Australian Cases before Australian Courts and Tribunals Involving Questions of Public International Law 2006

Lucas Bastin, Naomi Hart, Justin Hogan-Doran, Claire McEvilly, Tim Stephens, Zelie Wood and Houda Younan[*]

International Law in General

Statutory interpretation – relevance of the International Covenant on Civil and Political Rights to interpreting the Australian Federal Police Act 1979 (Cth) – legitimate expectation

Rush v Commissioner of Police
(2006) 150 FCR 165; (2006) 229 ALR 383; (2006) 160 A Crim R 342;
(2006) Aust Torts Reports 81-829; [2006] FCA 12
Federal Court of Australia
Finn J

The applicants, Scott Rush, Renae Lawrence, Michael William Czugaj and Martin Stevens, sought to bring claims against members of the Australian Federal Police (AFP). The AFP had passed intelligence to Indonesian police that had resulted in the applicants being arrested and charged with drug trafficking that would expose them to the risk of the death penalty if they were convicted. The applicants sought to discover the identity of the AFP members who had collaborated with the Indonesian authorities. They raised two submissions under international law. The first was that section 8 of the Australian Federal Police Act 1979 (Cth) should be read in light of the International Covenant of Civil and Political Rights (ICCPR)[1] and the Second Optional Protocol to that Covenant, Aiming at the Abolition of the Death Penalty.[2] Under the former, Australia agreed that '[e]very human being has the right to life' (Art 6.1), and under the latter, Australia agreed that no one under its jurisdiction would be executed (Art 1). Second, the applicants submitted that they had a substantive legitimate expectation that the Australian government and its agencies would not expose them to risk of death penalty.

Justice Finn dismissed the application. On the first of these submissions, he held that the international instrument could not aid in interpreting section 8, because those instruments were enacted after the enactment of section 8. He also

* Sydney Centre for International Law, Faculty of Law, University of Sydney.
1 [1980] ATS 23.
2 [1991] ATS 19.

noted that the Protocol does not address actions taken by Australian public officials vis-à-vis foreign law enforcement agencies in connection with offences in their jurisdiction that can there attract the death penalty. On the second submission, Finn J held that the applicants were 'unable to show that a claim for relief based on the legitimate belief 'doctrine' could lead to relief being granted in this Court'. He first explained, '[t]he provisions of an international treaty do not form part of Australian law merely because Australia is a ratifying party to it.' Following *Minogue v Human Rights and Equal Opportunity Commission*,[3] he stated that neither the ICCPR nor the Second Optional Protocol of itself 'operate[s] to give rights to or impose duties on members of the Australian community'. He also drew on the definition of this doctrine, quoting the Hong Kong case *Ng Siu Tung v Director of Immigration*:

> The doctrine recognizes that, in the absence of any overriding reason of law or policy excluding its operation, situations may arise in which persons may have a legitimate expectation of a substantive outcome or benefit, in which event failing to honour the expectation may, in particular circumstances, result in such unfairness to individuals as to amount to an abuse of power justifying intervention by the court. Generally speaking, a legitimate expectation arises as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority.[4]

Justice Finn noted that although the doctrine has been adopted in Australian law in relation to procedural fairness and issues of natural justice,[5] the High Court has ruled that it does not form part of Australian law with respect to substantive benefits or outcomes.[6]

Statutory interpretation – relevance of the International Labor Organisation Convention concerning Termination of Employment at the Initiative of the Employer to interpreting the Industrial and Employees Relations Act 1994 (SA)

Ferdinands v Commissioner for Public Employment
[2006] HCA 5; (2006) 225 CLR 130; (2006) 224 ALR 238; (2006) 80 ALJR 555
High Court of Australia
Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ

The applicant, a police officer, was dismissed by the South Australian Police Commissioner after being convicted of assault. He applied to the Industrial Relations Commission complaining of harsh, unjust or unreasonable dismissal, pursuant to the Industrial and Employee Relations Act 1994 (SA) (the IER Act). In section 111(1) the Act referred to the International Labor Organisation Convention

---

3 [1999] FCA 85; (1999) 84 FCR 438, 35.
4 (2002) 5 HKFCA 1, 92.
5 *Attorney General (NSW) v Quin* [1990] HCA 21; (1990) 170 CLR 1; *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1.
6 *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273.

concerning the Termination of Employment at the Initiative of the Employer,[7] which, according to Article 2(1), applies to all employed persons. The Full Court of the Industrial Relations Commission held that it had no jurisdiction to entertain the application. The Full Court of the Supreme Court of South Australia agreed.[8] Those courts held that the legislative scheme governing the appointment and termination of appointment of police officers under the Police Act 1998 (SA) was not subject to review under the IER Act. They found that the Police Act effectively repealed the IER Act in relation to police officers.

The High Court dismissed the appeal. Gummow and Hayne JJ noted that although the Convention enshrines the right of employees to apply to an impartial adjudicating body if they consider that their employment has been unjustifiably terminated and provides a list of grounds that are unacceptable for termination, it does not refer to termination that is 'harsh, unjust or unreasonable'. Therefore, the 'harsh, unjust or unreasonable' criterion in the IER Act had content different from that for which the Convention provided. It was, for that reason a criterion, the inclusion of which did not implement the terms of the Convention, but went beyond its requirements.

In his dissenting judgment, Kirby J highlighted that it is unusual for state or territory laws to refer to international conventions. For that reason, he concluded:

> It must be assumed that the Parliament of South Australia took the course of scheduling the Convention deliberately and for the high purpose of ensuring, throughout the State, conformity of State law … with the provisions of international law stated in the Convention. [In such a case,] it is normal to construe any ambiguous provisions … in such a way, so far as possible, as to ensure compliance with the Convention.

Justice Kirby held that an entitlement to appeal to 'an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator'[9] provided for in Article 8 included the right to appeal to the Industrial Relations Commission, which could determine whether the termination was justified, as judicial review as outlined in Article 9 was limited to questions of errors of jurisdiction and law.

Statutory interpretation – value of submissions dealing with the relevance of international human rights conventions

Royal Women's Hospital v Medical Practitioners Board of Victoria
(2006) 15 VR 22; [2006] VSCA 85
Supreme Court of Victoria
Court of Appeal
Warren CJ, Maxwell P and Charles JA

A patient, referred to as Ms X, attended the emergency department of the Royal Women's Hospital and requested that her pregnancy be terminated. At the request of a Victorian Senator, Julian McGauran, the Medical Practitioners Board conducted an investigation into the professional conduct of the hospital's medical

---

7 [1994] ATS 4.
8 *Ferdinands v Commissioner for Public Employment* (2004) 233 LSJS 110.
9 [1994] ATS 4.

practitioners in their dealings with Ms X. To assist their investigations, the Board sought and was granted a search warrant by the Magistrates' Court of Victoria. The hospital applied to the Magistrates' Court to have the documents returned on the basis of statutory privilege and public interest immunity.[10]

Upon appeal to the Full Court, the hospital submitted that when balancing the public interest in shielding a document from a search warrant and in issuing such a warrant, content of international human rights conventions may be relevant. Here, the hospital relied on the ICCPR,[11] which provides in Article 17, '[n]o-one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.' It also relied on the International Covenant on Economic, Social and Cultural Rights (ICESCR),[12] which protects, in Article 12, the right of individuals to enjoy the highest attainable standard of physical and mental health. Finally, it relied on Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[13] which prohibits discrimination against women in the field of healthcare, including by providing access to appropriate services in connection with pregnancy. The hospital argued that a violation of confidentiality would deter women in particular from seeking medical advice and treatment.

The Court dealt with this submission in *obiter dicta*. President Maxwell affirmed the value of submissions dealing with the relevance of such conventions. Although he noted that unless an international convention has been incorporated into Australian law by statute, the convention cannot operate as a direct source of individual rights and obligations, he explained three ways in which such conventions can be relevant: (1) they can assist with statutory interpretation; (2) they may be used by the courts as a legitimate guide in developing the common law; and (3) they can serve as an indication of the value placed by Australia on the rights provided for in the convention.

Justice Charles of the Court of Appeal denied the relevance of the ICCPR because the interference was, in this case, neither arbitrary nor unlawful, as the Board had received a complaint and was fulfilling a statutory duty to investigate this notification by pursuing the documents from the hospital. He also denied that there was evidence of a lack of confidentiality or the presence of discrimination in the seizure of the documents.

---

10 *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2005] VSC 225.
11 [1980] ATS 23.
12 [1976] ATS 5.
13 [1973] ATS 9.

Statutory interpretation – relevance of Convention on the Rights of the Child in relation to visa renewal applications – legitimate expectation

Lam v Minister for Immigration & Multicultural & Indigenous Affairs
[2006] FCA 445
Federal Court of Australia
Lander J

The applicant, Thanh Tra Lam, was a Vietnamese-born man who had lived in Australia since 1994. In 2005 the Administrative Appeals Tribunal (AAT) cancelled his resident return visa because he had failed the character test. The applicant had prior drug convictions and had worked for only three months since migrating to Australia.

Upon appeal to the Federal Court, the applicant submitted that the Minister should exercise Ministerial Discretion No 21 of the Migration Act 1958 (Cth), which allowed a visa to be granted to an applicant who had failed the character test if his or her deportation would not be in the best interests of a child with whom he or she had a close relationship. The applicant had a six-year-old sister, and submitted that his deportation would impair his parents' ability to parent her well. Justice Lander found that as there was no evidence that the applicant and his sister had ever met each other, they could not be described as having a close relationship and so the discretion could not be enlivened.

The applicant also submitted that the AAT was also obligated to rule in accordance with the Convention on the Rights of the Child,[14] which provided in Article 3, 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

Justice Lander considered the case of *Minister for Immigration and Ethnic Affairs v Teoh*.[15] In that case, an applicant who failed the character test had a wife and seven children and step-children, who would 'face a bleak future' if he was deported. Justice Lander distinguished *Teoh* from the present case, as the former was decided before the passage of the Ministerial Discretion. Because that discretion identified the class of children whose best interests should be given primary consideration – children with whom the applicant has a close relationship – he held that the applicant could not have a legitimate expectation that children outside of that class would also be given primary consideration.

14 [1991] ATS 4.
15 [1995] HCA 20; (1995) 183 CLR 273.

Statutory interpretation – prohibition of solitary confinement at international law – relevance of international law in interpreting state legislation

Garland v Chief Executive, Department of Corrective Services
[2006] QSC 245
Supreme Court of Queensland
Atkinson J

Mr Garland applied to the Supreme Court of Queensland for judicial review of a decision made by the Chief Executive of the Department of Corrective Services to keep him in a maximum security unit. The decision was made on the basis that he posed a substantial threat to the security or good order of the facility, pursuant to section 47(2)(b)(iii) of the Corrective Services Act 2000 (Qld). Mr Garland sought review on the grounds that, *inter alia*, the decision was otherwise contrary to law because his solitary confinement in the maximum security unit was inhumane and was in violation of section 3 of the Act. Section 3 provided that the 'purpose of corrective services is community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders'. Justice Atkinson rejected this ground of review, and dismissed the appeal altogether.

Mr Garland submitted that the concept of 'humane containment' should be defined in light of the Standard Guidelines for Correction in Australia. These in turn should be interpreted in light of the United Nations Standard Minimum Rules for the Treatment of Prisoners,[16] the ICCPR, and the United Nations Basic Principles and Guidelines on the Treatment of Prisoners.[17] Upon reviewing the jurisprudence on the use of international law in interpreting domestic legislation, Atkinson J concluded that 'international law, treaties and guidelines provide an interpretative guide to concepts such as "humane containment"'.[18] He referred to the instruments identified by the applicant, as well as the United Nations Manual on Human Rights for Judges, Prosecutors and Lawyers;[19] jurisprudence of the European Human Rights Commission;[20] and the Concluding Observations of the United Nations Committee Against Torture.[21] These sources indicated that the lawfulness of solitary confinement depends upon the aim, length and conditions of the confinement in each particular case. Here, the confinement was not for the purposes of punishment, but for the security of the facility. It satisfied all the requirements in the international and national guidelines and therefore was not inhumane.

---

16 Approved by Economic and Social Council Res 663C (XXIV), 31 July 1957 and 2076 (LXII) (13 May 1977).
17 Adopted by GA Res 45/111 (14 December 1990).
18 [2006] QSC 245 [106].
19 *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (Office of the United Nations High Commissioner for Human Rights: Geneva, 2002).
20 *R v Denmark* (1985) 41 *Eur Comm HR*.
21 UN Doc GAOR, A/53/44, 17 [156] (Norway) and UN Doc GAOR, A/52/44, 34 [225] (Sweden).

Meaning of 'aliens' – Constitutional nationality – Impact of considerations of statelessness on 'alien' classification

Koroitamana v Commonwealth of Australia
[2006] HCA 28
High Court of Australia

The child applicants, having been born in Australia to parents who were neither Australia citizens nor permanent residents, risked becoming unlawful non-citizens should their temporary bridging visas not be renewed. They challenged the constitutional validity of sections 198 and 189 of the Migration Act 1958 (Cth), which provide for the removal and detention of unlawful non-citizens, based on the argument that the power to make laws with respect to 'naturalisation and aliens' under section 51(xix) of the Constitution did not extend to a power to treat the applicants as aliens. The applicants argued that a person born in Australia could not be an 'alien' on the ordinary understanding of the word unless they possessed a further 'relevant characteristic', such as foreign allegiance. The applicants argued that, although they were eligible for Fijian citizenship on registration, this was not a 'relevant characteristic', and relied on their 'constitutional nationality' to protect them from removal as unlawful non-citizens. The Full Court of the Federal Court held that the applicants were aliens, and therefore that the question of the constitutional validity of the relevant sections did not arise.

The High Court unanimously found that special leave should be granted but the appeal dismissed with costs on the basis that the applicants were aliens. The Court agreed that, although not factually identical with the present case, *Singh v Commonwealth*[22] must be accepted as authority for the propositions that at the time of federation the concept of alienage did not have 'an established and immutable legal meaning,' and that 'birth in Australia does not of itself mean that a person is beyond the reach of the power conferred on the Parliament by s51(xix)'.

In a joint judgment Gummow, Hayne and Crennan JJ found that 'there is support in the decisions of this Court neither for the "constitutional citizenship" of those born in Australia, nor for the retention of that character until supervening dissociation with the Australian community'. These Justices considered it settled that Parliament has the power, through section 51(xix), to control questions of citizenship, and agreed with Gleeson CJ and Heydon J that to hold otherwise would be a 'considerable fetter' on parliamentary powers. Noting that Parliament does not have unbridled power to define concepts of alienage, Kirby J noted that in the international instruments subsequent to the 1948 Universal Declaration of Human Rights,[23] international law was not expressed in terms of a 'right to nationality' but rather a 'right to acquire a nationality'. Justice Callinan expressed deep disquiet with the result of the case but held himself bound by *Commonwealth v Singh*[24] to join in the orders.

---

22 (2004) 209 ALR 355.
23 GA Res 217A (1948).
24 (2004) 209 ALR 355.

The question of the relevance of possible statelessness to the status of the applicants was dealt with in *obiter dicta*. The applicants argued that they were not stateless because they could not be treated as aliens by Australia. It was accepted that statelessness would have been a 'relevant characteristic' permitting their treatment as aliens by their own argument. Chief Justice Gleeson and Heydon J found that, subject to international obligations, 'it is open to Parliament to treat a stateless person as an alien'. Justice Kirby, with his emphasis on the right to acquire nationality, held that in this case considerations of potential statelessness could be ignored when deciding whether the applicants were aliens as such a status could be 'readily cured' given their entitlement to registration as Fijian citizens.

Human Rights

Courts and judicial system – Apprehended bias – right to an impartial tribunal

Smits v Roach
[2006] HCA 36; (2006) 228 ALR 262; (2006) 80 ALJR 1309
High Court of Australia

The respondents sought advice from Freehill, Hollingdale & Page (Freehills), solicitors, in the 1980s in connection with a peat deposit in Victoria. They argued that Freehills provided negligence advice that resulted in them failing to apply for and to obtain a peat mining licence. The respondents engaged a second firm of solicitors, the appellants, in relation to a professional negligence action against Freehills. The respondents terminated the retainer of the appellants, and the appellants commenced proceedings against the respondents to recover legal costs. They were heard by McClellan J, whose brother was chairman of partners at Freehills. The senior counsel for the appellants knew of this familial relationship. The appellants filed a notice of motion requesting McClellan J disqualify himself. Justice McClellan refused on the grounds of the knowledge of the senior counsel for the appellants. The appellants were unsuccessful in their appeal to the New South Wales Court of Appeal, which held accepted the appellants' claim of apprehended bias, but found that the appellants waived their right to object to McClellan J's participation in the case because of the knowledge of their senior counsel. The High Court dismissed a further appeal from this decision. In the course of his reasons Kirby J discussed the right to an impartial trial at international law and noted that one purpose of strict rules relating to the disclosure by judges of a potentially disqualifying interest or association is 'to ensure that Australia's municipal law and practice, in this respect, conforms to its obligations under international law'.[25] Justice Kirby observed that where there is 'any ambiguity or uncertainty in the expression of the common law and perhaps in wider circumstances, it is permissible to give it a meaning and application bearing in mind Australia's treaty obligations' including those contained in the ICCPR.[26] Justice Kirby noted that the requirements of Article 14.1 of the ICCPR, which

25 (2006) 228 ALR 262 [102]-[103].
26 Ibid [103].

provides that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law', also form part of the common law.

Criminal Law – offence of possession of child pornography – admissibility of evidence – International Covenant on Civil and Political Rights

R v Pj
[2006] ACTSC 37
Supreme Court of the Australian Capital Territory
Connolly J

The accused was charged with knowingly having in his possession photographs, video images, DVDs and written stories depicting or otherwise representing young persons engaged in acts of a sexual nature, being a depiction or representation that would offend a reasonable adult person. The accused challenged the Crown case on the basis that there were irregularities in how the police obtained a search warrant and the search itself, meaning that certain evidence of conversations involving the accused were inadmissible as evidence.

Justice Connolly stated that although search warrants were obtained and executed by members of the Australian Federal Police, they were authorised under Territory law, and, consequently, may be affected by the Human Rights Act 2004 (ACT). This Act requires that Territory laws should be interpreted in a way that is consistent with human rights as far as possible. He also emphasised that the Evidence Act 1995 (ACT) requires that when exercising a statutory discretion to exclude illegally or improperly obtained evidence, any inconsistency with the ICCPR should be considered.

Criminal Law – appeal against conviction – incompetence of counsel – whether appellant had been denied a fair trial under international law

Stevens v McCallum
[2006] ACTCA 13
Court of Appeal of the Australian Capital Territory
Higgins CJ, Crispin P and North J

The appellant had been convicted of assault in the ACT Magistrates Court after counsel for the defence tendered as evidence a transcript of a police interview with the appellant that would otherwise have been inadmissible. In reaching its decision, the Court drew on the judgment of Kirby J in *Nudd v The Queen*.[27] In that case, Kirby J recognised an implicit assumption of a right to the provision of competent legal counsel. He referred to Article 6 of the European Convention on Human Rights,[28] which guarantees the right to a fair trial, and Article 14.1 of the ICCPR,

27 [2006] HCA 9; 80 ALJR 614.
28 213 UNTS 221.

which provides the right to have criminal matters decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The Court noted specially that counsel acting incompetently is 'a necessary but not sufficient condition for concluding that due process has been denied'. If a conviction was inevitable, notwithstanding defects in the trial process, a breach of the right to a fair trial may not suffice to require that the result be set aside. But in this case, the Court allowed the appeal, holding that the appellant's counsel had shown incompetence by tendering the transcript, which was the only evidence upon which the conviction was based. The Court found that there were no grounds upon which the respondent could have tendered the transcript. There had been a miscarriage of justice because the appellant had unfairly lost a reasonable chance of acquittal.

Disability discrimination – deaf child required to be taught in a sign language she did not properly understand – whether ability to 'cope' sufficient to ground a finding that she was 'able to comply' with the requirement or condition imposed

Hurst v State of Queensland
(2006) 151 FCR 562; (2006) 235 ALR 53; (2006) 91 ALD 533;
[2006] FCAFC 100
Federal Court of Australia
Ryan, Finn and Weinburg JJ

The applicant, Tiahna Hurst, was a 'severely to profoundly' deaf child who was able to communicate in a sign language called Auslan. When Tiahna attended school, however, she was not allowed to use or communicate in that form of sign language. The State of Queensland, through its education department, insisted that Tiahna be taught and communicate in English (including signed English). She was not provided with an interpreter.

An application was filed in the Federal Court on behalf of both Tiahna and another applicant, Ben Devlin. The application claimed that the state's requirement was unlawful indirect discrimination on the basis of disability. The application was filed by Ben's next friend, Kim Devlin. Ben succeeded in the application, but Tiahna did not. Justice Lander at first instance held that Tiahna was in fact able to comply with the requirement imposed by the state, and that the discrimination was therefore not unlawful as it did not fall foul of section 6(c) of the Disability Discrimination Act 1992 (Cth). An appeal was lodged against the decision of the primary judge on Tiahna's behalf by her next friend.

The appeal was allowed. The Court, in a single joint judgment, held that the primary judge's focus on whether Tiahna's hearing ability was comparable to her peers and whether she was able to 'cope' with being taught in English, was misplaced. It failed to address the real issue of law, namely, whether Tiahna suffered any serious disadvantage as a result of having to comply with the requirement or condition that she be taught in English instead of Auslan. The Court held that the evidence strongly suggested that Tiahna had suffered and would continue to suffer the requisite serious disadvantage to ground a finding of

unlawful indirect discrimination. An ability to 'cope' was not sufficient to establish that the condition or requirement imposed was one with which Tiahna was 'able to comply'; rather it demonstrated the serious disadvantage that she would not be able to achieve her full potential. It was sufficient for an applicant to satisfy the requirement in section 6 of the Act that he or she is 'not able to comply' with a requirement or condition if that applicant will in fact suffer a serious disadvantage in so complying, irrespective of whether he or she can 'cope' with that requirement or condition. The Court also dismissed the argument that Tiahna was too young at the time of the application to have suffered any serious disadvantage under section 6 of the Act. There was, as it were, no temporal limitation on Tiahna's case.

During submissions on the appeal, counsel for Tiahna and for the intervenor (the Human Rights and Equal Opportunities Commission) referred to the Declaration on the Rights of Disabled People. This was the international instrument which the Act sought to implement. Counsel stressed that the Act should be interpreted in the context that the Declaration provided. It was said that this context required a broad and benevolent interpretation of section 6 of the Act. It also required, especially in view of Australia's obligations under the ICCPR and the Convention on the Rights of the Child,[29] that measures by taken to ensure that people living with disabilities be as self-reliant as possible. Although the Court in its reasons did no more than note these submissions, the interpretation it gave to section 6 of the Act, and its treatment of existing authority on the point, confirm that it afforded the provision the broad and beneficial construction required by the international instruments.

Sex discrimination – refusal to alter birth certificate after gender reassignment surgery because the applicant was married – whether discrimination on the basis of marital status

AB v Registrar of Births, Deaths and Marriages
(2006) 235 ALR 147; (2006) 92 ALD 570; [2006] FCA 1071
Federal Court of Australia
Heerey J

The applicant was a post-operative male to female transgender person. She had been married before her gender reassignment surgery, but had been separated from her wife for a long time. After the surgery, the applicant's birth certificate still reflected her birth gender, so she applied to the Victorian Registrar of Births, Deaths and Marriages to have it amended. The Registrar refused on the basis that the Births, Deaths and Marriages Act 1996 (Vic) prevented the amendment of birth certificates after marriage. The applicant filed an application in the Federal Court claiming under section 22 of the Sex Discrimination Act 1984 (Cth) that the Registrar had unlawfully discriminated against her on the basis of her marital status.

Justice Heerey dismissed the application holding that section 22 of the Act only applied insofar that it implemented the International Convention on the Elimination

---

29 [1991] ATS 4.

of All Forms of Discrimination Against Women.[30] After a comprehensive analysis of the meaning and import of the preamble to the Convention, Heerey J concluded that 'the Convention addresses a particular species of the genus discrimination, namely discrimination against women'.[31] The Convention was not concerned with any discrimination that affected both women and men indiscriminately, such as discrimination against people because they are married or unmarried. Rather, the allegedly discriminatory conduct had to treat women less favourably because they are married. Justice Heerey found that the discrimination in this case did not fall under this description. The Registrar's refusal of the applicant's request to amend her birth certificate had nothing to do with the fact that she was a woman. Had she been a man the result would have been the same. Justice Heerey also held that section 22 of the Act could not be given some broader operation than that which was necessary to implement Australia's obligations under the Convention.

Sex discrimination – whether discrimination in the supply of services by an unincorporated not-for-profit association can be excused on community service grounds – whether discrimination excused as a 'special measure'

Kennedy v Anti-Discrimination Commission of the Northern Territory
(2006) 92 ALD 134; [2006] NTCA 9
Northern Territory Court of Appeal
Mildren, Thomas and Southwood JJ

In this case, two of the appellants were excluded from a forum run by one of the respondents, the Top End Women's Legal Service (TEWLS), because they were men. The forum sought to educate women, mostly of migrant backgrounds, in Australian family law. The TEWLS was an unincorporated association funded by the Northern Territory government.

Two issues arose on the appeal. The first was whether the discriminatory conduct by TEWLS was excused because it was providing a community service for no profit. The second was whether the discrimination could be excused as it was a special measure designed to promote equality for a disadvantaged group. Justice Mildren held that the discrimination was excused only because it was a special measure. Since the TEWLS was not 'a person' for the purposes of section 41(2) of the Anti-Discrimination Act (NT), its discrimination was not excused as a community service. Justices Thomas and Southwood agreed.

In disposing of the appeal, mention was made of the decision of Brennan J in *Gerhardy v Brown*, [32] which considered Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination.[33] Article 1(4) exempts from anti-discrimination legislation 'special measures' taken for the advancement of the human rights of disadvantaged groups. Justice Brennan clarified that, when assessing whether a special measure should be implemented, it

30 [1983] ATS 9.
31 *AB v Registrar of Births, Deaths and Marriages* [2006] FCA 1071 [32].
32 (1985) 57 ALR 472.
33 [1975] ATS 40.

is the function of the political branch to make that assessment, and the courts are limited only to deciding whether any relevant legal criteria are complied with. Given that the Anti-Discrimination Commissioner had determined that section 57 of the Act applied in this case so that the services provided by the TEWLS were a 'special measure', the Court of Appeal needed only find that the Commissioner had not erred in this determination. It did so, and the appeal was dismissed on that basis.

Racial discrimination – underpayment of indigenous Australians employed by the State of Queensland – whether breach of right to equal pay for equal work

Baird v State of Queensland
(2006) 156 FCR 451; (2006) 236 ALR 272; (2006) 94 ALD 43;
[2006] FCAFC 162
Federal Court of Australia
Spender, Allsop and Edmonds JJ

During the period 1975 to 1986, the appellants were employed on the Hope Vale and Wujal Wujal Reserves in Queensland. The Reserves were under the management of the Lutheran Church, and the grants were paid by the State of Queensland to the Church for disbursement as wages to the appellants. The appellants claimed that they were underpaid wages on the basis that they were indigenous Australians.

The appellants filed an application with the Federal Court arguing that the underpayment of wages was unlawful racial discrimination pursuant to section 9(1) of the Racial Discrimination Act 1975 (Cth). At first instance, that application was dismissed by Dowsett J on the basis that the appellants' application depended on the existence of a relationship of employment between them and the state, which relationship had not been established on the evidence.[34]

On appeal, the appellants asserted that their application did not depend on a finding that an employment relationship existed, and that the primary judge had erred in his construction of section 9(1) of the Act. Justice Allsop wrote the leading judgment, with which Spender and Edmonds JJ agreed. In disposing of the appeal, Allsop J found that the conclusions of the primary judge were founded on two related propositions. The first was that the state was under no obligation to make any payments to the Church for use on the reserves, and in that context, there was no discriminatory element involved in its payment of those grants to the Church. The second proposition was that no real life comparator or comparison existed against which it was possible to assess the asserted 'discriminatory element'. Justice Allsop held that the primary judge erred in respect of both these propositions. The notions underlying the propositions – that is, the need for an obligation to undertake the act in question and the need for a comparator or comparison for a distinction to exist – were not necessary elements for a finding of

34 *Baird v State of Queensland* [2005] FCA 495 [114], [137].

unlawful racial discrimination under section 9(1) of the Act to be made. Accordingly, the appeal was allowed.

Justice Allsop relied heavily on principles of interpretation drawn from public international law. Noting that section 9(1) of the Act was taken directly from Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination,[35] he stated that 's 9(1) must be construed in that international context'.[36] After referring to the limited *travaux préparatoires* to the Convention, he concluded that there was little debate as to the terms of Article 1, and that they must therefore be given a broad and beneficial meaning, 'in accordance with the fundamental purposes of the Convention and in particular with the purpose that is emphasised in the preamble: the necessity of eliminating racial discrimination in all its forms and manifestations'.[37] In giving the terms such a definition, Allsop J referred to leading international law publicists and held that:

> [an] interpretation of s 9(1) apt to encompass all kinds of acts of racial discrimination is to be preferred in furtherance of the purpose of eliminating racial discrimination in all its forms and manifestations. … Further, it is important to treat the terms of s 9(1) as comprising a composite group of concepts directed to the nature of the act in question, what the act involved, whether the act involved a distinction etc based on race and whether it had the relevant purpose or effect.[38]

After progressing through the interpretation of the Act required by the above approach and by the elements of section 9(1) itself, Allsop J concluded that the state, in calculating and paying the grants to the Church in the manner that it did between 1975 and 1986, contravened section 9(1) of the Act.

United Nations Convention on the Rights of the Child – imposition of life sentences on children under the age of eighteen

R v Elliott and Blessington
[2006] NSWCCA 305
New South Wales Court of Criminal Appeal
Spigelman CJ, Kirby and Howie JJ

Mr Elliott and Mr Blessington had been convicted and sentenced to life imprisonment for murder. At the sentencing, Newman J recommended that they never be released but at this time such non-release recommendations had no legal force. Consequently, Mr Elliott and Mr Blessington could not challenge the recommendation during their original appeal to the New South Wales Court of Criminal Appeal. Legislative changes to the Crimes (Sentencing Procedure) Act 1999 (NSW) subsequently gave statutory force to all non-release recommendations. In these proceedings, Mr Elliott and Mr Blessington sought leave to appeal out of time against the recommendation, or, in the alternative, to reopen the first appeal. Leave to appeal was refused on both grounds.

---

35 [1975] ATS 40.
36 *Baird v State of Queensland* [2006] FCAFC 162 [58].
37 Ibid [60].
38 Ibid [61].

In his dissenting opinion, Kirby J refused leave to appeal out of time, but granted leave to reopen the first appeal. In coming to the conclusion that the life sentences were manifestly excessive, Kirby J took into account the offenders' youth. At the time of the crime, Mr Elliott was 16 and Mr Blessington was 15 and Kirby J referred to the United Nations Convention on the Rights of the Child,[39] Article 37 of which specifies that '[n]either capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age.'[40]

International Covenant on Civil and Political Rights – Convention relating to the Status of Stateless Persons – whether there was a legitimate expectation the Minister would take Australia's international obligations into account

Jovicic v Minister for Immigration & Multicultural Affairs
[2006] FCA 1758
Federal Court of Australia
Moore J

Mr Jovicic was born in Paris in 1966 to parents who were both citizens of Yugoslavia. In 1968 his parents migrated to Australia with him and his siblings and the family was granted permanent entry permits on their arrival. In 1983, the Mr Jovicic's parents became Australian citizens. They did not apply for citizenship on his behalf. In 1994, Mr Jovicic became the holder of a transitional (permanent) visa. Between 1979 and 2001, he was convicted for a number of criminal offences. In 2002, the Minister cancelled his visa pursuant to section 501(2) of the Migration Act 1958 (Cth) (the Act). Mr Jovicic sought judicial review of the decision to cancel his visa. The application was dismissed.

Mr Jovicic had three main grounds of appeal. First, he submitted that the Minister failed to take into account Australia's obligations under the ICCPR, as required by Direction 21.[41] He argued that Direction 21 created a legitimate expectation that the Minister would consider whether he faced a real risk of violation of his rights under Article 6 (right to life) or Article 7 (freedom from torture and cruel, inhuman or degrading punishment) on his return to Serbia, and that if the Minister intended to depart from that expectation, that Mr Jovicic would be accorded procedural fairness.[42] Second, Mr Jovicic submitted that Direction 21 created a legitimate expectation that the Minister would consider Australia's obligations under Article 31(1) of the Convention Relating to the Status of Stateless Persons[43] (CSSP), and that if the Minister proposed to depart from that expectation, that Mr Jovicic would be accorded procedural fairness.[44] Mr Jovicic submitted he had previously been a citizen of the Socialist Republic of Yugoslavia

---

39 [1991] ATS 4.
40 [2006] NSWCCA 305 [129]-[130].
41 Issued by the Minister pursuant to s 499 of the Migration Act 1958 (Cth).
42 [2006] FCA 1758 [11].
43 [1974] ATS 20.
44 [2006] FCA 1758 [18].

which had ceased to exist in 1992.[45] Third, Mr Jovicic submitted that the issues paper presented to the Minister contained misleading statements and the failure to accord him an opportunity to correct them was a breach of procedural fairness.[46]

The Court held that Mr Jovicic's submissions that he had 'a legitimate expectation that both a *non-refoulment* obligation said to arise under the ICCPR and an obligation not to expel a stateless person under the CSSP would not be acted on without giving him the opportunity to argue against that course being taken' failed at the threshold.[47] Even assuming that the two international instruments raised such an expectation, 'the applicant singularly failed to provide the Minister with any information that might reasonably have caused the Minister not to decide to cancel the applicant's visa because of the instruments'.[48] Mr Jovicic was notified of the Minister's intention to cancel his visa under section 501 and had multiple opportunities to give evidence of a risk to his rights under the ICCPR and of his statelessness.[49] While Mr Jovicic raised concerns about his life in Serbia, they did not suggest that he might face torture or cruel, inhuman or degrading treatment or punishment.[50] As to the third submission, the Court confirmed that 'a person is entitled to an opportunity to comment on adverse material provided to the decision-maker by others, and the failure to provide an opportunity constitutes a denial of procedural fairness'.[51] However the statement that Mr Jovicic was a 'Yugoslav citizen' was not adverse material as it did not impeach any case the he had advanced in opposition to the cancellation of his visa. Mr Jovicic had failed to contend that he was stateless at all.

Refugees

Refugee Convention – relationship with domestic legislation – whether recognition of refugee status irrevocable

Minister for Immigration & Multicultural & Indigenous Affairs v QAAH of 2004[52]
[2006] HCA 53; (2007) 231 ALR 340
High Court of Australia

The principal question in the appeal was whether an entrant to Australia, who has been granted a temporary protection visa, is, on its expiry, and notwithstanding benign changes in the conditions of the country from which he fled, entitled under Australian law to assert that he continues to be a person to whom Australia owes

45 Ibid [17].
46 [2006] FCA 1758 [23].
47 Ibid [27].
48 Ibid [28].
49 Ibid.
50 Ibid.
51 Ibid [30].
52 An application for special leave to appeal in *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54, which raised similar issues, was argued at the same time as this appeal.

protection obligations under the Refugees Convention.[53] Acting Chief Justice Gummow and Callinan, Heydon and Crennan JJ held that:

> Australian courts will endeavour to adopt a construction of the [Migration Act 1958 (Cth)] and the Regulations, if that construction is available, which conforms to the Convention. And this Court would seek to adopt, if it were available, a construction of the definition in Art 1A of the Convention that conformed with any generally accepted construction in other countries subscribing to the Convention, as it would with any provision of an international instrument to which Australia is a party and which has been received into its domestic law. The Convention will also be construed by reference to the principles stated in the Vienna Convention on the Law of Treaties … even though the Vienna Convention has not been enacted as part of the law of Australia.[54]

While Article 1 of the Refugees Convention is to be interpreted in good faith, the majority affirmed the decision of the House of Lords in *R (European Roma Rights) v Prague Immigration Officer*,[55] which recently emphasised that 'the principle of good faith is not in itself a source of obligation where none otherwise would exist'.[56] The majority held further that:

> Both the opening words of Art 1C(5), "He can no longer" (emphasis added), and the subsequent words, "the circumstances ... have ceased to exist" (emphasis added), make it clear that the circumstances from time to time and not merely as a matter of history are the relevant circumstances, that is, that the "status", as the Convention has it, of a person permitted to reside in an asylum country may change as circumstances in the country which he has left change.[57]

Justice Kirby (in dissent) held that the meaning of Article 1 of the Refugee Convention and its relationship to the system of temporary protection established by the Migration Act 1958 (Cth) 'raises a question of construction that is made more difficult by the absence of settled State practice on the application of the provisions of the Convention to individual cases'.[58] Drawing a distinction between 'recognition' of refugee status and 'protection' afforded as a consequence of that recognition, Kirby J concluded that: 'There is no place in the Convention scheme for temporary, partial or provisional recognition of refugee status.'[59] He held that:

> The temporary and permanent visas established by the Act cannot alter, unilaterally, the language and requirements of the Convention that forms part of Australian law. Specifically, they cannot change the provisions and structure of the Convention insofar as it provides for the cessation of "refugee" status, once that status has been accepted in the case of a person claiming surrogate protection from a country of refuge. Cessation of such status, once granted, is governed by art 1C(5) of the Convention.[60]

---

53 Convention Relating to the Status of Refugees (28 July 1951) [1954] ATS 5 as amended by the Protocol Relating to the Status of Refugees [1973] ATS 37.
54 [2006] HCA 53; (2007) 231 ALR 340 [34].
55 [2005] 2 AC 1.
56 [2006] HCA 53; (2007) 231 ALR 340 [42].
57 Ibid [43].
58 Ibid [52].
59 Ibid [144].
60 Ibid [145].

Justice Kirby observed further that:

> it was proper and helpful to have regard to UNHCR materials on the intended meaning and operation of the cessation provisions in the Convention. Such materials confirm what the language and apparent purpose of the Convention in any case demonstrate. In order to conclude that cessation of a recognised "refugee" status has been established, a forensic (although, in Australia, not a legal) burden of persuasion rests on whoever suggests a change of circumstances in the refugee's country of nationality. … It will require a distinct satisfaction of a fundamental, stable and durable change in the conditions of the country of nationality that occasioned the refugee's flight.[61]

Convention Relating to the Status of Refugees – whether a familial group constitutes a 'particular social group' – whether unwillingness to persecute one member of that group undermines claim of persecution

QAAT of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs
[2006] FCAFC 18
Full Court of the Federal Court of Australia
Dowsett, Allsop & Edmonds JJ

The appellant was a citizen of Afghanistan of Hazara ethnicity. After his arrival in Australia he was granted a temporary protection visa owing to his fear of the Taliban. His later application for a permanent protection visa was refused by a delegate of the Minister. He appealed to the Refugee Review Tribunal (RRT) which affirmed the delegate's decision. He then applied to the Federal Court for judicial review of the Tribunal's decision under section 39B of the Judiciary Act 1903 (Cth). The application was dismissed, and he appealed to the Full Court. The Court allowed the appeal, quashed the decision of the Tribunal and ordered the Tribunal to review again the decision of the delegate.

In his application for a permanent protection visa, the appellant offered new grounds to found his claim for protection. His sister had been married to a local commander in the post-Taliban regime. The local commander wished to take a second wife, which the appellant's sister objected to. A divorce ensued. The appellant claimed that he feared persecution by the local commander by reason of his membership of a particular social group – that is, his membership of his familial social group would make him the target of persecution owing to the commander's humiliation and anger at what had happened in his marriage. The Tribunal had accepted the appellant's evidence that the commander was harassing the appellant's family and that the commander had arrested and mistreated the appellant's brother using the pretext of a missing gun. However the appellant had also given evidence that his father had successfully deflected the commander's investigations by alleging the appellant had possession of the gun. The Tribunal found that, while it was possible for the appellant's family group to be a particular social group under the Refugees Convention), it was not so in these circumstances because the commander was not prepared to direct his conduct towards one member of that

---

61 Ibid [146].

group (the father). Justice Allsop (with whose judgment Dowsett and Edmonds JJ concurred) found a 'logical flaw' in this argument:

> The fact that the commander was not prepared to direct conduct to one member of the group – that is, the family – does not destroy the existence of that group. There may be all sorts of reasons why the perpetrator of any hypothesised persecution may not choose to direct his or her attention to one member of the group but is willing to direct it to another member of the group. The proposition that it is not directed to one member of the group does not deny the fact that it is being directed to the other member of the group because he or she is a member of the group. [62]

Justice Allsop held that if the commander's conduct was directed at the appellant because he is his sister's brother, there was a basis for the operation of Article 1A(2) of the Convention.[63] The fact that the commander's conduct was personally motivated by humiliation and anger did not affect the appellant's claim. In contrast, if his sister were to seek a protection visa for fear of her former husband venting his humiliation and anger on her, that would be 'an entirely private matter' and not persecution for a Convention reason.[64] The Court found that the Tribunal had misconstrued the Convention 'by requiring more than the humiliation as the motivating factor' and on the basis 'that the social group seems to have been eliminated merely because one member of the social group was not a factual target of the conduct'.[65]

Immigration – Refugee Convention – Article 1F – individual responsibility – whether provides for accessorial liability

SZCWP v Minister for Immigration & Multicultural & Indigenous Affairs
[2006] FCAFC 9
Federal Court of Australia
Wilcox, Gyles and Downes JJ

This case concerned an appeal from a decision of a Deputy President of the Administrative Appeals Tribunal (AAT) refusing to grant to the appellant a Protection (Class XA) visa on that basis that there were strong reasons to consider that he had been complicit in, and had committed, war crimes and crimes against humanity within the meaning of Article 1F of the Refugees Convention, and therefore was excluded from protection under the Convention.

The question on appeal concerned the position of an active participant in an organisation that carries on a long and deliberate campaign involving many atrocities against non-military personnel that are crimes against humanity and war crimes. In that regard, consideration was given to Articles 7 and 8 of the Rome Statute which prescribed the types of action that may constitute crimes against humanity and war crimes, respectively. While Gyles and Downes JJ considered the question to be one of fact for the AAT, Wilcox J observed that the proper interpretation of these provisions is a matter of law. In that regard, he held that

---

62 [2006] FCAFC 18 [19].
63 Ibid [20].
64 Ibid [21].
65 Ibid [22].

'there is no authority that suggests it would be enough to satisfy Article 7.1(a) [murder] that the person is an associate or accomplice of persons who have carried out killings'.[66] Justice Wilcox considered the circumstances of individual criminal responsibility in Article 25 of the Rome Statute, but held that '[b]ecause of the jurisdictional function of Article 25, it is debatable whether it operates to extend the range of the definition of crimes against humanity contained in Article 7(1).'[67] In respect of Article 8.2(c)(i) ('violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture'), the 'Elements of Crimes' makes it clear that this item applies only where the relevant person directed an attack:

> [T]he relevant person must have done the act; it is not enough that the person may have associated with others who so acted. Although these four categories are not an exhaustive statement of what constitutes "violence to life and person", it seems reasonable to apply the same requirements of individual responsibility to any violence that falls outside the stated four categories.[68]

Crimes against humanity – treaty interpretation – Rome Statute – defence of superior orders

SZITR v Minister for Immigration and Multicultural Affairs
(2006) 44 AAR 382; [2006] FCA 1759
Federal Court of Australia
Moore J

The applicant was a Sri Lankan national who joined the Sri Lankan Army in 1997 and fought against the Liberation Tigers of Tamil Eelam (LTTE). After some time fighting on the front line, the applicant was assigned to a unit responsible for questioning detained LTTE fighters. During his role as interrogator, the applicant would often use force and threats against the detainees to elicit information. The 'force' included slapping and kicking detainees, beating them with wooden batons and beating them with his fists. Although the applicant was not authorised to cut or injure a detainee, often his conduct would result in serious injuries, such as dislocated bones and detached muscles. The applicant was only authorised to conduct the early phases of the interrogation. Other interrogators conducted the advanced, more brutal phases. The duration of the applicant's interrogation could last for an hour, and sometimes up to six hours. Eventually, the applicant migrated from Sri Lanka to Australia. He applied for a protection visa.

The application for a protection visa was denied by a delegate of the Minister because it was found that the applicant was not a person to whom Australia owed protection obligations under the Refugees Convention (section 36(2)(a) of the Migration Act 1958 (Cth)). The applicant was said to fall outside the scope of the Convention because he had committed a crime against humanity (Art 1F(a) of the Convention). The applicant sought merits review by the AAT. The Tribunal held that, in satisfaction of Article 1F of the Convention, there were 'serious reasons for considering that' the applicant had committed the crime against humanity of torture

66 [2006] FCAFC 9 [42].
67 Ibid [45].
68 Ibid [63].

under Article 7(1)(f) of the Rome Statute of the International Criminal Court.[69] The Tribunal arrived at this conclusion by adopting and applying the definition of torture set out in a document titled 'Elements of Crimes', which had been incorporated into the Rome Statute by Article 9. The Rome Statute itself had been incorporated into Australian law by section 3 of the International Criminal Court Act 2002 (Cth). The Tribunal also noted that the defence of superior orders in Article 33 of the Rome Statute did not apply to crimes against humanity, and that the applicant had not raised the defence of duress under Article 31(1)(d).

The applicant applied to the Federal Court for judicial review of the Tribunal's decision. The applicant asserted four grounds of review: (i) the Tribunal erred in its understanding of the 'mental element' of torture by applying Article 30(1) of the Rome Statute, and not referring to Article 7(2)(e); (ii) the Tribunal had not made necessary findings of fact to support its conclusion that the applicant had inflicted severe pain or suffering constituting torture; (iii) the Tribunal had erred in its finding that the applicant's presence at interrogation sessions where detainees were tortured constituted aiding or abetting torture with a common purpose; and (iv) the Tribunal erred in its finding that the applicant had 'custody or control' over the detainees who were tortured.

The Court dismissed each of these grounds for review. It held that there was no inconsistency between Article 7(2)(e) and Article 30(2) of the Rome Statute in their descriptions of the 'mental element', and that the Tribunal did not err by only considering the more expansive description in Article 30(2). The Court held that its finding on this point rendered unnecessary any consideration of the Tribunal's reasons on the aiding and abetting issue. The Court also held that the Tribunal made sufficient findings of fact to substantiate its conclusion that the applicant had inflicted on detainees severe pain and suffering constituting torture. In addition, the Court held that the Tribunal was correct to interpret the phrase 'custody or control' to include those who had *de facto* rather than just *de jure* control over the detainees.

The key issue before the Court was whether the Tribunal erred by failing to consider an issue not raised by the applicant, namely, whether the defence of superior orders under customary international law (not under Article 33 of the Rome Statute) exculpated him of the finding that there were serious reasons for considering that he had committed the crime against humanity of torture. The applicant argued that, although he failed to raise this argument before the Tribunal and although it was not the duty of the Tribunal to make out his case for him, the Tribunal was obliged to apply correctly the law to the matters in issue before it. Accordingly, said the applicant, by not considering the application of the defence of superior orders under customary international law the Tribunal had erred in the discharge of its duties. The fact that he had not raised this issue before the Tribunal did not, the applicant submitted, exclude him from arguing it before the Court.

The Court rejected this submission. Noting that the applicant was represented before the Tribunal, the Court held that the defence of superior orders under

---

69 [2002] ATS 15.

customary international law was not a claim that 'clearly emerge[d] from the material'[70] before the Tribunal. Therefore, the Tribunal could not be said to have failed in the discharge of its duties by failing to consider that claim. Given the Court dismissed this ground of review on unexceptional administrative law principles, it declined to address the correctness of the various legal proposition advanced by the applicant as to the availability of the defence of superior orders.

Acquisition of citizenship under domestic and international law – law of state succession – whether citizenship to be determined by reference to municipal laws of the state

VSAB v Minister for Immigration & Multicultural & Indigenous Affairs
[2006] FCA 239
Federal Court of Australia
Weinberg J

The first appellant (the wife) was a citizen of the Former Yugoslav Republic of Macedonia (FYROM). She came to Australia with her children in 2000 on visitor visas. The second appellant (the husband) followed a few weeks later and entered on a FYROM passport. Upon arriving in Australia the husband lodged an application for a protection visa for himself and his family, describing his current citizenship as Bosnian, and claiming that he feared persecution upon his return to Bosnia-Herzegovina by Serb nationalists because of his opposition to their policies and his 'mixed marriage' to a Macedonian. He claimed he was not a national of FYROM. The delegate of the Minister refused to grant a protection visa, rejecting his claim that he had no right to reside in FYROM and finding that he was a national of that country. The RRT affirmed the decision of the delegate on 24 May 2002. An appeal to the Federal Magistrates Court was dismissed. The husband then appealed to the Federal Court, which also dismissed the appeal.

The Tribunal had found that since the husband was a national of FYROM, and he was not subject to persecution there, it was unnecessary to consider his claim of persecution in Bosnia-Herzegovina. This finding was made on the basis that the husband had lived in FYROM since 1991, had been issued two passports by FYROM (the latter of which listed Skopje as his residential address), had habitually departed and re-entered FYROM on those passports, had been married to a national of FYROM since 1986, and that he seemed to satisfy the Department of Foreign Affairs and Trade information relating to the requirements for FYROM citizenship. The husband claimed that he had only obtained these passports due to bribery. They did not provide evidence or entitle him to FYROM citizenship. He had made enquiries about obtaining FYROM citizenship, but found he could only obtain it with further exorbitant bribes. In these proceedings, the husband challenged the findings of the Tribunal on the basis there was no evidence to support the conclusion that he was a FYROM national. He submitted that 'at common law, and under customary international law, a person's nationality had to be determined by the municipal law of the State in relation to which nationality was

70 *SZITR v Minister for Immigration and Multicultural Affairs* [2006] FCA 1759 [50].

claimed'[71] (citing *Tji v Minister for Immigration and Ethnic Affairs*[72] and *Oppenheimer v Cattermole (Inspector of Taxes)*[73]). The Tribunal should have undertaken a detailed analysis of the domestic law of the FYROM.[74]

Justice Weinberg observed that the concept of 'nationality' is 'generally used to signify the legal connection between an individual and a State. The primary relevance of nationality under international law is to provide a basis upon which a State can exercise jurisdiction over persons.'[75] He accepted that 'questions of nationality are generally to be determined in accordance with the municipal laws of the State concerned'[76] (citing the Convention on Certain Questions relating to the Conflict of Nationality Laws[77]) although 'there are limits on the extent to which such municipal laws will be recognised under international law'[78] (citing the *Nottebohm Case* (*Liechtenstein v Guatemala*),[79] *R v Burgess* and *ex parte Henry*[80] and *Sykes v Cleary*[81]). He noted that the term 'nationality' was generally interchangeable with the word 'citizenship'[82] and that, while Article 1A(2) of the Refugee Convention uses the former, 'the question whether the appellant husband was a national of FYROM was effectively answered by asking whether he was a citizen of FYROM'.[83] Justice Weinberg further noted:

> The complicating feature of this case lies in the peculiar status of FYROM, which is a new State that assumed responsibility for the governance of the particular area in which the husband resided at the time that Yugoslavia dissolved into a number of separate States. In international law, a succession of States occurs when one State replaces another in taking over responsibility for the international relations of a particular territory. This may occur when several States unite into a single State. It may also occur when a single State dissolves into several new States, or when part of the territory of one State is transferred to another State.
>
> In general, the conferral of the nationality of the successor State or States, and the withdrawal of the nationality of the predecessor State or States, is governed by the municipal laws of the relevant States. However, some attempts have been made to formulate general rules or principles governing the conferral or withdrawal of nationality in such circumstances. For example, the International Law Commission has adopted Draft Articles on the 'Nationality of Natural Persons in relation to the Succession of States' which were submitted to the United Nations General Assembly

---

71 [2006] FCA 239 [24].
72 (1998) 55 ALD 508, 513-4 per Finkelstein J.
73 [1976] AC 249.
74 [2006] FCA 239 [25].
75 Ibid [48].
76 Ibid [49].
77 [1938] ATS 4 arts 1, 2.
78 [2006] FCA 239 [49].
79 [1955] ICJ Rep 4, 20-3.
80 (1936) 55 CLR 608, 649 per Latham CJ.
81 (1992) 176 CLR 77, 105-6 per Mason CJ, Toohey and McHugh JJ, 112 per Brennan J, 127 per Deane J, 131 per Dawson J, and 135 per Gaudron J.
82 [2006] FCA 239 [50]-[52].
83 Ibid [53].

> in 2000. The Draft Articles have no official or legal status, beyond that fact, unless any of their provisions are said to reflect customary international law.[84]

Justice Weinberg went on to hold, however, that there is no rule that 'when nationality is disputed in a case of derivative acquisition of nationality, the Tribunal can act only upon direct evidence as to the law regarding such acquisition in the foreign country, and is required to disregard circumstantial evidence that bears upon that question'.[85] He held that the Tribunal was free to acquaint itself with FYROM by means of 'secondary sources of a non-scholarly nature, including country information of the type utilised in this case'.[86] While there may have been more up-to-date sources of information available, this was merely a basis for criticism of the Tribunal's decision, not grounds for establishing jurisdictional error.[87]

Refugee Convention – Article 1F – meaning of 'serious reasons for considering' – construction by reference to later instruments

VWYJ v Minister for Immigration & Multicultural & Indigenous Affairs
[2006] FCAFC 1
Federal Court of Australia
Gray, Kiefel and Lander JJ

There were two questions raised on appeal: (i) what was the standard to be applied in determining whether there were 'serious reasons for considering' that a person satisfied the requisites in Article 1F of the Refugee Convention; and (ii) whether the Administrative Appeals Tribunal (AAT) erred in determining that the appellant's participation in the massacre of civilians in the Palestinian refugee camps at Sabra and Shatilla in Lebanon on 16 to 18 September 1982 involved a crime against peace, a war crime or a crime against humanity, by reference to international instruments that came into effect after the relevant incidents.

While finding that both questions need not be pursued in the present appeal, Gray J (with whom Kiefel and Lander JJ agreed) offered the following observations. First, while 'serious reasons for considering' has been held to be a standard less than beyond reasonable doubt, and less than the balance of probabilities, and as requiring 'strong' evidence:

> It might be considered undesirable to interpret the 'serious reasons for considering' test, found in an international instrument, by reference to standards of proof required for different purposes in the legal systems of some, but by no means all, countries which are parties to that instrument. It might also be thought to be undesirable to substitute for the words of art 1F of the Convention other words that do not express the nature of the test with any greater precision, and might mislead a decision-maker into searching for particular items of evidence, rather than examining the evidence as a whole.[88]

---

84 Ibid [55]-[56].
85 Ibid [57].
86 Ibid [58].
87 Ibid [59].
88 [2006] FCAFC 1 [25].

Second, in determining whether the appellant had committed a crime against peace, war crime, or a crime against humanity 'as defined in the international instruments drawn up to make provision in respect of such crimes' (art 1F(a)), the AAT referred to the Charter of the International Military Tribunal at Nuremberg (which antedated the 1982 massacre), the Rome Statute of the International Criminal Court and the statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda respectively (all three of which came into effect well after 1982). Justice Gray observed that:

> It might be thought that the use of subsequent instruments to determine whether the appellant's acts involved criminality of the required kind gave retrospective operation to those instruments.[89]

Arbitral Awards

Convention on the Recognition and Enforcement of Foreign Arbitral Awards – interpretation of 'agreement in writing' in Article III

HIH Casualty & General Insurance Limited (in liquidation) v R J Wallace sued on his own behalf and on behalf of all other members of Syndicate No 683 at Lloyd's of London for the 1993 underwriting account & Ors

[2006] NSWSC 1150

New South Wales Supreme Court

Einstein J

HIH Casualty & General Insurance Limited (HIH) instituted proceedings in the Supreme Court of New South Wales against Lloyds Syndicate 683 (Syndicate 683) in relation to a series of reinsurance policies. The issue was whether, on the proper construction of the policies, HIH must have paid out its underlying insureds before it could be entitled to be indemnified under the terms of reinsurance with Syndicate 683. Syndicate 683 sought an order that the proceedings be stayed under, *inter alia*, section 7 of the International Arbitration Act 1974 (Cth) (the Act). The notice of motion seeking stay of proceedings was dismissed.

Section 7 of the Act provided that where proceedings involve the determination of a matter that, pursuant to an arbitration agreement, is capable of settlement by arbitration, the Court shall order a stay of proceedings and refer the parties to arbitration. An 'arbitration agreement' was defined in section 3(1) of the Act to mean an agreement in writing of the kind referred to Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention).[90] Article II provides:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

---

89 [2006] FCAFC 1 [25].

90 [1975] ATS 25.

> 2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

HIH submitted that the arbitration agreement in question did not constitute an 'agreement in writing' under the Convention. In construing Article II of the Convention, Justice Einstein accepted the following propositions:

- The policy underlying the definition in Article II(2) and the requirement that an agreement be 'in writing' is to ensure that the arbitration agreement was actually consented to and concluded;
- The modifying phrase 'signed by the parties or contained in an exchange of letters or telegrams' applies to both arbitral clauses in contracts and arbitration agreements;
- The reference to 'exchange' in sub-clause 2 of Article II means that there must be a mutual transfer of documents. The mere transmission of a document by one party to the other cannot linguistically satisfy the requirement of 'exchange';
- Even if one party has orally or tacitly accepted an arbitration agreement contained in a document forwarded by the other party, this will not suffice to satisfy the second limb of Article II(2). An oral offer accepted in writing will not suffice;
- The fact that the parties have had an ongoing trading relationship and regularly used the same standard conditions including an arbitral clause will not overcome the lack of compliance with Article II(2) if there has been no exchange of documents in respect of the particular transaction or if the agreement is otherwise not signed by both of the parties;
- Although Article II(2) of the Convention which relevantly contains the definition of 'agreement in writing' uses the word 'include', the two instances given in that article, namely a document signed by both parties or an exchange of letters or telegrams, contain the universe of circumstances that will satisfy the writing requirement of the Convention, and therefore, the Act.[91]

Syndicate 683 could not establish that all the relevant policies had been signed by both parties. Syndicate 683's established procedure of scratching (completing other information on a slip presented by the broker as agent for HIH), stamping and processing the slip did not render the slips 'agreements in writing'.[92]

---

91 [2006] NSWSC 1150 [135].
92 Ibid [150].

International Environmental Law

Convention on Biological Diversity - Convention on Conservation of Nature in the South Pacific – role of international law in interpreting domestic legislation

Brown v Forestry Tasmania (No 4)
[2006] FCA 1729
Federal Court of Australia
Marshall J

Senator Bob Brown made an application under section 475 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the Act) seeking an injunction to restrain Forestry Tasmania from undertaking any forestry operations in the Wielangta State Forest. Senator Brown submitted that the proposed operations would contravene section 18(3) of the Act, which prohibits a person from taking an action that will have or is likely to have a significant impact on a listed threatened species in the endangered category. Senator Brown alleged that the operations would have a significant impact on three threatened species: the Tasmanian wedge-tailed eagle, the broad-toothed stag beetle and the swift parrot. The application was upheld.

Forestry Tasmania submitted, *inter alia*, that it was exempt from section 18(3) (found in Part 3 of the Act) owing to the operation of section 38 of the Act. Section 38 provides that Part 3 does not apply to Regional Forestry Agreement (RFA) forestry operations undertaken in accordance with a RFA. The international law issue arose in the Court's consideration of whether Forestry Tasmania's operations were conducted in accordance with the relevant RFA between the State of Tasmania and the Commonwealth of Australia. Senator Brown submitted that the RFA:

> is a parallel process to provide environmental protection to that otherwise provided directly by the EPBC Act. … [T]o meet the objects of the EPBC Act, the RFA must provide real, practical protection to threatened species … otherwise … the EPBC Act will fail to implement the international obligations on which it is founded. … [T]he RFA must be interpreted as a method of securing the aims of the EPBC Act which, in turn, implement international obligations, such that the approach to the interpretation of the EPBC Act and hence the RFA must not conflict with international law, as far as the language permits.[93]

Justice Marshall held that the forestry operations would not be, and had not been, conducted in compliance with the RFA.[94] Consequently, section 38 of the Act did not exempt the operations from section 18(3). Justice Marshall made it explicit that his construction of the Act was informed by 'the Conventions which it implements in compliance with Australia's international obligations'. [95] He identified these Conventions as being the Convention on Biological Diversity[96]

---

93 [2006] FCA 1729 [219]-[221].
94 Ibid [293].
95 Ibid [295].
96 [1993] ATS 32.

and the Convention on Conservation of Nature in the South Pacific.[97] This accorded with the position adopted by the Full Court of the Federal Court in *Minister for Environment and Heritage v Queensland Conservation Council Inc and Anor*,[98] which recognised that the Act 'was enacted to implement the provisions of the Convention on Biological Diversity 1992, and other international environmental agreements into Australian law'.[99] Justice Marshall also referred to *Booth v Bosworth*,[100] in which Justice Branson held that, in exercising the Court's discretion under section 475 of the Act, 'it would be a rare case in which a Court could be satisfied that the financial interests of private individuals, or even the interests of a local community, should prevail over interests recognised by the international community and the Parliament of Australia as being of international importance'.[101] Justice Marshall concluded by saying

> The requirement in s 18(3) of the EPBC Act that an action not occur which is likely to have a significant impact on a listed threatened species must be seen in the context of an Act and Conventions which underlie the promotion of recovery of threatened species. Similarly, the exemption for RFA forestry operations in s 38 of the EPBC Act must be seen, in context, as providing an exception only if an alternative means of promoting the recovery of a species is achieved by a Regional Forest Agreement. Such an approach is consistent with the High Court's view of the influence of Conventions as an aid in interpreting domestic legislation designed to give effect to them; see *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 287 where Mason CJ and Deane J said: "It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law." That proposition, their Honours said, required courts to: "… favour a construction, as far as the language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations." I have adopted that approach in this judgment.[102]

Law of the Sea and Maritime Law

Non-recognition by Japan of Australian Antarctic Territory – impact of assertion of jurisdiction on international relations between Australia and friendly foreign power – service of injunction outside the jurisdiction

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd
[2006] FCAFC 116; (2006) 154 FCR 425; (2006) 232 ALR 478
Federal Court of Australia
Black CJ, Moore and Finkelstein JJ

In 2004, Humane Society International Inc commenced proceedings in the Federal Court against a Japanese company, Kyodo Senpaku Kaisha Ltd (Kyodo), alleging

---

97 [1990] ATS 41.
98 (2004) 139 FCR 24.
99 Ibid [2].
100 (2001) 114 FCR 39.
101 Ibid [115].
102 [2006] FCA 1729 [301].

that its whaling activities in the Australian Whale Sanctuary offshore of the Australian Antarctic Territory contravened the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act). Under that Act, it is an offence to kill, injure, take, interfere with, treat or possess whales within the Sanctuary. Kyodo, which had hunted whales in accordance with a special permit issued by the Japanese government under Article VIII of the 1946 International Convention for the Regulation of Whaling,[103] had killed over 200 minke whales since 2000. Japan does not recognise Australia's claim of territorial sovereignty over the Australian Antarctic Territory. Humane Society International sought leave to serve the originating process on Kyodo in Japan under Order 8 of the Federal Court Rules. At first instance, Allsop J refused leave.[104]

The Full Court of the Federal Court found, by majority, that Allsop J's discretion to refuse leave had miscarried. Chief Justice Black and Finkelstein J noted that the EPBC Act did not exempt the conduct of non-Australian citizens aboard non-Australian vessels. Because the Court was engaged by an action in respect of subject matter with which it could deal, the action was instituted by an applicant who had standing, and the action is not oppressive, vexatious or otherwise an abuse of process, the Court could not refuse to adjudicate the dispute.

Justice Allsop had refused leave on the basis that granting an injunction would be contrary to Australia's long-term national interests, including its claim of territorial sovereignty in Antarctica. The Full Court was unanimous that political considerations were irrelevant in deciding whether to grant leave. Justice Allsop had also refused leave on the grounds that an injunction would be unenforceable against Kyodo and therefore 'futile'. In his dissenting judgment, Moore J agreed. He stated that a 'matter' requires a right, duty or liability and a legally enforceable remedy, and accepted that any order against Kyodo would almost certainly be ignored. He held that the Court should not use an order to pressure a body which was not a party to the proceedings, such as discouraging the Japanese government from issuing further whaling permits.

Although they accepted that an injunction is a discretionary remedy that may be refused if it cannot be enforced, Black CJ and Finkelstein J held that 'futility' should not bar the Court from making an order in this case. They held that the enforceability of an injunction would be most appropriately considered when the application itself is heard, and not when the court is deciding whether there should be leave to serve out the jurisdiction. They also noted that the appellant should not have borne the burden of showing that an injunction would be a useful remedy. They also characterised this injunction as a 'public interest injunction'. In the case of such a public interest remedy, the Court is empowered to grant an injunction irrespective of whether it appears to the Court that the person intends to engage again in conduct of the prohibited kind. They also attached weight to the deterrent value of an injunction. Following cases dealing with the Trade Practices Act 1974

---

103 [1948] ATS 18.

104 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664; see note in 'Cases Involving Questions of Public International Law 2005' (2007) 26 *Aust YBIL* 257.

(Cth),[105] they held that granting an injunction, even where it may not be enforced, marks out the Court's view of the seriousness of the conduct.

Convention on the International Regulations for Preventing Collisions at Sea – meaning of 'ship'

Smith v Perese [2006] NSWSC 288
New South Wales Supreme Court
Studdert J

The plaintiff was struck by a boat while engaged in recreational spearfishing, displaying a surface marker buoy. He was successful in showing that the defendant failed to keep a proper lookout and to travel at an appropriate speed, given the conditions, as required by rules 5 and 6 of the Navigation (Collisions) Regulations 1983, which implement into Australian law the COLREGS (Convention on the International Regulations for Preventing Collisions at Sea).[106]

The defendant was successful in applying to the Court to determine the limit of his liabilities under the Limitation of Liability for Maritime Claims Act 1989 (Cth), which gives the force of law to the 1976 Convention on Limitation of Liability for Maritime Claims[107] (s 6). The limits in the Convention only apply to claims against shipowners (art 1(1)). These are defined in Article 1(2) as 'the owner, charterer, manager and operator of a seagoing ship'. Although some common parlance and dictionaries refer to a ship as a large seagoing vessel, most definitions are not determined by size. Various State and Federal legislation (such as the Navigation Act 1901 (NSW) and the Admiralty Act 1988 (Cth)) apply to every or any kind of vessel used in navigation. According to Studdert J:

> the common element is that the definitions of "ship" are broad. Certain classes of objects are expressly included or excluded in the statutory definitions, but a common element of the various statutes is that a ship means "any kind of vessel" either capable of or used in navigation by water.[108]

Authority also suggested that to be engaged in navigation involved not merely moving on the water but ordered movement from one place to another. The defendant's craft was 'an abalone diving boat' which was 'a highly manoeuvrable vessel used in navigation by water; it goes to sea, albeit that it would appear to operate in waters close to the coast; and it is used in ocean fishing for abalone'. It was 'small and it is equipped with no cabin'.[109] Justice Studdert held that the boat in question was a ship.

---

105 For eg *Hughes v Western Australian Cricket Association (Inc) & Ors* (1986) ATPR 40-748.
106 [1980] ATS 5.
107 [1991] ATS 12.
108 *Smith v Perese* [2006] NSWSC 288 [166].
109 Ibid [181], [184].

Arrest of foreign fishing vessel – automatic forfeiture – whether fuel bunkers part of ship

Scandinavian Bunkering AS v The Bunkers on Board The Ship FV 'Taruman' [2006] FCAFC 75 (24 May 2006)

The Australian Fisheries Management Authority (AFMA) seized an 'FFV' – a Foreign Fishing Vessel – fishing in the Australian Fishing Zone off Macquarie Island without a necessary licence contrary to the Fisheries Management Act 1991 (Cth) (FMA). The vessel was arrested, and was subject to an automatic forfeiture pursuant to section 106A of the FMA as a boat used in an offence against sections 100, 100A, 101 or 101A of the FMA. The Notice of Seizure served under sections 84(1A) and 106 specified the boat and nets, traps, equipment and catch.

A few days after its arrival in Hobart, the plaintiff arrested the ship and commenced an *in rem* action against the boat's bunkers under section 17 of the Admiralty Act 1988 (Cth) due to failure to pay under contract for goods including fuel supplied as necessaries for the operation of the ship. The bunkers included some 22,000 litres of fuel. Justice Ryan ordered a separate determination of the question 'whether AFMA or the Commonwealth has any right, title or interest in and to the fuel bunkers on board the ship and if so whether such right, title or interest prevails over the interest in the said bunkers claimed by the plaintiff in this action'. The Chief Justice decided that the determination would be made by the Full Court.

The seizure, detention and forfeiture of the boat have effect despite its arrest or order for sale under the Admiralty Act 1988 (Cth) according to section 108A of the FMA. Section 4 of the FMA defined a boat as a 'launch, vessel or floating craft of any description'. The plaintiff contended that section 108A of the FMA did not apply to the plaintiff's claim as a boat was said not to include its bunkerage. In the leading judgment, Kiefel J noted that a review of the extrinsic material for the amendment to the FMA that introduced section 108A was directed at the problem of competing claims under the Admiralty Act 1988 (Cth) and the FMA, which had arisen in cases.[110] Further, since the seizure and detention can involve the movement of the boat to another location, it necessarily involved seizure of the bunkerage.[111]

The Court also considered, by extension, the meaning of a 'ship' which is the subject of an arrest under the Admiralty Act 1988 (Cth), implementing as it does the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships.[112] The Court held that the bunkerage was part of the property of the ship, and not 'other property' within the meaning of 'ship' under section 17 of the Act (the right to proceed *in rem* on an owner's liability under a general maritime claim concerning a ship or other property).[113]

---

110 *Scandinavian Bunkering AS v The Bunkers on Board The Ship FV 'Taruman'* [2006] FCAFC 75 [52].

111 Ibid [60].

112 (1952) 439 UNTS 193.

113 *Scandinavian Bunkering AS v The Bunkers on Board The Ship FV 'Taruman'* [2006]

Arrest of ships – standard form arbitration agreements – New York Convention

Comandate Marine Corp v The Ship 'Boomerang I'
[2006] FCA 859
Comandate Marine Corp v The Ship 'Boomerang I'
[2006] FCAFC 106; (2006) 151 FCR 403
Comandate Marine Corp v Pan Australia Shipping Pty Ltd
[2006] FCAFC 192 (20 December 2006)

This triumvirate of cases considered a number of domestic and international law issues concerning the arrest of ships and standard form arbitration agreements. One outcome of the former was the stillbirth of the 'anti-anti-suit injunction'. Of the latter, the principal issues was the definition of an 'owner' in the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships[114] and a more expansive approach to the interpretation of the breadth of arbitration clauses and the arbitrability of claims made under the Trade Practices Act 1974 (Cth) for the purposes of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[115]

The case began at first instance with interim orders made by Allsop J. Comandate time chartered a ship to Pan, which ship was detained by the Australian Maritime Safety Authority (AMSA) for a hull fracture and the lack of visas for its master and crew. The agreement included the NYPE 1993 charter party with an arbitration clause stipulating English law arbitration in London. To forestall such arbitration, Comandate commenced proceedings on the time charter by arresting a sister or surrogate ship, the *Boomerang I*, in Fremantle, Western Australia. The *Boomerang I* had been chartered from a third party under a demise charter. A demise charter, also known as a 'bareboat' charter, is the lease of a vessel in which all control is relinquished by the owner to the charterer, and the charterer bears all the expenses of operating the ship including the crew.

One question before Allsop J was whether the word 'owner' in section 19(b) of the Admiralty Act 1988 (Cth) encompassed demise charterer or bareboat charterer. Section 17 of the Act provided for general maritime claims (as defined in s 4) to be commenced *in rem* (ie, against a ship) on owners' liabilities. Section 18 provided for claims *in rem* on demise charterer's liabilities. Section 19 concerned arrest of surrogate ships. These could be arrested when, at the time the cause of action arose, a relevant person (the person who would be liable on the claim in a proceeding commenced as an action *in personam* – s 3) was (19(a)) an owner, charterer or in possession of the ship the concern of the claim and (19(b)) the relevant person was, at the time of commencement of proceedings, the owner of the surrogate ship. There was conflicting authority on this. The ship was permitted to continue its

---

FCAFC 75 (24 May 2006) [96].

114 439 UNTS 193.

115 [1975] ATS 25.

voyage from Fremantle to Sydney while a Full Court was convened hastily to consider that question among others.[116]

The Full Court, sitting in its original rather than appellate jurisdiction, set aside the writ and refused to accept the argument put on behalf of Comandate that the surrogate ship arrest provided for by section 19 of the Admiralty Act 1988 (Cth) could be availed of in circumstances where the relevant person (Pan) was the demise charterer of the ship.[117] In short, as stated by Emmett J:

> While there is a curious lack of symmetry in the language of [ss 17, 18 and 19], it is easy to discern a cascading scheme in the way the sections are intended to operate … The use of the word 'owner' in paragraphs (b) of ss 17 and 19 in contradistinction to the use of demise charterer in section 18(b), indicates the intention of the drafter of the provisions to draw a distinction between the owner, on the one hand, and a charterer, whether a demise charterer or otherwise, on the other.[118]

The final case concerned agreements to arbitrate governed by the New York Convention and the role, if any, for the 'anti-anti-suit injunction'. Such an order was made by Emmett J when Comandate threatened an anti-suit injunction in England if Pan did not undertake to arbitrate in London in accordance with the NYPE 1993 charter. The principal issue however was the breadth of the agreement to arbitrate disputes 'arising out of' the charter and so whether that phrase included disputes arising from pre-contractual negotiations and claims under the Trade Practices Act 1974 (Cth). The Full Court, reversing the decision of Emmett J, held that the words could include such claims. In so doing, the Full Court took a broader approach to the interpretation of such words than that of Emmett J, and effectively departed from the approach of an earlier Full Court in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)*.[119] Moreover, Allsop J held that such claims were arbitrable. In each case, an approach was taken that favoured arbitration of the whole of the disputes over any splitting of cases.

The Full Court also held that commencement of *in rem* proceedings does not in itself amount to a repudiation of an arbitration agreement since the parties are not the same. The Full Court thus declined to take the approach suggested by a number of Law Lords in *Republic of India v India Steamship Co Ltd (No 2)* (*The 'Indian Grace'*),[120] namely that the notion of an action against an inanimate object was a fiction which had outlived its useful life.[121] The difference with the House was however rooted in issues of statutory interpretation of different legislation.

Special leave to appeal against the setting aside of the writ was refused.[122]

---

116 *Comandate Marine Corp v The Ship 'Boomerang I'* [2006] FCA 859.
117 *Comandate Marine Corp v The Ship 'Boomerang I'* [2006] FCAFC 106; (2006) 151 FCR 403.
118 Ibid [1], [3].
119 (1998) 90 FCR 1.
120 [1998] AC 878.
121 *Republic of India v India Steamship Co Ltd (No 2) (The 'Indian Grace')* [1998] AC 878 [100].
122 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] HCATrans 353, 421.

Salvage – quantum of reward – International Convention on Salvage

United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC
[2006] FCA 1141
Tamberlin J

The case concerned the grounding of the capsize bulk carrier *La Pampa* in Gladstone harbour, Queensland. The ship was worth some $20 million with about $US 5 million in coal and large supplies of oils and diesel. A co-ordinated salvage was attempted by three tugs, resulting in a claim for salvage of $6.6 million on an agreed salvage value of over $37 million. The award by Tamberlin J was limited to $850,000.

The Navigation Act 1912 (Cth) gives force of law to the International Convention on Salvage.[123] Article 13 of the Convention sets the criteria for fixing the salvage reward in the event that the salvors' efforts are successful. The reward is capped at the value of the property salved, including the vessel. The quantum of the reward must be fixed 'with a view to encouraging salvage operations,' taking into account various criteria in no particular order of weight or significance.[124] It is not plainly exhaustive or inclusive as to matters to be taken into account. The salvors sought to fix their claim having regard to an unlisted factor, namely the ship's exposure to third party liabilities.

Justice Tamberlin looked to the *travaux preparatoires* to see if such a factor was excluded from the article and, if not, whether it could be relevant in a particular case. He held that it was not excluded, and could be relevant. In commenting on the interpretation of the article in this way, Tamberlin J said:

> It may be said that such an approach introduces an additional element of unpredictability in fixing a reward, but it must be kept in mind that the whole exercise is not one of arithmetic precision. It is an exercise of evaluation, judgment, and the balancing of broad considerations. In this particular case, having regard to the circumstances to which I refer below, the prospective exposure to liability of the vessel is a matter to which I have given little weight as a general enhancing factor in fixing the reward. I now turn to consider the specific considerations.[125]

As to the application of the criteria, Tamberlin J noted that English Courts had, since the seventeenth century, 'consistently rejected any hard and fast rule as to the reward being calculated by the application of a fixed percentage of salved value'. The cases involving percentage awards involved widely differing factual matrices. The skill and efforts of the salvors in preventing or minimising 'damage to the environment' was a factor in Article 13(1)(b). The Port of Gladstone was the habitat of species of world-class and highly sensitive marine life and also significant marine resources that may be vulnerable to damage caused by pollution. However, Tamberlin J interpreted the provision was dealing with steps taken that minimise or prevent such harm, rather than steps which are aimed at that outcome, and it was not concerned with third party liability for such damage. Factually,

---

123 [1998] ATS 2.
124 *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* [2006] FCA 1141 [39].
125 Ibid [58].

Tamberlin J found that there was no incident that seriously affected or posed a direct (as opposed to a merely possible) threat to the environment, or any notable escape of pollutants or contamination. Having considered all of the factors, Tamberlin J fixed the salvage reward on a global basis at $A850, 000.00. The award of damages was appealed to the Full Court, which refused the appeal.

External Affairs Power

External affairs – criminal jurisdiction – nationality principle – geographical externality – foreign relations – international concern

XYZ v Commonwealth
[2006] HCA 25; (2006) 227 ALR 495; (2006) 80 ALJR 1036
High Court of Australia

The plaintiff was an Australian citizen charged with offences of child sex tourism committed in Thailand in 2001 contrary to sections 50BA and 50BC of the Crimes Act 1914 (Cth). The plaintiff challenged the constitutionality of these provisions on the grounds that they were not supported by the external affairs power, section 51(xxix) of the Constitution. The Court upheld the validity of the legislation by a 5:2 majority.

The plaintiff argued that section 51(xxix) was directed to relations between Australia and other states and did not confer a general power to legislate with respect to matters external to Australia. In this respect the plaintiff asked the High Court to overrule its decisions in *Polyukovich v Commonwealth*[126] and *Horta v Commonwealth*[127] however, Gleeson CJ, Gummow, Hayne and Crennan JJ refused to do so and rejected the argument that the external affairs power was limited in this way. Chief Justice Gleeson held that if the argument were accepted it 'would expose a substantial weakness in Australia's capacity to exercise to the full the powers associated with sovereignty'.[128] In their joint judgment Gummow, Hayne and Crennan JJ cited the following passage from the reasons of Dawson J in *Polyukovich v Commonwealth* as stating the modern doctrine as to the scope of section 51(xxix):

> The power extends to places, persons, matters or things physically external to Australia. The word 'affairs' is imprecise, but it is wide enough to cover places, persons, matters or things. The word 'external' is precise and unqualified. If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase 'external affairs'.[129]

In the course of his reasons Gleeson CJ made several observations concerning issues of jurisdiction in public international law:

> The assertion of extra-territorial criminal jurisdiction is not, in itself, contrary to the principles of international law … [and] … the exercise of extra-territorial jurisdiction in respect of this kind of offence has been undertaken by many other

126 (1991) 172 CLR 501.
127 (1994) 181 CLR 183.
128 (2006) 227 ALR 495 [17].
129 (1991) 172 CLR 501, 632.

> countries. The territorial principle of legislative jurisdiction over crime is not the exclusive source of competence recognised by international law. Of primary relevance to the present case is the nationality principle, which covers conduct abroad by citizens or residents of a state. Jurisdiction is also exercised by states under the passive personality principle, under which foreigners are punished for conduct harmful to nationals of the legislating state, the principle which enables protection of the security of the state, and principles concerning the repression of certain kinds of crime.[130]

Justice Kirby also held that the provisions were constitutional, but not on the basis that all matters external to Australia fall within the external affairs power. He noted that 'there are now so many facts, persons and things external to Australia's geographical borders that, if this is accepted as a valid criterion for sustaining federal laws applicable to facts, persons and things within Australia, there would be almost no limit to the lawmaking power thereby accorded to the Federal Parliament'.[131] However Kirby J did find that the laws were valid because they were laws going to the relationship between Australia and another country, Thailand, and the United Nations treaty body responsible for implementing the [Convention on the Rights of the Child[132]].[133] In reaching this conclusion Kirby J made the following observations concerning international legal principles of jurisdiction:

> Starting from a general principle that "crime is local" and historically part of the public law of a nation, international law might have developed in a way that forbade one nation state making its own laws imposing criminal liability by reference to the conduct of its own nationals within the territory of another state … However, that is not how international law in fact developed. … In the present case, both Thailand (under the territorial principle) and Australia (under the active nationality principle) could exercise jurisdiction over the plaintiff in full conformity with international law. The international relations of nation states, including those of Australia and Thailand, have developed in accordance with this principle of international law. Indeed, the principle has been clear, at least since the decision of the Permanent Court of International Justice in the Case of the SS 'Lotus' more than 70 years ago.

In their dissenting judgment Callinan and Heydon JJ found that the term 'external affairs' combined both 'external' and foreign 'affairs' elements that could not be separated. They rejected the view that the external affairs power allowed legislation on external matters alone, held that nothing in the legislation affected Australia's relations with other countries, and questioned whether the external affairs power could be used to legislate with respect to matters of 'international concern' given the indeterminacy of the concept.

---

130 (2006) 227 ALR 495 [4].
131 Ibid [116].
132 [1991] ATS 4.
133 (2006) 227 ALR 495, [139].