# When tendency evidence will have significant probative value

Kirsten Edwards and Belinda Baker report on *Hughes v The Queen* [2017] HCA 20.[1]

## Introduction

The High Court has held that in determining whether evidence will have 'significant probative value' for the purposes of admissibility as tendency evidence under s 97 of *Evidence Act 1995* (NSW), (Evidence Act), it is not necessary that the evidence exhibit 'similarity', 'underlying unity' or a 'modus operandi' with the charged act. In so finding, the High Court resolved a divergence in approaches in Victorian and New South Wales courts as to the extent to which similarity of tendency evidence was necessary in order to meet the statutory threshold in s 97.

## Background to the decision

The appellant was a former star of the television program '*Hey Dad!*' which was broadcast in Australia in the 1980s. He was charged with 11 counts of child sexual abuse against five complainants. The complainants varied in age (from 6 years to 15 years). The appellant had come into contact with the complainants through his work, social and family connections. The conduct comprising the charged acts varied in nature.

At trial, the Crown sought to rely on tendency evidence which included the complaints made by the five complainants, together with the evidence of six other tendency witnesses who had either worked with the appellant or had known him through social or familial connections. Three of the tendency witnesses were women who alleged sexual misconduct by the appellant in his home when they were young girls and the other three were women who alleged inappropriate sexual conduct by the appellant at his workplace when they were in their late teens or early twenties.

The Crown sought that each complainant's testimony be admitted as tendency evidence in relation to the charges in respect of each other complainant, and that the testimony of the six other witnesses be admitted as tendency evidence in relation to all of the charges.

There were dissimilarities in the conduct that was the subject of the tendency evidence, in the ages of the complainants, the nature of the alleged conduct and in the locations of the alleged incidents. However, it was contended that the tendency evidence had significant probative value because the evidence 'disclosed the appellant's sexual interest in underage girls and tendency to engage in sexual activity with them opportunistically as the occasion presented in social and familial settings and the work environment'.[2]

The evidence of the several complainants and the tendency witnesses was held by the trial judge to be cross-admissible as tendency evidence pursuant to ss 97 and 101 of the Evidence Act. The appellant was convicted of nine of the alleged counts, relating to four complainants.

An appeal to the New South Wales Court of Criminal Appeal in respect of the admissibility of the tendency evidence (amongst other grounds) was dismissed.[3] In its reasons, the Court of Criminal Appeal held that there was no requirement that tendency evidence necessarily exhibit similarity, underlying unity or a modus operandi with the charged act for the evidence to have significant probative value for the purposes of s 97.

In so doing, the Court of Criminal Appeal rejected the approach adopted by the Victorian Court of Appeal in *Velkoski v R* which had held that for tendency evidence to have significant probative value, it 'must possess sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct' and that 'it remains apposite and desirable to assess whether those features reveal "underlying unity", a "pattern of conduct", "modus operandi", or such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely'.[4]

The High Court granted special leave in respect of the question of whether the tendency evidence had significant probative value for the purposes of s 97 of the Evidence Act. The grant of special leave did not extend to the Court of Criminal Appeal's determination that the probative value of the tendency evidence 'substantially outweighed' its prejudicial effect for the purposes of s 101 of the Evidence Act.

## The High Court's decision

By majority (Kiefel CJ, Bell, Keane and Edelman JJ; Gageler, Nettle and Gordon JJ dissenting), the High Court dismissed the appellant's appeal against his convictions.

The majority, in a joint judgment, held that the decision of *Velkoski* 'evince[d] an unduly restrictive approach to the admission of tendency evidence' and that the New South Wales Court of Criminal Appeal's conclusion that the tendency evidence adduced at the trial had significant probative value was not attended by error.[5]

The majority held that the absence of any reference to 'similarity' in the text of s 97 was a 'clear indication that s 97(1)(b) is not to be applied as if it had been expressed in those terms.'[6] The majority stated further that '[d]epending upon the issues in the trial, a tendency to act a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it.'[7]

In reaching the conclusion that the tendency evidence in the present case was of significant probative value, the majority had regard to the unusual nature of the tendency in the present case, namely, an 'inclination on the part of a mature adult to engage in sexual conduct with underage girls and a willingness to act upon that inclination are unusual as a

matter of ordinary human experience'.[8]
The majority also considered it significant that the interactions which the appellant was alleged to have pursued involved 'courting a substantial risk of discovery by friends, family members, workmates or even casual passers-by' and that that level of 'disinhibited disregard of the risk of discovery by other adults is even more unusual as a matter of ordinary human experience'.[9]
The majority further observed that the use of the words 'the court thinks' in s 97(1)(b) has the result that the admissibility of tendency evidence may involve questions on which reasonable minds might reach different conclusions. In view of this, the majority warned that the prosecution should be conservative in deciding whether to rely upon tendency evidence given the risks involved in seeking to adduce tendency evidence that is 'borderline'.[10]
In detailed dissenting judgments, Gageler, Nettle and Gordon JJ were each of the view that the key passages in *Velkoski* were correct statements of principle. Justices Gageler and Gordon held that the trial judge and the Court of Criminal Appeal had erred in concluding that the evidence of one of the 15 year old complainants (EE) was admissible on the other counts.[11] In addition, Nettle J was of the view that there was error in the admission of further counts and evidence as tendency evidence.[12] Each of the dissenting justices considered that it was significant that the act that was the subject of the count relating to EE was in the context of a 'reciprocated' relationship which was of a different character from the alleged acts which were the subject of the other counts.
*Hughes v The Queen* was the second time in two years that the High Court had resolved a divergence between New South Wales and Victorian approaches to the interpretation of the Evidence Act. In *IMM v The Queen*,[13] the High Court by a 4:3 majority found in favour of the approach of the New South Wales Court of Criminal Appeal to the definition of 'probative value'.

## ENDNOTE

1 The authors appeared as junior counsel for the appellant and the respondent in the High Court. Any expression of any opinions is their own.
2 *Hughes v The Queen* [2017] HCA 20 at [10].
3 *Hughes v R* [2015] NSWCCA 330.
4 [2014] VSCA 121; (2014) 45 VR 680 at [17], [35].
5 [2017] HCA 20 at [12].
6 *ibid* at [34].
7 *ibid* at [37].
8 *ibid* at [57]. See also at [40].
9 *ibid* at [57]. See also at [63].
10 *ibid* at [42].
11 *ibid* at [114], [170] and [225].
12 *ibid* at [170].
13 [2016] HCA 14; (2016) 257 CLR 300.

# What does it mean to hold an office in an international organisation?

Piotr Klank reports on *Commissioner of Taxation v Jayasinghe* [2017] HCA 26

### Background and significance

The High Court has set out the principles for determining when a person holds an office in an international organisation for the purposes of the *International Organisations (Privileges and Immunities) Act 1963* (Cth) (IOPI Act). If a person does hold such an office, the person is entitled to several privileges and immunities including exemption from Australian taxation.
The respondent, Mr Jayasinghe, was a qualified civil engineer, who was engaged by the United Nations Office of Project Services (UNOPS) under what was known as an 'Individual Contractor Agreement' to work in Sudan as a project manager. Mr Jayasinghe was an Australian resident for tax purposes and the commissioner of taxation (commissioner) assessed the taxpayer on earnings from his engagement with UNOPS.
Mr Jayasinghe objected to the assessments contending that his earnings were exempt from taxation under the IOPI Act, both on the facts and also because the commissioner was bound by his public ruling TD 92/153. Mr Jayasinghe's objection was disallowed and with the aid of counsel appearing pro bono, he appealed to the Administrative Appeals Tribunal. Mr Jayasinghe was successful on both grounds in the Tribunal,[1] and again on the commissioner's appeal to the Full Federal Court.[2]
The commissioner further appealed to the High Court, which unanimously allowed the appeal in respect of both grounds. The primary judgment comprised joint reasons of Kiefel CJ, Keane, Gordon and Edelman JJ. In a short, separate judgment, Gageler J also held in favour of the commissioner for reasons that were consistent with the joint judgment.

### Questions before the High Court

Two questions were considered by the High Court. The first was whether, during the relevant income years, Mr Jayasinghe was a person who held an office in an international organisation within the meaning of s 6(1)(d)(i) of the IOPI Act, such that he was entitled to exemption from taxation on the income he received from UNOPS. The second was whether, by reason of s 357-60(1) of Schedule 1 to the *Taxation Administration Act 1953* (Cth) and TD 92/153, the commissioner was bound to exempt Mr Jayasinghe from taxation on the income he received from UNOPS.

### Did Mr Jayasinghe hold an office in an international organisation?

Section 6 of the IOPI Act, titled 'Privileges and immunities of certain international organisations and persons connected therewith', relevantly provides for the conferral, by regulations, of privileges and immunities on entities and persons. Different categories of personnel are entitled to different privileges and immunities.
In the present case, the High Court had to consider the proper construction of 6(1)(d)(i) of the IOPI Act. This confers the privileges and immunities in Part I of the Fourth Schedule of the IOPI Act on a person who holds an office in an international organisation to which the IOPI Act applies. One of those privileges is an exemption from taxation on salaries and emoluments received from the organisation, on which Mr Jayasinghe was relying.
In determining whether Mr Jayasinghe was a person who held an office in an international organisation, the High Court did not adopt either the approach advanced by Mr Jayasinghe (which had been accepted by the Tribunal and by the majority in the Full Federal Court), which focussed on the concept of 'office' adopted in domestic law following the decision of Rowlatt J in *Great Western Railway Co v Bater*[3], nor the approach advanced by the commissioner (and accepted by Allsop CJ in dissent in the Full Court), which focussed on the designation of a position as an office by the international organisation itself.[4]
Rather, Kiefel CJ, Keane, Gordon and Edelman JJ held[5] that in determining whether a person 'holds an office in an international organisation', s 6(1)(d)(i) of the IOPI Act is concerned with the incidents of the relationship between the person and the relevant international organisation. It focuses on the substance of the terms upon which a person is engaged - not whether the relevant