)(c)).

The area of the lands is 102,630 square kilometres, slightly more than 10 per cent of the land area of South Australia...

His Honour considered the background to the Land Rights Act, and continued (at 507–527; 117–143):

This brief conspectus of the Land Rights Act shows that it treats Pitjantjatjaras and non-Pitjantjatjaras differently. The issue of a land grant to a Pitjantjatjara corporation, Anangu Pitjantjatjaraku, is authorized; but no other person may acquire any proprietary, occupational or usufructuary interest in lands. Pitjantjatjaras have unrestricted access to the land; but, except for those classes referred to in sub-ss (8) and (11) of s 19, no other person has a right of access though he may seek and be given written permission to enter. The difference in treatment is based on race. I used the expression "based on race" to mean "based on race, colour, descent or national or ethnic origin"—the words used in s 9(1) of the Racial Discrimination Act...

The difference in the treatment of Pitjantjatjaras and non-Pitjantjatjaras invites consideration of the Racial Discrimination Act. The Racial Discrimination Act was enacted to give effect to the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention) which is set out in the Schedule to the Racial Discrimination Act. No challenge to the validity of the Racial Discrimination Act is made. At the material time, that Act was the "exhaustive and exclusive" statement of the law for Australia relating to racial discrimination: *Viskauskas v Niland* (1983) 57 ALJR 414 [; 47 ALR 32]. In that case, the Court said (at p 418 [; p 40]) that the Commonwealth Parliament could not "admit the possibility that a State law might allow exceptions to the prohibition of racial discrimination or might otherwise detract from the efficacy of the Commonwealth law". When the Commonwealth Parliament, in performance of an international treaty obligation, introduces the provisions of an international convention into Australian municipal law, it is beyond the limits of the power conferred by s 51 (xxix) of the Constitution for the Commonwealth Parliament to enact a law that operates, or that permits a State law to operate, in a manner inconsistent to any substantial extent with the operation which international law intends the Convention provisions to have.

It is necessary, therefore, to ascertain the scope for the relevant provisions of the Racial Discrimination Act and to ascertain whether those provisions have any relevant effect on the operation of the Land Rights Act...

Section 9(1) of the Racial Discrimination Act provides:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

This provision prohibits acts involving racial discrimination as defined by the Convention. The Convention definition of "racial discrimination" (Art 1(1)) is reproduced almost precisely by the words of s 9(1)...

Section 10 provides, inter alia:

> (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> (2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

Among the rights referred to in Art 5 of the Convention is the "right to freedom of movement and residence within the border of the State" (para (d)(i))...

It is...necessary to consider whether s 9(1) makes unlawful the issuing of a land grant to Anangu Pitjantjatjaraku and whether the Land Rights Act is a special measure. These questions require consideration of the meaning and operation of the relevant provisions of the Racial Discrimination Act and of the Convention to which the text of that Act refers. The introduction into a Commonwealth statute of Convention provisions drawn in general terms produces novel problems of statutory interpretation. The Act, incorporating some of the terms of the Convention and referring to others, may be thought to employ what Lord Simon of Glaisdale described in a similar context as "rubbery and elusive language" (*Ealing LBC v Race Relations Board* [1972] AC 342 at 362) for which a strict or legalistic construction would not be appropriate (per Lord Fraser of Tullybelton in *Mandla v Dowell Lee* [1983] 2 AC 548 at 565). I have elsewhere stated my opinion that the true meaning of the Act is ascertained by reference to the meaning in international law of the corresponding Convention provisions (*Koowarta v Bjelke-Petersen* (1982) 56 ALJR 625 at 666 [; 39 ALR 417 at 491–2]) and that Art 31 of the Vienna Convention on the Law of Treaties furnishes the most authoritative declaration of the emergent international rules for the interpretation of treaty provisions (*Commonwealth v Tasmania* (1983) 57 ALJR 450 at 528–9 [; 46 ALR 625 at 774]). Article 31(1) of the Vienna Convention provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The context includes, inter alia, the preambles to the treaty (Art 31(2)). The objects and purposes of the Convention appear in the preambles to the Convention, the first three of which read as follows:

> *Considering* that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,
>
> *Considering* that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,
>
> *Considering* that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination.

The States Parties to the Convention acknowledge the object of securing human dignity for all and equality between human beings through the achievement of universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race. The modern international concern with human rights and fundamental freedoms for all had its origin in the treaties signed and declarations made by certain European States after the First World War guaranteeing the protection of racial minorities (see McKean: *Equality and Discrimination under International Law* (1983), Chs I and II). The concern of that time with the rights and freedoms of minorities has been subsumed under a concern that the human rights and fundamental freedoms of all human beings be respected and observed. The securing of universal respect for and observance of human rights and fundamental freedoms for all is a broader object than the protection of minorities; the attaining of the broader object would preclude unjustified discrimination on any ground against any minority or, for that matter, any majority.

The Convention does not seek to achieve so broad an object. It condemns discrimination that is "based on race, colour, descent or national or ethnic origin"; it does not concern itself with discrimination on other grounds, for example, religious or political belief. The Convention pursues the aim of racial equality which, as Dr Egon Schwelb wrote in "Elimination of Racial Discrimination", *International and Comparative Law Quarterly*, vol 15 (1966), 996 at p 1057, "has permeated the law-making, the standard-setting and the standard-applying activities of the United Nations family of organizations since 1945". Racial equality is the opposite of racial discrimination, and full racial equality would be achieved by the elimination of all forms of racial discrimination. However, the Convention does not seek to eliminate racial discrimination in every field of life. The Convention definition of racial discrimination, substantially reproduced in s 9(1), comprehends a distinction etc based on race that "has

the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right and fundamental freedom in the political, economic, social, cultural or any other field of public life". (It may be that some of the rights listed in Art 5 of the Convention, which are apparently intended to be particular rights or freedoms of the kind mentioned in the definition, do not in truth fall within the specified fields, but that is of no relevance in this case.) The object of the Convention is thus limited in some respects. At its heart is the object of achieving universal recognition and observance of human rights and fundamental freedoms for all, and the limitation of the Convention's object to the achievement of racial equality in the fields of public life focusses attention on particular ways in which human rights and fundamental freedoms should be recognized and observed.

The recognition and observance of human rights and fundamental freedoms by a State involves a restraint on the untrammelled exercise of its sovereign powers in order to ensure that the dignity of human beings within each State is respected and that equality among human beings prevails. Clearly enough, human rights and fundamental freedoms are not to be understood as the rights and freedoms which a person has under a particular legal system; they are rights and freedoms which every legal system ought to recognize and observe. They are inalienable rights and freedoms that a human being possesses simply in virtue of his humanity, independently of any society to which he belongs, independently of the legal regime which governs it, and independently of any right or freedom that he might acquire by entering into a special relationship with another. The term connotes the rights and freedoms which must be recognized and observed, and which a person must be able to enjoy and exercise, if he is to live as he was born—"free and equal in dignity and rights", as the Universal Declaration of Human Rights proclaims. The State and other persons are bound morally, though not legally, to recognize and observe those rights and freedoms. What is their content? The Universal Declaration of Human Rights contains a general statement of human rights, and particular examples (some relating, perhaps, to private fields of life) are set out in Art 5 of the Convention. But an attempt to define human rights and fundamental freedoms exhaustively is bound to fail, for the respective religious, cultural and political systems of the world would attribute differing contents to the notions of freedom and dignity and would perceive at least some differences in the rights and freedoms that are conducive to their attainment (see Donnelly: "Human Rights and Human Dignity", *The American Political Science Review*, vol 76 (1982), 303).

In time, international law may spell out with more precision the contents of human rights and fundamental freedoms, but for the present it must be accepted that the term is imprecise in its meaning. That is not to say that it is devoid of meaning, much less to say that the provisions of the Racial Discrimination Act which contain or incorporate a reference to the term, namely, 22 8(1) and 9(1), have no effect or operation. But it is not necessary to give an exhaustive definition to human rights and fundamental freedoms in order to give meaning to those provisions.

The conception of human rights and fundamental freedoms in the Convention definition of racial discrimination describes that complex of rights and freedoms the enjoyment of which permits each member of a society equally with all other members of that society to live in full dignity, to engage freely in any public activity and to enjoy the public benefits of that society. If it appears that a racially classified group or one of its members is unable to live in the same dignity as other people who are not members of the group, or to engage in a public activity as freely as others can engage in such an activity in similar circumstances, or to enjoy the public benefits of that society to the same extent as others may do, and that the disability exists because of the racial classification, there is a prima facie nullification or impairment of human rights and fundamental freedoms. To that general proposition, there are some exceptions.

First, human rights and fundamental freedoms are not nullified or impaired where some attribute specific to the racially classified group reasonably requires differential treatment of those who are members of the group and those who are not in order to effect a legitimate object (not being the making of a racial distinction). The possession of such an attribute by itself does not affect the human rights and fundamental freedoms of an individual; it is only the selection of the attribute as the criterion of differential treatment that may nullify or impair those rights and freedoms. Thus the colour of a race does not affect the human rights and fundamental freedoms of the members of the race, but a colour bar ordinarily does. The first exception may be illustrated by an example. An artist who needs the services of a Pitjantjatjara as a model does not impair the human rights and fundamental freedoms of others when he employs a Pitjantjatjara simply because he is a Pitjantjatjara. A person of another racial group could not offer the required authenticity of appearance of a Pitjantjatjara, and could not be heard to say that his human rights and fundamental freedoms had been nullified or impaired. This is a rare exception, for there are few legitimate objects that do require differential treatment based on specific racial attributes. Differential treatment based on a specific racial attribute ordinarily constitutes racial discrimination. I need not refer again to this exception for it has no relevance to the present case and will seldom be relevant in other cases of alleged racial discrimination (though it may be of considerable relevance where other kinds of discrimination are in issue). The second exception arises when the differential treatment is manifestly based on race, but that treatment is, or is due to, a special measure to which Art 1(4) of the Convention applies. Then the racial distinction is justified by special considerations.

In the present case, the law of South Australia accords differential treatment to Pitjantjatjaras and non-Pitjantjatjaras with respect to the right of access to approximately 10 per cent of the land area of South Australia and with respect to the acquisition of proprietary, occupational and usufructuary rights in or over Crown lands. When the land grant was issued, non-Pitjantjatjaras lost any opportunity to acquire, either by alienation from the Crown or by transfer after alienation, any estate or interest in the lands (Land Rights Act, s 17). The right of non-Pitjantjatjaras to freedom of movement

over a large area of South Australia—a right of the kind set out in Art 5(1)(d)(i) of the Convention—is impaired. The impairment of the right of non-Pitjantjatjaras is not based on the ownership of the lands by Anangu Pitjantjatjaraku, but simply on racial classification. Though s 19 confers, as we have seen, protection that supplements the proprietary rights of the owner, its operation is independent of the vesting of title. The difference in treatment is based not on common law proprietary rights, but on race. The differential treatment of Pitjantjatjaras and non-Pitjantjatjaras achieves no legitimate object except to confer a privilege on Pitjantjatjaras. Assuming for the moment that the Land Rights Act is not a special measure, it is, in my opinion, clearly discriminatory. The inequality of treatment is produced by the law itself, not by any act done in exercise of a discretion created by the law. A discriminatory law or a discriminatory act done in due obedience to the law denies the human right of equality before the law, referred to in the third preamble to the Convention. The right to equality before the law without distinction as to race is guaranteed by the States Parties to the Convention (Art 5). The claim to equality before the law is, as Sir Hersch Lauterpacht wrote (*An International Bill of the Rights of Man* (1945), at p 115), "in a substantial sense the most fundamental of the rights of man...It is the starting point of all other liberties". A distinction etc based on race that is required by law nullifies the enjoyment of the human right to equality before the law.

But it has long been recognized that formal equality before the law is insufficient to eliminate all forms of racial discrimination. In its *Advisory Opinion on Minority Schools in Albania* (1935) Ser A/B No 64, the Permanent Court of International Justice noted the need for equality in fact as well as in law, saying (at p 19):

> Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.
>
> It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality of fact...

As Mathew J said in the Supreme Court of India in *State of Kerala v NM Thomas* [1976] 1 SCR 906 at 951, quoting from a joint statement of Chandrachud J and himself: "It is obvious that equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations". In the same case, Ray CJ pithily observed (at p 933): "Equality of opportunity for unequals can only mean aggravation of inequality".

The validity of these observations is manifest. Human rights and fundamental freedoms may be nullified or impaired by political, economic, social, cultural or religious influences in a society as well as by the formal operation of its laws. Formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities "in the political, economic, social, cultural or any other field of public life". In an opinion which dissented on a point that is not material here, Judge

Tanaka wrote in the *South West Africa Cases (Second Phase)* ICJ Reports 1966, at pp 305–6:

> "We can say accordingly that the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.
>
> The question is, in what case equal treatment or different treatment should exist. If we attach importance to the fact that no man is strictly equal to another and he may have some particularities, the principle of equal treatment could be easily evaded by referring to any factual and legal differences and the existence of this principle would be virtually denied. A different treatment comes into question only when and to the extent that it corresponds to the nature of the difference. To treat unequal matters differently according to their inequality is not only permitted but required. The issue is whether the difference exists. Accordingly, not every different treatment can be justified by the existence of differences, but only such as corresponds to the differences themselves, namely that which is called for by the idea of justice—'the principle to treat equal equally and unequal according to its inequality, constitutes an essential content of the idea of justice' (Goetz Hueck: *Der Grundsatz der Gleichmassigen Behandlung in Privatrecht* 1958, p 106) [translation].
>
> Briefly, a different treatment is permitted when it can be justified by the criterion of justice. One may replace justice by the concept of reasonableness generally referred to by the Anglo-American school of law.
>
> Justice or reasonableness as a criterion for the different treatment logically excludes arbitrariness.

Formal equality must yield on occasions to achieve what the Permanent Court in the *Minority Schools of Albania* opinion (at p 19) called "effective, genuine equality".

A means by which the injustice or unreasonableness of formal equality can be diminished or avoided is the taking of special measures. A special measure is, ex hypothesi, discriminatory in character; it denies formal equality before the law in order to achieve effective and genuine equality. As Vierdag in *The Concept of Discrimination in International Law* (1973), says at p 136:

> The seeming, formal equality that in a way may appear from equal treatment is replaced by an apparent inequality of treatment that is aimed at achieving 'real', material equality—somewhere in the future. And this inequality of treatment is accorded precisely on the basis of the characteristics that made it necessary to grant it: race, religion, social origin, and so on.

A legally required distinction, exclusion, restriction or preference based on race nullifies or impairs formal equality in the enjoyment of human rights and fundamental freedoms, but it may advance effective and genuine equality. In that event, it wears the aspect of a special measure calculated to eliminate inequality in fact. Some writers regard benign discrimination as

falling outside the conception of discrimination in international law. Thus, McKean, op cit, p 288, expresses the view that the provision of special measures are not now regarded as constituting racial discrimination:

> It is now generally accepted that the provision of special measures of protection for socially, economically, or culturally deprived groups is not discrimination, so long as these special measures are not continued after the need for them has disappeared. Such measures must be strictly compensatory and not permanent or else they will become discriminatory. It is important that these measures should be optional and not against the will of the particular groups affected, and they must be frequently reconsidered to ensure that they do not degenerate into discrimination. The other type of protective measure which is permissible is the provision of special rights for minority groups to maintain their own languages, culture, and religious practices, and to establish schools, libraries, churches, and similar institutions. These measures are not discriminatory because they merely allow minorities to enjoy rights which are exercised by the rest of the population. Such measures produce 'an equilibrium between different situations' and should be maintained as long as the groups concerned wish.

A similar view is expressed by Mr Partlett in his article "Benign Racial Discrimination: Equality and Aborigines", *Federal Law Review*, vol 10 (1979), p 238.

In the United States, a majority of the Supreme Court has held that the clause in the Fourteenth Amendment which guarantees "the equal protection of the laws" is not necessarily violated by a racial classification which is calculated to redress the disparate impact of past discrimination, at least where the instances of past discrimination are specific: *University of California Regents v Bakke* 438 US 265 (1978) at 307, 356, 369, 399, 407 [57 L Ed (2d) 750]. Blackmun J said (at p 407):

> In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy....

Distinctions, exclusions, restrictions and preferences based on race which deny formal equality before the law fall into two radically different categories: those which have the purpose of achieving effective and genuine equality by alleviating the conditions of a disadvantaged class and those which do not. Broadly stated, special measures are in the former category and outside the latter category. Part II of the Racial Discrimination Act applies only to the latter category. If the Land Rights Act were not a special measure, Pt II of the Racial Discrimination Act would apply to it. The former Act, as a matter of construction, formally effects racial inequality. The issue of a grant of title to the lands to Anangu Pitjantjatjaraku to be used and managed by Pitjantjatjaras and the resulting exclusion of non-Pitjantjatjaras from acquiring any proprietary, occupational or usufructuary rights in or over the lands is discriminatory. It involves a preference based on race, and it denies to non-Pitjantjatjaras equality before the law. Equally, the prohibition of entry by non-Pitjantjatjaras without a written permit is

discriminatory. If the resolution of this case depended on no more than the construction of the Land Rights Act and of ss 9 and 10 of the Racial Discrimination Act, s 19 would fall on either of the two grounds earlier mentioned: first, it is ancillary to s 15 which authorizes the doing of a discriminatory act that s 9 of the Racial Discrimination Act would make unlawful, namely, alienation of Crown lands to Anangu Pitjantjatjaraku to be held subject to the discrimination provisions of the Land Rights Act. Second, the prohibition contained in s 19 of the Land Rights Act is inconsistent with the operation that s 10 of the Racial Discrimination Act would have on s 18 of the Land Rights Act.

Although the Land Rights Act is a measure which effects formal discrimination, it may yet be a special measure to which Art 1(4) applies. If it is such a measure, Pt II of the Racial Discrimination Act has no application. Article 1(4) provides:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

"Special measures", deemed not to be racial discrimination, are not the subject of the obligation imposed on States Parties by Art 5 of the Convention "to prohibit and to eliminate racial discrimination in all its forms". Indeed, Art 2(2) imposes an obligation on States Parties to take special measures. It provides as follows:

> State Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

The Convention does not use precisely the same words in Art 1(4) and in Art 2(2), but those provisions are complementary and their expressions should be consistently construed. A "special and concrete" measure taken by a State Party in performance of an obligation under Art 2(2) is a "special measure" within the meaning of that term in Art 1(4). The class to be benefited by a special measure must be a racial or ethnic group or individuals belonging to the group. The sole purpose of a special measure is to secure such "adequate advancement" or "adequate development and protection" of the benefited class as is necessary to ensure "equal enjoyment or exercise of human rights and fundamental freedoms". The occasion for taking a special measure is that the circumstances warrant the taking of the measure to guarantee that the members of the benefited class shall have "the

full and equal enjoyment of human rights and fundamental freedoms". From these conceptions, the indicia of a special measure emerge. A special measure (1) confers a benefit on some or all members of a class; (1) the membership of which is based on race, colour, descent, or national or ethnic origin; (3) for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms; (4) in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy the exercise equally with others human rights and fundamental freedoms.

The first indicium: The beneficiaries of a special measure are natural persons, not a corporation. In the present case, the benefits conferred on Pitjantjatjaras by the Land Rights Act do not consist in the ownership of the lands but in the rights which Pitjantjatjaras are individually or collectively able to exercise over or in respect of the lands. Although the Pitjantjatjaras are enabled to use and manage the lands as they see fit and to treat the lands as their home, individual Pitjantjatjaras are denied the power to invite or to permit a non-Pitjantjatjara to come upon the lands. Does this feature of the scheme impair the human rights and fundamental freedoms of the Pitjantjatjaras the enjoyment of which a special measure is intended to protect? It is immaterial that individual Pitjantjatjaras are not the legal owners of the lands, for human rights and fundamental freedoms are not necessarily legal rights and freedoms. The right of a person to invite or to permit another to enter the home which he occupies seems to me to be an aspect of the right to freedom of peaceful association which is declared by Art 20 of the Universal Declaration of Human Rights. Under the Land Rights Act, the right of an individual Pitjantjatjara appears to be impaired, for the power to permit entry is reposed exclusively in the Executive Board or its delegate.

The human right to invite or permit another to enter one's home is not unqualified. It can be regarded as an individual right when the individual alone occupies the home, but it is more a collective right when premises are the home of a group. At all events, where the enjoyment of the home might be prejudiced if the individual right were not foregone in favour of a collective right, it cannot be said that the human rights and fundamental freedoms of the household's members are impaired by their acceptance of membership on the terms that the right should be exercised collectively. Analogously, though the analogy is strained by the cumbersome requirements of s 19, the human rights and fundamental freedoms of the Pitjantjatjaras are not impaired by their foregoing the individual right to invite or to permit another to enter the lands in favour of a group right exercisable by the Executive Board or its delegate. The vast area of the lands and perhaps some elements of tradition may explain why the cumbersome procedure was prescribed. A fear entertained by Pitjantjatjaras that individual Pitjantjatjaras could be improperly overborne by those who wish to gain entry to the lands for socially disruptive purposes or a need to retain close control on entry at times of Aboriginal ceremonies are possible explanations for what may appear at first sight to be serious impairment of

individual rights. Having regard to the purpose of the measure, presently to be mentioned, I am unable to regard the absence of an individual power to permit entry as a ground for holding that s 19 is inconsistent with the character of a special measure. The Land Rights Act satisfies the first indicium.

The second indicium: Although Art 1(4) refers to "racial or ethnic groups", it should be understood as referring to the several categories of race, colour, descent or national or ethnic origin mention in Art 1(1) in order to make Art 1(4) read symmetrically with Art 1(1). The manifest purpose of Art 1(4) is to exempt from the definition of "racial discrimination" those distinctions, exclusions, restrictions or preferences which are made for the sole purpose stated in that paragraph. It would not accord with the object of the Convention to construe the Art 1(4) exemption as limited to distinctions, etc based on race or ethnic origin and to leave within the definition of racial discriminations those distinctions, etc based on colour, descent or national origin. In the present case, for reasons earlier stated, the criterion of membership of the benefited class is racial.

The third indicium: The purpose of a legislative measure can be collected from its terms and from the operation which it has in the circumstances to which it applies, but international law does not require that these be regarded as the only sources from which the purpose of a measure can be collected (see Ramcharan: *International Law and Fact-Finding in the Field of Human Rights* (1982), Ch III). Of course, not all special measures are legislative. Any fact which shows what the persons who took or who promoted the taking of a measure intended it to achieve casts light upon the purpose for which it was taken provided the measure is not patently incapable of achieving what was so intended. The intention of those persons is a matter of fact. The finding of facts in order to determine the scope or validity of a law raises a particular problem that does not arise on the finding of the facts in issue between litigating parties. It will be necessary presently to examine that problem but, for the moment, it suffices to say that the purpose of a measure may not be, or may not be merely, a question of construction.

A special measure must have the sole purpose of securing advancement, but what is "advancement"? To some extent, that is a matter of opinion formed with reference to the circumstances in which the measure is intended to operate. "Advancement" is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them. An Aboriginal community without a home is advanced by granting them title to the land they wish to have as a home. Such a grant may satisfy a demand for land rights. But an Aboriginal community would not be advanced by granting

them title to land to which they would be confined against their wishes. Such a grant would be a step towards apartheid. Even if the promoters of the measure had the purpose of promoting the interests of the residents of that land, the measure would deny the residents' human rights and fundamental freedoms (see paras 128–131 of the *Namibia (SW Africa) Advisory Opinion* of the International Court of Justice: ICJ Reports 1971, p 16, at pp 56–7). The difference between land rights and apartheid is the difference between a home and a prison. Land rights are capable of ensuring that a people exercise and enjoy equally with others their human rights and fundamental freedoms; apartheid destroys that possibility.

The degree of advancement which a special measure is intended to achieve is "adequate". The purpose of a special measure must not be to convert the beneficiaries from a disadvantaged class to a class that enjoys greater privileges than are necessary to ensure their "equal enjoyment of human rights and fundamental freedoms".

The purpose of the Land Rights Act can be collected from its terms, from the Report of the Pitjantjatjara Land Rights Working Party and from the speeches of the Ministers in charge of the Bill for the Act in the respective Chambers of the Parliament of South Australia. From those sources, its purpose appears to be the restoration to the Pitjantjatjaras of the use and management of the lands free from disturbance by others so that they may foster the traditional affiliations that Pitjantjatjaras have with the lands and discharge the traditional responsibilities to which they are subject in respect of the lands. The purpose is thus to restore to the Pitjantjatjaras the "hearth, home, the source and locus of life, and everlastingness of spirit" to which the late Professor Stanner referred in a passage which I quoted in *Re Toohey; Ex parte Meneling Station Pty Ltd* (1982) 57 ALJR 59 at 70 [; 44 ALR 63 at 87]. The conferring of legal rights on the Pitjantjatjaras and their corporation and the exclusion of non-Pitjantjatjaras from the lands are the means by which it is intended that the Pitjantjatjaras should be able to foster their traditional affiliation with the lands, to discharge their traditional responsibilities, and to build or buttress a sense of spiritual, cultural and social identity. A racial minority which wishes to preserve its own identity may need particular supports to preserve that identity, and it may need to preserve that identity of its members are not to be disadvantaged in the society of which it is a part. If such a racial minority is denied those supports, its members may not only lose their own sense of identity but be unable to adopt the standards and customs of the majority or to cope with the pressures which assimilation with the majority entails. In Australia, the phenomenon of landless, rootless Aboriginal peoples is sadly familiar. Many of them are incapable of enjoying and exercising "on an equal footing" the human rights and fundamental freedoms that are the birthright of all Australian citizens. I would conclude that the purpose of the Lands Rights Act is to provide the support—undisturbed and full access to the Pitjantjatjaras' traditional country—with the intention of advancing the Pitjantjatjaras in order to ensure their ability to enjoy and exercise, equally with others, their human rights and fundamental freedoms. That is a purpose of the kind prescribed by Art 1(4).

The fourth indicium: While the third indicium is concerned with the purpose of taking the measure, the fourth indicium is concerned with the need for the measure to be taken. The need must match the purpose. Is there a need to take the measure and does the measure secure no more than adequate advancement? A measure taken for the purpose mentioned in Art 1(4) by the legislature of a State or a Territory or by an Executive Government (whether of the Commonwealth, a State or a Territory), is not a special measure if there is no occasion for taking a special measure. That is so although the branch of government that takes the measure has or, but for Pt II of the Racial Discrimination Act, would have the power or authority to do so. If a measure is taken when there is no occasion for taking a special measure. Part II of the Racial Discrimination Act applies to or in relation to the measure.

The third and fourth indicia of a special measure involve questions of fact and opinion. Is the object which the measure is intended to secure "adequate advancement" of the kind mentioned in Art 1(4) and is the protection given the beneficiaries "necessary in order to ensure [them] equal enjoyment or exercise of human rights and fundamental freedoms"? To determine whether the measure in question is intended to remove and is necessary to remove inequality in fact (as distinct from formal inequality), the circumstances affecting the political, economic, social, cultural and other aspects of the lives of the disadvantaged group must be known and an opinion must be formed as to whether the measure is necessary and likely to be effective to improve those circumstances. The objective circumstances affecting the disadvantaged group are matters of fact, capable of ascertainment albeit with difficulty. But once those circumstances are ascertained, an assessment must be made about a number of matters: what is "adequate advancement" of the beneficiaries in the circumstances? do they require the protection given by the measure in order to enjoy and exercise their human rights and fundamental freedoms equally with others? Whether a measure is needed and is likely to alter the circumstances affecting a disadvantaged racial group in such a way that they will be able to live in full dignity, to engage freely in any public activity and to enjoy the public benefits of society equally with others if they wish to do so is, at least in some respects, a political question. A court is ill-equipped to answer a political question.

In the first instance, of course a political branch of government determines whether an occasion exists for taking a particular measure. An obligation to take a special measure "when the circumstances so warrant" is imposed by Art 2(2) of the Convention. That is an obligation in international law, and no municipal court has jurisdiction to enforce that obligation, or to determine "when the circumstances so warrant." The obligation to take special measures falls to be performed by a political branch of government. If a political branch of government decides that a racial group is in need of advancement to ensure that they attain effective, genuine equality and that a particular measure is likely to secure the advancement needed and that the circumstances warrant the taking of the measure, a municipal court has no jurisdiction under international law to determine whether those decisions have been validly made and whether the measure therefore has the character

of a special measure under the Convention. But when the legal rights and liabilities of individuals are in issue before a municipal court and those rights and liabilities turn on the character of the Land Rights Act as a special measure, the municipal court is bound to determine for the purposes of municipal law whether it bears that character. But the character of a special measure depends in part on a political assessment that advancement of a racial group is needed to ensure that the group attains effective, genuine equality and that the measure is likely to secure the advancement needed. When the character of a measure depends on such a political assessment, a municipal court must accept the assessment made by the political branch of government which takes the measure. It is the function of a political branch to make the assessment. It is not the function of a municipal court to decide, and there are no legal criteria available to decide, whether the political assessment is correct. The court can go no further than determining whether the political branch acted reasonably in making its assessment (cf *United States v Sandoval* 231 US 28 (1913), at p 46 [58 L Ed 107, at p 114]). In *R v Poole; Ex parte Henry (No 2)* (1939) 61 CLR 634, where the validity of a rule made to carry out and to give effect to the Convention for the Regulation of Air Navigation was in issue, Starke J said (at p 648) that "within reason it is or at least should be for the discretion of the rule-making authority to determine, in the particular case, what are the appropriate and effective means of carrying out and giving effect to the Convention". To go further than deciding whether the assessment could reasonably be made would be to assume a function that is necessarily committed to another branch of government. In some cases, it may not be open to a court to act upon a political assessment made by another branch of government, but where it is open to a court to do so, the court does not itself undertake the making of the assessment. The jurisprudential foundation for that approach may be found in one or other of the features of a political question to which the Supreme Court of the United States referred in *Baker v Carr* 369 US 186 (1962) [; 7 L Ed (2d) 663]. Delivering the opinion of the court in that case, Brennan J said (at p 217 [; p 686]):

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

It is not necessary to identify the foundation in the present case. It is enough that the court determines no more than this: could the political assessment inherent in the measure reasonably be made? If the political assessment could not have been made reasonably, the measure does not bear the character of a special measure and the court must so hold. As Brennan J

said (at p 217 [; p 685]), the courts "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power". The court does not have to decide a political question; at most it must decide the limits within which a political assessment might reasonably be made. To determine the matter, it is necessary to apply any relevant legal criteria, for example, that the wishes of the beneficiaries for the measure are of great importance in satisfying the element of advancement. It is also necessary to find, as matters of fact, the circumstances affecting the racial group and the effect which the special measure is likely to have on those circumstances.

A measure which satisfies the four indicia is not a special measure if the provisos in the latter part of Art 1(4) apply. The measure must not "lead to the maintenance of separate rights for different racial groups" nor "be continued after the objectives for which [it was] taken have been achieved". These provisos are intended to ensure that formal discrimination is not suffered to continue when protective measures to achieve effective and genuine equality are no longer necessary.

The terms in which the provisos are expressed require some exegesis. The first point is whether the temporal expression at the end of Art 1(4)—"after the objectives...have been achieved"—relates to the maintenance of separate rights as well as to the continuation of the special measure. If the proviso prohibiting the maintenance of separate rights for different racial groups were to operate before the objectives of a special measure were achieved, formal equality before the law could not be suspended in order to provide effective, genuine equality. The Convention would entrench inequalities in fact by precluding any legislative distinction based on race. Clearly that is not the object of the Convention. The proviso relating to the maintenance of separate rights, like the proviso relating to the continuation of special measures, is intended to limit the period during which formal discrimination may be permitted.

The second point is whether the provisos deny the character of a special measure to a measure that does not, from its inception, define the time when it is to cease. The point is relevant to the Land Rights Act because the Act does not contain a "sunset" clause automatically bringing it to an end at some future time. What the provisos are concerned to avoid, however, is the maintenance of separate rights after the objectives have been achieved and the continuation of special measures after that time. The provisos are satisfied if, when that time arrives, separate rights are repealed and special measures are discontinued. As it is impossible to determine in advance when the objectives of a special measure will be achieved, the better construction of the provisos is that they contemplate that a State Party will keep its special measure under review, and that the measure will lose the character of a special measure at the time when its objectives have been achieved. But the provisos do not require the time for the operation of the special measure to be defined before the objectives of the special measure have been achieved. With the passage of time, circumstances may no longer warrant the continuation of some or all of those provisions of the Land Rights Act which provide for formal discrimination. If that time comes, a provision which creates an unsustainable formal discrimination will fall because Pt II

of the Racial Discrimination Act will then apply to it. As Dixon J said in *Australian Textiles Pty Ltd v Commonwealth* (1945) 71 CLR 161 at 181: "If a power applies to authorize measures only to meet facts, the measure cannot outlast the facts as an operative law."

If it was reasonable to make the assessment that the Land Rights Act was necessary to ensure effective and genuine equality when it was enacted, the maintenance of separate rights up to the present time could not be held to be unreasonable. The vesting of title to the lands in Anangu Pitjantjatjaraku without more does not achieve the objectives of the Land Rights Act. The advancement which the legislature thought "adequate" went beyond the vesting of title. The inalienability of title, the ability of the Pitjantjatjaras to control the use and management of the land, the primacy of the wishes and opinions of the traditional owners and the exclusion of non-Pitjantjatjaras without the written permission of the Executive Board or its delegate are elements of the continuing protection intended for the Pitjantjatjaras...

In the present case, although no evidence was tendered by either party as to the statutory facts, the Working Party Report and the ministerial speeches in the Parliament were produced to the court, and the court may inform itself from those sources. Moreover, the courts of this country are familiar with the existence of traditional Aboriginal affiliations with, and responsibilities in respect of, land. The existence of such affiliations and responsibilities have been recognized judicially on many occasions, and judges who sit in courts in areas where Aboriginal tradition remains strong are familiar, in varying degree, with the nature of the affiliations and responsibilities that exist in respect of the country in those areas. There is sufficient material from which the statutory facts required to decide the present case can be ascertained.

The first three indicia of a special measure are established chiefly by reference to the text of the Land Rights Act, supplemented by the passage earlier cited from the Working Party's Report. That report shows that the Working Party believed that the Pitjantjatjaras needed protection of the kind given them by the Land Rights Act. The known facts are reasonably capable of supporting that assessment. Most of the area of the lands has been an Aboriginal reserve. By definition all Pitjantjatjaras have a traditional relationship with the lands or with some parts of the lands. It may be inferred that they have no other home. Homelessness is a disadvantage sadly suffered by people of all races, but Aborigines with traditional relationship with their country may reasonably be thought to need protection from an inundation of their culture and identity by those who embrace different values and who constitute a majority in Australian society. That may not be the view of all Australians, but it is a view that the Parliament of South Australia could reasonably hold. It is a view which might reasonably be held by a mature and humane society, desiring to respect the culture and identity of any peaceful minority group and to accord dignity to the members of that group. It is a view that a court could not hold to be unreasonable. The political assessments evidenced by the enactment of the Land Rights Act, being reasonably made, establish the indicia of a special

measure. The Land Rights Act is a special measure and therefore it is not inconsistent with or affected by Pt II of the Racial Discrimination Act.

The appeal should be allowed...

Gibbs CJ considered whether the Land Rights Act could be a special measure as follows: (at 483–484; at 87–89):

The legislature has no doubt acted on the view that to enable the Pitjantjatjaras to live on the land in accordance with their traditions and customs and to maintain their relationship to the land, which is a relationship quite different from that to which persons of European descent are accustomed, it is necessary not only that they should own the land but also that they should have full control of access to it. There can be little doubt that the provisions of s 19 of the Act were intended to be a protective measure, enacted in the interests of racial or ethnic groups thought to require that protection. There was no evidence put before the court to show that the facts either did or did not satisfy the words of Art 1(4) . . . [W]e must determine as best we can the facts which will enable us to answer the question whether the Act is a special measure within Art 1(4). We may take judicial notice of facts that are notorious and may rely on the material placed before us, particularly that contained in the report to which I have already referred. In the light of that material it can hardly be doubted that the three ethnic groups do require special protection within the meaning of Art 1(4). Further, there is no reason to conclude that the protection afforded by the Act is more than is necessary, having regard to the nature of the lands, the uses to which they have been put, the preservation of the rights of existing users and the special provisions designed to ensure justice to the most likely potential users, viz miners, as well as the needs of the protected groups....

It was further submitted on behalf of the defendant that the measures taken by the Act lead to the maintenance of separate rights for different racial groups contrary to the proviso to Art 1(4). It is obvious enough that measures within the introductory words of Art 1(4) may involve some special rights for the members of the protected group. The proviso that such measures should not lead to the maintenance of special rights for different racial groups cannot be intended to prevent special rights being conferred for the purpose mentioned in the Article; it must be intended to prevent such rights from being maintained, ie kept in force. In my opinion the words of both limbs of the proviso should be read together. The proviso as a whole appears to be designed to prevent such special rights as are granted from being indefinitely maintained or continued after the special measures have achieved their objective. It cannot be said that the present case falls within the proviso. The special measures were taken only in 1981 and it is obvious from the nature of things that a considerable time may elapse before it can be hoped that the special measures will be effective. It is, however, a matter of concern that the Act has an obvious air of permanency. It does seem to be intended to set up permanently a separate regime for the Pitjantjatjaras. I doubt whether it would be allowable under the Convention, which by the proviso to Art 1(4) recognizes that protection may degenerate into discrimination, to keep s 19 permanently in force. That, however, is a matter for the future. The situation to which the proviso is directed has not yet been

reached. The Act as a whole may be upheld as a special matter within s 8(1) of the Racial Discrimination Act.

For these reasons I would allow the appeal and would answer in the negative the question whether s 19 of the Act is invalid or restricted in its operation by reason of the Racial Discrimination Act.

Mason J concluded his judgment as follows (at 498; 105–106):

The remaining question is whether the State Act satisfies the proviso to Art 1.4. The provisos to Arts 1.4 and 2.2 are not expressed in identical terms. In the first the proviso is that "such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved". In the second the proviso requires that the measures shall not "entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved". The difference in expression does not warrant a difference in interpretation because both provisions insist that the special measures shall be discontinued after achievement of the objects for which they were taken. Even so, there is some difficulty in fitting legislative regime of the type in question within the framework of the proviso. It is looking primarily to measures of a temporary character, perhaps conferring special rights, which will alleviate the disadvantages under which the people of a particular race labour at a particular stage in their evolution. In the present case the legislative regime has about it an air of permanence. It may need to continue indefinitely if it is to preserve and protect the culture of the Pitjantjatjara peoples. Whether that be so is a question which can only be answered in the fullness of time and in the light of the future development of the Pitjantjatjara peoples and their culture. The fact that it may prove necessary to continue the regime indefinitely does not involve an infringement of the proviso. What it requires is a discontinuance of the special measures after achievement of the objects for which they were taken. It does not insist on discontinuance if discontinuance will bring about a failure of the objects which justify the taking of special measures in the first place.

That the State Act is expressed to operate indefinitely is not a problem. It would be impracticable for the legislation to specify a terminal point in the operation of the regime which it introduces. It is sufficient to say that, if and in so far as the validity of the State Act depends on its fitting the character of special measures within Art 1.4 of the Convention, its validity would come in question once the proviso to the article ceases to be satisfied.

For the foregoing reasons I consider that the State Act is valid, and that the appeal should be allowed.

In similar vein, Wilson J said (at 504–505; 113–114):

In my opinion, the State Act bears upon its face the clear stamp of a special measure such as is contemplated by the Convention. The emphasis upon traditional ownership and the functions of Anangu Pitjantjatjaraku set out in s 6(1) are plainly directed to enabling the Pitjantjatjaras to protect and preserve their culture, a culture which, as the Premier observed in the House of Assembly in the course of the second reading speech (see

Hansard, House of Assembly, 23 October 1980, p 1387) "is still largely intact". In his speech, the Premier refers to the extensive discussions and negotiations with the Aboriginal leaders of the relevant tribes that preceded the preparation of the Bill. The result is a measure directed to securing for the Pitjantjatjaras such advancement as will enhance their capacity to experience the full and equal enjoyment of human rights and fundamental freedoms. This conclusion is open notwithstanding the uncertain content of the phrase "human rights and fundamental freedoms". There is no reason to doubt that the detailed provisions regarding access to the lands which are contained in s 19 were seen by the legislature as reasonable and necessary measures to enable Anangu Pitjantjatjaraku to discharge its functions in a manner most conducive to the advancement and protection of its members.

The effect of the proviso to Art 1(4), read in the light of the second sentence of Art 2(2), is to ensure that in no case shall a special measure entail as a consequence the maintenance of unequal or separate rights after the objectives for which they were taken have been achieved. This may pose a problem at some time in the future but in my opinion the absence of any reference in the State Act to meet the condition contained in the proviso does not deny its present character as a special measure.

It follows then, in my view, that the Commonwealth Act does not affect the operation of s 19 of the State Act.

There is a further submission, advanced by the Solicitor-General for South Australia, upon which I should comment. The submission is that racial discrimination within the meaning of the Convention refers only to those distinctions or differentiations which are arbitrary, invidious or unjustified. It is a submission from which the Solicitor-General for the Commonwealth dissociated the Commonwealth. It may be true that some of the problems surrounding the implementation of the Convention would be minimized if it were possible to place acts of benign discrimination, including well-motivated legislative acts, altogether beyond the reach of the Convention on the ground that such assistance to a deprived racial group was not embraced within the evil to which the Convention is directed. This understanding of racial discrimination has been expounded by WA McKean, both in an article published in 1970 entitled "The Meaning of Discrimination in International and Municipal Law" in 44 The British Year Book of International Law 177, and recently in a monograph, *Equality and Discrimination Under International Law* (1983), at pp 286–8.

Whether or not it is desirable to adopt such an understanding of the concept of racial discrimination, in my opinion it is not possible to construe the Convention so as to give effect to it. Such a construction would be incompatible with the recognition the Convention expressly gives to special measures. To paraphrase Art 1(1), the paragraph defines racial discrimination to mean "any distinction, exclusion, restriction or preference" based on race which has the effect of impairing the enjoyment on an equal footing of a human right in a field of public life. That definition is not confined to distinctions which are arbitrary, invidious or unjustified. It refers to *any* distinction, etc. It was therefore necessary for the Article to go on to deal with special measures, measures which notwithstanding their benign

character would otherwise be proscribed with all other acts of racial discrimination. Such measures are deemed not to be racial discrimination so long as the proviso is satisfied. If the Convention did not intend "racial discrimination" to bear an inclusive meaning, there would be no need to make any provision for special measures.

I would allow the appeal...

Deane J concluded his consideration of whether s 19 of the Land Rights Act constituted "special measures" as follows (at 530–536; 147–154):

The Convention is framed in words that are, no doubt intentionally, both general and vague. Its provisions are arguably inappropriate to be incorporated, by reference, in domestic legislation where a greater degree of precision and certainty is ordinarily desirable than is often attainable or advisable in international conventions defining the obligations of nations in relation to both external and domestic affairs. The provisions of Art 1(4), which s 8(1) of the Commonwealth Act incorporates by reference, are no exception.

Articles 1(4) and 2(2) must be read together. Article 2(2) imposes upon States Parties to the Convention a positive obligation, when the circumstances so warrant, to "take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms". Article 1(4) is complementary to Art 2(3) in that it exempts "special measures" of the kind which it describes from the positive prohibitions which the Convention imposes upon "racial discrimination". At least for a domestic court required to determine its applicability to local legislative provisions, Art 1(4) poses some difficulties which go beyond the possibly unavoidable vagueness of words such as "adequate" and concepts such as "human rights" and "fundamental freedoms". Thus, quite apart from the difficulty involved in characterizing a legislative provision by reference to its having been "taken" for a "sole purpose", there is an element of ambiguity about the reference point of the words "such" and "as" (where first occurring in the paragraph) while the words "shall not be deemed" would seem to be more appropriate to preclude the operation of a deeming clause than to provide that what is within a definition is to be deemed not to be within it. The general purport of Art 1(4), read in the context of Art 2(2), is, however, clear enough. Subject to the proviso to which reference will subsequently be made, the term "racial discrimination" shall not, for the purposes of the Convention, encompass "special measures taken for the sole purpose" of securing the development and protection of disadvantaged racial or ethnic groups or individuals belonging to them to the extent necessary to ensure to such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms.

The question whether particular actions or provisions constitute "special measures" of the type excluded from the definition of "racial discrimination" in the Convention and, by reference to s 8(1) of the Commonwealth Act, from the application of Pt II of the Commonwealth Act is essentially a

question of characterization. Such characterization must necessarily be in a factual context. It involves, among other things, the identification of the particular racial or ethnic group or groups which require, or whose individuals require, special and positive measures to enable equal enjoyment or exercise of human rights and fundamental freedoms and the resolution of the question whether the particular actions or provisions satisfy the requirement that they be "taken for the sole purpose of securing" an objective of the kind described in Art 1(4).

Whatever may be the position before an international forum such as the Committee on the Elimination of Racial Discrimination established by Art 8 of the Convention, the question whether provisions of Commonwealth or State legislation satisfy a requirement that they be "taken" for a designated "sole purpose" is different from the question whether the particular provisions will in fact achieve that purpose. On the other hand, that question cannot be resolved by reference to the variety of subjective purposes which may have led individual members of the relevant Parliament to have voted in favour of the passage of the particular legislation. What is necessary for characterization of legislative provisions as having been "taken" for a "sole purpose" is that they can be seen, in the factual context, to be really and not colourably or fancifully referable to and explicable by the sole purpose which is said to provide their character. They will not be properly so characterized unless their provisions are capable of being reasonably considered to be appropriate and adapted to achieving that purpose. Beyond that, the court is not concerned to determine whether the provisions are *the* appropriate ones to achieve, or whether they will in fact achieve, the particular purpose.

It would seem that the Aboriginal people had inhabited this country for at least 40 milleniums before the arrival of the first white settlers less than 200 years ago. To the extent that one can generalize, their society was not institutionalized and drew no clear distinction between the spiritual and the temporal. The core of existence was the relationship with and the responsibility for their homelands, which neither individual nor clan "owned" in a European sense but which provided identity of both in a way which the European settlers did not trouble to comprehend and which the imposed law, based on an assertion of *terrae nullius*, failed completely to acknowledge, let alone protect. The almost two centuries that have elapsed since white settlement have seen the extinction of some Aboriginal clans and the dispersal, with consequent loss of identity and tradition, of others. Particularly where the clan has survived as a unit living on ancestral lands, however, the relationship between the Aboriginal peoples and their land remains unobliterated. Yet, almost two centuries on, the generally accepted view remains that the common law is ignorant of any communal native title or other legal claim of the Aboriginal clans or peoples, even to ancestral tribal lands on which they still live (see *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141). If that view of the law be correct, and I do not suggest that it is not, the common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in [1823] when Marshall CJ, in *Johnson v McIntosh* (1823) 8 Wheaton 543 at 574 [; 5

Law Ed (2d) 681 at 688–9], accepted that, subject to the assertion of ultimate dominion (including the power to convey title by grant) by the State, the "original inhabitants" should be recognized as having "a legal as well as just claim" to retain the occupancy of their traditional lands. It is in this context that one must approach the question whether the provisions of s 19 of the State Act are, or are included in, "special measures" of the kind referred to in Art 1(4) of the Convention.

The central provisions of the State Act include:

(i) the establishment of the statutory corporation (Anangu Pitjantjatjaraku) of which all Pitjantjatjaras are members, and of its Executive Board;

(ii) provision for the vesting of the lands in the statutory corporation;

(iii) identification of the functions of the statutory corporation as including the administration of the land vested in it and the protection of the interests of traditional owners in relation to the management, use and control of the lands; and

(iv) provision that all Pitjantjatjaras shall have unrestricted rights of access to the lands.

Those central provisions were, plainly enough, special measures taken for the purpose of adjusting the law of South Australia to grant legal recognition and protection of the claims of the Pitjantjatjaras to the traditional homelands on which they live. Until those special measures were enacted, the doctrine that this continent was *terrae nullius* at the times when British sovereignty was imposed had combined with the narrowness of the notions of ownership and occupation under the imported law to make the Pitjantjatjaras a disadvantaged racial or ethnic group as regards one of the "human rights" which the Convention specifically identifies, namely, the "right to own property alone as well as in association with others" (Art 5(d)(v)). That "right to own property" extends to what Art 11 of Convention No 107 of the International Labour Organization identified as the "right of ownership, collective or individual, of the members of [indigenous and other tribal and semi-tribal populations] over the lands which [those] populations traditionally occupy". It embraces the right to preserve such lands as homelands upon which sacred sites may be safeguarded and traditional customs and ways of life may be pursued in accordance with the ordinary law. In my view, those central provisions are special measures of the kind referred to in Art 1(4) in that they are, for the purposes of that paragraph, "special measures taken for the sole purpose of securing adequate advancement" of a racial or ethnic group "requiring such protection as may be necessary in order to ensure" that group "equal enjoyment or exercise of human rights and fundamental freedoms".

The right to exclude strangers in an ordinary incident of ownership of land. If s 19 of the State Act had been confined to providing procedures by which the statutory corporation could enforce the right to exclude strangers which is implicit in the vesting of the lands and the conferral of powers of management and control, there would be no difficulty at all in identifying the section as part of the "special measures" which s 8(1) of the

Commonwealth Act protects from the application of ss 9 and 10. The provisions of s 19 are not, however, so confined and cannot be so readily explained or preserved. They operate independently of the vesting of the lands. They erect around the lands a barrier against the entry of non-Pitjantjatjaras in the form of a prohibition enforceable by criminal sanction. That barrier against entry does not extend to exclude the police and others acting in the performance of their public duties. Members of Parliament and genuine parliamentary candidates and their staff, entry in case of emergency and some others with special interests or in pursuit of particular activities (see State Act s 19(8) and Divisions III, IV and VI of Pt III). Otherwise, it can be lifted only by discretionary decision of the statutory corporation given pursuant to a cumbersome procedure involving a written application setting out purpose, period, time and place of the desired entry and the grant of conditional or unconditional permission to enter "by instrument in writing" (see State Act, s 19(3), (5)).

One cannot but be conscious of the diversity of the views that have been expressed about the identification, extent and resolution of the problems involved in the mitigation of the effects which almost two centuries of alien settlement have had on the lives and culture of the Australian Aboriginals. Even among men and women of goodwill there is no obvious consensus about ultimate objectives. At most, there is a degree of consensus about some abstract generalized propositions: that, within limits, the Aboriginals are entitled to justice in respect of their homelands; that, within limits, those Aboriginals who wish to be assimilated within the ordinary community should be assisted in their pursuit of that wish; that, within limits, those Aboriginals who desire separately to pursue and develop their traditional culture and lifestyle upon their ancestral homelands should be encouraged, assisted and protected in that pursuit and development. It is in the identification and resolution of the problems involved in determining "the limits" that consensus breaks down and that the greatest difficulties lie. The cause of the Aboriginal peoples will not be advanced if those difficulties are ignored. To the contrary, the difficulties will only be exacerbated.

It is inevitable that the provisions of the State Act will effectively set aside approximately one-tenth of South Australia as a separate and distinct area within the State. The Pitjantjatjaras and other residents of that area will be free to leave it. Non-Pitjantjatjaras will be excluded from it unless they can show some particular entitlement or obtain permission to enter. To some extent, this position existed before the State Act was enacted. It is, in any event, a necessary consequence of the legal recognition and protection of the claims of the Pitjantjatjaras to their traditional lands and of their entitlement, within the law, to pursue and develop their traditional culture and way of life upon those lands. The problem with s 19 is that the rigid formalities which it requires to be satisfied before a non-Pitjantjatjara can be given permission to enter the lands and the criminal sanctions which enforce them seem likely to create an over-isolated enclave within South Australia entrenched behind what amounts to a type of passport system. The evidence before the court neither explains the need for those rigid formalities and criminal sanctions nor indicates the extent of separation of the Pitjantjatjaras which is likely to

result in fact from the establishment or maintenance of such an enclave. Nor does the evidence provide a basis for anything more than speculation about the identity or resolution of possible problems involved in that establishment or maintenance. There is no information before the court about the constitution or the proposed constitution of the statutory corporation. There is no information about the means by and extent to which it is proposed that the ordinary criminal law of South Australia will be enforced within the lands. Nor is there any information before the court about the existence or extent of any conflict between traditional customs and the ordinary law of South Australia either on extreme matters such as enforcement of promised marriage and ritual killing and spearing or on more mundane matters such as marriage, maintenance and inheritance. There is no information about relationships, status and needs between and within particular groups of the Pitjantjatjaras: the young and the old, the female and the male, the weak and the strong, the sick and the healthy. There is no information about what exists or is proposed in the way of facilities for needs such as education and health. The facts in the present case illustrate that, under s 19, not even a group of elders of the Pitjantjatjara people is entitled to invite a non-Pitjantjatjara, be he Aboriginal or not, upon the lands. One is left to speculate about the danger that, particularly for the female and the weak, the difference between separate development and segregation might become more theoretical than real.

If the matter were solely for my decision, I would incline to the view that the case should be remitted to the learned special magistrate to allow the factual material to be supplemented. Sitting as a member of a Full Court, however, I feel it incumbent upon me to deal with the matter on the material presently before the court, inadequate though I consider that material to be. If the relevant question were whether it had been shown that the rigid formality of s 19 of the State Act is necessary to achieve a purpose of the kind referred to in Art 1(4) of the Convention, I would be of the view that it had not been shown that it was. As has been seen, however, a finding that a provision was "taken" for a "sole purpose" of that kind will not be precluded unless it appears that the provision is not capable of being reasonably considered to be appropriate and adapted to achieving that purpose. Approaching the matter on that basis, the conclusion to which I have, on balance, come is that the provisions of s 19 of the State Act should be accepted as constituting part of the "special measures" of the kind referred to in Art 1(4) of the Convention and as therefore enjoying the protection of s 8(1) of the Commonwealth Act.

The provisions of s 19 must be viewed in the context of the overall legislative scheme which was enacted for the purpose of adapting the law of South Australia to recognize and protect the claims of the Pitjantjatjaras to their homelands. The factual material which is before the court tends to support the conclusion that the section was truly enacted as part of that overall legislative scheme. In particular, it appears that the provisions of the State Act emerged from long discussions and negotiations between representatives of the Government of South Australia and representatives of the Pitjantjatjaras on the subject of the Pitjantjatjaras' claim to the lands.

> While the formality of the only procedure by which a stranger can obtain permission to enter the lands appears to me to be undesirable from the viewpoint of all or at least some of the Pitjantjatjaras themselves as well, of course, as from the viewpoint of others, including other Aboriginals, it must be acknowledged that the formality involved may prove, in fact, to be no more burdensome than that which has been thought appropriate and acceptable in other parts of Australia and in other parts of the world in provisions acknowledging and protecting the land rights of native inhabitants. It can be argued that some such strict and formal procedure is essential to protect individual Pitjantjatjaras from being overborne by others or, more important, to ensure that particularly sacred areas of the traditional lands are protected and held inviolate. In the circumstances, while the material before the court does not persuade me of the need for or desirability of the provisions of s 19, I can see no proper grounds for doubting that they were enacted in good faith for the same purpose as that which characterizes the central provisions of the State Act.
>
> There remains to be considered the argument that the provisions of the State Act were not special measures within Art 1(4) of the Convention for the reason that they came within the terms of the proviso to that paragraph. That proviso must be construed both in its context in Art 1(4) and with reference to the similar proviso contained in Art 2(2) which imposes a positive obligation upon States Parties to take special measures. When the proviso is so construed, it appears that its final words ("after the objectives for which they were taken have been achieved") should be read as qualifying both of its previous limbs, with the result that the proviso excludes from the "special measures" to which Art 1(4) applies only measures which, "as a consequence", lead to the maintenance of separate rights for different racial groups after the time when the objectives for which they were taken have been achieved or which are continued after that time. It was argued that the proviso would prevent provisions from being "special measures" to which Art 1(4) applied unless the provisions themselves contained some qualification which would automatically deprive them of operative force if they were continued or if they led to the maintenance of separate rights for different racial groups after the objectives for which they were "taken" had been achieved. That argument must be rejected. There is nothing at all in the proviso to para 4 of Art 1 which justifies the requirement of any such qualification. All that the proviso does is to deprive "special measures" of the protection of Art 1(4) if and when the circumstances referred to in the proviso have come about. Plainly those circumstances have not come about in the present case.
>
> I would allow the appeal...

See also per Murphy J at 500; 107; per Dawson J at 541; 161.

The whole issue was discussed in the Report of the Australian Law Reform Commission (PP Nos 1986/136 and 137) on Aboriginal Customary Law that was tabled in the Senate on 12 June 1986 (Sen Deb 1986, 3833), paras 147–157.

Individuals—discrimination—racial discrimination—Convention for the Elimination of All Forms of Racial Discrimination—Declaration by Australia upon ratification—possible Article 14 declaration

On 4 November 1987 the Attorney-General, Mr Lionel Bowen, provided the following written answer to the respective questions (HR Deb 1987, 2043–2044):

Mr Hollis asked the Attorney-General, upon notice, on 18 September 1987:

(1) Did Australia declare, when it ratified the 1965 Convention on the Elimination of All Forms of Racial Discrimination on 30 September 1975, that it would seek from Parliament at the first suitable moment legislation specifically implementing the terms of Article 4(a) making dissemination of racist ideas and incitement to racial discrimination punishable by law.

(2) Has the Government considered introducing the legislation; if so, what has been the outcome of its deliberations.

(3) Is he able to say whether any State Government has introduced such legislation.

Mr Lionel Bowen—The answer to the honourable member's question is as follows:

(1) The text of the declaration made by Australia on ratification of the Convention is:

> THE GOVERNMENT OF AUSTRALIA furthermore DECLARES that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a).

(2) The Commonwealth has had the matter under consideration for some time. A number of options have been suggested, including criminal sanctions, civil proceedings and complaint handling procedures similar to those followed by the Human Rights and Equal Opportunity Commission in other areas. The problems in this area are not considered susceptible to a simple solution involving the choice of one or other of these options. A major difficulty lies in striking a suitable balance between freedom of speech and the rights of people to live free from racist abuse. The New South Wales Government has recently announced its intention to establish a working party to consider legislation in that State to provide remedies for racial defamation. It is hoped that the outcome of the New South Wales initiative will be to throw further light on ways in which the objectives of eliminating race hatred and racist propaganda might best be achieved.

(3) No such legislation has been introduced, so far as I am aware.

On 18 November 1987 the Attorney-General, Mr Lionel Bowen, provided written answers (HR Deb 1987, 2357–2358) to a number of questions relating to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the third of which answers was as follows:

> In the Government's view, a declaration would enhance Australia's international human rights reputation by demonstrating readiness to submit our human rights performance to further international scrutiny. Since the co-operation of the States is regarded as necessary for the effective operation of Article 14 in relation to Australia, the question of making a declaration under Article 14 has been under discussion with the States for some time in the Standing Committee of Attorneys-General. As yet, agreement has not been reached with all States.

Individuals—discrimination—racial discrimination—apartheid

On 31 May 1985 the Minister for Foreign Affairs, Mr Hayden, provided the following written answer to a question on notice in the Senate (Sen Deb 1985, 2986):

> The Australian Government's very strong opposition to apartheid has been placed firmly on public record. Most recently the Government, in response to tragic violence in South Africa, made a strong statement on South Africa to the United Nations Security Council on 8 March 1985. Mr Hayden made a statement in Parliament on the deplorable killings in Uttenhage on 21 March, the day of the twenty-fifth anniversary of the Sharpeville Massacre. The Government sees no other purpose being served by making a purely formal diplomatic protest. The South African Government is kept well aware of the Australian Government's views and concerns on apartheid through our Embassy in Cape Town and the South African Embassy in Canberra.
>
> Yes. Australia supported the provisions of Security Council Resolution 560 adopted on 12 March 1985 which condemned South Africa's policy of apartheid and endorsed the Security Council President's statement on 22 March expressing grave concern over the rapid deterioration of the situation in South Africa.
>
> On 26 October 1983 the Government announced its decision to strengthen its policy on sporting contacts with South Africa following a general Cabinet review of Australia's relations with South Africa. This policy, which aims to discourage sporting contacts with South Africa, is in line with the Government's total rejection of apartheid and with its objective to persuade the South African Government to dismantle the apartheid system. This policy is also consistent with both the United Nations General Assembly Resolution 31 . . . of [6] November 1976 and the 1977 Gleneagles Declaration on apartheid in sport.

Individuals—discrimination—racial discrimination—International Convention on the Suppression and Punishment of the Crime of Apartheid

On 30 April 1987 the Minister for Foreign Affairs, Mr Hayden, provided the following written answer to the respective questions (HR Deb 1987, 2366):

Mr Hollis asked the Minister for Foreign Affairs, upon notice, on 20 August 1986:

(1) Is Australia taking steps to become a party to the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.

(2) How many nations have already become parties to the Convention.

Mr Hayden—The answer to the honourable member's question is as follows:

(1) Australia shares totally the abhorrence of apartheid which underlies the 1973 Apartheid Convention and has been in the forefront of international efforts to achieve the broad purpose of the Convention, namely the eradication of apartheid. In line with the strategy embodied in the Commonwealth Accord on South Africa agreed at Nassau in 1985 and extended at the London meeting of Commonwealth Heads of Government in August last year, we have undertaken concrete measures to bring home to the South African Government that its policies must change.

The reluctance of the Government to become a party to the Apartheid Convention should not be seen as diminishing our commitment to the removal of apartheid. It is related rather to problems with certain legal concepts, especially the notion of criminality, on which the Convention is based. The Convention's definition of apartheid as a crime is imprecise and difficult to accommodate in a system of criminal law like our own which regards a clear definition of a criminal offence as an essential safeguard of civil liberties. Some of the activities which are embraced in the definition would not be regarded as criminal under Australian legislation. There are in addition problems with the concept of universal jurisdiction embodied in the Convention, under which any State party to the Convention is technically obliged to prosecute any person within its jurisdiction responsible for the broadly defined crime of apartheid wherever the act is committed and whatever the person's nationality may be.

(2) 85 nations have become party to the Convention. No country with a political and legal system similar to Australia's has become a party.

Individuals—discrimination—racial discrimination—Fiji and South Africa

On 22 October 1987 the Minister representing the Minister for Foreign Affairs and Trade in the Senate, Senator Gareth Evans, said in answer to a question (Sen Deb 1987, 1113):

> There is a sense in which there is some identity of approach between the military regime in Fiji and the long-established white regime in South Africa. Both do involve, of course, a measure of institutionalised racism. Regrettably, that is also true of a number of other countries around the world where constitutions are written in such a way as to preserve communal rights, often at the expense of majority rights. I can think of at least one other example in our own region. The difference between the two countries, however, is still an extremely significant one in quantitative terms. The

institutionalisation of racism in South Africa has been an endemic part of that whole country's latter day, modern existence. Blacks in that country are denied absolutely the right to vote; they are denied the right to participate at all—not only on a minority basis, but at all—in the governing institutions of that country. Blacks in South Africa are denied the most fundamental respect for human dignity in the way in which the apartheid laws operate to deny access to public facilities, institutions and things of that kind.

Mercifully, the institutionalisation of racism has not gone down that particular path in Fiji. The racism that exists and that is now institutionalised in Fiji is confined essentially to the political process, and participation in that process, to the extent that would be appropriate were democratic principles to be fully applied. We deplore the course that has been taken in Fiji. We have made that abundantly apparent. We hope that it will be changed. But it is a caricature of the situation—an indefensible caricature—to place the Fijian situation on all fours with the monstrous institutionalised racism involved in apartheid.

Individuals—extradition—Australian legislative changes

On 30 May 1984 the Attorney-General, Senator Gareth Evans, introduced amendments to Australia's extradition laws into Parliament. For his second reading speeches explaining the purpose of the Extradition (Commonwealth Countries) Amendment Bill 1984 and the Extradition (Foreign States) Amendment Bill 1984: see Sen Deb 1984, 2108–2109.

On 25 March 1985 the Attorney-General, Mr Bowen, introduced the Extradition (Commonwealth Countries) Bill 1985 and explained the purpose of the Bill as follows (HR Deb 1985, 595–597):

This Bill provides for amendment to the Extradition (Commonwealth Countries) Act 1966 which governs extradition between Australia and other member countries of the Commonwealth. That legislation is based on a scheme, known as the London scheme, agreed to by Commonwealth Law Ministers in 1966 to regulate the extradition of fugitive offenders between Commonwealth countries. All Commonwealth countries have based their domestic extradition legislation insofar as it relates to extradition with other Commonwealth countries on the London scheme.

In 1983 Commonwealth Law Ministers met to review the London scheme and agreed to certain changes to it to improve its operation. Putting these changes into effect requires amendment to the legislation of the various Commonwealth countries and this Bill provides for those amendments to the Australian legislation. A Bill was in fact introduced in 1984 but lapsed with the dissolution of the Parliament that year. In addition to the amendments dealt with by Commonwealth Law Ministers the Bill incorporates amendments considered necessary to resolve difficulties which have risen in the practical operation of the legislation and to improve the structure of the legislation. The more significant amendments provided for by the Bill are as follows:

Voluntary return: This procedure will allow a fugitive to waive the full extradition process and be returned voluntarily to the requesting country.

Appeal by requesting country: At present only the fugitive may appeal against a magistrate's decision on an extradition application. This amendment will permit an appeal to be lodged on behalf of the requesting country if the magistrate rejects the extradition request.

Executive discretion to refuse extradition: This amendment will extend the Attorney-General's discretion to refuse to extradite in any situation where it would be unjust or oppressive to grant extradition. At present the discretion may be exercised only if the triviality of the offence, mala fides or lapse of time would make it unjust or oppressive to grant extradition.

Extradition for fiscal offences: This amendment will make it clear that offences against laws relating to taxation, Customs duties, foreign exchange control and other revenue matters which have hitherto not been extraditable, will be extraditable.

Speciality rule: This amendment will make it clear that an extradited person may not be tried in the requesting country for offences other than those in respect of which his extradition has been granted until he has been given an opportunity of leaving that country. At present the legislation provides that a person may not be tried for any offence other than an offence in respect of which extradition was sought until he has been given the opportunity of returning to the requested country.

Offences of a political character: This amendment will provide that a decision to refuse extradition because the offence in respect of which extradition is sought is of a political character may be taken only by the Attorney-General and not the magistrate. Decisions of the courts in this area have not been helpful and it is considered that in any event such decisions would more appropriately be taken by the executive. This is the practice in the United States of America.

Evidence that may be led by a fugitive: An extradition hearing is not intended to determine the guilt or innocence of the fugitive but whether a case exists which would justify the fugitive's trial in the requesting country. Magistrates have in the past permitted fugitives to lead evidence to challenge the merits of the prima facie case sought to be established by the requesting country. This amendment will make it clear that such evidence may not be led. The fugitive may of course argue that a prima facie case is not established.

Convictions in absentia: This amendment will make it clear that, where a fugitive is sought for an offence in respect of which he has been convicted in absentia, whether that conviction is final or not, the requesting country must produce evidence of guilt as well as of the conviction.

Application for habeas corpus: At present a fugitive committed to prison to wait extradition may apply for habeas corpus to any court of competent jurisdiction. The proposed amendment will make it clear that application may be made to the Federal Court or the appropriate State Supreme Court but not both. Any appeal from the Federal Court or a State Supreme Court will be heard by a Full Court of the Federal Court.

The amendments proposed will significantly improve the Extradition (Commonwealth Countries) Act 1966 and facilitate the processing of extradition requests by and of Australia. This legislation has no financial impact. I think this summarises the situation and I commend the Bill to the House.

Also on 25 March 1985 the Attorney-General, Mr Bowen, introduced the Extradition (Foreign States) Amendment Bill 1985 and explained the purpose of the Bill as follows (ibid):

This Bill provides for amendments to the Extradition (Foreign States) Act 1966. That Act regulates Australia's extradition relations with countries that are not members of the Commonwealth and with which Australia has extradition arrangements. Two amendments to this Bill are of particular importance and result from the work of the task force I established in February of this year to conclude extradition arrangements with appropriate countries as a matter of urgency.

The first amendment will enable Australia to conclude extradition arrangements with countries which do not require the requesting country to furnish evidence of guilt but rather information as to the allegations against the fugitive. This amendment is of particular significance to civil law countries whose systems have difficulty in adapting to the provision of pre-trial evidence. The extradition arrangements of most European countries which are reflected in the European Convention on Extradition do not require the production of prima facie evidence.

The second amendment will permit the conclusion of arrangements which permit extradition to be granted for any offence which carries a penalty of 12 months imprisonment or more without specifically describing the offence. This latter amendment will avoid difficulties which have been experienced in the past where the same offence is described differently in law of the two countries concerned. The second amendment reflects the trend to 'no list' treaties in modern extradition law.

Advice of the proposed amendments has been particularly well received by civil law countries in Europe, several of which have indicated a readiness to conclude modern treaty arrangements as soon as these amendments are law. On the question of treaty arrangements generally, I should add that the draft model treaty which I approved recently has already been distributed to some countries which the task force has identified as countries with which the conclusion of treaty arrangements should be given priority.

Apart from these two significant amendments it should be noted that most of the amendments to the London Scheme agreed to by Commonwealth Law Ministers in 1983 to which I referred in introducing the Extradition (Commonwealth Countries) Amendment Bill 1985 are equally applicable to the legislation governing extraditions between Australia and countries which

are not Commonwealth countries. This Bill accordingly incorporates all the amendments proposed to the Extradition (Commonwealth Countries) Act 1966 which are appropriate to be incorporated in the Extradition (Foreign States) Act 1966. In addition, the Bill incorporates amendments considered necessary to resolve difficulties which have arisen in the practical operation of the legislation and to improve the structure of the legislation. As such the Bill will significantly improve that Act and facilitate the processing of extradition requests by and of Australia...

The Attorney-General, Mr Bowen, gave his address in reply to the debate on 26 March 1985: see HR Deb 1985, 917–919; and moved certain amendments to the Extradition (Commonwealth Countries) Amendment Bill 1985 on 19 April 1985: see HR Deb 1985, 1482–1483.

Individuals—extradition—extradition agreements with particular countries

On 26 October 1984 an extradition arrangement based on reciprocity was concluded between Australia and Ireland: see HR Deb 1985, 31 May 1985, 3198. For treaties with the Federal Republic of Germany, Finland, the Philippines, Indonesia, Denmark and Norway: see HR Deb 1985, 31 May 1985, 3197. And further with Finland: see Comm Rec 1985, 320; and with Italy: see ibid, 1445–1446.

On 17 September 1984 the Attorney-General, Senator Gareth Evans, announced he had decided not to extradite a Garry Maxwell Cant to Canada to face a criminal charge of child abduction: see Comm Rec 1984, 1807–1808.

Individuals—extradition—mutual assistance in criminal matters

In the course of a speech given by the Deputy Prime Minister and Attorney-General, Mr Bowen, at the University of Queensland on 2 October 1985, the Attorney said (Comm Rec 1985, 1694–1695):

The Australian Government attaches great importance to the development of a comprehensive international framework of multilateral and bilateral mutual legal assistance treaties in criminal matters. It recognises that the activity of organised crime and drug traffickers thwarts the personal, and socio-economic aspirations of law-abiding citizens. Consequently, I consider it is imperative that greater international co-operation and assistance be introduced into the investigation and prosecution processes to enable major criminal suspects to be brought to justice regardless of where they may be found. Similarly, the proceeds of criminal activity, regardless of where found, should be denied to those persons who have obtained them and, hopefully, returned to the society which was a victim of the criminal conduct from which those proceeds were derived.

I would like to briefly outline certain features which I believe should be contained in model treaties if they are to be effective. Firstly, and most importantly, I believe that assistance should extend not just to the law enforcement activities of police forces but also to proceedings which have been commenced. In other words, assistance should be available both at the investigative and prosecutorial stages. With respect to investigations, assistance is already granted on an informal basis through Interpol. Whilst

the treaties should formalise this I do not believe that the treaties should displace the availability of informal assistance. I would see mutual assistance treaties as complementing rather than derogating from existing avenues of assistance. The importance of treaties is that countries party to them accept obligations under international law to assist each other in accordance with the terms of the treaty.

Secondly, I believe that mutual assistance treaties should permit service in other countries of documents with respect to proceedings on foot in the Requesting State.

Thirdly, for any mutual assistance scheme to be effective it should provide, as a central provision, that a witness in another country can be called, in that country, if necessary under compulsion, to appear to testify and produce documents in accordance with the requirements of the law of that country. Australia's domiciliary law already permits a witness in Australia to be called to give evidence before a Magistrate for the purpose of transmitting that evidence for use in proceedings in courts in other countries.

Fourthly, any scheme must have provisions which deal with access to documents and records including business records.

Frequently serious criminal activity can only be successfully prosecuted if the 'paper trail' and the 'money trail' can be followed. I see access to such records, particularly access to the records of financial institutions in other countries, as being necessary if drug trafficking and other major crime is to be effectively and successfully prosecuted.

Fifthly, I believe that any successful scheme of mutual assistance must include a formula which would permit the evidence obtained in another country to be admissible in the courts of the requesting country. A precedent for this is found in extradition law where, provided it is duly authenticated, evidence or information obtained in one country is admissible in the courts of another country. Clearly safeguards must be developed to ensure fairness to an accused but a prosecution should not fail merely because a witness resident in another country cannot be brought to the country where the prosecution has been commenced. In the current session of Parliament I will be introducing legislation to permit evidence taken overseas to be introduced in courts dealing with Commonwealth matters.

Sixthly, I believe that provision should be made for law enforcement authorities in the requested country to be able to conduct searches for, and to seize, evidence that would assist in the prosecution of crime in the requesting country.

The seventh area which I believe should be addressed in any mutual assistance arrangement relates to the proceeds of criminal activity. I have already given some detail of steps being taken in this area. Clearly any international arrangement should be concerned with depriving criminals of the proceeds of their activity.

The final area which I believe should be addressed relates to the transfer of prisoners either to give evidence in a trial in another country or to be tried for offences committed in that country. It is wrong that a prosecution may fail in one country because an essential witness is a prisoner in another country. Equally, it cannot be right that because a person has been convicted

in one country and is serving a sentence there, he cannot be tried for offences committed in other countries. Such arrangements would need to provide safeguards including the return of such a prisoner to the country in which he was originally sentenced.

See also the written answer of the Minister for Foreign Affairs, Mr Hayden, in HR Deb 1985, 17 October 1985, 2461.

Individuals—extradition—Australian legislation—mutual assistance in criminal matters—consolidated extradition legislation

On 30 April 1987 the Attorney-General, Mr Bowen, introduced the Mutual Assistance in Criminal Matters Bill 1987 into the House of Representatives, and explained the purpose of the Bill as follows (HR Deb 1987, 3218–2321):

This Bill will provide a legislative basis for Australia to enter into arrangements with other countries whereby it can request and grant assistance in criminal matters. The assistance will relate both to the investigation and prosecution of crime. This Bill represents a significant initiative of this Government in its fight against organised and international crime.

At the conclusion of the Special Premiers Conference in April 1985 the Prime Minister committed the Government to pursuing actively opportunities for increased co-operation with other countries in combating crime.

The final report of the Royal Commission into the Activities of the Nugan Hand Group which was presented on 12 July 1985 recommended, inter alia, that the Commonwealth Government give consideration to upgrading the priority accorded to the establishment of modern mutual assistance agreements. At the seventh United Nations Crime Congress in Milan in 1985 Australia was instrumental in proposing, and having unanimously carried, a resolution calling for greater international co-operation in combating organised crime and urging all governments to give urgent attention to the development of mutual assistance arrangements.

This Bill in particular will enable Australia, in co-operation with other countries, to deprive criminals of off-shore havens in which to hide their profits. My discussions overseas, particularly in the United States of America and Switzerland, have completely confirmed the need for legislation in this area if Australia is to carry out effectively its international responsibilities in combating crime. I was impressed in the course of those discussions with the number of countries which expressed interest in the early completion of mutual assistance arrangements with Australia.

In early 1985 I established a task force to extend and modernise Australia's extradition arrangements with other countries. In that short period I have signed 14 extradition treaties. Negotiations have also been opened up with another 27 countries. The task force has also commenced the process of developing mutual assistance arrangements with other countries based on this Bill. I would like to take this opportunity to express my appreciation of the tremendous work done by the task force, including officers of my Department and the Department of Foreign Affairs, in the development of legislation as well as treaties and other arrangements. The

work of the task force has resulted in a treaty-making process without precedent in this country's history. I am confident that the good work of the task force will continue.

This Bill has been the subject of extensive consultation with the States and the Northern Territory. The success of this proposed legislation, and the international arrangements for mutual assistance, will depend heavily on close co-operation and understanding between the Commonwealth and the States. The Bill also ensures that rights of persons are properly protected in accordance with Australian standards of justice. The Bill reflects the principles of the Commonwealth Scheme of Mutual Assistance in Criminal Matters agreed at the Commonwealth Law Ministers meeting in Harare in July 1986.

I shall now turn to the principal features of the Bill. Clause 5 of the Bill makes it clear that its object is to facilitate the provision and obtaining by Australia of international assistance in criminal matters in areas which include:

(a) the obtaining of evidence, documents and other articles;
(b) the provision of documents and other records;
(c) the location and identification of witnesses or suspects;
(d) the execution of requests for search and seizure;
(e) the making of arrangements for persons to give evidence or assist in investigations;
(f) the forfeiture or confiscation of property in respect of offences;
(g) the recovery of pecuniary penalties in respect of offences;
(h) the restraining of dealings in property, or the freezing of assets, that may be forfeited or confiscated or that may be needed to satisfy pecuniary penalties imposed, in respect of offences;
(i) the location of property that may be forfeited, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences; and
(j) the service of documents.

The Bill's real function is to provide a legislative basis for Australia to honour the obligations it will be assuming in treaties and arrangements thereby ensuring that other countries will honour their obligations to Australia.

Clause 7 of the Bill provides that the Act may be applied to a foreign country specified in the regulations. Clause 8 is a particularly important clause in that it sets out circumstances in which the Attorney-General can refuse assistance. These exceptions to the provision of assistance are designed to ensure that national and State interests are safeguarded and that no injustice or oppression is caused to individuals. The substantive parts of the Bill also reflect the concern that Australia should not, in responding to a foreign request for assistance, unfairly disadvantage any individual.

Part II of the Bill empowers the Attorney-General to authorise a magistrate in Australia to take evidence and have documents and articles produced for transmission to a foreign country for use in proceedings in that country. The person to whom the foreign proceedings relate is entitled to be represented at the hearing in Australia as is any other person giving evidence

or producing documents or other articles at the hearing. The relevant authority of the foreign country is also entitled to be represented.

Part III of the Bill deals with search and seizure at the request of foreign countries. The foreign country must specify the reasonable grounds which it has for believing that a thing which is relevant to a proceeding or investigation involving a serious offence against the law of that country is located in Australia. A search warrant may not issue unless the foreign offence carries a maximum penalty of at least 12 months imprisonment.

Part IV of the Bill deals with arrangements for persons and prisoners to travel to a foreign country at the country's request or to Australia at Australia's request to give evidence in a criminal proceeding or to assist a criminal investigation.

Most serious organised crime has international dimensions. It is accordingly vital that Australia have arrangements whereby persons overseas, whether prisoners or not, can be transferred to Australia to give evidence or assist investigations. Safeguards are built into the procedures established. For example, the person is entitled to immunity from prosecution both in respect of offences allegedly committed prior to departure from the foreign country to travel to Australia to give evidence or assist an investigation and also in respect of the evidence he or she gives except for perjury.

The Bill will enable Australia to ease significantly the task of foreign investigation and prosecution agencies in cases where crucial evidence or witnesses are in Australia. Australia will also benefit by being able to make requests for similar assistance pursuant to the arrangements it will be entering into. For example Australia will be able to seek by compulsory process access to banking and other financial records in foreign countries.

It is vital that Australia be able to give effect to foreign forfeiture and confiscation orders in relation to the proceeds of overseas criminal activity where those proceeds are located in Australia. In turn it is also vital that Australia be able to seek the forfeiture and confiscation of the proceeds of crime committed in Australia where the proceeds are found overseas. The proceeds of criminal activity, regardless of where found, should be denied to those persons who have obtained them and hopefully returned to the society which was a victim of the criminal conduct to which those proceedings relate.

The major amendment to the form of the Bill in which it was originally introduced into the House on 22 October 1986 is the addition of a new Part VI concerning the proceeds of crime. This Part will link in to the provisions of the Proceeds of Crime Bill 1987 and permit, at the international level, forfeiture and confiscation by Australia at the request of foreign countries and vice versa.

Part VII of the Bill provides for service of foreign criminal process in Australia. The Part also contemplates Australian criminal process will in turn be able to [be] served in a foreign country.

The Government attaches great importance to development of a comprehensive international framework of mutual assistance treaties and arrangements. Major crime is becoming increasingly international in scope.

It is imperative that greater international co-operation and assistance be introduced into the investigation and prosecution processes to enable major criminal suspects to be brought to justice. This Bill provides the legislative backing for Australia to enter into these international arrangements.

While it is not possible to estimate the resource and cost implications of this Bill it is clear that Australia will derive considerable benefit from assistance from other countries. I should mention in this regard that Australia has already received significant assistance from a number of foreign countries. I mention in particular Switzerland where significant funds associated with Australian narcotics trafficking have been frozen. However, to extend and improve this kind of assistance Australia must be in a position to extend assistance to other countries. The cost of providing that assistance will be at least offset, and probably outweighed, by the value of the assistance Australia receives.

On 28 October 1987 the Attorney-General, Mr Bowen, introduced the Extradition Bill 1987 into Parliament, and explained the purpose of the Bill as follows (HR Deb 1987, 1615–1616):

This Bill consolidates and, where necessary, amends Australia's extradition laws. In November 1985 I gave to the Parliament an undertaking that an exhaustive review of the extradition laws would be undertaken to ensure that there were no inconsistencies or problems of implementation. That review has resulted in the preparation of this Bill. As the Bill is substantially a consolidation of existing laws I propose, in this introduction, to concentrate upon changes to the current laws.

The Bill also introduces important new principles most of which add to the safeguards afforded to people whose extradition from Australia is sought. It is these new safeguards which I regard as the most important elements of the Bill. The first is a statutory prohibition providing that no person will be extradited from Australia to face charges or to serve a sentence in respect of a purely military offence. By a purely military offence I mean an offence not known to the ordinary criminal law. I do not include in this category offences such as drug trafficking by members of defence forces which can be dealt with either by civilian or military courts. Military offences are offences like insubordination or desertion. Australia will not extradite, nor seek extradition, for such offences.

The second new safeguard is to preclude extradition where the death penalty can be imposed for any offence for which extradition is granted. Unless Australia receives an undertaking from the requesting country that either such penalty will not be imposed or if imposed will not be carried out extradition will be refused. A third new safeguard gives effect to the obligation Australia will assume when it accedes to the Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment. The Bill requires refusal of extradition unless the Attorney-General is satisfied that the person will not be subjected to torture.

Clause 45 is innovative. It will allow, in certain circumstances, Australia to reap the benefits of the provision contained in most of our extradition treaties which permits the requested state to refuse to extradite its nationals. Many civil law countries are precluded by law from extraditing their

nationals. Common law countries, on the other hand, usually extradite because their laws do not generally give extraterritorial jurisdiction over nationals to the courts. The effect has therefore been an unequal application of the treaty obligation in relation to extraditing nationals where the parties to the treaty are a civil law and a common law country.

Clause 45 seeks to redress the balance by allowing Australia to prosecute Australian citizens for offences committed overseas in cases where extradition is refused solely on the basis of citizenship and where the requesting country will not extradite its nationals. The courts of the States and Territories are vested with jurisdiction—via the operation of the Judiciary Act—to hear and determine cases where the Attorney-General consents to prosecution. The offence with which the person may be charged in Australia is the offence under the relevant State or Territory law with which he or she could have been charged had the conduct which gave rise to the extradition request occurred in that State or Territory. Australia will thus have the facility, in appropriate cases, to try its own citizens for criminal conduct engaged in overseas and any sentence imposed would be served in Australia.

Since the second half of the nineteenth century almost every extradition treaty negotiated has contained a provision which stated that extradition would not be granted for political offences. Originally, political offences were offences against the state and those who committed them were often seeking asylum in the country of refuge. Wishing to be able to grant such asylum, countries overwhelmingly recognised the concept of asylum by refusing to extradite those who had been referred to as ideologically motivated offenders. A problem then arose as to how to distinguish between types of offences and the motivation of offenders. That problem manifested itself in the decisions of courts determining extradition cases and has led to confusion as to the real meaning of the phrase 'political offence'. The civilised world is now faced with the grave problem of politically-motivated terrorists whose crimes are such that they should not find a haven behind the doors of the political offence exception to extradition.

The Bill seeks to clarify this difficult area of law by imposing limits on the political offence exception. It does so by excluding from that exception crimes recognised by the international community in multilateral treaties as being extremely serious. The crimes statutorily excluded from the exception are set out in the definition of 'political offence' in clause 5 of the Bill. They relate to hijacking, safety of aircraft, genocide, torture, the taking of hostages and the protection of internationally protected persons. The Bill also has the effect of allowing treaties to be negotiated which add to the list of exceptions to the political offence exception. Crimes which may be added by way of regulation include crimes recognised in future multilateral conventions to which Australia becomes a party, other crimes against heads of state or heads of government and crimes of violence committed in circumstances which create a collective danger to innocent life. This limitation of the political offence exception represents Australia's clear abhorrence of terrorist conduct and our unwillingness to provide any sort of haven for

criminals whose serious or violent crimes are allegedly perpetrated for ideological reasons.

The Bill simplifies certain matters which have led the courts into difficulty under the current laws. It does not change the law; it merely expresses in clearer language the concepts contained in the current Acts. The major of these changes relate to the determination of dual criminality and the satisfaction of the prima facie evidence or committal for trial tests. Sub-clause 10(3) makes it clear that the court is to look at all the acts or omissions alleged against the person sought and if any or all of those acts or omissions would have constituted an offence against the relevant law in force in Australia had the conduct occurred in Australia and the minimum penalty test is satisfied in respect of them, the dual criminality test is satisfied.

Sub-clauses 11(4) and 11(5) operate to unify throughout Australia the test to be applied by courts in determining whether evidence supplied by the requesting country is sufficient to justify the trial of the person sought. These sub-clauses will apply where a request is received from a country with which Australia has an extradition relationship requiring the production of prima facie evidence that the offence was committed. Since arrangements of this sort were entered into there have been amendments to the laws of some Australian States which have had the effect of changing the test of whether a person should be committed for trial. At least one of these changes requires the magistrate to assess what a hypothetical jury might decide at trial. The effect of the application of this test to an extradition case is to permit the magistrate to postulate as to the potential outcome of a foreign trial and clearly has the effect of abrogating the rule that extradition proceedings should not be determinative of the guilt or innocence of the person sought.

The test set out in the Bill requires the magistrate to form the view that the evidence provided would, if uncontroverted, provide sufficient grounds to put the person on trial. In other words, the magistrate must determine that the evidence provided is sufficient to warrant a court inquiry in relation to the offence or alleged offence. This test will be applied throughout Australia and will therefore overcome the problem, for example, of two or more co-conspirators being arrested in different States and having the magistrates coming to different conclusions on the basis of the same evidence.

Clause 18 of the Bill recognises that certain people are willing to return to the country seeking their extradition and there to face the processes of the law. This clause therefore re-enacts the provisions relating to consent to surrender which were introduced into Australian law in 1985. Experience over the last two years has shown that a reasonable percentage of extradition requests have come to speedy and satisfactory conclusions by the person sought consenting to his or her surrender.

Clause 20 takes the consent concept further by allowing a person sought to consent to being tried on return for offences for which extradition cannot be granted, normally because the sentence which can be imposed falls below the minimum required to make the offence extraditable. The benefit of the accessory extradition process is that it enables a person to return and stand

trial for all outstanding offences for which he has been surrendered. The result may well be concurrent sentences and at the end of the sentence the person will have wiped the slate clean. He will not be faced with the unenviable choice of having either to face new proceedings or to leave permanently the country to which he has extradited. I expect that the provision will be most availed of by people whose extradition is sought by their own country. Clause 20 requires that the requesting country lists all extraditable and non-extraditable offences so as to give the person sought a clear understanding of the charges he can be required to face on return. The operation of the rule of speciality still protects him in respect of any offence not specified in the request for extradition and any offence for which extradition is not granted or not consented to as the case may be.

The Bill contains an enhanced system of review and appeal procedures designed to ensure that the removal of decisions under the Bill from administrative review pursuant to the Administrative Review (Judicial Decisions) Act 1977 does not leave a person without recourse to proper review procedures. Although the system of review and appeal in this Bill is similar to that contained in the current Acts it imposes upon requesting countries seeking review new time limits within which applications or appeals must be made.

It was only after lengthy deliberation that decisions taken under extradition laws were determined to be decisions which should be removed from the scope of the Judicial Review Act. Fundamentally the decision was forced upon us because fugitives were pursuing both their statutory rights to review under the extradition Acts and, often concurrently, their rights under the Judicial Review Act. One case was taken to the Supreme Court of New South Wales on an application for the issue of a writ of habeas corpus at the same time as the Full High Court was determining an application under the Administrative Decisions (Judicial Review) Act. Had either application succeeded the result to the fugitive would have been exactly the same. Another case shows that fugitives can, and have, made a habeas corpus application to the Supreme Court of a State, sought removal of those proceedings to the High Court, made application to the Federal Court pursuant to the Extradition Act and following determination by the Full Federal Court taken the matter back to a single judge of the Federal Court of Australia pursuant to the Judicial Review Act.

The enormous cost to the Australian community of a review system which permits unnecessary duplication cannot be justified. Additionally, the lengthy delays caused by duplex review procedures have caused some consternation with Australia's treaty partners. In one case, the proceedings took in excess of two years. The Bill therefore establishes rights to review and appeal, all the way to the High Court of Australia, and at the same time leaves in place the High Court's original jurisdiction—also exercisable by the Federal Court—to grant relief.

Another innovation is to be found in the provisions relating to temporary surrender. I do not anticipate that these provisions will often be used but I can see their great utility where the interests of justice require that a trial be conducted but the operation of extradition laws which bar the surrender of a

person serving a prison sentence in the requested country has the effect of postponing that trial for years. Temporary surrender allows a person otherwise unavailable for surrender to be sent to, or received from, another country for trial and then to be returned to finish the first sentence. After that time he or she can be permanently surrendered to serve any sentence imposed at the time of temporary surrender. The provision will be useful in cases involving more than one accused where trials are better conducted concurrently. In this regard I see major drug rings being able to be dealt with effectively. An example of a case where temporary surrender to Australia may have been most useful was the Mr Asia case.

I now turn back to the safeguards for a person whose extradition is sought. The Bill requires extradition to be refused in any case where the surrender is sought for the purpose of prosecution or punishing the person on account of race, religion, nationality or political opinion. It also requires refusal of extradition where any prejudice on any of those grounds may result. Extradition must also be refused if the person has been acquitted, pardoned or has served the sentence imposed in respect of the same conduct where that acquittal, pardon or service was in either Australia or in the requesting country. Where a third country has granted the pardon or has acquitted the person the Attorney-General may refuse to extradite. This reservation to the Attorney-General of the power to consider third country pardons and acquittals has been proved in the international arena to be desirable.

I concede that it would, in normal circumstances, be unheard of to surrender a person who had been pardoned. Recent experience suggests, however, that some drug offenders have the means and have sufficient influence to purchase pardons with the very intention of using such a pardon or acquittal to defeat extradition. I would require from the requesting country substantial evidence that I should go behind a pardon or acquittal and question its bona fides and can only foresee so doing in extreme circumstances such as cases where the country purporting to acquit or pardon had no connection with the alleged offence.

Australia's model extradition treaty which has formed the basis of all treaties and arrangements negotiated since May 1985 contains other mandatory and discretionary bars to extradition which operate either directly to protect the person sought or to protect Australia's sovereignty. Pursuant to these treaty provisions extradition can be refused if the Attorney-General, acting under clause 22, considers that a treaty prohibition exists or treaty discretion should be exercised. For example no persons may be extradited if they either have been or are likely to be dealt with by an extraordinary or ad hoc tribunal or court. Australia will extradite only where the normal courts of the requesting State are to deal with the offender. Nor may extradition be granted for a statute barred offence. The treaty provisions permitting discretionary refusal operate in any case where Australia would have concurrent jurisdiction and either decides to exercise that jurisdiction or, alternatively, makes a deliberate decision in the exercise of that jurisdiction not to prosecute. Where the age or health of a person is such as would make surrender totally incompatible with humanitarian considerations most, if not

all, modern treaties give a discretion to refuse to surrender and/or to delay surrender. All of these treaty matters are matters which must be considered by the Attorney-General before he issues a warrant for surrender. The Bill recognises that there may be other circumstances where the Attorney-General exercises a discretion not to order surrender. For example, the Attorney-General may refuse surrender when it would be unjust, oppressive or too severe a punishment to extradite.

The Bill contains a special part which governs extradition relations with New Zealand. Our close ties with that country have made appropriate a reciprocal regime which bears a very close similarity to the extradition relations between the various Australian States and Territories contained in the Service and Execution of Process Act 1901. Fugitives are moved between Australia and New Zealand by a process based on the backing of warrants by magistrates. The whole process is normally handled by the police in exactly the same way as an interstate extradition would be handled. The Bill's only innovation in this area is to permit temporary surrender to New Zealand.

As I stated at the beginning of this speech, this legislation is the result of a comprehensive review of the efficacy of the current extradition laws. It embodies much of the wisdom of our courts which has been gleaned from judgments. The law has been rewritten to make it more readable and accessible for courts, foreign countries, practitioners and fugitives. It seeks to recognise modern problems and to resolve them and in so doing adopts an approach which ensures that a proper balance is struck between the aspirations of the international community in wanting to limit havens for law breakers and the legitimate expectations of persons accused or convicted of crimes that they will be dealt with humanely and in accordance with law.

The Bill passed Parliament and was assented to on 9 March 1988 (Act No 4 of 1988).

Individuals—extradition—principle of double criminality—relevance of the principle in interpreting extradition treaties

In the course of their judgments in *Riley v Commonwealth of Australia* (1985) 62 ALR 497, 159 CLR 1, decided by the High Court of Australia on 18 December 1985, four of the five judges comprising the Court made some observations on the rule of double criminality in interpreting the Extradition Treaty between Australia and the United States of America for the purposes of extradition proceedings under the Extradition (Foreign States) Act 1966 (Commonwealth). Gibbs CJ, Wilson and Dawson JJ said (at 505; 11–12):

> it was said that to give [the Treaty] that effect would be to depart from the principle of double criminality—a principle which writers on international law have described as accepted and basic: see "Research in International Law" *Supplement to the AJIL*, vol 29(1935), at p 81, which cites the Resolutions of Oxford adopted in 1880: "As a rule it should be required that the acts to which extradition applies be punishable by the law of both countries, except in cases where by reason of particular institutions or of the geographical situation of the country of refuge the actual circumstances constituting the offence cannot exist."

In Oppenheim's *International Law* 8th ed. (1955), vol 1, at p 701, it was said: "And no person is to be extradited whose deed is not a crime according to the Criminal Law of the State which is asked to extradite, as well as of the State which demands extradition".

It is, however, clear that domestic statutes and international treaties may be framed in such a way as to require a person to be extradited for conduct which is an offence only in the requesting State. It is clear in principle that so far as municipal law is concerned, the principle can have no effect other than as a possible guide to interpretation. It was held by the Supreme Court of the United States in *Factor v Laubenheimer* (1933) 290 US 276; 78 Law Ed 315, that the nature and extent of the right to demand extradition and the duty to extradite depend on the terms of the Treaty which creates the right and the duty rather than on the principles of international law: see at p 287 (p 320 of Law Ed). Lord Diplock appears to have proceeded on the basis of a similar view in *Re Nielsen* [1984] AC 606 at 624–5.

According to Deane J (at 506–510; 15–19):

> International law recognizes no inherent right of a State to require that another State deliver to its custody a person whom it alleges to be guilty of a criminal offence against its laws. Any right to require the extradition of such a person must be based upon the dual foundation of an applicable extradition treaty and the primary principle of all international law that *pacta sunt servanda*. Where an extradition treaty exists between States, the existence and content of any right to require, or any obligation to grant, extradition will fall to be determined by reference to the treaty's terms. Even when another State is entitled to require extradition of a person under the provisions of an extradition treaty to which this country is a party however, neither the Executive Government nor any member of it has any automatic right to detain or deliver up that person otherwise than pursuant to the mandate of some Act of the Parliament. Without such a mandate, any pretension of the Executive to a right to deprive a person of his or her liberty in pursuance of some obligation under international law will be unavailing against the writ of *habeas corpus*.
>
> The provisions of an extradition treaty fall to be construed by reference to the somewhat amorphous rules of international law which are commonly classified as the "law of treaties". Under those rules, a treaty must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Vienna Convention on the Law of Treaties, Article 31; cf *Re Arton (No 2)* [1896] 1 QB 509 at 517; and see generally, on construction of treaties, O'Connell: *International Law* 2nd ed (1970), vol 1, pp 251ff and the learned writings which Professor O'Connell mentioned in n 37 on pp 251–2). Treaties dealing with a specific subject, such as extradition, must also be construed in the light of any particular principles of international law and of any particular standards accepted by the member States of the international community in relation to that subject. Thus, for example, it is a well-recognized standard of the international community, though not binding as a rule of international law, that extradition—with its attendant deprivation of liberty and disruption of lives—should only be requested or granted in

cases where the alleged offence is a serious one (see, eg *Shapiro v Ferrandina* (1973) 478 F 2d 894 at 906–7, n 12 and O'Connell, op cit, vol 2, at p 722).

The present appellants rely upon what has been commonly called the "principle" of double criminality in propounding a restrictive construction of the provisions of both the Treaty and the Act. That principle is not a mandatory rule of international law in that it is not a breach of international law if a State fails to observe it either by becoming a party to an extradition treaty which negates it or in requesting or granting extradition in contravention of it. As Professor Manley O Hudson has noted ("The Factor Case and Double Criminality in Extradition", American Journal of International Law, vol 28 (1934) 274, at pp 285–6), the principle of double criminality "does not constitute a restrictive limitation on the power of States, and two States are competent to depart from it in entering into arrangements for extradition. A treaty may provide for the surrender of a person charged with an act which is made criminal only by the law of the requesting State: it might even provide for the surrender if the act is made criminal only by the law of the requested State, though this would be very peculiar, indeed". Nor does international law demand that the principle of double criminality be observed by domestic tribunals in applying the provisions of an extradition treaty which do not incorporate it. The principle "may be laid down in domestic extradition law and may on that account be binding upon the courts, or it may be expressly stipulated in extradition treaties, but no international rule prevents municipal tribunals from ignoring it in cases where neither the national law nor a treaty prescribes its observance" (see Professor Verzijl: *International Law in Historical Perspective*, (1972) vol 5, pp 336–7).

On the other hand, double criminality, although not binding as a mandatory rule under international law, has long been recognized as an accepted principle which is customarily observed by States in making and applying arrangements for the extradition of alleged offenders (see, eg, Hudson, op cit, at pp 283–5; "Research in International Law", Supplement to American Journal of International Law, vol 29 (1935) pp 81–2). As such, the principle of double criminality constitutes an important part of the matrix of rules of international law and of internationally accepted standards against which the provisions of an extradition treaty must be construed. The terms of the Treaty which are in issue in the present appeals must be interpreted in the light of that principle (cf Hudson, op cit, at pp 285–6). A national court will accordingly be conscious of the requirements of the principle in a case, such as the present, where it is called upon to construe the terms of an extradition treaty. In a case of ambiguity, the strong assumption of observance of the principle will ordinarily outweigh the more general rule requiring that the terms of a treaty be liberally construed. The only other respect in which the principle against double criminality is likely to become relevant for the purposes of the municipal law of this country is as a guide, in a case of ambiguity, to the legislative intent to be discerned in statutory provisions dealing with extradition.

Notwithstanding widespread acceptance of the principle of double criminality as a general standard to be observed in international relations, the precise content of the principle remains unsettled. Its essential utility is to provide an available safety mechanism whereby a State is not required to surrender up a person, possibly one of its own nationals, to be tried and punished for conduct which, according to the standards accepted by those within its boundaries, is not deserving of punishment at all (see Shearer: *Extradition in International Law* (1971), pp 137–8). As a generally accepted limitation of obligations under extradition treaties, it avoids the international complications and ill-will which are likely to result from an *ad hoc* refusal of extradition based on the unacceptability to the requested State of particular laws of a requesting State. The utility of the principle of double criminality is, however, likely to be outweighed by the impediment which it represents to the advancement of criminal justice if its content is defined in over-technical terms which would preclude extradition by reason of technical differences between legal systems, notwithstanding that the acts alleged against the accused involve serious criminality under the law of both requesting and requested States.

One can find in the writings of some publicists and in some judgments of international and domestic courts support for the view that the principle of double criminality requires correspondence or substantial correspondence between an entire offence under the law of the requesting State, being an alleged offence for which extradition is sought, and an entire offence under the law of the requested State. This approach is likely to result in primary emphasis being placed upon labels and correspondence of legal elements. If unqualified, it would significantly and arbitrarily frustrate the effectiveness of extradition arrangements between States with dissimilar systems of criminal law. The preferable view—and that which commands general acceptance—rejects the need for precise correspondence between labels or between the [constituent] elements of identified legal offences under the criminal law of the requesting and requested States and defines the principle of double criminality in terms of substance rather than technical form. On this view, the requirement of double criminality is satisfied if the acts in respect of which extradition is sought are criminal under both systems, even if the relevant offences have different names and elements (O'Connell, op cit, vol 2, at p 723). This view places primary emphasis upon the acts constituting the offence alleged against the accused in the warrant rather than upon general theoretical correspondence between the legal elements of the offence which he is alleged to have committed against the law of the requesting State and some offence recognized by the law of the requested State.

One of the most authoritative general statements of the preferable view of the requirement of double criminality remains that contained in the resolutions adopted by the Institut de Droit International at its 1880 Oxford meeting: "As a rule it should be required that *the acts to which extradition applies* be punishable by the law of both countries, except in cases where by reason of particular institutions or of the geographical situation of the country of refuge the actual circumstances constituting the offence cannot

exist" (emphasis added). Of comparable importance for this country is the provision of Art 10 of the London Scheme of 1966: "The return of a fugitive offender will either be precluded by law or be subject to refusal by law...*if the facts on which the requests for his return is grounded* do not constitute an offence under the law of the country or territory in which he is found" (emphasis again added; quoted in Ryan: *International Law in Australia*, 2nd ed (1984), p 199). It has been suggested that the requirement of double criminality will be satisfied whenever the acts alleged in the extradition request would involve the commission of a criminal offence in both the requesting State and the requested State (see, eg Levy: "Double Criminality and the US-UK Extradition Treaty", Brooklyn Journal of International Law, vol VII:2 (1982), 475 at pp 482–3). That suggestion would, however, unduly discount the content of the requirement of double criminality if it would permit extradition in a case where conviction under the law of the requesting State was possible upon proof of some only of the acts alleged in the warrant. The principle of double criminality is satisfied where, and only where, any alleged offence against the law of the requesting State in respect of which extradition is sought would necessarily involve a criminal offence against the law of the requested State if the acts constituting it had been done in that State. As O Dalaigh CJ of the Irish Supreme Court commented in *State (Furlong) v Kelly* [1971] IR 132 (a case in which England was the requesting State and Ireland was the requested State):

> The basic inquiry is to discover whether the several ingredients which constitute the offence specified in the warrant, *or one or more of such ingredients*, constitute an offence under the law of the [requested] State....If the English offence consists of, say four essential elements a + b + c + d, then a corresponding Irish offence exists only if it contains either precisely these same four essential elements *or a lesser number thereof*. If the only Irish offence that can be pointed to has an additional essential ingredient (that is to say, if the Irish offence may be defined as a + b + c + d + e), then there is no corresponding Irish offence...for the simple reason that, *ex* [*hypothesi*], conduct a + b + c + d falls short of being an offence under Irish law or, in plainer words, is not an offence. It is fundamental to extradition that no one shall be extradited for acts or omissions (the offence alleged in the warrant) which, if repeated within the State, would not offend against our law (at p 141, emphasis added).

That clear formulation of the content of the requirement of double criminality in the case of a composite crime has been subjected to some criticism on the ground that it unduly restricts the circumstances in which extradition should be granted. It is, in some respects, more demanding than the approach adopted in the passage from the judgment of Griffiths J in *R v Governor of Pentonville Prison; Ex parte Budlong* [1980] 1 WLR 1110 at 1122–3 which was cited by Lord Diplock in *Re Nielsen* [1984] AC 606 at 624 and which would seem to have been seen as over-restrictive by the Irish Supreme Court itself in *Hanlon v Fleming* [1981] IR 489 (see Coutts: "Double Criminality", Journal of Criminal Law, vol 48 (1984), 93). It is not, however, open to valid criticism on the ground that it understates the requirement of double criminality since it effectively precludes extradition

except in a case where conviction of the alleged offence against the law of the requested State would necessarily involve proof of some act or acts which would be criminal under the law of the requested State.

Individuals—extradition—nature of an offence of "a political character"

In *Prevato v Governor, Metropolitan Remand Centre and Others* 64 ALR 37, decided by Wilcox J in the Federal Court of Australia in Sydney on 6 February 1986, consideration was given to the nature of an offence of "a political character" in determining whether or not Prevato, an Australian citizen, should have been extradited to Italy in pursuance of an Extradition Treaty between Australia and Italy and the Extradition (Foreign States) Act 1966. Prevato had been committed to prison in respect of various charges for which his extradition had been sought. These were:

(1) ...in complicity with one another, the first 9 as promoters and organizers, in execution of a program adopted by the 'Ronde Armate Proletarie' (proletarian armed patrols) of which they were members, which program was intended to oppose 'selection' in schools, and RUGGERO, PAESOTTO, GRIGGIO and PREVATO having materially committed the facts—set fire to the registers and class works of the teachers of the Technical Institute 'Marconi' in order to destroy them, thus putting the school building in danger of fire.

(The applicant was not named as one of the "promoters and organizers", being named last in the list of 11 names.)

(2) ...in complicity with one another and in the capacities mentioned above destroyed the school registers (public deeds) mentioned above.

(3) ...in complicity with one another, in their aforesaid capacities and in order to make an attempt on public safety and to commit the offences mentioned above—possessed inflammable substances, and in particular a can containing three litres of petrol.

Charges 44, 45 and 46 each related to an incident said to have occurred at the Selvatico Technical Institute on 8 September 1980, the applicant being then aged 18 years. Those charges read as follows:

(44) ...in complicity with one another and for purposes of terrorism and eversion of the democratic order—decided to damage and subsequently damaged with metal bars an electronic laboratory and an electronic computer in the Secretary's Office of the Technical Institute 'P Selvatico', threatening persons an causing damage to other items existing in said Institute (telephone sets, armchairs, a writing-desk, a chair, typewriters, an amplifier, a mini computer, a painting by Manzu accent and a polyptych of Tono Zancanaro), thus causing said Institute to suffer heavy financial damage (not less than ten million lire).

(45) ...in complicity with one another, being masked and in order to subvert the democratic order—decided to threaten and actually threatened public officials (teachers and other members of the Institute "P Selvatico' while in the exercise of their duties).

(46) ...in complicity with one another and for purposes of terrorism and eversion of the democratic order—deprived the teaching and non-teaching

staff of the Institute 'Selvatico' of their person liberty, said staff being public officials in the exercise of their duties.

His Honour said of the submission that these offences were of a "political character" as follows (at 60–66):

> Section 13(1) of the Extradition (Foreign States) Act provides that a person is not liable to be surrendered to a foreign state "if the offence to which the requisition for his surrender relates is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character [or] if the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character". Article VIII of the Treaty between Australia and Italy contains a similar, although not identical, provision.
>
> The wording of s 13 of the Extradition (Foreign States) Act is similar in substance to that contained in s 3(i) of the Extradition Act 1870 of the United Kingdom. There have been a number of decisions in English courts relating to the application of that provision but counsel for the Attorney-General submit that it is unnecessary for the court, in the present case, to consider those authorities because, in this case, the question whether any of the alleged offences was an offence of a political character is a matter for the Attorney-General alone, and not for the court. Counsel drew attention to the scheme of the Act, pointing out that, if at the relevant time the Attorney-General is of the opinion that the relevant offences are of a political character, he or she is forbidden both to initiate extradition proceedings in an Australian court (s 15(2)) and to issue a warrant for the surrender of the fugitive: s 18A(1). Counsel concede that the magistrate is entitled to have regard to the question whether the offence is one of a political character in a case where the fugitive has adduced evidence to that effect. This concession is made upon the basis that s 17(6)(b) permits evidence to be adduced by the fugitive on that issue, a permission which would be pointless if the magistrate was required to disregard that evidence. But it is said that where no such evidence is presented the magistrate—and on review this court—is not concerned with the question.
>
> I do not accept this construction of the Act. Section 13(1) provides that a person "is not liable to be surrendered" for extradition if the relevant offence is an offence of a political character [and] by s 17(6)(b) the magistrate is required to be satisfied, before making an order for committal of a person, that the person "is liable to be surrendered". This means that, in any case in which any claim is made of non-liability to surrender pursuant to s 13 (see *Riley* (1984) 57 ALR at 255), the magistrate must be satisfied that the claim is unfounded and that the person is in law liable to be surrendered. For the purposes of determining that matter the magistrate is required to consider "any evidence properly adduced by the person"; but it is not a pre-condition of such determination that evidence has been adduced. The political character of the relevant alleged offence may appear from the evidence adduced to the magistrate on behalf of the Attorney-General; cf the comment of Lord Goddard CJ in *R v Governor of Brixton Prison; Ex parte Kolczynski* [1955] 1 QB 540 at 550. It is true, as counsel for the Attorney-General points out, that it is likely that the Attorney-General will

have had all of this material before him at the time when he decided to institute the extradition proceedings so that, if no evidence is adduced on behalf of the fugitive, the magistrate is placed in the position of being asked to review the opinion of the Attorney-General upon that point. But there is no anomaly in that; it is unrealistic to expect that the Attorney-General would have had the same opportunity as the magistrate for unhurried consideration of the case and, of course, the Attorney-General would lack the benefit of argument on behalf of the fugitive. The policy of the Extradition (Foreign States) Act is to ensure that, at each stage of the extradition process, consideration is given to any material suggesting that the offence was of a political character; as was said by Viscount Radcliffe in *Schtracks,* ([1964] AC at p 586) in relation to the similar scheme of the United Kingdom Act: "it seems to be the evident intention of the statute that the issue [of political character] should be considered as a substantive matter at any stage by any authority, magistrate, court or Secretary of State, which has a duty to perform in relation to the extradition". In that case fresh evidence upon that issue was permitted to be adduced even in the House of Lords. The question whether the offences in relation to which the extradition of Prevato is sought are offences of a political character fell within the jurisdiction of the magistrate. Upon an application for review of the magistrate's decision it is a matter for this court.

The first case under s 3(i) of the United Kingdom statute was *Re Castioni* [1891] 1 QB 149, a case in which extradition was sought upon a charge of murder. The prisoner was said to have participated in an armed insurrection against the government of the canton of Ticino in Switzerland in the course of which he shot a member of the State Council of the canton. The Divisional Court upheld the fugitive's claim that the offence was one of a political character. All members of the curt emphasized that it was not enough that the alleged offence had taken place in the course of a political disturbance—a person might use such a disturbance as a cloak for an act for private vengeance or greed—but that the crime was political if committed as part of a political activity and with a political object in mind. Each member of the court accepted that an offence was of a political character if, with the requisite object, it occurred in the course of a political disturbance.

No attempt was made in *Castioni* to frame an exhaustive definition of "offences of a political character". Neither was it necessary to determine whether it was an essential characteristic of such an offence that there be a disturbance of the peace or that there be political parties contending for power; both features were present in *Castioni.* The latter question, however, arose three years later in *Re Meunier* [1894] 2 QB 415; a case in which France sought the extradition of a self-confessed anarchist on charges of wilfully causing certain explosions, occasioning death. The Divisional Court held that, in order to constitute an offence of a political character there must be two or more parties competing for government in the requesting State, each seeking to impose the government of their choice upon the other. As the party with whom Meunier was associated was opposed to all governments, this condition was not fulfilled.

In more recent times the narrow interpretation adopted in *Meunier* has been rejected. Thus in *Kolczynski, supra*, the Divisional court upheld a claim of political character made by seven members of the crew of a Polish fishing trawler who took charge of the ship whilst it was in the North Sea—assaulting and/or imprisoning certain officers in the process—and brought it into port at Whitby, where they sought political asylum. In answer to extradition proceedings brought by Poland, based upon various charges of assault, wounding and damage to property, the seven men argued that the offences were of a political character in that it was a rebellion against the political officers commanding the ship; or alternatively that the requisition had been made with a view to trying or punishing them for an offence of a political character. Notwithstanding that Poland was a one party State, and that the seven men were not members of a political group, they succeeded on the second ground. The court was satisfied that the offences for which the men would be tried were the offences alleged in the extradition proceedings—all of which were extraditable offences and not obviously political in character—but that, having regard to evidence as to the recording of their conversations and the circumstances in which the rebellion occurred, the prosecution would in fact be a political prosecution.

The concept of an "offence of a political character" received extensive attention in the House of Lords in *Schtraks*. The fugitive claimed that the offences of perjury and child stealing alleged against him by Israel fell within this description because they arose out of his intervention to ensure that the child, his nephew, was brought up in the orthodox Jewish faith. Both the issue of religious upbringing and the case itself were matters of political controversy in Israel but the fugitive had acted merely out of personal conviction and not as a member of any political party. His claim of political character failed. Lord Reid pointed out (at p 581) that the list of extraditable crimes did not include any offences which were overtly political, so that the question for the court must always be to determine whether an offence which is, on its face, an ordinary criminal offence has in fact a political character. At p 583 he observed that the court was not concerned with the question whether any political cause espoused by the fugitive was good or bad—and compare the observation of Denman J in *Castioni* (at p 158) that the court is not concerned with the wisdom of carrying out the relevant act in the advancement of that cause—but that "the motive and purpose of the accused in committing the offence must be relevant and may be decisive". His Lordship went on to reject the necessity for open insurrection or for an intention to change the composition of the government:

> An underground resistance movement may be attempting to overthrow a government and it could hardly be that an offence committed the day before open disturbances broke out would be treated as non-political while a precisely similar offence committed two days later would be of a political character. And I do not [see] why the section should be limited to attempts to overthrow a government. The use of force, or it may be other means, to compel a sovereign to change his advisers, or to compel a government to change its policy may be just as political in character as the use of force to achieve a revolution. And I do

not see why it should be necessary that the refugee's party should have been trying to achieve power in the State. It would be enough if they were trying to make the government concede some measure of freedom but not attempting to supplant it.

Viscount Radcliffe thought that the concept of a political offence should be limited to opposition between citizen and government; that it is not enough that there is a contest between opposing political forces not in power. He said (at pp 591–2):

> In my opinion the idea that lies behind the phrase 'offence of a political character' is that the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country. The analogy of 'political' in this context is with 'political' in such phrases as 'political refugee', 'political asylum' or 'political prisoner'. It does indicate, I think, that the requesting State is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international, aspect. It is this idea that the judges were seeking to express in the two early cases of *Re Castioni* and *Re Meunier* when they connected the political offence with an uprising, a disturbance, an insurrection, a civil war or struggle for power: and in my opinion it is still necessary to maintain the idea of that connection. It is not departed from by taking a liberal view as to what is meant by disturbance or these other words, provided that the idea of political opposition as between fugitive and requesting State is not lost sight of: but it would be lost sight of, I think, if one were to say that all offences were political offences, so long as they could be shown to have been committed for a political object or with a political motive or for the furtherance of some political cause or campaign. There may, for instance, be all sorts of contending political organizations or forces in a country and members of them may commit all sorts of infractions of the criminal law in the belief that by so doing they will further their political ends: but if the central government stands apart and is concerned only to enforce the criminal law that has been violated by these contestants, I see no reason why fugitives should be protected by this country from its jurisdiction on the ground that they are political offenders.

I have referred extensively to *Schtracks* because this decision, and especially the quoted passage from the speech of Viscount Radcliffe, was adopted by the High Court of Australia upon the only occasion, of which I am aware, that any Australian court has had to consider the nature of an offence of a political character: *R v Wilson; Ex parte Witness T* (1976) 135 CLR 179. In that case a prospective witness sought to prohibit a magistrate from taking evidence, under s 27 of the Extradition (Foreign States) Act, in relation to a pending criminal trial in the Federal Republic of Germany. The offences were alleged to have occurred in White Russia during the wartime occupation of that area by Germany. Barwick CJ, with whom Gibbs and Stephen JJ agreed in terms and Mason J agreed in substance, applied the words of Viscount Radcliffe to dismiss the claim. His Honour said (at p 184): "Here, the offences of which Albert Kruger is accused are founded

upon acts which are not shown to have been done in any sense by way of, or in performance of, political opposition by him to Germany as it formerly was, or to West Germany which no prosecutes him: nor is it shown that they were done in the course of a political disturbance."

I will refer shortly to two recent English decisions cited by counsel: *R v Governor of Pentonville Prison; Ex parte Cheng* [1973] AC 931 and *R v Governor of Pentonville Prison; Ex parte Budlong* [1980] 1 WLR 1110. *Cheng* was a case in which the United States of America sought the extradition of a Taiwanese citizen, resident in the United States, who was a member of an organization opposed to the ruling Nationalist Party government in Taiwan. Mr Cheng was accused of the attempted murder of the Taiwanese vice-premier during a visit of the latter to the United States. By majority, Lord Hodson, Lord Diplock and Lord Salmon (Lord Wilberforce and Lord Simon of Glaisdale dissenting) the House of Lords rejected his claim that the offence was one of a political character. The majority applied the words of Viscount Radcliffe in *Schtraks* to hold that there must be conflict upon a political matter between the fugitive and the government of the requesting State. In the case under consideration the fugitive had no quarrel with the United States government—the requesting State—but only with the Taiwanese government.

The facts of *Cheng* are remote from the present case but the speech of Lord Diplock is interesting for its emphasis upon single purpose. His Lordship said (at p 945): "So, even apart from authority, I would hold that prima facie an act committed in a foreign state was not 'an *offence* of a political character' unless the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed, or to induce it to change its policy, or to enable him to escape from the jurisdiction of a government of whose political politicies the offender disapproved but despaired of altering so long as he was there."

Budlong was also a case in which the United Kingdom sought extradition; on this occasion of two persons said to have been involved in burglaries of various offices of United States government agencies. The burglaries were committed by members of the Church of Scientology with the purpose of obtaining information regarding actions taken against the Church by those agencies. The Divisional Court rejected the claim of political character, saying (at p 1124): "...that the applicants did not order these burglaries to take place in order to challenge the political control or government of the United States; they did so to further the interests of the Church of Scientology and its members..."

Counsel for the Attorney-General points out that in *Budlong* there was no reference to the object of changing government policy; but the case cannot be regarded as authority for the view that such an object may not be sufficient to institute an offence of a political character. This would be inconsistent with the speeches in both *Schtracks* and *Cheng*.

The evidence in the present case, emerging from the statements of all three witnesses, was that the acts in relation to which Prevato is charged occurred in the course of a long and bitter campaign to induce a change in education policy in government schools in Padua. The evidence does not

show whether these schools were conducted by the national government or by a provincial or local government but it is not an essential requirement of a political offence that the relevant contest be with the national government. *Castioni* shows that. The early debate upon the necessity for there to be a campaign to change the government itself was decisively resolved in the negative in *Schtraks*; it is enough that there be a concerted campaign to change government policy. Not every offence committed in the course of opposition to government policy is a political offence. There must be, at least, an organized, prolonged campaign involving a number of people. The offence must be directed solely to that purpose; it must not involve the satisfaction of private ends. And the offence must be committed in the direct prosecution of that campaign; so an assault upon a political opponent in the course of the campaign may be a political offence but an assault upon a bank teller in the course of a robbery carried out to obtain funds for use in the campaign would not be.

In the present case these requirements are all satisfied. The matter of purpose does not depend only upon the statements of the three co-accused men. It is fundamental to the case alleged by the Republic of Italy against Prevato. Not only is there no suggestion of private purpose; count 1 of the warrant alleges that the 11 persons named therein carried out the alleged offences "in execution of a program adopted by the 'Ronde Armate Proletarie' of which they were members, which program was intended to oppose 'selection' in schools". The incidents at the Marconi Institute and the Selvatico Institute were not acts preliminary or incidental to the campaign; they were active acts of protest, part of the political campaign itself. Once it is determined that there is no necessity for the relevant campaign to be one seeking a change in government, that it is enough that the campaigners seek a change of government policy, there is no valid distinction between this case and *Castioni*. To adopt the words of Lord Reid in *Schtraks*, this was a case of "the use of force...to compel a government to change its policy" and, upon the evidence and the allegations, for no other purpose. For these reasons I am of the opinion that the offences alleged against the applicant are all offences of a political character, so that—even if there were evidence sufficient to justify his trial for those offences—his surrender may not lawfully be ordered.

Orders

For the reasons I have set out in seemed to me proper, on 31 January 1986, to make orders in Application G6 of 1986, in respect of each of the five counts in relation to which the applicant was committed to prison, that it be declared that the evidence adduced before Mr Miszalski was not sufficient to justify his trial if the various acts or omissions constituting the alleged offences had taken place in New South Wales and that the offence was an offence which, by reason of the circumstances in which it was committed, was an offence of a political character, in respect of which the applicant was not liable to be surrendered. I ordered that the decision of Mr Miszalski be set aside and in lieu thereof that the applicant be released and that the Attorney-General pay the applicant's costs.

Individuals—passports—right of free movement for all—nature of passport

In November 1985 the Australian Human Rights Commission reported on the Passports Act 1938 (PP No 16/1986 presented to Parliament on 13 February 1986), in the course of which the relationship of passports to human rights was considered, as follows:

II. PASSPORTS AND HUMAN RIGHTS

5. Article 12 of the International Covenant on Civil and Political Rights (ICCPR) states:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Thus Article 12 provides for the right of free movement for all persons lawfully in a country, for the right to leave a country and the right to return to one's own country. The granting or withdrawal of passports by a State is a process directly related to Article 12. Therefore, the Commission is of the view that legislation relating to passports must reflect the fundamental human rights and freedoms as contained in Article 12.

6. "Literally the word 'passport' meant a licence to pass a port or city gate or haven; or in other words a licence to pass safely from one place or one country to another place or country."[1] "Originally, a passport was a document identifying a citizen, requesting foreign powers to allow its bearer to enter and pass freely and safely, and recognizing the right of the bearer to the protection and good offices of his own country's diplomatic and consular officers. Today, however, another crucial function is control over exit."[2] Hence the passport is a document without which an individual is virtually unable to leave any country, including his own, and to return to his country. It is, therefore, a document which allows a person freedom to travel. At present in international law, no person has a legal right to the grant of a passport by the country of which the person is a national. However, in recent years there has been a growing international acceptance of the concept that freedom of travel is an aspect of human rights which needs to be protected, even though the issue of passports is a matter of policy within the discretion of the State and not a matter within the area of international law.

7. It seems established, therefore, that a passport is a vital prerequisite to the rights to freedom of movement as set out in Article 12. This is supported by the decision of the UN Human Rights Committee in *Vidal Martins v*

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1 'The Right to a Passport', 48 ALJ 61.

2 Paul Sieghart, *The International Law of Human Rights*, p 183.

Uruguay (1982) 3 HRLJ 165 at 166 in which it was stated that "a passport is a means of enabling him (a person) 'to leave any country, including his own', as required by Article 12(2) of the Covenant". This view was further reiterated in another Committee decision in *Varela v Uruguay* (1983) 4 HRLJ 204 at 205. The Commission is of the view that in order to protect this right to freedom of movement, an Australian citizen should have an inherent right to a passport. Accordingly, it *recommends* that the Passports Act confer on the citizen a right to a passport, subject to the conditions laid down in that Act, which themselves should be within the restrictions allowed by Article 12.3. The Commission's review of the Passports Act itself is designed to determine whether the individual's right to freedom of movement conferred by Article 12 is respected by that legislation.

Individuals—human rights—the right to leave one's country

On 5 June 1986 the Minister for Foreign Affairs, Mr Hayden, answered a question on notice: see HR Deb 1986, 4911.

Individuals—passports—Australian passports—removal of the Crown

On 11 October 1984 the Minister representing the Minister for Foreign Affairs in the Senate, Senator Gareth Evans, said in answer to a question without notice (Sen Deb 1984, 1653):

> On the recommendation of the Royal Commission of Inquiry into Drug Trafficking conducted by Mr Justice Stewart a passports committee was formed in 1983 to supervise matters relating to the security of Australian passports and visas. As part of its initial examination of the then current passport the Committee noted a number of deficiencies in respect of non-observance of the usages and requirements of protocol and the rules of heraldry. One of the deficiencies was the superimposition of the Royal Crown of St Edward above the coat of arms of Australia on the cover of the passport. This was an incorrect depiction of these two heraldic symbols. In addition, there was no record that royal approval had ever been obtained for the use of the Royal Crown of St Edward on Australian passports. The Crown was excluded from the new series passports introduced in March 1984 to correct this deficiency, in recognition of the principles involved in the depiction of the coat of arms of Australia.

The Minister for Foreign Affairs, Mr Hayden, elaborated on the reasons for removing the Crown in written answers on 11 October 1984 (HR Deb 1984, 2260) and 15 October 1984 (ibid, 2106–2107).

Individuals—passports—amendment to Australian passport legislation

On 23 August 1984 the Minister for Foreign Affairs, Mr Hayden, introduced the Passports Amendment Bill 1984 into Parliament and explained the purpose of the Bill: see HR Deb 1984, 299–300.

Individuals—passports—Australians with dual nationality—practice for Australians in departing Australia

On 27 May 1987 the Minister for Immigration and Ethnic Affairs, Mr Young, provided the following written answer to a question on notice asking whether

an Australian citizen was permitted to hold a passport of another country (HR Deb 1987, 3465):

> Australian law does not prevent an Australian citizen with dual nationality holding a passport of another country. Whether an Australian citizen is entitled to a passport of another country would depend upon the laws of the other country.

On 7 October 1987 the Minister for Industry, Technology and Commerce, Senator Button, provided the following written answer to a question about persons leaving Australia without a passport (Sen Deb 1987, 842):

> In normal circumstances, the Australian Customs Service requires all passengers leaving Australia through one of our International airports to produce a valid passport as proof of identity.
>
> In special circumstances however, it is not unusual for persons to depart Australia without a passport.
>
> This could occur when:
>
> there is a death in the family and there is no time to wait for the issue of a passport;
>
> there is loss or theft of a passport and travel must be undertaken before a replacement can be issued; or
>
> a foreign national (particularly from New Zealand) has no valid passport but wishes to return to take up residence in their country of origin.
>
> In all these cases, the Australian Customs Service would expect suitable proof of identity to be produced.
>
> In every instance, the final departure is contingent upon the willingness of the airline to carry persons without valid passports.
>
> Officers of the Australian Customs Service have no powers to prevent the departure from Australia of passengers without passports. Where they are aware of a legal prohibition to travel such as:
>
> a Departure Prohibition Order issued pursuant to Sub-regulation 16(1) of the Taxation Administration Act 1953; or
>
> a Family Law Restraining Order issued pursuant to Section 70A of the Family Law Act;
>
> action will be taken to detain those passengers identified in the Order pending action by the relevant authority, such as the Australian Federal Police.

Individuals—visas—visas for migrants—issuing of visas in South Africa

On 16 April 1986 the Minister for Immigration and Ethnic Affairs, Mr Hurford, issued the following statement (Comm Rec 1986, 570):

> Migrants would be automatically issued with three-year resident return visas from 1 September this year, the Minister for Immigration and Ethnic Affairs, the Hon Chris Hurford, said today. He said: 'This will be a much more helpful arrangement than the current system. It will allow migrants multiple re-entry to Australia during the first years of settlement'.
>
> The current system basically requires migrants to stay in Australia twelve months before they can obtain re-entry permits. Mr Hurford said he recognised that migrants often wished to return temporarily to wind up business arrangements, sell a house and tidy up financial affairs.

The new policy would particularly help business migrants, many of whom needed some time progressively to transfer their business operations to Australia. It would allow more flexibility in meeting legitimate needs, but be tougher on those without a genuine commitment to settlement. He said:

> The policy presumes that the majority of migrants will spend most of the three year period in Australia, and indeed, have taken steps to become citizens.
>
> For the genuine resident who does not take out Australian citizenship but wishes to travel after the expiry of the three-year multiple entry visa, further visas valid for five years or the life of the passport will be issued.
>
> But for those who seek to abuse the policy by failing to show commitment to residence in the three-year period, no further visa will be issued.

On 20 November 1986 the Minister for Immigration and Ethnic Affairs, Mr Hurford, issued the following statement, in part (Comm Rec 1986, 2108):

> The Minister for Immigration and Ethnic Affairs, the Hon Chris Hurford, today announced the Government's decision to stop issuing visitor and other temporary entry visas in South Africa.
>
> Exceptions will only apply in compassionate, humanitarian and national interest circumstances where such visits are consistent with Australia's policy of opposition to apartheid.
>
> Mr Hurford said that from tomorrow, South African citizens and residents, and those visiting South Africa who wished to visit Australia, would need to apply to Australian missions outside South Africa for their visas. Facilities for the processing of applications for permanent settlement in Australia would continue to be made available in South Africa.
>
> The decision results from measures agreed to in London by six Commonwealth Heads of Government.

Individuals—visas—issue of a visa to Fretilin leader to visit Australia

On 4 September 1984 the Minister for Foreign Affairs, Mr Hayden, said in part in a written answer to a question on notice in the Senate (Sen Deb 1984, 432):

> The visit to Australia of Mr Jose Ramos Horta, Fretilin's representative at the United Nations, reflects the Government's belief that as a matter of general principle, such persons should not be refused entry solely on the grounds that they are likely to express controversial views while they are here. In allowing Mr [Horta] to visit Australia, the Government made it clear, including to the Indonesian authorities, that the visit was in Mr Horta's personal capacity, that he would not receive any Government assistance and that the visit did not imply any change in the Government's attitude towards Fretilin.
>
> The initial cancellation of Ambassador Dalrymple's visit to East Timor, for whatever reasons, caused some surprise. The foregoing circumstances surrounding Mr Horta's visit to Australia were clearly understood by Indonesian authorities and a similar visit had been made in June 1983 by two Fretilin Central Committee Members, Abilio Araujo and Roque Rodriquez.

The Government held the view that a visit to East Timor to examine developments in the province since the visit of the Australian Parliamentary Delegation in August 1983 was in both countries' interest. This point was accepted by the Indonesian Government and the visit took place from 4 to 7 July 1984.

Individuals—visas—issue of Australian visas to controversial visitors

The following note on the issue of a visa to the African National Congress Representative in Australia appeared in the Department of Foreign Affairs' *Backgrounder*, No 424, 28 March 1984, Annex, 1–3:

Late in 1983, Mr Edwin Funde applied to the Australian High Commission in Lusaka for a visa to enter Australia for the purpose of opening an Information Office for the African National Congress. On 2 December 1983, Australia's High Commissioner to Zambia handed Mr Funde the following letter:

Dear Mr Funde,

On 26 October 1983 the Australian Minister for Foreign Affairs decided that the African National Congress and the South-West Africa Peoples' Organisation would be allowed to establish information offices in Australia. The Minister has decided that the establishment of an African National Congress office in Australia should be on the following basis:

- The purpose of the ANC office in Australia should be for the dissemination of information only. It should not advocate violence as a means of achieving political objectives.
- The ANC office in Australia and the ANC staff would not have any privileged status and would be subject to Australian Law.
- The Australian Government would not provide any financial support to the office.
- We would like to have confirmation that the ANC accept these terms.

Yours sincerely,

(I.L. James)
High Commissioner

Mr Funde was informed that a visa could only be issued on the basis of acceptance of the conditions contained in the letter. He did so orally, and said that it would be appropriate for this to be confirmed in writing by the Secretary-General of the African National Congress. Such confirmation in writing was received later the same day.

Individuals—visas—non-issue to South African visitors

On 2 March 1984 the Minister for Immigration and Ethnic Affairs, Mr West, said in answer to a question without notice (HR Deb 1984, 416–417):

The Government has made a decision on those two visitor's visa applications. The Government, after consultation between the relevant Ministers, has decided not to issue visas. The stated purpose of the visit was for Mr Kent Durr, a National Party member of parliament, and Mr Mahmoud Rajab, a member of the Indian Members Presidential Council, to address

conferences, arranged by the South African Embassy and entitled 'South Africa Today and Tomorrow', in Canberra, Sydney and Perth between 23 March and 31 March.

I have a copy of a letter from the South African Ambassador to various people in Australia which sets out some of the topics to be covered by Mr Durr. Presumably this is an outline of the addresses to be given. Mr Durr was to address the conferences on questions such as the importance of the Cabinet Committee on Blacks, South African policy towards South West Africa, or Namibia, the Republic of South Africa's defence capability, its sporting scene, and South Africa's internal priorities. It asks whether Australians can make a contribution. Quite frankly, I am not sure what contribution any Australian could be expected to make to the South African Government's Cabinet Committee on Blacks.

I have been informed by my Department that, if visas were granted, it would be the first visit by South African members of parliament for many years. I understand that the former Government did not grant any such visas. Indeed, that would be consistent because the attitude of the former Government towards sporting contacts was well known, as is our attitude in government. Our policy on sporting contacts is well known, as revised last year and as explained by the Foreign Minister. I put it to the House that it is entirely consistent with that policy to refuse entry to members of parliament who have responsibility for the devising and implementation of South African policy. We do not think that it is appropriate to allow such people into Australia to promote South African Government policy.

I conclude by informing the House that every application concerning controversial visitor entry, including such matters as the entry of members of parliament from South Africa, will be treated on its merits in future, according to the purpose of the visit.

Following this incident the Minister for Foreign Affairs, Mr Hayden, announced on 6 April 1984 as follows (Comm Rec 1984, 551–552):

The Minister for Foreign Affairs, the Hon Bill Hayden, announced today that the Government had further tightened its stringent anti-apartheid policy. Mr Hayden said that from now on Australia would not permit South Africans holding official positions to enter Australia if the principal purpose of the visit was to promote apartheid doctrine or policies. This reflects the Government's abhorrence to the peculiarly odious character of the apartheid doctrine practised by the South African Government.

The decision on entry follows a review of policy guidelines undertaken after an attempted visit earlier this year of two South African Government supporters to take part in seminars organised by the South African Embassy. The Australian Government had refused their applications for visas because it considered the visit was primarily a propaganda exercise designed to support apartheid.

The two were Mr Kent Durr, a backbench member of the ruling National Party and Mr Mahmoud Rajab, an Indian member of the South African President's Council. Mr Hayden said that approval of their visit would have been inconsistent with the Australian Government's uncompromising stand against apartheid.

Mr Hayden noted that the Leader of the Opposition had now proposed that the Opposition would invite Mr Durr, Mr Rajab and a South African Opposition politician to come to Australia. Mr Hayden said that under its new guidelines the Government would be prepared to approve the applications for visas which might result so long as the Leader of the Opposition gave, as requested by the Prime Minister, a written assurance that while in Australia as guests of the Opposition their visit would not be exploited for the purpose of promoting apartheid.

Individuals—Refugees—procedures for applications for refugee status in Australia

Following is an extract from a Note on procedures for the determination of refugee status under international instruments submitted by the High Commissioner for Refugees on 7 September 1981 to the Executive Committee of the High Commissioner's Programme (A/AC 96/INF 152/Rev ,3):

AUSTRALIA

9. The *legal basis* for the determination of refugee status is:

- Migration Act 1958–1975

  Cabinet decisions of 24 May 1977 and 16 March 1978
- Rules of procedure settled by the Determination of Refugee Status Committee on 5 December 1977.

10. The *competent authority* for the determination of refugee status is the Minister for Immigration and Ethnic Affairs. The applicant for refugee status addresses himself in the first instance to the immigration authorities in his State of residence; he is interviewed under oath by a senior officer of the Department of Immigration and Ethnic Affairs. Copies of the transcript of the interview are made available to the Minister, to the applicant, and to the UNHCR Representative in Australia. The transcript of the interview, together with any additional relevant information, is transmitted for consideration to the Determination of Refugee Status Committee, composed of a representative each of the Department of Immigration and Ethnic Affairs (Chairman), the Prime Minister and Cabinet Department, the Department of Foreign Affairs, and the Attorney-General's Department. After considering the case, the Committee makes a recommendation to the Minister for Immigration and Ethnic Affairs, who takes the final decision.

11. The above-mentioned rules of procedure do not expressly give a formal right of *appeal*, but provide that the Minister may refer any case back to the Determination of Refugee Status Committee for reconsideration in the light of additional information.

12. The UNHCR Representative is informed of all applications for refugee status and is provided with a copy of the proceedings of the interview of the applicant by the Senior Immigration Officer. He is also invited to attend the proceedings of the Determination of Refugee Status Committee in an advisory capacity. Applicants for refugee status have the right to contact the UNHCR Representative.

13. No special identity card is issued to a recognized refugee.

Individuals—refugees—applicant for refugee status in Australia—procedures for considering refugee applications

The Minister for Immigration and Ethnic Affairs, Mr West, said in the House of Representatives of the case of Mayer on 5 September 1984 (HR Deb 1984, 627–628):

> Mathew Mayer is a former resident of Irian Jaya who for a long time has been a resident of Papua New Guinea under his permissive residence status visa issued by that Government. He arrived in Australia on 25 June on a three-week visitor visa and applied for refugee status on 3 July, alleging as a reason for his application his previous involvement with the Operasi Papua Merdeka movement and involvement in arranging the Australian Broadcasting Corporation interview between Alan Hogan and James Nyaro. I referred that application under due process to the Determination of Refugee Status Committee which, in due course, recommended to me a rejection. I endorsed that rejection because of the discrepancies that emerged in his statements and records of interview which to my mind cast extreme doubt on the veracity of his evidence.
>
> Further, I rejected it because I received through the DORS Committee assurances of the highest level from the Government of Papua New Guinea that he would be able to return to Papua New Guinea and that that Government would not return him to Indonesia. I said that he should depart voluntarily. At that stage I did not write a deportation order, nor have I yet done so. The applicant then applied for a change of status to permanent residence on compassionate grounds under section 6A(1)(e) of the Migration Act. I considered that in due course and rejected it on the ground that the argument for compassion was insufficient. I again ordered that he depart voluntarily, this time by 31 August. I now understand that solicitors on behalf of Mr Mayer have requested a review of my decision not to grant refugee status. That will go to the DORS Committee.

For the issue of whether an applicant denied refugee status was entitled to a statement of reasons for the refusal: see *Minister for Immigration and Ethnic Affairs v Mayer* (1984) 61 ALR 609; 157 CLR 290.

Individuals—refugees—Australian practice in considering claims—confidentiality—definition of "refugee" adopted by the United Nations High Commissioner for Refugees

On 2 May 1986 the Minister representing the Minister for Immigration and Ethnic Affairs in the Senate, Senator Grimes, said in the course of an answer to a question (Sen Deb 1987, 2298):

> Australia has a well-established and long-established and respected procedure for handling claims by people who arrive in Australia seeking refugee status. It is in the individual's interests to approach the appropriate authorities with any claims that he or she may have. I believe that it is in the interest of people such as members of Parliament, who sometimes get approached in this regard, to approach the Government.
>
> All claims are examined thoroughly and no one is deported while a claim is being processed. Applications are examined by the Determination of Refugee Status Committee. It is not a decision-making body, but it makes

recommendations to the Minister for Immigration and Ethnic Affairs. It is government policy not to discuss individual cases. This policy was designed many years ago to protect the individuals who are making claims. Illegal immigrants without refugee claims should be dealt with in accordance with the current legislative and policy provisions relevant to their situation, and the Australian Government simply cannot, as any previous government could not, condone queue-jumping of this type. People who knowingly break the law or encourage others to do so expose themselves to penalties under the Migration Act.

On 14 March 1986 the Minister for Immigration and Ethnic Affairs, Mr Hurford, provided a written answer to a question on notice in the Senate: see Sen Deb 1986, 1113.

On 8 December 1987 the Minister for Immigration and Ethnic Affairs, Mr Young, said in the course of an answer in the House of Representatives (HR Deb 1987, 2939):

Australia works very closely with the United Nations in the declaration of people as refugees. The status of those people is much clearer because they are people who are outside their home country and who have good reason, as decided by the UNHCR, to be declared as refugees as they cannot return to their home country for fear of persecution.

Australia participates in the global programs of taking refugees. Decisions in those cases are not made by any committee. The DORS Committee operates internally, domestically, in determining the position of people who arrive in this country, usually illegally, and then seek refugee status.

Individuals—refugees—claimants for refugee status from Irian Jaya

On 8 October 1986 the Minister for Immigration and Ethnic Affairs, Mr Hurford, wrote in answer to a question on notice (HR Deb 1986, 1719):

(1) to (5) A total of eleven Irian Jayans have arrived in Australia since June 1985 and have sought refugee status. All eleven arrivals have had their claims presented to the DORS Committee. Meetings for this purpose were held on 2 October 1985 and 12 June 1986. The first five arrivals were considered at the 2 October 1985 meeting. The further six arrivals were considered at the 12 June 1986 meeting.

The DORS Committee has made recommendations to me on each of the eleven Irian Jayan applicants for refugee status. These recommendations are in the nature of advice to me as the Minister responsible for making the decision on the applications. As such, it would not be appropriate to divulge the contents of that advice.

Examination of the refugee claims was a complex and difficult undertaking. As I announced on 18 June 1986. I have granted refugee status to two applicants where the facts were clear. The other nine cases were not so clear. I remain of the view that the best long term solution for those nine is for them to return to their homes voluntarily.

Also as announced on 18 June, I approved the issue of unrestricted Temporary Entry Permits to all eleven Irian Jayans for a period of six months. Their situation will be subject to review at the end of that time.

This decision was taken to allow all matters relating to their long-term future to be further explored.

The Government's decision that all persons arriving in Australia from our near neighbours, in circumstances such as those of the Irian Jayans, will not be allowed to stay in Australia permanently, remains in force.

Individuals—indigenous populations—Australian Aboriginals

The following is an extract from a report submitted by Australia in July 1984 to the Third Session of the Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission of Human Rights in Geneva (E/CN 4/Sub.2/AC 4/1984/2/Add 3 dated 25 July 1984):

The Australian Government uses both a *legal* and an *administrative* definition of its indigenous population.

When referring to the indigenous population of Australia, reference is made not only to Aboriginal people but also to Torres Strait Islander people, who maintain a separate culture. Torres Strait Islander people inhabit the islands in the Torres Strait north of Australia which are part of the State of Queensland. Historically, the Torres Strait Islander people have maintained close contact with mainland Aboriginal people in North Queensland.

(a) Legal Definition

The legal definitions of an "Aboriginal" have evolved within the Federal Government's power under section 51 (xxvi) of the Constitution (as amended in 1967) "to make laws...with respect to...the people of any race for whom it is deemed necessary to make special laws". Both Aboriginals and the Torres Strait Islanders are accepted by the Federal Government to be "a race" for this purpose. The definitions embodied in Federal legislation focus on race to ensure that the legislation is constitutionally valid. That is, they are designed to ensure that the power of the Federal Government to enact that legislation cannot be challenged. They do not therefore attempt to deal with degree of Aboriginal descent, nor to define in any other way the categories of person to whom the legislation may apply.

The most recent legislation to define "Aboriginal", the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984, states "Aboriginal means a member of the Aboriginal race of Australia and includes a descendant of the indigenous inhabitants of the Torres Strait Islands". In the recent *Franklin Dam* case, all seven members of the High Court of Australia made reference in varying detail, to the meaning of the word "race" in section 51 (xxvi) of the Constitution. The general thrust of the judgments handed down supported, in principle, the Australian Government's working definition of an Aboriginal.

(b) Administrative Definition

To identify persons eligible for the specific Aboriginal programmes and benefits which it has established, the Australian Government has developed the following administrative definition which, with slight variations, is generally used by Australian Government authorities:

> An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres

Strait Islander and is accepted as such by the community with which the person associates.

The definition contains three key elements, or criteria, all of which must be satisfied, viz:

Aboriginal descent;

Self-identification as an Aboriginal;

Acceptance by the community as an Aboriginal.

An administrative approach to definitions brings a number of advantages. The definition takes into account concepts of self-identification and community acceptance which are central to the rationale for the Australian Government's Aboriginal advancement programmes. It removes the need to prove actual degrees of descent which could be regarded as insulting for many individuals. Apart from these difficulties, experience has shown that lineage is not a reliable indicator of the extent to which an Aboriginal or Islander person may suffer economic and/or social disadvantage. Nor is there any need for cumbersome and potentially offensive registration by Aboriginals and Torres Strait Islanders. Importantly, the working definition approach has proven generally acceptable to Aboriginal people and organizations.

Some difficulties are associated with this administrative definition. There is no really acceptable test for the concept of "Aboriginal descent", retention of which is essential to continue the link with the Federal Government's constitutional powers. Similarly the words "community" and "identifies" are used without being defined. Administratively, assessments of these concepts can at times be difficult to establish.

Two other complicating factors should be noted. The working definition is not consistently used or accepted by all State and Federal Government agencies responsible for the administration of Aboriginal advancement programmes. Moreover, there is a history of dispute over whether Melanesian groups, other than Torres Strait Islanders, eg descendants of South Sea Islanders also known as Pacific Islanders, brought to Australia in the last century to work, qualify for assistance under the definition of "Aboriginal or Torres Strait Islander".

(c) General conclusion

The Australian Government's experience has been that flexible working definitions of indigenous populations based on the elements of descent, and most importantly self-identification and community acceptance, are more useful and less problematic than artificial and potentially offensive attempts to classify individuals rigidly according to lineage.

While it recognizes the different factors at play in relation to other indigenous groups in other parts of the world, the Australian Government would endorse a similarly flexible approach in addressing the question of definition for the purposes of drafting international standards to protect indigenous rights. The Government would be concerned if minimal differences of opinion about definitions became an obstacle to progress in the debate about the fundamental human rights of indigenous populations.

Individuals—indigenous populations—Australian Aboriginals

On 30 July 1984 the Minister for Aboriginal Affairs, Mr Holding, addressed the United Nations Working Group on Indigenous Populations in Geneva, and part of his speech was as follows (Comm Rec 1984, 1401–1403):

> In identifying criteria to distinguish the rights of indigenous populations and in developing special measures to remedy their disadvantaged position, we should avoid any suggestion that separate development or [secession] is at issue. Indigenous populations are an integral part of national communities and should enjoy the full civil and political rights of their fellow citizens, in addition to their own rights. This is the firmly held view of the Australian Government.
>
> An important item on the agenda for this session of the Working Group is the question of definition of indigenous populations. Clearly the criteria by which such populations are identified are for indigenous people to state. I will do no more than summarise the position in Australia where we have legislative and administrative definitions.
>
> The Australian Constitution makes references to 'the people of any race' and that is the basis of the Government's legislative power. The working definition adopted for the administration of government programs has three key elements. A person must:
>
> - be of Aboriginal descent
> - identify as an Aboriginal
> - be accepted as an Aboriginal by the community with which the person associates.
>
> By taking this approach we have avoided other more limiting, and potentially offensive, criteria such as degrees of descent. These criteria apply to individuals. They may, however, have some relevance to the definition of indigenous populations.
>
> The other major item that this working group is giving special attention to is land rights. The fact that it is being considered at such an early stage in its work underlines the importance attached to this issue by indigenous people. In Australia the Aboriginal and Torres Strait Islander people have suffered the disadvantage of being dispersed and dispossessed of their land. The Australian Government recognises the prior occupation and ownership of Australia by Aboriginal and Torres Strait Islander people. It recognises the spiritual affinity Aboriginal people have with the land—that the land is life in the spiritual as well as the physical sense for Aboriginal people.
>
> Acknowledging the disadvantaged position of Aboriginal people as a group in Australian society and respecting the spiritual affinity Aboriginal people have with the land, the Australian Government recognises their rights to land in accordance with five basic principles. Those principles are:
>
> - Aboriginal land to be held under inalienable freehold title
> - protection of Aboriginal sites
> - Aboriginal control in relation to mining on Aboriginal land
> - access to mining royalty equivalents
> - compensation for lost land to be negotiated.
>
> There is already some Federal and State legislation which goes towards meeting these principles. But legal rights vary in different States and Territories in Australia. The Australian Government is committed to ensure a

consistent national approach to land rights for Aboriginal people in terms of these five principles.

To implement this policy, an Aboriginal steering committee has been formed to provide advice on the development of proposals for model Federal land rights legislation. The Australian Government recognises that the differing legislative and administrative arrangements which apply in the States and Territories of Australia, are factors which need consideration when negotiating towards this end. It is not an easy task, but it is one to which the Australian Government is committed...

As the Minister for Aboriginal Affairs I have made it clear to Aboriginal people, in public forums and in Parliament, that neither the granting of land rights, nor the recognition of prior Aboriginal occupation and ownership in any way puts Australian sovereignty in question. Given the opportunity, Aboriginal people will make their own future as citizens of the Australian nation. Sovereignty is vested in the Crown and parliaments for one nation of people.

Individuals—indigenous populations—Australian Aboriginals—definition

On 26 November 1987 the Minister for Aboriginal Affairs, Mr Hand, said in answer to a question (HR Deb 1987, 2775–2776):

The definition that is in place at this point is as follows:

> An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Island descent who identifies as an Aboriginal or Torres Strait Islander and who is accepted as such by a community in which he or she lives.

I do not intend to undertake an examination or review of that definition. I remind the House that it was developed in about 1967 following a referendum; it became a current interpretation in 1972, and Cabinet endorsed it in 1978. It was part of the Aboriginal Development Commission Act in 1980. It is a view that is shared, as I understand it, by both sides of this Parliament, and it is one that I support. Therefore, I see no reason to review it.

For a discussion of the definition of "Aborigine" and its use in Australian legislation, as well as its consideration by the High Court of Australia, see the report of the Australian Law Reform Commission on Aboriginal Customary Law (PP No 1986/136 and 137) at paragraphs 88 to 95. The scope and limits of Constitutional power in the Parliament of the Commonwealth of Australia to legislate for Aborigines is considered at paragraphs 1012 to 1018. The report was tabled in the Senate on 12 June 1986 (Sen Deb 1986, 3833).

Individuals—indigenous populations—International Labour Organisation—Convention No 107—revision—Australian attitude

On 18 November 1987 the Minister for Foreign Affairs and Trade, Mr Hayden, provided the following written answer to a question on notice in the Senate (Sen Deb 1987, 2007):

Australia has not ratified International Labour Organisation (ILO) Convention 107.

In recent years ILO Convention 107 on Tribal and Indigenous Populations (1957) has attracted adverse criticisms in various forums because it contains a number of outmoded concepts, especially the emphasis on integration. The ILO now considers that revision of the Convention is necessary, in particular to shift the Convention's emphasis from the objective of integration to that of respect for the identity of indigenous populations.

This view is consistent with the Australian Government's policy of recognizing the fundamental right of Aboriginals and Torres Strait Islanders to retain their identity and traditional life style, where desired.

Australia has not ratified the Convention because of the outmoded concepts it contains. However, we have been active in the processes developed by ILO to review the Convention. Australia played a central role at the Meeting of Experts on the Revision of Convention 107 in Geneva in September 1986. The ILO Governing Body in November 1986 decided to include the revision of the Convention on the agenda of the International Labour Conference in 1988 and 1989.

The Australian Government supports the revision of the Convention and will work towards a revised text which can attract the broadest possible support. A revised Convention should be adopted by the International Labour Conference in June 1989, after which it would be open to competent national authorities to ratify.

For an earlier and similar answer by the Minister for Employment and Industrial Relations, see Sen Deb 1987, 3 June 1987, 3520.

Individuals—indigenous populations and minorities—collective human rights guarantees

The report of the Australian Law Reform Commission on Aboriginal Customary Law (above p 162) also discusses the general international law position of minorities and indigenous peoples (paragraphs 171 *et seq*). Following are paragraphs 178, 192 and 193 from the report (footnotes omitted):

178. *Conclusion: A Duty of Recognition?* Suggestions have been made for a more comprehensive United Nations Declaration or Covenant on the Rights of Minorities and specifically of Indigenous Peoples, although progress towards this goal has been extremely slow. The present position is that Australia is not precluded by its international obligations from an extensive recognition of Aboriginal customary laws (subject to protection of the 'human rights of individual Aborigines', a matter dealt with later in this Chapter). However the only international obligation with respect to the granting of such recognition at present is Art 27 of the Civil and Political Rights Covenant, which imposes only limited obligations in this context.

192. *General Conclusions.* The materials referred in this Chapter suggest the following conclusions:

- The provisions of the Civil and Political Rights Covenant should be 'read as a whole' so as to be consistent with each other rather than to conflict.
- In this process of interpretation, clear and specific provisions of the Covenant prevail over general and vaguer provisions. For example the provisions of Art 6 with respect to the right to life and the death penalty

are precise and specific. The toleration of tribal killing is inconsistent with Art 6, however much such killings may be, or have been, an aspect of the 'culture' of an ethnic minority.

- On the other hand, the Covenant was intended to apply to a wide range of economic, social and cultural environments. It is an attempt to establish minimum standards, not uniformity of treatment. It is not to be interpreted by reference to the standards and practices of one part only of the international community. Decisions of regional courts or bodies—such as the European Court of Human Rights—even on similarly worded provisions, cannot simply be assumed to apply to the Covenant.
- In particular, terms in the Covenant which imply a measure of cultural relativity may have to be applied by reference to the cultural community within which the case arose (including, by virtue of Art 27, a minority ethnic or cultural group). A good example is the notion of 'degrading' treatment (Art 7). What would be degrading in one community or culture might not be degrading, indeed, might be fully accepted in another. This is not to say that such terms lack meaning, or that the Convention establishes no standards at all. Some terms and concepts (eg the death penalty: Art 6) contain no element of relativity at all. Others enact, or imply, a world-wide standard of protection inherent in the individual person as such; for example, the prohibition of torture or slavery. But not all the Covenant's provisions are of this kind. It is a mistake, for example, to assume that the protection given by Art 23 to 'the family' extends only to the nuclear family upon which Western society is supposedly founded. In communities where different family structures exist, it is those structures which Art 23 protects.
- For these reasons, and others, each case must be considered in its own context and in relation to the most precise or 'directly applicable' Covenant provision. Whether the Covenant has been violated depends not merely on the terms of the local law but on the method and circumstances in which it has been applied.

193. *Ensuring Basic Human Rights: The Aboriginal Customary Law Reference*. It follows that the impact of human rights standards on proposals for the recognition of Aboriginal customary laws depends on the particular proposal and cannot be discussed in the abstract. Detailed treatment of human rights issues is therefore left to particular chapters of this Report. On the basis of the survey of relevant human rights instruments in this chapter, and of its conclusions on those more detailed issues, the Commission believes that the recommendations in this Report do not involve violations of basic human rights for Aborigines or for other Australians. On the contrary, those recommendations are fully consistent with basic human rights. If implemented they would help to ensure those rights, as the Commission's Terms of Reference require. This is particularly so in that in a number of respects present Australian law or its administration fail to respect fully the rights of Aboriginal people. Thus the non-recognition of Aboriginal marriages, and the excessive intervention by child welfare agencies in Aboriginal families that has been a feature of welfare practice in Australia, consitute a failure to respect Aboriginal family life. Aspects of police

interrogation and court procedure have sometimes led in effect to Aboriginal defendants being compelled to confess guilt. The need to respect human rights and cultural identity of Aboriginal people supports the case for appropriate forms of recognition of Aboriginal customary laws.

Individuals—human rights—the extent of Australia's rights and obligations in relation to human rights in international law

The Attorney-General, Mr Bowen, on 16 August 1985 sent the following letter to the Senate Committee inquiring into the possibility of a Bill of Rights for Australia (PP No 496/1985, Appendix III, 101–109):

Thank you for your letter of 24 June 1985 concerning Australia's rights and obligations in relation to international human rights.

You sought advice on two questions in relation to the inquiry by the Committee on "the desirability, feasibility and possible content of a national Bill of Rights for Australia". The two questions you asked were:

(a) what are Australia's rights and obligations in relation to human rights in international law;

(b) to what extent has the Commonwealth constitutional power to enact law implementing such obligations and rights.

Your questions are very broad and wide-ranging, and it is difficult to provide a comprehensive answer without detailed research and consideration of the many individual human rights instruments. In the circumstances, I have thought it best to provide some general comments. I suggest that if, in the light of my comments, you have more specific issues, you might seek further advice from my Department.

Question (a)

You refer to your question to 'rights' and 'obligations' in relation to human rights in international law. The position generally is that international law imposes certain obligations on States to accord certain rights to individuals within their jurisdiction. Individuals do not themselves have rights at international law, except to the extent that a treaty might give a right to petition or bring a complaint before an international body. Australia has not yet accepted any obligation to accord such a right. Rights which Australia has at international law in this area are similarly limited to the right to complain about the discharge by another State of obligations assumed by that State. For the purpose of this answer, I have, therefore, confined myself to a consideration of *obligations* concerning human rights which Australia has assumed, or is subject to, in international law. When speaking of 'rights', I primarily have in mind the rights of individuals that Australia is obliged to respect or recognise in its domestic law pursuant to its international obligations.

Obligations relating to human rights in international law are derived in the main from treaties. I attach a list of treaties dealing with human rights to which Australia is a party. The treaties listed come primarily from 3 sources: the United Nations, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Labour Organisation (ILO). The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are

representative of the more detailed provisions in the other treaties. There are many other human rights instruments of less than treaty status that set out principles rather than obligations for the international community to adhere to. Some of these have been taken into account in the Human Rights Commission Act 1981, which enables the Human Rights Commission to examine Commonwealth laws and practices to ensure conformity with United Nations Declarations made in relation to children, and mentally retarded and disabled persons. The existence and the exact content of obligations contained in the various treaties and instruments can only be ascertained by a close examination of the terms of those documents. Further, Australia may have modified the international obligations to which it would otherwise be subject by making reservations to particular treaties.

Even in the absence of specific treaty obligations, the abuse of some human rights is condemned by the international community. Condemnation of this abuse may be so extensive as to give rise to obligations to prevent certain human rights abuses at customary international law. It was recognized in *Koowarta v Bjelke-Petersen* ((1982) 153 CLR 168) that Australia is obliged at international law, even in the absence of a treaty obligation, not to engage in torture, genocide, imprisonment without trial, and wholesale deprivations of the right to vote, work, or be educated (per Gibbs CJ at p 206).

You will appreciate, therefore, that it is impossible to give an exhaustive account of Australia's rights and obligations in relation to human rights in international law. The attached list of relevant treaties should not, therefore, be seen as conclusive.

Where human rights obligations exist in international law, the manner in which they are to be satisfied varies. Some human rights treaties require States to take positive measures domestically to ensure that rights are protected by law. For example, Article 2.2 of the International Covenant on Civil and Political Rights requires parties 'to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant'. On the other hand less immediate obligations are imposed under the International Covenant on Economic, Social and Cultural Rights. Article 2.1 provides:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Again, each treaty provision would need to be examined to determine the extent of any obligations requiring domestic implementation. The interpretation by Australia of certain of its human rights obligations can be found in reports that Australia is required to lodge under certain of the treaties.

Question (b)

As you are aware, by a 4 to 3 majority, the High Court decided in *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 46 ALR 625, that the existence of a treaty obligation was sufficient to give rise to a matter of 'external affairs' (Constitution, s.51(xxix)) so as to enable the Commonwealth to enact legislation to implement the obligation domestically throughout Australia, though the subject matter of the obligation was otherwise outside Commonwealth legislative power. The minority judges held that the subject matter of the Convention must additionally be one of sufficient 'international concern'. It will be a question in relation to each instrument whether obligations are imposed, or, if not, whether the subject matter of the instrument is a subject of international concern. The external affairs power is, of course, subject to limitations contained in the Constitution.

In relation to human rights obligations *Koowarta's case* established that the external affairs power may be invoked to implement the International Convention on the Elimination of All Forms of Racial Discrimination. The International Covenant on Economic, Social and Cultural Rights, was listed by Mason J in the *Tasmanian Dam Case* at p. 691 as being among the 'many instances of the common pursuit by nations of common objectives of a humanitarian, cultural and idealistic kind'. Mason J went on to say that '(t)here are so many examples of the common pursuit of humanitarian, cultural and idealistic objectives that we cannot treat subjects of this kind as lacking the requisite international character to support a treaty or convention which will attract the exercise of the (external affairs) power'. The judgments of Mason J and the other justices in the majority in the *Tasmanian Dam Case* (Murphy, Brennan and Deane JJ) clearly establish that the Commonwealth's external affairs power also extends to giving effect to the International Covenant on Civil and Political Rights. Other constitutional heads of power can, of course, be relied on to give effect, at least in part, to international human rights obligations. The Sex Discrimination Act 1984 is a good example of the use of other constitutional powers, in addition to the external affairs power, to give effect to such treaty obligations.

Individuals—human rights—International Labor Organisation Conventions—breach of Conventions by Queensland legislation

On 13 April 1985 the Prime Minister, Mr Hawke, sent the following telex to the Queensland Premier, Sir Joh Bjelke-Petersen (Comm Rec 1985, 476):

My dear Premier

I am writing to inform you of the acute concern of my Government at your Government's handling of the industrial dispute in the electricity industry in your State...

At the same time you should be in no doubt as to the depth of my Government's concern at the passage of legislation by your Government which does not take account of rights and processes which have long been accepted in Australia and which are in clear breach of a number of international treaties.

In my Government's view, the use of legislation to override conditions of employment established by an independent tribunal, the limitations on the jurisdiction and powers of industrial tribunals, the lack of review on the merits of decisions by the Electricity Authorities Industrial Causes Tribunal or of sanctions imposed for strike activity, the automatic termination of employment in certain circumstances, the provisions purporting to prohibit 'obstruction' which can unreasonably resist and penalise peaceful picketing, and the changes to evidentiary standards in legal proceedings, are just some examples of a legislative approach by your Government which is unacceptable by Australian democratic standards.

As regards the contravention of international treaties, this occurs through breaches of ILO Conventions 29, 87, 98 and 105, the International Covenant of Civil and Political Rights, and the International Covenant of Economic, Social and Cultural Rights. All of these Conventions and Covenants have been ratified by this country. These breaches occurred in the Electricity (Continuity of Supply) Act 1985, the Electricity Authorities (Industrial Causes) Act 1985 and the Industrial Conciliation and Arbitration Amendment Act 1985.

As you know, ratification of ILO conventions is only undertaken when the law and practice of all States and the Commonwealth are in conformity with them and we have clear obligations to ensure that such law and practice continue to conform with the requirements of these treaties. It is also our national responsibility to proceed towards full compliance with the international covenants mentioned above.

I look forward to your co-operation and to your early agreement to participate in the proposed discussions. I look forward to your reply.

Attached to the Prime Minister's News Release (P 85/47) containing the text of the telex to the Queensland Premier were details of the breaches by Queensland. The Attachment is as follows (the breaches were also detailed in a written answer to a question on notice in the Senate on 31 May 1985: see Sen Deb 1985, 3010–3011 (Minister for Employment and Industrial Relations), and were the subject of two reports by the Human Rights Commission tabled in Parliament on 19 April 1985 (PP No 79/1985) and 21 May 1985 (PP No 202/1985)):

Forced Labour Convention, 1930 (ILO Convention No 29)
Abolition of Forced Labour Convention, 1957 (ILO Convention No 105)
International Covenant on Civil and Political Rights

- Under section 3 of the Electricity (Continuity of Supply) Act 1985, the Electricity Commissioner is given an extremely wide power to direct any person whom he considers capable of carrying out the necessary work, to perform work to provide, maintain or restore a supply of electricity.
- Under section 4 of the Act, employees of the Queensland Electricity Commission or of an Electricity Board are liable to a penalty for non-compliance with such a direction. While it appears that no penalty attaches to non-compliance by other persons, they may understandably feel under the menace of a penalty, at least until there is a judicial determination on the matter.

- These provisions are too wide to be permissible under ILO Convention No 29 which requires the suppression of the use of forced or compulsory labour. Although some exceptions are permitted under the Convention, the legislation is not confined to the circumstances covered by the permissible exceptions.
- The power to direct may be exercised, even when no real emergency exists, to require non-employees to perform work, or to require employees to perform work outside the normal scope of their employment.
- To the extent that the legislation does enable the power to be exercised in these ways, it authorises 'forced or compulsory labour' contrary to ILO Convention No 29 and the existence of the legislation constitutes a breach of that Convention.
- Moreover, the power is wide enough to authorise forced or compulsory labour of kinds specified in ILO Convention No 105. Among other things, the Convention prohibits the use of forced or compulsory labour as a means of labour discipline or as a punishment for having participated in strikes. To that extent, the existence of the legislation is in breach of that Convention.
- Article 8.3 of the International Covenant on Civil and Political Rights also proscribes forced or compulsory labour. Although provision is made in Article 8.3 for certain exceptions, the power of direction mentioned above is not limited to circumstances falling within those exceptions. To the extent that the legislation exceeds the scope permissible under Article 8.3, its existence constitutes a breach of that provision.

Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Convention No 87)
International Covenant on Economic, Social and Cultural Rights

- Under section 7 of the Electricity (Continuity of Supply) Act 1985, there is effectively a prohibition on strike activity in the electricity industry. In addition, the Electricity Authorities Industrial Causes Act 1985 makes participation in a relevant strike an 'illegal' act and imposes a duty to refrain from participating in certain strikes. Employees participating in a 'strike' (as defined) in the electricity industry are subject to an automatic loss of pay, and, at the employer's option, to dismissal or suspension without pay.
- ILO Convention No 87 guarantees the right of workers to further and defend their occupational interests. The Freedom of Association Committee of the Governing Body of the ILO ('the Committee') has said on a number of occasions that the right to strike is a legitimate means of exercising this right.
- The Committee has also recognised that the right to strike may be restricted or prohibited in the civil service or in essential services because a strike there could cause serious hardship to the community. However, the Committee has stated that where this is such a restriction it should be accompanied by adequate, impartial and speedy conciliation and arbitration procedures in which the parties can participate at every stage

and in which awards are binding in all cases on both parties. These awards, once made, should be fully and promptly implemented.

- It may be that the Electricity Authorities Industrial Causes Tribunal established by the Electricity Authorities Industrial Causes Act 1985 is able to employ such conciliation and arbitration procedures in relation to the matters coming within its jurisdiction. However, that tribunal has no jurisdiction to relieve employees of the sanctions referred to above. Moreover, there is no court or other body independent of the employer, the Minister or the Electricity Commissioner, as the case may be, who can determine whether an employee on whom sanctions have been imposed has, in fact, participated in a relevant strike [see ss 28(4) and 29(4) of the Electricity Authorities Industrial Causes Act 1985 which oust the jurisdiction of the courts].
- These elements of the State legislation do not comply with the rights protected under the provisions of ILO Convention No 87. Furthermore, the lack of provision for resort to a court or other independent body in relation to the imposition of sanctions conflicts with Article 7 of the International Covenant on Economic, Social and Cultural Rights which requires the provision of '*just* and favourable conditions of work'.
- Another breach of ILO Convention No 87 occurs by virtue of the new provisions enacted in the Industrial Conciliation and Arbitration Act Amendment Act 1985 relating to the cancellation and suspension of the registration of a union. There is insufficient scope for consideration by an independent tribunal of the substance of a case against a union in relation to the grounds for cancellation or suspension.

Right to Organise and Collective Bargaining Convention, 1949 (ILO Convention No 98)

- The existence of ss 3 and 4 of the Electricity (Continuity of Supply) Act 1985, which respectively confer powers that extend to the giving of directions to union members as such, and impose penalties for non-compliance, constitutes a breach of this ILO Convention.

Other Comments: The list given above does not purport to be exhaustive. Further Commonwealth examination may disclose other breaches. Moreover, even where the existence of legislation itself is not a breach, the exercise of powers or the taking of other action under the legislation would need to be examined to consider whether it constituted a breach of the international obligations mentioned above or of any other international obligations.

See also the answer provided by the Attorney-General, Mr Bowen, to a question on notice on 11 February 1986: HR Deb 1986, 119.

Individuals—human rights—International Covenant on Civil and Political Rights—Optional Protocol—action by Australia

On 5 June 1986 the Minister for Foreign Affairs, Mr Hayden, provided the following answer to a question on notice (HR Deb 1986, 4892):

Ratification by Australia of the Optional Protocol to the International Covenant on Civil and Political Rights is under consideration in the appropriate federal/states consultative forum, the Meeting of Ministers on Human Rights.

There have been differing reactions from the State and Territory Governments to the proposal that Australia accede to the Optional Protocol and consequently consultations are continuing.

I favour ratification of the Optional Protocol, which already has the support of a substantial number of Western and other countries, and hope that the Government might be able to proceed expeditiously.

Any further question on the domestic processes for ratification should be addressed to the Attorney-General.

On 17 February 1987 the Attorney-General, Mr Bowen, provided the following answer to a question on notice (HR Deb 1987, 64):

The question of ratification has been discussed with the States and the Northern Territory in the Meeting of Ministers on Human Rights. Agreement has not yet been reached and the question is still under obligations.

I am not yet in a position to indicate when ratification of the Optional Protocol might take place. The Covenant itself was ratified on 13 August 1980.

Individuals—human rights—International Covenant on Civil and Political Rights—proposed second optional protocol on abolition of the death penalty

On 23 July 1986 the Minister for Foreign Affairs, Mr Hayden, issued the following statement (Comm Rec 1986, 1180):

The Minister for Foreign Affairs, the Hon Bill Hayden, announced today that the Australian Government would support international moves to abolish capital punishment.

Mr Hayden said that in 1980 the Federal Republic of Germany proposed to the United Nations General Assembly the negotiation of a second optional protocol to the International Covenant on Civil and Political Rights. This instrument, which would impose an obligation on parties to abolish capital punishment and not to restore it, has been considered by the Commission on Human Rights and its subcommission which is to consider a report on the proposal at its session next year.

Mr Hayden said that because many countries at present oppose the abolition of the death penalty, progress on the optional protocol would be slow. He added that this prospect, however, would not deter Australia from playing an active part in seeking support in multilateral bodies for the abolition of capital punishment.

Individuals—human rights—the right to work

In the case of *Hughes v Western Australian Cricket Association (Inc) and Others* (1986) 69 ALR 660, decided by Toohey J in the Federal Court of Australia in Perth on 27 October 1986, the applicant was a professional cricketer who had been automatically disqualified by the rules of his

Association for playing a cricket match in South Africa. He argued, among other things, that the rule in question offended against a "right to work". His Honour said of this argument (at pp 703–704):

> *Right to work*
>
> This conclusion makes it unnecessary to deal with the so called "right to work" pleaded in para 39 of the statement of claim.
>
> In any event I am not persuaded that there is such a right, at least in the broad and unqualified terms argued for on behalf of the applicant. Certainly there is *Nagle v Feilden, supra,* in which it was held that the practice by the Jockey Club of Great Britain in refusing trainers licences to women on the basis of sex discrimination as opposed to merits, constituted a prima facie case of interference with a person's right to work at his trade or profession. But that case and other cases can be explained by reference to the particular facts and the nature of the disqualification and the circumstances in which it was imposed.
>
> In my view there cannot be inferred from that decision or any other some over-arching principle whereby any interference with a person's entitlement to work constitutes a tort or otherwise gives rise to a cause of action.

Individuals—Human rights—UN Convention against Torture

On 18 December 1984 the Minister for Foreign Affairs, Mr Hayden, issued a statement welcoming the unanimous adoption by the United Nations General Assembly of an International Convention Against Torture on 10 December 1984 (Comm Rec 1984, 2553). On 31 October 1985 Mr Hayden announced that Australia would sign the Convention (Comm Rec 1985, 1947). On 10 December 1985 Mr Hayden announced that Australia was to sign the Convention on that day in New York, Human Rights Day (Comm Rec 1985, 2280).

Individuals—human rights—United Nations Convention Against Torture

On 28 October 1987 the Minister for Foreign Affairs and Trade, Mr Hayden, said in answer to a question (HR Deb 1987, 1593):

> The United Nations Convention against Torture and Other Cruel, [Inhuman] or Degrading Treatment or Punishment was adopted unanimously by the United Nations General Assembly on 10 December 1984. Australia signed the Convention on 10 December 1985. The Attorney-General announced the Government's decision to ratify the Convention at the opening of the Human Rights Congress in Sydney on 25 September 1987. The process of drafting legislation is now, I believe, well advanced. It is a matter of completing that legislation and moving to the ratification of the legislation in the Parliament for us to be able to do that, which I think should be in the very near future.

Individuals—human rights—children—Hague Convention on the Civil Aspects of International Child Abduction

On 30 December 1986 the Attorney-General, Mr Bowen, issued the following statement in part (Comm Rec 1986, 2314):

> Measures aimed at overcoming the serious legal and practical difficulties involved in the abduction of children to and from Australia will come into

force for Australia on 1 January 1987, the Attorney-General, the Hon Lionel Bowen, said today. This follows Australia's ratification of the Hague Convention on the Civil Aspects of International Child Abduction.

Announcing the coming into force of the Convention, Mr Bowen said the Convention dealt with the wrongful removal of children from a contracting State in contravention of custody rights effectively exercised under the law of another contracting State.

The Convention was adopted by the Hague Conference on Private and International Law in Plenary Session 25 October 1980 and entered into force on 1 December 1983. It is currently in force in France, Hungary, Switzerland, Portugal, the United Kingdom and Canada. It will also come into force in Luxemburg on 1 January 1987. Mr Bowen said:

> After considerable consultations with the States and the Northern Territory in the Standing Committee of Attorneys-General, regulations have been made under s 111B of the Family Law Act to enable the implementation of the Convention in Australia. These regulations are referred to as the Family Law (Child Abduction Convention) Regulations.

On 25 March 1987 the Attorney-General, Mr Bowen, provided the following answer to a question on notice in part (HR Deb 1987, 1541):

> It might be of interest to the honourable member that 2 cases of children abducted to Australia have already been reported under the Convention. One was from France and the other from the United Kingdom. In one case the child has already been located and returned. There has not yet been any use of the Convention in respect of children abducted from Australia.

Individuals—human rights—prisoners—death penalty

On 9 May 1984 the Attorney-General, Senator Gareth Evans, provided the following written answer to a question on notice in the Senate on the rights of prisoners (Sen Deb 1984, 1881):

> Australia is a party to the International Covenant on Civil and Political Rights. A number of articles of that covenant deal with the rights of people in detention. In particular, article 10 provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> The conditions of prisoners in State prisons is the responsibility of the State Governments.
>
> At present there is no legislation under which the Commonwealth Government has power to intervene where problems arise in the treatment of prisoners in State prisons.
>
> In this situation, the Commonwealth Government can do no more than point out the nature of Australia's obligations under the Covenant and exhort the State Governments (and the Northern Territory Government) to observe these standards in the treatment of prisoners.
>
> The State and Northern Territory Governments are also aware of, and subscribe to, the more detailed provisions of the Standard Minimum Rules for the Treatment of Prisoners. These rules were approved by resolutions of the Economic and Social Council of the United Nations. The Rules are not

an instrument to which the procedure of signature applies but a statement of principles which Governments are called upon to honour.

The Australian Bill of Rights has, as was announced recently, been approved in principle by the Government, although its introduction has now been deferred. The Bill of Rights, being a statement of fundamental human rights, would be an appropriate place for the Commonwealth to give legislative effect to provisions of the International Covenant on Civil and Political Rights, such as article 10, on an Australia-wide basis. I would expect the issue to be taken up in that context.

On 31 May 1985 the Attorney-General, Mr Bowen, provided the following written answer to a question on notice in the Senate on international agreements for the transfer of prisoners serving terms of imprisonment in other countries (Sen Deb 1985, 3011–3012):

Negotiations with other countries for international agreements have not commenced. The nature of the proposed scheme is still under consideration within the Standing Committee of Attorneys-General.

The Standing Committee of Attorneys-General considered the matter of international transfer of prisoners at its last meeting on 2 May 1985. At that meeting, it was decided that the Commonwealth would prepare revised proposals for the Committee's consideration. These would include ways of excluding serious drug offenders from the scheme.

The drafting of enabling legislation has not commenced. It would not be appropriate to commence this until the nature of the scheme has been agreed.

With the nature of the proposed scheme not yet agreed, it cannot be accurately predicted when prisoners, who might be eligible for transfer under the scheme, will be able to be transferred back to Australia.

On 13 May 1985 the Minister for Defence, Mr Beazley, provided the following written answer to the respective question on notice in the House of Representatives (HR Deb 1985, 2241):

(1) Has his attention been drawn to the answer by the previous Attorney-General to question No 1652 in the last Parliament which stated that the death penalty has been abolished in the Commonwealth, its Territories and the Australian States with the exception of New South Wales in two cases.

(2) Are there any laws or circumstances in which Australian military personnel can carry out executions (a) on Australian territory and (b) elsewhere; if so, what are they.

(1) Yes.

(2) I assume that by 'execution' the honourable member means the implementation of a sentence of death imposed by a court or military tribunal.

There is no Commonwealth legislation applicable to the Australian Defence Force which would authorise members of the Defence Force to carry out an execution, in Australia or elsewhere.

No circumstances can be envisaged in which members of the Defence Force would otherwise be involved in carrying out an execution, in Australia or elsewhere.

Individuals—human rights—persons under detention

On 18 November 1987 the Attorney-General, Mr Bowen, provided answers to three questions: see HR Deb 1987, 2358.

Individuals—human rights—Australian response to human rights issues in foreign countries

On 19 April 1985 the Australian Government's response to the Parliamentary Committee's report on Australia's relations with ASEAN Countries was presented to Parliament, part of which, relating to Human Rights, read as follows (HR Deb 1985, 1523):

Recommendations

4. (a) "The Committee recognises the widespread interest in Australia in human rights issues and the continuing role which these issues may play in Australia's relations with the ASEAN region. The level of influence which Australia can exert on human rights issues will depend partly on the overall quality of Australia's multilateral and bilateral relationships in the region".

4. (b) "Australia will need to continue to approach human rights issues in ASEAN countries with sensitivity. Attempting to draw direct associations between the extension of aid and human rights performances of regional governments would not, except in unusual circumstances, be appropriate".

Response

The Government's approach to human rights questions in ASEAN countries takes fully into account the reality recognised by the Committee that Australia's ability to influence human rights developments will depend in part on the quality of Australia's multilateral and bilateral relationships in the region. The Government accords human rights a high priority in its foreign policy and is strongly committed to the promotion and protection of human rights. This together with the high level of community interest and concern in human rights matters, ensures that the Government meets its responsibility to respond to violations of human rights wherever these occur. The Government believes however that it is essential to act constructively on human rights matters and that Australia's human rights concerns can be most effectively pursued in the context of mutual understanding and sound bilateral relations. The Government appreciates the Committee's view that Australia needs to approach human rights issues in ASEAN countries with sensitivity. As a country with a different social, cultural and economic history, working within a different political structure and system of values from that of its neighbours Australia must pursue its human rights objectives in the ASEAN region with tact, determination, sensitivity and persistence.

The Government agrees with the Committee's view that the provision of development assistance should not inextricably be linked to a country's performance in human rights. The Government does not believe that aid should be automatically withheld from countries whose human rights record is poor. The adoption of such measures is most likely to inflict punishment on the poorest and most exposed who would be innocent of the human rights abuses perpetrated by their Governments. Nevertheless there will be scope for

aid to be directed in a way which serves also to encourage positive developments in human rights. This possibility should be taken into account in developing proposals for development assistance.

Individuals—human rights—East Timor

On 10 May 1985 the Minister for Foreign Affairs, Mr Hayden, provided the following written answer in part to a question on notice in the Senate (Sen Deb 1985, 1779–1780):

> The resolution on East Timor voted on during the 41st session of the United Nations Commission on Human Rights was considered under the confidential procedures of the Commission. The procedures are based on ECOSOC resolutions 1503 (XLVII), 1235 (XLII) and 728F and enable the Commission to consider in closed session communications from individuals and non-government organisations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights. To preserve the effectiveness of these procedures and the cooperation of states with them, members of the Commission undertake not to disclose details of closed debate or decisions. The Australian Government regards the confidential procedures as a useful mechanism for constructive dialogue on human rights and remains committed to their protection.
>
> As however the fact of consideration of East Timor at CHR 41 has already been the subject of articles in the press, in Indonesia and elsewhere, it would be proper for me to advise in general terms that the consideration proceeded on the basis of a recommendation from a working group of the Commission that the human rights situation in East Timor be kept under review. The recommendation foreshadowed possible termination of such consideration at next year's session. Australia voted for the recommendation, explaining this position in the context of our broader human rights concerns, including the need for proper international access to East Timor.

On 28 May 1985 the Minister representing the Minister for Foreign Affairs in the Senate, Senator Gareth Evans, said in part in answer to a question without notice (Sen Deb 1985, 28 May 1985, 2591):

> The Government is aware of reports from time to time concerning accusations of human rights violations in East Timor. We view these reports with concern but have no recent information to suggest increased levels of activity by either Indonesian or Fretlin forces which might have led to killings by either side. We follow the situation in East Timor with very close attention. The Government has raised its concern about East Timor, including, of course, human rights issues, with the Indonesian authorities on many occasions, most recently at the United Nations Commission on Human Rights in March 1985.

On 17 October 1985 the Minister for Foreign Affairs, Mr Hayden, provided the following written answer in part to a question on notice in the House of Representatives (HR Deb 1985, 2459–2460):

> (2) (a) Permission to visit the province of East Timor is requested by the Australian Embassy in Jakarta from time to time as the opportunity arises. There is no regular schedule of visits to the province by Australian Embassy

staff who, in the normal course of their duties, visit the different provinces comprising the Republic of Indonesia. The Embassy is aware of the importance of making regular visits to particular provinces such as East Timor and Irian Jaya and is seeking to increase the frequency of visits by Embassy personnel. Permission has been sought for an Ambassadorial visit to the province.

(b) As stated by the Prime Minister in Parliament on 22 August, Australia has, since 1979, recognised Indonesian sovereignty over East Timor. This has enabled Australia to seek permission for visits to the province by Australian delegations, including by non-government organisations. The Government has also sought free access to East Timor for international humanitarian organisations and aid workers because of our continuing concern about the human rights situation in the province.

(c) On the basis of information available the Government does not intend to lobby to put the question of East Timor on the agenda of the UN Commission on Human Rights. The Commission voted in closed session at its 41st session in 1985 not to keep the human rights situation in East Timor under review. Australia preferred that the situation should be kept under review, and voted to keep it under review. This view was not sustained by the Commission.

The closed session work of the Commission is based on matters referred to it by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, a body of independent experts. In August each year the Sub-Commission decides which countries the Commission should examine at its next session on the basis of evidence indicating continuing and gross violations of human rights. In August 1985 the Sub-Commission decided that new communications on the human rights situation in East Timor did not warrant its re-inclusion on the list of situations to be considered in closed session at the Commission's 42nd session.

While it would be possible for Australia to lobby for consideration of East Timor in public session, new information suggesting a continuing pattern of gross violations of human rights would be required to justify this. The Government is not aware of substantial new information of the human rights situation in East Timor which could convince the Commission to take up the question. The most recent information was that presented by Amnesty and others to the 41st session which has already been taken into account.

Action on Australia's part concerning the Human Rights situation in East Timor should be judged primarily by our capacity to bring about an improvement in the situation. At attempt to revive the issue in public session in 1986 in the absence of evidence of significant new developments would probably fail. Such an initiative may also weaken Australia's capacity to exert positive influence on the Indonesian authorities over events in East Timor.

The Minister for Foreign Affairs, Mr Hayden, provided a written answer in similar terms to a question on notice in the Senate on 5 November 1985: see Sen Deb 1985, 1604–1605.

Individuals—human rights—Indonesia—Australian response

On 29 November 1985 the Minister for Foreign Affairs, Mr Hayden, provided the following written answer to a question on notice in the House of Representatives (HR Deb 1985, 4080):

> On the basis of information available to the Government, I stated in public on 8 July 1984 that between 2,000 and 4,000 people had been shot without trial by so-called 'death squads' in Indonesia.
>
> There have been reports from time to time of 'mysterious killings' in Jakarta and other centres. In the absence of reliable information about the extent of the killings, it is difficult to determine their present level. At the same time, the number of victims of such killings appears to have substantially declined over the past eighteen months.
>
> I am not aware of any firm evidence to show that there is a connection between these reported mysterious killings and the Indonesian authorities. If the Indonesian authorities have sanctioned the executions, as alleged in press reports, it would be a matter of deep concern to the Australian Government.
>
> I raised this matter with relevant Indonesian authorities during my visit to Jakarta for the Association of South East Asian Nations Plus Ministerial Consultations in July 1984. The position of the Indonesian Government has been that the killings are the result of fighting between rival criminal gangs.
>
> The Australian Government believes that summary executions are a clear contravention of the fundamental human rights embodied in the universal declaration on human rights and the international covenant on civil and political rights. The Government has consistently taken the view that Australia has a strong interest in seeing internationally accepted human rights observed and respected, especially in our region, and believes that in all situations the due process of law should be followed. Our representatives to the Indonesian authorities are in keeping with this interest.

Individuals—human rights—Nicaragua—Australian response

On 28 May 1985 the Minister for Foreign Affairs, Mr Hayden, provided the following written answer in part to a question on notice in the Senate (Sen Deb 1985, 2665–2666):

> I have seen the report referred to and am aware also of other more general reports dealing with alleged human rights abuses by anti-[Sandinista] contra forces. This and other information available to the Australian Government suggests that contra forces have pursued a policy of destroying health centres and schools and have sought to intimidate and terrorise the population. Indiscriminate attacks also appear to have been carried out against civilians.
>
> The Government has consistently opposed the use of military force in Central America and on a number of occasions has expressed publicly its concern about contra activity and conveyed its views on the subject to the United States Administration. Reports of human rights abuses by the contras, particularly those directed at civilians or medical personnel, are cause for added concern and are to be deplored.
>
> I have made arrangements for the Government's views on this particular issue to be brought to the attention of the US authorities.

On 29 November 1985 the Minister for Foreign Affairs, Mr Hayden, provided the following written answer in part to a question on notice in the House of Representatives (HR Deb 1985, 4058–4059):

> The Government has expressed concern at the erosion of pluralism and civil liberties in Nicaragua on a number of occasions and will continue to do so where appropriate. Most recently, I said in a speech delivered to the Australian Human Rights Congress in Central America on 21 July 1985, that the human rights record of the Sandinistas since the revolution has not been immaculate and that it would be a tragedy, after what the Nicaraguans have been through, if they trampled human rights in the rush to the barricades. At the same time, the Government has made clear that it believes the human rights record of the Nicaraguan Government to be considerably better than those of some other Central American Governments. The human rights record of the Contras is atrocious.

Individuals—human rights—Philippines—Australian response

On 8 May 1985 the Minister for Foreign Affairs, Mr Hayden, provided the following written answer in part to a question on notice in the Senate (Sen Deb 1985, 1593):

> The Government devotes considerable time and resources to keeping itself informed about human rights developments in countries throughout the world, including the Philippines. The Australian Embassy in Manila is understanding instructions to provide regular reporting on the human rights situation and to follow up specific cases which have been referred to it. The Embassy obtains information from a variety of sources, both official and non-governmental. The Government complements reporting from Manila with information from other sources including the press, publications such as the United States Department of State's 'Country Reports on Human Rights Practices' submitted to Congress annually, and reports from a number of non-government organisations, including Amnesty International, which follows developments in the Philippines. The Government also takes note of reports submitted by the Philippines to United Nations bodies, notably the Commission on Human Rights, and also the Committee on the Elimination of Racial Discrimination to which the Philippines reports as a State Party to the International Convention on the Elimination of All Forms of Racial Discrimination.

A further written answer was provided on 30 May 1985: see Sen Deb 1985, 2899.

Individuals—human rights—South Africa, Sri Lanka, USSR—Australian response

For statements on the human rights situations in other countries, see, among others, Comm Rec 1985, 1197–1198 (South Africa—introduction of state of emergency); Sen Deb 1985, 11 November 1985, 1883 (Sri Lanka—communal conflicts); and HR Deb 1984, 6 June 1984, 2975–2976 (USSR—Dr Sakharov and Dr Bonner).

Individuals—humanitarian law—Palestinian people in Occupied Territories

On 25 March 1985 the Minister for Foreign Affairs, Mr Hayden, provided the following written answer to a question on notice in the Senate (Sen Deb 1985, 775):

1. The rights of the population of the Occupied Territories are governed by the Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War. The situation in the Occupied Territories is coming under increasing scrutiny in United Nations bodies, most recently the Commission of Human Rights, and by other international agencies. As a member of both the Security Council and the Commission on Human Rights Australia is required to monitor closely the situation in order to consider allegations of abuses which come before these bodies. Australia has urged that Israel abide by its obligations under the Fourth Geneva Convention.

2. The Australian Government is aware of the recent reports to which the honourable senator has referred.

3. At the Dehaishe Refugee Camp near Bethlehem, Rabbi Moshe Levinger, the Leader of the Jewish settlers in Hebron, spent most of the last four months living in a caravan opposite the camp. This was in protest at alleged rock throwing by inhabitants of the camp. On 4 February he fired shots into the air after his caravan became the target for a stone throwing protest. Levinger is reported to have chased his assailants into the camp where he remained for more than an hour before being removed by Israeli security forces. Rabbi Levinger has now called off his protest.

4. The Government is also aware of reports that the Israeli Government proposes to institute new measures against alleged 'rioters and subversive elements' among the West Bank Palestinian population. Prime Minister Peres is reported to have described these measures in terms of 'increased presence, heightened alertness and appropriate punishment for those found guilty'. The measures are in the wake of a number of serious recent attacks which have claimed the lives of two Israelis and left several injured. Jewish settlers in the West Bank have for some time been demanding tougher measures by the Government for security in the area.

5. The Government is also aware of the report prepared by Palestinian lawyers in the West Bank and released recently by the International Commission of Jurists in Geneva. The Government is currently studying the report which I understand takes the form of twenty separate sworn affidavits by Palestinian detainees in the West Bank detention centre of Al-Fara'a.

6. The Australian Government is concerned with the question of the human rights situation in the Israeli Occupied Territories. The Government has also consistently expressed the view that the Israeli settlements in the West Bank are contrary to International Law and a significant obstacle to peace efforts.

For Australia's comments on the proposal for the establishment of a new international humanitarian order, see A/40/348/Add.2 of 9 October 1985.

Individuals—human rights—human rights in individual countries—Afghanistan—Fiji—Guatemala

On 5 June 1986 the Minister for Foreign Affairs, Mr Hayden, provided the following answer to a question on notice, in part (HR Deb 1986, 4864):

> The Australian Government has not sought to take the issues of Labour conditions and practices in Afghanistan to the ILO and sees no current need to do so.
>
> While relations between the Soviet Union and Afghanistan are close, responsibility for Labour conditions and practice in Afghanistan lies with the Afghan authorities. Australia does not recognise the present government of Afghanistan. In these circumstances concerns about Labour conditions and practices in Afghanistan would be best expressed at multilateral forums.

On 27 October 1987 the Minister representing the Minister for Foreign Affairs and Trade, Senator Gareth Evans, said in answer to a question (Sen Deb 1987, 1280):

> There have been reports of a number of actions taken against Fiji Indians by the military forces in that country in particular. We are aware that a growing number of civil servants, both senior Fiji Indian and others, have been summarily dismissed, and the dismissals or enforced resignations are becoming more common at lower levels. We are also aware of persistent reports that some Fiji Indians in particular are subjected to harassment by Taukei youths and petty criminals, apparently again in some cases with the connivance of elements of the military. Short term detentions continue of former coalition supporters, trade unionists and other citizens who may have connections to identified opponents of the regime. The ban on activity on Sunday, other than attendance at church, discriminates against the very large numbers of non-Christian Fiji citizens. Colonel Rabuka has announced on a number of occasions that the political and civil rights of Fiji Indians will be protected and that Fiji Indians are welcome to remain in Fiji. We simply hope that these assurances will be heard and acted upon.
>
> Australia is concerned about infringements of international human rights standards, wherever they may occur. We are particularly concerned that there may have been violations in Fiji of the International Covenant on Civil and Political Rights. The Government has repeatedly made clear—both directly and, of course, most recently at the Commonwealth Heads of Government Meeting through the Prime Minister—that the best interests of the people of Fiji will be served by as rapid a return as possible to the parliamentary processes.

On 18 February 1986 the Minister representing the Minister for Foreign Affairs in the Senate, Senator Gareth Evans, said in answer to a question about human rights in Guatemala (Sen Deb 1986, 493):

> The Amnesty International report referred to by Senator Bolkus is one of a number which have documented Guatemala's poor human rights record. The Australian Government has consistently condemned the repeated instances of massive human rights violations in that country. We have voted in favour of resolutions in the United Nations General Assembly and in the Commission on Human Rights in Geneva which were strongly critical of Guatemala's lack of respect for basic human rights. In addition, the Minister

for Foreign Affairs, Mr Hayden, issued a statement on 23 April 1985 expressing concern at the recent wave of politically motivated violence and his personal alarm that human rights activists had been singled out for attack. That was quickly brought to the attention of the Guatemalan Government of the day. Elections in December 1985 returned Guatemala to civilian government after 31 years of almost uninterrupted military rule. Australia welcomed this development in a message to the President-elect, at the same time joining the United Nations General Assembly in expressing the hope that this election would mark at least the first step towards an improvement in the human rights situation there.