Cases before Australian Courts and Tribunals Involving Questions of Public International Law 2007

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International Law in General

Constitutional interpretation — relevance of international law

Bennett v Commonwealth
(2007) 234 ALR 204; (2007) 81 ALJR 950; [2007] HCA 18
High Court of Australia
Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ

At issue was the validity of provisions of the Norfolk Island Amendment Act 2004 (Cth) by which Australian citizenship was made a precondition for voting for, and standing for election to, the Legislative Assembly of Norfolk Island. The High Court unanimously upheld the validity of the Norfolk Island Amendment Act 2004 (Cth) as a valid exercise of section 122 of the Constitution.

In his decision Kirby J noted that members of the High Court have expressed different opinions on the relevance of international law to interpreting the Constitution. As in earlier decisions, Kirby J maintained that it may be appropriate, in some cases, to have regard to international law as part of the legal context in which the Constitution now operates and must be understood. However, he noted that McHugh J in *Al-Kateb v Godwin*[1] expressed the opinion that international law is irrelevant to constitutional interpretation.

Justice Kirby observed the right to take part in the government of one's country is enshrined in Article 21 of the 1948 Universal Declaration of Human Rights.[2] In a later elaboration of these rights in the 1966 International Covenant on Civil and Political Rights (ICCPR)[3] it is made clear that the right of democratic participation is restricted to citizens (Art 25). Under Article 2, unreasonable impediments to attaining citizenship due to 'national origin' are forbidden, however the requirement of citizenship for the enjoyment of the right to vote, or to be elected to a governmental body, are recognised by the international community. He

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1 [2004] HCA 37; (2004) 219 CLR 562, 617–30.
2 GA Res 217A(III), UN Doc A/810 (1948).
3 [1980] ATS 23.

concluded that since there was no violation of international human rights law in upholding the validity of the Norfolk Island Amendment Act, there was no need, in this case, to continue the debate as to the relevance of international law in constitutional interpretation.

Statutory interpretation — relevance of the International Covenant on Civil and Political Rights to interpreting the Evidence Act (1995) NSW

Cornwell v R
(2007) 231 CLR 260; (2007) 81 ALJR 840; (2007) 234 ALR 51; [2007] HCA 12
High Court of Australia
Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ

The applicant, Richard Cornwell, was charged with conspiracy to import narcotics. Cornwell claimed privilege against self-incrimination under section 128(8) of the Evidence Act 1995 (NSW). At issue was the interpretation of section 128, particularly section 128(7) and section 128(8). Section 128 applies where a witness objects to giving evidence on the grounds that it may incriminate him or her. Under section 128(3) '[i]f the witness gives the evidence, the court is to cause the witness to be given a certificate under this section in respect of the evidence.' Section 128(7) states that evidence given by a person in respect of which a certificate under this section has been given cannot be used against the person. Section 128(8) states that the above does not apply where the defendant gives evidence that he or she 'did an act the doing of which is a fact in issue.'

At trial, Howie J granted a certificate under section 128. The Crown appealed against the Court of Criminal Appeal's refusal to allow a Crown appeal against this decision, arguing that 'fact in issue' meant any fact relevant to the proceedings in contest between the parties. The accused, however, argued that 'fact in issue' referred only to elements of the offence charged. A majority of the High Court held that the Crown's construction was to be preferred and allowed the appeal.

In his dissenting judgment, Kirby J expressed the view that the court should read section 128 consistently with the ICCPR, and basic common law principles, so as to provide:

> an appropriate measure of protection for the fundamental principle of human rights defensive of the entitlement of all persons ordinarily to be free of a legal obligation of self-incrimination.

Australia is a party to the ICCPR, Article 14.3(g) of which states that '[i]n the determination of any criminal charge against him, everyone shall be entitled…[n]ot to be compelled to testify against himself or to confess guilt.' While the ICCPR is not, as such, part of Australian domestic law, where there is ambiguity or uncertainty in the meaning of an Australian statute, 'a court today will read the statute in a way that resolves the ambiguity or uncertainty in favour of conformity

with a binding obligation of international law.[4] Justice Kirby therefore argued that a liberal reading of section 128 should be preferred, so as to uphold immunity from self-incrimination to the greatest extent possible.

Statutory interpretation — relevance of international human rights law to the law governing search warrants

New South Wales v Corbett
(2007) 230 CLR 606; (2007) 81 ALJR 1368; (2007) 237 ALR 39, [2007] HCA 32
High Court of Australia
Gleeson CJ, Gummow, Kirby, Callinan and Crennan JJ

The applicant, James Corbett, challenged the validity of a search warrant to search his home for firearms. The application for the search warrant had referred to an offence under the Firearms Act 1989 (NSW). However, that Act had been repealed and replaced by the Firearms Act 1996 (NSW). An offence of unauthorised possession of a firearm existed under both Acts, and the definition of a 'firearms offence' continued to be identified by reference to the repealed Act. At issue, therefore, was whether the offence was sufficiently stated in the application, and consequently, whether the search warrant was valid.

The High Court reversed the decision of the Court of Appeal of the Supreme Court of New South Wales, and upheld the validity of the search warrant. Justice Kirby, in his separate judgment, held that courts should take a strict approach to interpreting provisions regarding search warrants. He stated that the rule of strictness can only be fully understood against the background of, *inter alia*, 'the development of instruments expressing relevant norms of the international law of human rights to which Australia is a party,' even though they may not have been incorporated into Australian domestic legislation. Specifically Article 17 of the ICCPR, which states that 'no one shall be submitted to arbitrary or unlawful interference with his privacy, family [or] home', lends support to the rule of strictness. Nonetheless Kirby J concluded that the relevant section of the 1989 Act could be taken to refer to the corresponding provision of the 1996 Act. The application for a search warrant therefore contained no significant inaccuracy or impression, nor was it misleading to Mr Corbett. The warrant was therefore valid.

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4 See *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* [1908] HCA 87; (1908) 6 CLR 309, 363; *Zachariassen v The Commonwealth* [1917] HCA 77; (1917) 24 CLR 166, 181; *Mabo v Queensland [No 2]* [1992] HCA 23; (1992) 175 CLR 1, 42; *Vasiljkovic v Commonwealth* [2006] HCA 40; (2006) 80 ALJR 1399, 1430; [2006] HCA 40; 228 ALR 447, 486.

Statutory interpretation — relevance of the ICCPR to interpreting the Australian Securities and Investments Commission Act 2001 (Cth)

Smith v The Queen
(2007) WAR 201; [2007] WASCA 163
Supreme Court of Western Australia
Court of Appeal
Pullin, Buss and Miller JJA

The applicants, Brian Smith and Stuart Corp, were charged with failure to act honestly in the exercise of their powers and the discharge of the duties of their office as directors and substantial shareholders in two public companies, WSM and Hallmark Gold NL (HLM), in contravention of the Corporations Act 2001 (Cth). On appeal, the applicants argued that certain counts of the indictment should be severed on the grounds of the privilege against self-incrimination embodied in section 68 of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act).

Section 68(1) of the ASIC Act abrogates the common law rule against self-incrimination and provides that if there is a requirement made of the person, the fact that the information might tend to incriminate the person is not a reasonable excuse for a person to refuse or fail to give information. Section 68(3) states that this information is not admissible in criminal proceedings against the person, except in a proceeding in respect of the falsity of the statement made. Section 68(2) provides that section 68(3) applies only where 'the statement…might in fact tend to incriminate the person.' The applicants argued that answers given in the course of the ASIC inquiry under section 68(1) were such that they were inadmissible as per subsections (2) and (3). The Crown claimed that since the statements were denials, or statements that they had no recollection, they could not be incriminatory statements according to section 68(2) and therefore did not attract privilege.

The court granted leave to appeal on this ground. The court agreed with the applicants' broader construction of section 68 that denials, statements of amnesia, or lies may fall within the category of statements that might in fact tend to incriminate, and that they therefore attracted the prohibition contained in subsection (3). Justice Buss of the Court of Appeal, with whom Pullin J agreed, noted that the right not to be compelled to testify against oneself or to confess guilt is embodied in Article 14(3)(g) of the ICCPR. Citing *Mabo v Queensland (No 2)*[5] he went on to state that:

> International law, while having no force as such in Australian municipal law, nevertheless provides an important influence on the development of Australian common law, particularly in relation to human rights.

5 (1992) 175 CLR 1, 42.

Criminal law — appeal against conviction — operation of the common law 'right to silence'

Tofilau v The Queen; Marks v The Queen; Hill v The Queen; Clarke v The Queen (2007) 231 CLR 396; (2007) 81 ALJR 1688; 238 ALR 650; [2007] HCA 39
High Court of Australia
Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ

Each of the four applicants had been tried and convicted of murder. In each trial, the judge admitted the evidence of undercover police officers of confessions made to them in the course of their undercover operations. To obtain these confessions, the police officers, posing as members of a gang, induced the suspects to take part in supposed criminal activity. Then, provided that the person was truthful about any past criminal behaviour that might attract adverse police attention, they offered the suspects the guarantee that the head of the gang could influence supposedly corrupt police officers to procure immunity from prosecution for the past crime.

On appeal from the Supreme Court of Victoria, each applicant submitted that, at common law, evidence of a confession may not be received against an accused person unless it is shown to be voluntary. A confessional statement will be excluded from evidence as involuntary if it has been obtained from an accused either by fear of prejudice or hope of advantage, exercised or held out by a person in authority.[6]

The majority of the court dismissed the appeal. Justice Kirby, in his dissenting judgment, held that the appeal should be allowed and the matter be remitted to the Court of Appeal. He considered reasons for and against the admissibility of the confessional evidence. Among the reasons against admissibility, he argued that the use of evidence obtained by undercover police officers 'tends to undermine both the principle of the common law protective of a suspect's "right to silence" and also a basic principle of the international law of human rights to which Australia has subscribed.'[7] This basic principle of international law is embodied in Article 14.3(g) of the ICCPR, which states that '[i]n the determination of any criminal charge against him, everyone shall be entitled...[n]ot to be compelled to testify against himself or to confess guilt.' Justice Kirby considered that such fundamental principles of international law may be referred to in order to inform and develop the common law.

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6 *Ibrahim v The King* [1914] AC 599, 609.
7 [2001] HCA 39 [148].

Human Rights

Extradition — legitimate expectation arising from Australia's ratification of the Torture Convention

Rivera v Minister for Justice and Customs
[2007] FCA 1693
Federal Court of Australia
Cowdroy J

The applicant, Lawrence Rivera, a United States citizen, sought a writ of prohibition to restrain the Minister for Justice and Customs from taking any action under a surrender warrant issued pursuant to section 23 of the Extradition Act 1988 (Cth). The warrant authorised the applicant to be surrendered to the United States in relation to the extradition offence of murder. The applicant had been held in custody since his arrest in 2002 and since that time had unsuccessfully challenged both the magistrate's decision which determined his eligibility for extradition, and the Minister's decision to surrender him to the United States.

The applicant's first main argument was that there is a legitimate expectation that the Minister will act in conformity with Australia's obligations under the Convention against Torture (CAT). [8] Mr Rivera claimed that conditions in Californian prisons are such that the risks of harm would amount to torture. [9] Relevantly, CAT provides that 'no State Party shall expel, return, or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' In making this argument the applicant relied on the decision of the High Court in *Minister for Immigration and Ethnic Affairs v Teoh,* [10] that:

> ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention. [11]

The applicant also relied on the fact that Australia is party to the Vienna Convention on the Law of Treaties, [12] which states, under Article 26, 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

Justice Cowdroy held that protection against extradition to another State where there are 'substantial grounds for believing such person might be subjected to torture,' [13] is provided for in Australian domestic law by section 22(3)(b) of the

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8 [1989] ATS 21.
9 *Rivera v Minister for Justice and Customs* [2007] FCAFC 123.
10 [1995] HCA 20; (1995) 183 CLR 273.
11 Ibid [290]–[291] (Mason CJ and Deane J).
12 [1974] ATS 2.
13 CAT [1989] ATS 21, art 3(1).

Extradition Act 1988 (Cth). Therefore, the applicant's reliance on *Teoh* was misplaced, since the legitimate expectation in that case was held to apply only where there were no 'statutory or executive indications to the contrary.' Since the applicant did not claim that the Minister acted contrary to the requirements of the Extradition Act, this argument failed.

The second main argument made by the applicant was that to remove him from the jurisdiction before the United Nations Committee on Torture made a final determination in respect of his communication would be inconsistent with Australia's obligations under Article 22 of CAT.[14] On this point, Cowdroy J held there is no such requirement imposed by Article 22. The existence of the Extradition Act means the rights of the applicant are governed solely by Australian domestic legislation. The proceedings were therefore dismissed on both points.

Native title — joinder of respondent — refusal on discretionary grounds — whether political question involved for the court — whether claim justiciable

Gamogab v Akiba
(2007) 159 FCR 578; [2007] FCAFC 74
Federal Court of Australia
Kiefel, Sundberg, Gyles JJ

The respondents were applicants in a native title determination on behalf of the Torres Strait Regional Sea Claim Group. The appellant, a Papua New Guinea (PNG) national, applied to be joined as a party pursuant to section 84(5) of the Native Title Act 1993 (Cth), on the basis that the interests of his group, the Dangaloub-Gizra, would be affected by a determination of the claim.

At first instance, Justice French found that the appellant's interests may be affected but exercised a discretion to refuse joinder because of a risk that the appellant's case may have raised matters best left to the Papuan courts, or bilateral agreement. The appellant had sought recognition from PNG and Australia of his group's rights, as traditional inhabitants, in the Torres Straight Region in accordance with a bilateral treaty.[15] At issue on appeal was the correct approach to section 84(5) which provides that the Federal Court may at any time join any person as a party to the proceedings, if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so.

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14 Article 22(1): A State Party to this Convention may at any time declare under this article that it recognises the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party to the Convention which has not made such a declaration.

15 Treaty Between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters, signed on 18 December 1978 (Sydney), [1985] ATS 4 (entered into force 15 February 1985).

Justice Gyles, Sundberg J agreeing, held that French J had misdirected himself as to the nature of the discretion that was being exercised, and on the issue of justiciability they held that the risk perceived by French J could have been dealt with 'by imposing appropriate terms upon joinder preventing the appellant from relying upon the matters that the primary judge regarded as inappropriate'.[16] This would have ensured that the appellant's arguments remained specific to the claim and justiciable. Thus, they allowed the appeal and remitted the matter to the primary judge.

In dissent, Kiefel J held that the refusal of joinder should be upheld on the basis of there being a political question inherent in the appellant's case which renders it non-justiciable. After a review of authorities,[17] Kiefel J stated that 'negotiations and agreements between Australia and another country are not to be the subject of judicial determination for the reason that they might cause embarrassment and affect relations between the countries. Questions raised concerning those subjects are non-justiciable'.[18] The appellant's argument on appeal proceeded upon an assumption that if the position of the appellant and his group under the treaty was not directly raised and the Court was not asked to make orders on that specific issue then the appellant's case would be justiciable because no question capable of creating embarrassment for the Australian government would arise. However, Kiefel J rejected this argument emphasising that any finding made by the Court, if the appellant were able to establish the traditional rights and interests of his group, would necessarily refer to those interests and thus provide a basis on which to protect them. If the Court were to make findings characterising the appellant and his group as traditional inhabitants under the treaty, even if specific reference to the treaty was omitted, those findings would conflict with the refusal of the PNG and Australian governments to accept the appellant's group. In such a situation, the potential for embarrassment in international relations is real.

Justice Kiefel also considered whether the fact that the Commonwealth to an extent supported the appellant in his application for joinder could have a bearing on question of justiciability. Referring to the position expressed in *Buttes Gas & Oil Co v Hammer*,[19] Kiefel J held that the reality of embarrassment did not determine whether a case was justiciable. The answer to the question in each case depends upon an appreciation of the nature and limits of the judicial function.

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16 *Gamogab v Akiba* (2007) 159 FCR 578, 56 per Gyles J.

17 *Buttes Gas & Oil Co v Hammer* [1982] AC 888, *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 (the *Spycatcher Case*), *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274.

18 *Gamogab v Akiba* (2007) 159 FCR 578, 34 per Kiefel J.

19 [1982] AC 888, 436 per Wilberforce J.

Statutory interpretation — relevance of the International Convention on the Elimination of All Forms of Racial Discrimination to interpreting the Racial Discrimination Act 1977 (Cth) — racial discrimination — right to equal treatment before tribunals

Bropho v State of Western Australia
[2007] FCA 519
Federal Court of Australia
Nicholson J

The case of the applicant, Bella Bropho, concerned racial discrimination. The applicant, an Aboriginal person of Nyungah origin, had served as a Governing Committee member, Vice-Chairperson, spokesperson and member of the Swan Valley Nyungah Community Aboriginal Corporation. She had been an inhabitant, and claimed to represent all Aboriginal persons who were of Nyungah origin and who had been inhabitants, of reserve 43131 at any time between 14 May 2003 and 12 June 2003. The applicant's claim was that the enactment of the Reserves (Reserve 43131) Act 2003 (WA) had prevented Aboriginal residents from managing or residing at the Lockeridge Camp. She contended that she had a human right to manage and exercise ownership rights over the land. As the Reserves Act deprived her (and other Aboriginal persons of Nyungah origin) of these rights, it was contrary to the Racial Discrimination Act 1977 (Cth), section 10 of which refers to Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[20] Article 5 is an undertaking by State Parties that they shall prohibit and eliminate racial discrimination in all its forms, and shall ensure that all persons have the right to, *inter alia*, own property and to equal treatment before tribunals.

Justice Nicholson dismissed the application. He found that the applicant had not established any human right to property, and that the deprivation of ownership rights in this case was not discriminatory. He relied on a judgment delivered by Mason J in *Gerhardy v Brown*[21] which stated:

> The exclusion of persons of a race, colour or origin from the enjoyment of a relevant right by reason of a law does not necessarily involve "racial discrimination" in that it may not amount to a distinction, exclusion, restriction or preference "which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise" of the right "on an equal footing". Consequently, s 10 should be read in the light of the Convention as a provision which is directed to lack of enjoyment of a right arising by reason of a law whose purpose or effect is to create racial discrimination.

Noting the need for a law to distinguish among different individuals on the basis of race before it could be deemed racially discriminatory, Nicholson J explained that such discrimination could be indirect: a law could impose an ostensibly neutral condition that in fact disproportionately disadvantages a racial group. He posed the relevant question as being 'whether an indirect

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20 [1975] ATS 40.
21 [1985] HCA 11; 159 CLR 70, 99.

[discriminatory] effect is established as a consequence of the proportionality of impact on (relevantly) Aboriginal persons', highlighting that 'the effect of a law is assessed independently of its apparent purpose'.

Justice Nicholson concluded that the Reserves Act's intended purpose was to protect women and children from violence and abuse and lacked 'any racially discriminatory purpose'.

In particular reference to the claim of a human right to property, Nicholson J found that the enjoyment of this right depends upon municipal and not international law. He held that the applicant (and other Aboriginal persons of Nyungah origin) held a right to manage the land in question, but did not enjoy any ownership rights, under domestic law. The continuation of such rights was governed by statutes which applied equally to individuals of all races.

In dicta, Nicholson J also held that the right conferred under Article 5(a) of the Convention — the right to equal treatment before tribunals and all organs administering justice — applies not only to treatment before a tribunal, but also access to such tribunals.

Constitutional law — inconsistency between Commonwealth and Victorian law — sex discrimination — discrimination on the basis of marital status — relevance of the International Convention on the Elimination of All Forms of Discrimination Against Women to interpreting the Sex Discrimination Act 1984 (Cth)

AB v Registrar of Births, Deaths and Marriages
(2007) 162 FCR 528; (2007) 240 ALR 399; [2007] FCAFC 140
Full Court of the Federal Court of Australia
Black CJ, Kenny and Gyles JJ

The appellant sought a declaration that the respondent, the Registrar of Births, Deaths and Marriages, had unlawfully discriminated against her on the ground of her marital status, contrary to section 22 of the Sex Discrimination Act 1984 (Cth) ('Commonwealth Act'). At section 3, the Commonwealth Act sought to give effect to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[22] The appellant's birth registration recorded the appellant as male, but the appellant had undergone sex affirmation surgery. The respondent had denied the appellant's requests to have the sex on her birth registration altered on the basis that the appellant was married and did not meet the criteria of the Births, Deaths and Marriages Registration Act 1996 (Vic) ('Victorian Act'), which provided at section 30C(3) that the Registrar cannot alter the birth registration of a married person. The appellant argued that the Victorian legislation was inconsistent with the Commonwealth Act and so could be struck down under section 109 of the Constitution.

The appeal was dismissed. Justice Kenny, with whom Gyles J agreed, found that the case depended on 'whether the prohibition against discrimination on the

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22 [1983] ATS 9.

ground of marital status in section 22 operates in relation to discrimination against women, to give effect to the Convention'.[23] She emphasised that under Article 1, the Convention specifically prohibited discrimination against women, which it defined as:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Justice Kenny held that the text of the Convention does not deal with discrimination on the basis of marital status, unless the discrimination amounts to discrimination against women, finding that the *travaux préparatoires* of the Convention supported this interpretation. She rejected the conclusion 'that the Convention gives rise to an obligation to eliminate discrimination on the ground of marital status per se, or even as regards women where such discrimination does not involve less favourable treatment than men'. She also rejected that the Convention prohibits discrimination between different classes of women, such as married and unmarried women. As the Victorian Act applied equally to men and women, there was no inconsistency with the Commonwealth Act.

Chief Justice Black dissented. He found that under the objects espoused in section 3 of the Commonwealth Act, section 22 of the same Act was intended to give effect to the Convention. He held that '[i]n prohibiting discrimination in the provision of services on the grounds of pregnancy and potential pregnancy, s 22 plainly gives effect to the Convention, because discrimination on those bases must involve discrimination against women'.[24] He argued that although the Convention did not require states to protect men from discrimination on the basis of sex or marital status, Australia had elected to express the Commonwealth Act in gender-neutral language so that both men and women benefited from its protection. He concluded that the fact that the Victorian Act discriminated against both men and women who were married should not obscure the more important fact that it discriminated on the basis of marital status, which is also prohibited under the Commonwealth Act.

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23 [2007] FCAFC 140 [78].
24 Ibid [15].

Refugees

Statutory interpretation — Convention Relating to the Status of Refugees — interpretation of well-founded fear of persecution — internal relocation

SZATV v Minister for Immigration and Citizenship
[2007] HCA 40
High Court of Australia
Gummow, Kirby, Hayne, Callinan and Crennan JJ

The appellant had appealed from the Federal Court of Australia. He was a Ukrainian national who claimed to face persecution in his home region for expressing his political beliefs through journalism. The Refugee Review Tribunal and the Federal Court had both found that it was reasonable for the appellant to relocate to another region in the Ukraine, and that he could avoid persecution by no longer being a journalist and instead finding work in construction, as he had done in Australia.

The appeal was allowed, with all five judges holding that the appellant was entitled to refugee status. All the judges referred to the Convention Relating to the Status of Refugees,[25] which was enacted into Australian law by the Migration Act 1958 (Cth). The Convention defines a refugee as a person:

> who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ... is unable or, owing to such fear, is unwilling to return to it.

Justices Gummow, Hayne and Crennan, with whom Callinan J agreed, referred to *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*,[26] in which Black CJ stated:

> Although it is true that the Convention [relating to the Status of Refugees] definition of refugee does not refer to parts or regions of a country, that provides no warrant for construing the definition so that it would give refugee status to those who, although having a well-founded fear of persecution in their home region, could nevertheless avail themselves of the real protection of their country of nationality elsewhere within that country. If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders.

They found that this ‘relocation principle’ appeared in legislation in both the United States and the European Union. The judges considered the critical question in such cases to be that formulated by Lord Bingham of Cornhill in *Januzi v*

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25 [1954] ATS 5.
26 [1994] FCA 1253; (1994) 52 FCR 437, 440–41.

Secretary of State for the Home Department[27]: whether it 'would be reasonable to expect [the appellant] to seek refuge in another part of the same country'. That would be determined, in part, by whether 'the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic human rights'. They concluded that in this case, it would not be reasonable to expect the appellant to 'live discreetly' in the Ukraine by ceasing to work as a journalist and so no longer attracting adverse attention. They followed the case of *S395 v Minister for Immigration and Multicultural Affairs*[28] which held that it would not be reasonable to expect two men who had faced persecution for their homosexuality in Bangladesh to relocate internally and live discreetly to avoid persecution.

Justice Kirby also acknowledged the State practice in favour of the existence of the 'relocation' principle. He denied that the principle was 'a free-standing prerequisite' to individual entitlements under the Refugees Convention, instead positing that whether a person seeking refugee status could internally relocate simply shed light on whether their fear of persecution was 'well-founded'. According to Kirby J, the court must assess whether a person could 'reasonably' be expected to relocate internally. Internal relocation would not be a reasonable option if:

> there are logistical or safety impediments to gaining access to the separate part of national territory that is suggested as a safe haven. Nor if the evidence indicates that there are other and different risks in the propounded place of internal relocation; or where safety could only be procured by going underground or into hiding; or where the place would not be accessible on the basis of the applicant's travel documents or the requirements imposed for internal relocation.

Additionally, an applicant's lack of family networks or other local support in other regions of their home country may cast doubt on the reasonableness of internal relocation. Also following *S395*, Kirby J found it would be unreasonable to expect the appellant to return to the Ukraine and not work as a journalist, as the right the Convention sought to protect was his right to work as a journalist and not suffer persecution for his political views.

Statutory interpretation — Convention Relating to the Status of Refugees — interpretation of serious harm

BRGAA of 2007 v Minister for Immigration and Citizenship
[2007] FCA 1950
Federal Court of Australia
Collier J

The applicant was an Arab citizen of Israel and a practising Catholic. In August 2006, the Minister for Immigration and Citizenship had denied him a protection visa. This decision was upheld by the Refugee Review Tribunal (RRT) and, subsequently, Burnett FM. Although the RRT had accepted that he had endured

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27 [2006] 2 AC 426, 440.
28 [2003] HCA 71; (2003) 216 CLR 473.

discrimination, harassment and threats by the Israeli Special Forces over 12 years before leaving Israel, it was not satisfied that there was a real chance that he would be seriously harmed by authorities if he were to return to Israel. Before Burnett FM, the applicant had submitted that the RRT made a jurisdictional error by failing to consider whether improper detention, threats of disappearance and death made to the applicant, and the pointing of a gun at the applicant, all at the hands of the Israeli Special Forces, could by themselves amount to serious harm for the purposes of section 91R(1)(b) of the Migration Act 1958 (Cth). Section 91R(2) provides that serious harm can include but is not limited to a threat to a person's life or liberty and significant physical harassment or ill-treatment. Burnett FM had found that the RRT's finding that there was not a realistic threat of serious harm to the applicant in the future was open to it on the evidence.

Justice Collier dismissed the appeal, affirming Burnett FM's decision. He found that verbal threats do not constitute serious harm under section 91R or the Convention Relating to the Status of Refugees[29] unless they indicate a current or prospective probability that harm will arise. Justice Collier considered the High Court's decision in *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs*[30] in ascertaining the meaning of the term 'threat to a person's life or liberty'. In that case, a Sri Lankan national had claimed that, as a result of his political activities in Sri Lanka, he had received a number of threats to his life from members of an opposition political party. The RRT had accepted the veracity of these claims, but rejected that they amounted to serious harm. After the applicant successfully sought judicial review by a Federal Magistrate, the Minister (who had denied the applicant a visa) appealed to the Federal Court which allowed the appeal. The High Court dismissed the applicant's appeal. Chief Justice Gleeson and Kirby J found that serious harm in the form of threats to a person's life or liberty related to 'future harm', and that there must be not only a communication of intention to harm, but also a likelihood of harm.[31] Justices Callinan and Heydon similarly found that serious harm, for the purposes of section 91R and the Refugees Convention, must relate to current or prospective harm.[32]

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29 [1954] ATS 5.
30 (2006) 231 ALR 54.
31 (2006) 231 ALR 54, 545.
32 (2006) 231 ALR 54, 555.

Migration

Migration — judicial review — refusal to grant a visa on character grounds – whether the Minister bound by international treaty obligations where Minister chooses to take them into account — whether failure to apply treaty provision correctly constitutes jurisdictional error

AB v Minister for Immigration and Citizenship
(2007) 96 ALD 53; [2007] FCA 910
Federal Court of Australia
Tracey J

In September 1982, as a member of the Lebanese Phalange Militia, the applicant was involved in a massacre of civilians at the Sabra and Shatilla Palestinian Refugee Camp in West Beirut. The applicant came to Australia in December 1993. After being refused a protection visa in 1994 because of his involvement in war crimes or crimes against humanity, the applicant made a series of applications in order to remain in Australia.

In 2006 the applicant was detained as an unlawful non-citizen. An application was made first for a Child (residence) Class BT Visa, for which he did not meet the relevant criteria, and then for a Bridging Visa E. In considering the second application, the Department issued a notice advising the applicant that in reaching a decision the Minister would have regard to whether a refusal would breach Australia's international obligations under the Refugee Convention[33], the CAT or the ICCPR. On 4 October 2006, pursuant to section 501(1) of the Migration Act 1958 (Cth), the Minister refused to grant the Bridging Visa E. The appellant sought judicial review of this decision on two grounds.

First, although the applicant conceded that there is no statutory obligation for a Minister to give effect to unincorporated treaty obligations, it was argued that once the Minister determined that she would take Australia's obligations under the ICCPR and the CAT into account, as a relevant consideration, she was obliged to ascertain and apply the relevant treaty obligations according to their terms. In rejecting this argument, Tracey J held that:

> Australia's unenacted international treaty obligations relating to refoulement of persons within the jurisdiction are matters to which decision-makers are entitled to have regard when exercising powers under s 501 of the Act. In the absence of legislative requirement they are not, however, bound to do so. If they do not bring them into account as part of the decision-making process no jurisdictional error will occur. If they choose to have regard to treaty obligations but, in some way, misunderstand the full extent or purport of the obligations, this will not constitute jurisdictional error.[34]

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33 Convention Relating to the Status of Refugees [1954] ATS 5.
34 [2007] FCA 910 [27].

It was thus held that the Minister had made no jurisdictional error, even if she erred in construing and applying the ICCPR or the CAT. While this decided the case, Tracey J went on to address the applicant's submission that the Minister erred in applying the 'necessary and foreseeable' test when deciding whether a 'real risk' of harm would confront the applicant in Lebanon. Justice Tracey rejected this contention, citing the Human Rights Committee decision of *Kindler v Canada*[35] which stated that the relevant question under Article 6 of the ICCPR was whether a country had exposed 'a person within its jurisdiction to the real risk (that is to say, a necessary and foreseeable consequence) of losing his life' contrary to the ICCPR. While more recent formulations of the test by the Human Rights Committee may have rephrased the relevant question, the Minister had not erred in preferring the expression in *Kindler.* Justice Tracey also rejected the applicant's submission that the Minister erred in failing to give discrete consideration to the test posed by the CAT. Aside from the fact that the Minister had indicated an intention to deal with both treaties together, the Minister was not bound to have regard to CAT obligations and the tests to be applied where not suggested to be different.

The applicant's second main ground of review was that he been denied procedural fairness. The applicant contended he had a legitimate expectation that the Minister would apply the constructions of the ICCPR and CAT as they were explained in the initial assessment or that, if some other construction was to be applied, he would have had the opportunity to be heard in support of an argument that this should not occur. However, Tracey J discerned no material difference between the initial assessment and reassessment formulations. In this case the applicant was afforded, and comprehensively utilised, the opportunity to tell the Minister what he contended Australia's treaty obligations were and how they applied to him. Therefore there was no unfairness.

Migration — judicial review — cancellation of visa — character test — suspected association with persons suspected of being or having been involved in criminal conduct — nature of association necessary to enliven ministerial discretion to cancel visa

Minister for Immigration and Citizenship v Haneef
(2007) 163 FCR 414; (2007) 243 ALR 606; (2007) 99 ALD 443;
[2007] FCAFC 203
Federal Court of Australia
Black CJ, French and Weinburg JJ

Dr Mohamed Haneef and his wife arrived in Australia from India in September 2006. On 2 July 2007 Dr Haneef was arrested by the Australian Federal Police and later charged with having intentionally provided resources, namely a mobile phone Subscriber Identity Module (SIM) card, to a terrorist organisation consisting of persons including his two second cousins, the Ahmeds, who had been arrested in relation to the attempted terrorist bombings in London and Glasgow in

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35 Communication No. 470/1991.

June 2007. Immediately upon Dr Haneef being granted bail on 16 July 2007, the Minister for Immigration and Citizenship cancelled his visa under section 501(3) of the Migration Act 1958 (Cth) on the ground that he did not pass the 'character test' because of his 'association' with the Ahmeds and because the Minister was satisfied that that the cancellation was in the national interest. Dr Haneef was kept in detention. On 27 July 2007 the charge against Dr Haneef was dismissed.

This case was an appeal from the orders made by Spender J setting aside the Minister's decision to cancel Mr Haneef's visa. The central issue in this appeal was the scope of 'association' and whether the Minister had applied the incorrect test. In a unanimous judgment, the Full Court agreed with the interpretation of 'association' adopted by Spender J and dismissed the appeal.

Pursuant to section 501(6)(b) of the Migration Act 1958 (Cth) a person does not satisfy the character test if the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct. The Full Court reiterated the principle that Acts should be construed, where possible, so as not to encroach upon common law rights and freedoms, and found that Dr Haneef's visa accorded him legal rights, including the right to live and work at liberty in Australia for the term of his visa. It was stated that this principle tends against a construction of section 501 which would result in an innocent association leading to a failure to pass the character test. The Full Court also rejected the idea that 'association' required some element of mateship or friendship. Ultimately, having regard to its ordinary meaning, the context in which it appears and the legislative purpose, the Full Court concluded that the 'association' to which this section refers is:

> an association involving some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organisation with whom the visa holder is said to have associated. The association must be such as to have *some* bearing upon the person's character.[36]

As the Minister had adopted a broader interpretation, he was found to have applied the incorrect test and the appeal was dismissed.

Statutory interpretation — decision to refuse visa — international law obligations relating to limitation periods for seeking judicial review — Migration Act 1958 (Cth)

Nguyen v Minister for Immigration and Citizenship
[2007] FCAFC 38
Full Court of the Federal Court of Australia
Moore, Bennett and Buchanan JJ

The appellant had arrived in Australia in December 1999 on a student visa that was valid until February 2000. She claimed that in March 2000, she met Van Tri Nguyen, whom she had married in a civil ceremony in February 2001 and who sponsored her application for both a permanent and temporary partner visa in

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36 *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203, [130].

March 2001, and that she gave birth to a child (of whom her husband was the father) on August 2002. After this child was born, the appellant discovered that her husband had been previously married and had never become divorced. She separated from him soon after. She claimed, however, that she had had a genuine relationship with him at the time at which she applied for the visas.

A delegate of the Minister refused her visa application in March 2003, and in April 2005, the Migration Review Tribunal (MRT) affirmed this decision. According to the applicant's file, upon a departmental home visit to the husband, he denied that they had ever been in a spousal relationship, that he knew where she lived, or that he was the father of her (at that time unborn) child. The MRT had invited the appellant to comment on this information, which the Tribunal considered would be the reason, or a part of the reason, for affirming the decision under review.

The appellant had lodged an application for judicial review to the Federal Magistrates Court. Federal Magistrate Smith denied the application on the basis that it had been lodged outside of the time limits prescribed by section 477 of the Migration Act 1958 (Cth). That provision prohibits the Federal Magistrates Court from allowing an application for judicial review which is not brought within 28 days of actual notification of the relevant decision or, pursuant to leave granted to bring such an application, within a further period of 56 days. The effect is that an absolute bar arises after 84 days. This 84-day period expired for the appellant on 24 February 2006. The appellant filed for judicial review on 30 June 2006.

One of the appellant's submissions before the Federal Court was that Smith FM erred in failing to take into account Australia's international legal obligations in the setting of restrictive timelines under section 477. The Court rejected this submission. It emphasised the primacy of domestic Australian law over international law, stating, '[i]t is to the law of Australia that regard must first be paid in the case of any suggestion of a conflict between domestic law and international law obligations'.[37] The appellant could neither point to any provision in an Australian statute which gave effect to the suggested international law obligations, nor could she identify any 'gap' in domestic law which such obligations could fulfil. Applying any international legal standard would thus involve 'disregard[ing] the language of the Act',[38] which the Court refused to do.

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37 [2007] FCAFC 38 [35].
38 Ibid.

Statutory interpretation — decision to refuse visa — obligation upon Minister to take account of international instruments — Migration Act 1958 (Cth)

Sales v Minister for Immigration and Citizenship
[2007] FCA 2094
Federal Court of Australia
Flick J

On 25 September 2007 the Minister for Immigration and Citizenship had decided that the applicant, Mr Sales, did not pass the 'character test' under section 501(6) of the Migration Act 1958 (Cth) because of his substantial criminal record. The Minister exercised his discretion under section 501(2) to cancel the applicant's Transitional Permanent visa. Seeking judicial review in the Federal Court, the applicant submitted that the Minister had failed to take account of a number of international conventions and other instruments, including the Convention on the Rights of the Child,[39] the ICCPR, the Universal Declaration of Human Rights,[40] and the International Convention on the Rights of Persons with Disabilities,[41] and so his decision was so unreasonable that no reasonable person could have made it.

Justice Flick dismissed the application. Citing the case of *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[42] he stated that the Minister would not have fallen into jurisdictional error by failing to consider the international instruments unless he was 'bound' to take them into account, a question which is determined by the express words or the implication of the statute in question. Justice Flick held that the Minister held a broad discretion, so was not bound to consider these international agreements. In reaching this conclusion, Flick J referred to *AB v Minister for Immigration and Citizenship*,[43] in which Tracey J had reviewed the relevant authorities and concluded:

> Australia's unenacted international treaty obligations relating to refoulement of persons within the jurisdiction are matters to which decision-makers are entitled to have regard when exercising powers under s 501 of the Act. In the absence of legislative requirement they are not, however, bound to do so. If they do not bring them into account as part of the decision-making process no jurisdictional error will occur.

Justice Flick observed that the ICCPR is included as Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 (Cth). Following the decision of Ryan, Merkel and Goldberg JJ in *Minogue v Williams*,[44] Flick J found that this does not render it incorporated into Australian law.

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39 [1991] ATS 4.
40 GA Res 217A(III), UN Doc A/810 (1948).
41 [2007] ATNIF 15.
42 [1986] HCA 40; (1986) 162 CLT 24.
43 [2007] FCA 910; 96 ALD 53 [27].
44 [2000] FCA 125; 60 ALD 366 [21]–[25].

Constitutional interpretation — relevance of international law

Roach v Electoral Commissioner
(2007) 233 CLR 162; (2007) 81 ALJR 1830; (2007) 239 ALR 1; [2007] HCA 43
High Court of Australia
Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ

Prior to 2006 the Commonwealth Electoral Act 1918 (Cth) (Electoral Act) prohibited a person serving a sentence of imprisonment of three years or longer from voting at an election for a House of the Commonwealth Parliament. Following amendment by the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth) (2006 Act), sections 93(8AA) and 208(2)(c) of the Electoral Act were amended to the effect that a person serving any sentence of imprisonment was prohibited from voting.

Victoria Roach, an indigenous woman sentenced to six years imprisonment, contended that the Electoral Act, as in force prior to and after the 2006 Act, was invalid under the Commonwealth Constitution. The combined effect of sections 51(xxxvi), 8 and 30 is that Parliament may make laws providing for the qualification of electors. Universal adult suffrage arose under such laws, including the Electoral Act. Sections 7 and 24 of the Constitution require that the senators and members of the House of Representatives be 'directly chosen by the people' of the State or the Commonwealth respectively. The majority (Gleeson CJ, and Gummow, Kirby and Crennan JJ) held that the 2006 amendments were invalid.

Ms Roach referred to and relied upon a range of foreign and international legal materials including the Canadian Charter of Rights and Freedoms, the First Protocol to the European Convention on Human Rights, the ICCPR, and decisions of the Constitutional Court of South Africa, but sought to distinguish decisions by the United States Supreme Court. In his dissenting judgment Hayne J rejected the relevance of any of these materials:

> [T]here was no similarity between the provisions considered in the cases referred to and relied on by Ms Roach and the provisions of the Constitution in issue. The only connection between the cases and other international materials upon which the plaintiff relied and the present issues is to be found in the statement of the problem as an issue about the validity of legislative provisions excluding prisoners from voting. That the problem may be stated in generally similar terms does not mean that differences between the governing instruments may be ignored. Yet in essence that is what the appeal made by the plaintiff to 'generally accepted international standards' seeks to have the Court do.[45]

Justice Heydon agreed with Hayne J and held that recourse could not be had to such materials:

> It is…surprising that the plaintiff submitted that those arguments were 'strongly supported' by decisions under the last three instruments 'which found that prisoner disenfranchisement provisions were invalid'. It is surprising because these instruments can have nothing whatever to do with the construction of the Australian

45 (2007) 233 CLR 162; [2007] HCA 43 [166].

> Constitution. These instruments did not influence the framers of the Constitution, for they all postdate it by many years. It is highly improbable that it had any influence on them. The language they employ is radically different. One of the instruments is a treaty to which Australia is not and could not be a party. Another of the instruments relied on by the plaintiff is a treaty to which Australia is a party, but the plaintiff relied for its construction on comments by the United Nations Human Rights Committee. If Australian law permitted reference to materials of that kind as an aid to construing the Constitution, it might be thought that the process of assessing the significance of what the Committee did would be assisted by knowing which countries were on the Committee at the relevant times, what the names and standing of the representatives of these countries were, what influence (if any) Australia had on the Committee's deliberations, and indeed whether Australia was given any significant opportunity to be heard. The plaintiff's submissions did not deal with these points. But the fact is that our law does not permit recourse to these materials. The proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most, though not all, of the relevant authorities – that is, denied by 21 of the Justices of this Court who have considered the matter, and affirmed by only one.[46]

White v Director of Military Prosecutions
(2007) 235 ALR 455; [2007] HCA 29
High Court of Australia
Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ

CPO White sought a writ of prohibition against the Director of Military Prosecutions commencing a prosecution against her for offences committed off base and off duty in the company of and against other members of the Australian Defence Forces ('ADF').

In accordance with a line of authority recognising the breadth of reach of the defence power to the acts of permanent members of the ADF, whether or not on duty (or on base), the High Court upheld the system of Courts Martial and Defence Force Magistrates as within the defence power.

Only Kirby J chose to consider international materials. Justice Kirby ultimately held that the system of Courts Martial was invalid, finding that:

> The Act does not conform to…constitutional requirements. Whilst provision is made in the Act for service tribunals to hear and determine trials, and to punish defence members upon conviction of conduct which might be described as exclusively or essentially disciplinary in character and carrying penalties of imprisonment for less than twelve months (or a commensurate fine), the Act has not been drafted to comply with the stated constitutional discrimen. It makes no provision for trial of serious service offences before a Ch III court. Nor does it include the procedure of indictment in those offences carrying a constitutional right to jury trial. Moreover, by importing the whole gamut of criminal offences based on Territory offences, but without the requisite procedural limitations and protections, the Act makes clear what is in any case obvious. It was intended to adopt a scheme for the separate trial and punishment of service members before service tribunals that are not Ch III

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46 Ibid [181].

> courts for what are, in terms and substance, criminal offences carrying maximum penalties rising in some cases to life imprisonment.[47]

During the course of examining the Courts Martial system and the offences which they try, Kirby J noted the plaintiff's reliance on Article 14(1) of the ICCPR. Article 14(1) provides that 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' Justice Kirby observed that 'the ICCPR does not enjoy a constitutional status in Australia. It has not been expressly incorporated into municipal law.'[48] However, Kirby J also commented on the importance of separation of the federal judicial power from the legislative power, and the reservation of its exercise to Ch III courts:

> [I]t is a requirement the importance of which extends far beyond formalities. In the case of service tribunals, it keeps military exceptionalism to a minimum. To that extent, it actually preserves an important general feature of our constitutional arrangements, inherited from the United Kingdom. It protects fundamental rights, now recognised by civilised nations and international law and, for much longer, inherent in our own legal system. It prevents any attempts of the other branches of government to expand the exceptions. When pressed, the defendants would not disclaim the possibility of relying on a precedent, established by this case, to attempt to expand such exceptions to other disciplined agencies (police, firemen, counter-terrorism and security agencies spring to mind). Confining the "exceptions" discourages the creation of new federal "courts" outside the integrated Judicature of the Commonwealth for which Ch III provides.[49]

Detention of Australian national in Guantánamo Bay — proceedings claiming that decision by Executive not to request national's release and repatriation took into account irrelevant considerations — relief of declarations, mandamus and habeas corpus sought — whether Act of State doctrine rendered matter non-justiciable — motion to strike out

Hicks v Ruddock
(2007) 156 FCR 574; (2007) 239 ALR 344; [2007] FCA 299
Federal Court of Australia
Tamberlin J

The applicant, David Hicks, was detained under the authority of the United States of America in the Guantánamo Bay detention facility, Cuba, and was charged before a United States Military Commission with 'providing material support for terrorism'. During that detention, members of the Australian Executive made public statements which evidenced a decision on their part not to request from the United States his release and repatriation, even though there was reason to believe

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47 (2007) 235 ALR 455; [2007] HCA 29 [147].
48 [2007] HCA 29 [136].
49 Ibid [184].

that such a request would be granted. Mr Hicks claimed that this decision of the Executive was based on irrelevant considerations, namely, that if he was repatriated there was no provision of Australian criminal law pursuant to which he could be prosecuted, and that he should be prosecuted before the military commissions irrespective of the fact that their constitution did not conform with United States and international law. Mr Hicks also claimed that the level of influence which the Australian Executive indicated it retained over the continuation of his detention was sufficient to ground an application for habeas corpus, which writ should issue because the detention was unlawful and because the influence was a 'kind of control' exercisable by the Executive. Before Mr Hicks' application progressed to hearing, the respondent Ministers and Commonwealth filed a motion to strike out the application on the bases that it had no reasonable prospects of success,[50] that it disclosed no reasonable cause of action,[51] and that the pleadings were embarrassing.[52] Determination of that motion raised three issues of substance.[53]

The first issue was whether an Australian court was precluded by the Act of State doctrine or principles of non-justiciability of matters concerning Australia's foreign affairs from adjudicating such a claim. After reviewing Australian and foreign jurisprudence on the Act of State doctrine and the non-justiciability of foreign affairs,[54] Tamberlin J held that it was arguable on existing authority that Mr Hicks' claim could be legitimately adjudicated by an Australian court, and as a consequence that 'neither the Act of State doctrine nor the principle of non-justiciability justify summary judgment at that stage of the proceedings.'[55] The second issue was whether Mr Hicks' application for habeas corpus was arguable, so that it should not be dismissed summarily. After iterating the elements necessary for this writ to issue — that the respondent has custody or control of the applicant and that the applicant's detention is unlawful — Tamberlin J held that Mr Hicks raised an arguable point that something less than actual custody may still be sufficient to satisfy the first element of the writ.[56] While the respondents'

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50 See s 31A(2) of the Federal Court of Australia Act 1976 (Cth).

51 See O 11 r 16(a) of the Federal Court Rules.

52 See O 11 r 16(b) of the Federal Court Rules.

53 A fourth issue, concerning alleged deficiencies in the pleadings, was dealt with by allowing Mr Hicks to redraft and file an amended version of his pleadings, [88]–[89].

54 *Buttes Gas & Oil Co v Hammer* [1982] AC 888; *Attorney-General (UK) v Heinemann Publishers Australia Pty Limited* (1988) 165 CLR 30; *Kuwait Airways Corporation v Iraqi Airways Company* [2002] 2 AC 883; *Petrotimor v The Commonwealth of Australia* (2003) 126 FCR 354; *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347; *Abu-Ali v Ashcroft* 350 F.Supp 2d 28 (2004); *Omar v Harvey* 416 F.Supp 2d 19 (2006).

55 [2007] FCA 299 [34].

56 *R v Secretary of State for Home Affairs; Ex parte O'Brien* (1923) 2 KB 361 was an important precedent. In that case, an agreement existed between the British Home Secretary and the Irish Free State government that if the relevant committee decided that Mr O'Brien ought not to be interned, then the Irish government would release him. The Court of Appeal held that the application for habeas corpus was properly directed to the Home Secretary, even though he had surrendered custody of Mr O'Brien to the Irish government.

submission 'that persuasion or the power to make a request falls far short of, and can never amount to, control' was regarded as having 'force', it did not mean that 'there [was] no reasonable prospect of success on this issue'.[57] On the second element of the writ, Tamberlin J was 'not persuaded that there is no reasonable prospect of success in the argument that the fact of detention is itself, without evidence of authorisation, sufficient to warrant the conclusion that the detention is unlawful'.[58] The third issue was whether the Court should summarily dismiss Mr Hicks' claim that the decision of the Executive not to request his release and repatriation was not only an administrative power susceptible to judicial review but also that its exercise was based on irrelevant considerations. The administrative power identified was the duty of the Australian government to protect its citizens abroad,[59] the existence of which power necessarily implied the existence of a duty to consider its exercise.[60] On the basis that section 61 of the Constitution assigned to the Executive the duty to protect and advance the Australian nation,[61] and given that members of the Executive publicly stated that they had decided not to request Mr Hicks' repatriation, Mr Hicks submitted that the Commonwealth had engaged in a consideration of the exercise of the protective power, and that the decision not to exercise it was reviewable. The grounds of review were that two irrelevant considerations tainted the decision — namely, that Mr Hicks could not be prosecuted pursuant to Australian criminal law, and that prosecution before the United States Military Commission was acceptable despite their constitution breaching United States and international law. Contrary to this, the respondents submitted that the Commonwealth bore no duty to protect its citizens overseas, and that simply because it was able to request the United States to repatriate Mr Hicks did not mean that it was obliged (even to consider whether) to do so. In refusing to dismiss the claim summarily, Tamberlin J held that Mr Hicks' arguments were 'not foreclosed by authority', and that the principles of this type of judicial review were 'far from settled'.[62] As a result of the above findings, Tamberlin J declined to strike out Mr Hicks' application, concluding that '[t]here are no bright lines which

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57 [2007] FCA 299 [49]-[50].

58 Ibid [56].

59 Reliance was placed on *Joyce v Director of Public Prosecution* [1946] AC 347, 370–71 (Lord Jowitt):

> [B]y a universally recognized customary rule of the law of nations every state holds the right of protection over its citizens abroad. This rule thus recognized may be asserted by the holder of a passport which is for him the outward title of his rights. It is true that the measure in which the state will exercise its right lies in its discretion. But with the issue of the passport the first step is taken. Armed with that document the holder may demand from the State's representatives abroad and from officials of foreign governments that he be treated as a British subject, and even in the territory of a hostile state may claim the intervention of the protecting power.

60 See *Murphyores Incorporated Pty Limited v Commonwealth* (1976) 136 CLR 1, 17-18 (Mason J).

61 See *Davis v Commonwealth* (1988) 166 CLR 79, 110 (Brennan J).

62 [2007] FCA 299 [77].

foreclose, at this pleading stage, the arguments sought to be advanced in the present case'.[63]

While the procedural context of this decision means that no ratio findings of international law were made, several of the propositions advanced by both parties touched upon international law and were deemed at least arguable by the Court. First, the Act of State doctrine was discussed at length by Tamberlin J. Although the doctrine was framed in terms of domestic legal principles of non-justiciability, special attention was devoted to decisions which emphasised the role of international law in the courts of one State declaring a lack of jurisdiction over the sovereign actions of another State. In particular, the dictum in *Kuwait Airways Corporation v Iraqi Airways Company*[64] was noted:

> In appropriate circumstances it is legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law... Nor does the 'non-justiciable' principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one State against another when the breach is plain and, indeed, acknowledged. In such a case the adjudication problems confronting the English court in the *Buttes* litigation do not arise. The standard being applied by the court is clear and manageable, and the outcome is not in doubt.

In the context of Mr Hicks' claim, the standard which was said to be breached was the minimum trial rights guaranteed to accused persons both in international law, through the Convention (III) relative to the Treatment of Prisoners of War,[65] and in the domestic law of the United States and Australia. Indeed, this first matter of international legal principle, though not determinative of Mr Hicks' claim, permeated through the Court's decision due to its connection to the justiciability of a claim as a whole. The second emergence of international legal principle was in connection with Mr Hicks' argument that some type of reciprocal duty of allegiance and protection existed between State and citizen, which finds particularised expression in section 61 of the Constitution. Although attention in this respect was given to domestic decisions which were said to support the existence of such counterpart duties,[66] Tamberlin J noted the existence of international legal scholarship on this point.[67] Finally, in respect of Mr Hicks' claim for habeas corpus, Tamberlin J noted the argument that illegality of detention may be shown on the basis of international legal principles,[68] although at this stage of the proceedings such proof was not necessary to demonstrate that the claim was at least arguable and should not be summarily struck out.[69]

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63 Ibid [93].
64 [2002] 2 AC 883, 1080–1.
65 [1958] ATS 21.
66 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 198; *Joyce v Director of Public Prosecutions* [1946] AC 347, 371.
67 [2007] FCA 299 [62].
68 Ibid [81].
69 See generally, Justice B Tamberlin and L Bastin, 'David Hicks in Australian Courts: Past and future legal issues' (2008) 82 *Australian Law Journal* 774.

Slavery — allegation of possession of slaves in the sex industry — conviction — whether ss 270.1 and 270.3 of Criminal Code Act 1995 (Cth) constitutionally valid — whether definition of 'slavery' in domestic and international law uncertain

R v Tang
(2007) 16 VR 454; (2007) 212 FLR 145; [2007] VSCA 143
Victorian Court of Appeal
Maxwell P, Buchanan and Eames JJA

Wei Tang was convicted under sections 270.1 and 270.3 of the Criminal Code Act 1995 (Cth) of possessing and using as slaves five women of Thai extraction who had immigrated to Australia to work in the sex industry, and who had voluntarily entered into an agreement with Ms Tang so that they incurred a debt of at least $40,000, which they then paid off through the provision of sexual services. The Victorian Court of Appeal in this decision heard Ms Tang's appeal against conviction and sentence.

Ms Tang's appeal contained the following submissions: (a) that sections 270.1 and 270.3 of Criminal Code were beyond the constitutional power of the Commonwealth, and were not supported by the external affairs power in section 51(xxix) of the Constitution, and that the wording of sections 270.1 and 270.3 of Criminal Code went beyond the express wording of the Convention to Suppress the Slave Trade and Slavery 1926,[70] which the Code was seeking to implement; (b) that, even if the Code was within constitutional power, its application is confined only to when the accused is the 'owner' of the slave, as distinct from someone who exercises some degree of power of another person; (c) that the definition of 'slavery' in section 270.1 of the Code was uncertain, thus meaning the trial had miscarried; and (d) that the jury had been misdirected as to the relevant mental element of the crime charged.

The Court of Appeal rejected the first three submissions,[71] but allowed the appeal on the last[72] on the basis that the trial judge had not given accurate directions as to the mental element of the crime of possessing a slave, namely, that the accused was intentionally exercising powers that an owner would exercise over property, and was so exercising aware of the fact that the victim had been reduced to a condition where he or she was in fact no more than mere property. In rejecting the first three arguments, the Court held that: (a) sections 270.1 and 270.3 of Criminal Code were supported by the external affairs power of the Constitution because they were reasonably appropriate and adapted to implementing the Convention;[73] (b) that the Code was not confined in its applicability only to accused persons who were 'owners' of the slave, but can be read more broadly

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70 [1927] ATS 11.
71 [2007] VSCA 143 [41], [49], [77].
72 Ibid [145].
73 Ibid [41].

without going beyond the Commonwealth's constitutional remit;[74] and (c) that the slavery provision in section 270.1 of the Code is not uncertain, and that proof of the offence does not therefore necessarily entail a miscarriage of the trial.

The Court of Appeal interpreted the Convention in its reasoning, in particular to understand whether its scope *ratione materiae* extended beyond chattel slavery. The Court of Appeal also investigated to what extent the scope *ratione materiae* of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956[75] covered conditions where the victim was bound by debt bondage or contract. In its investigation, the Court of Appeal drew on the principles of treaty interpretation set out in Articles 31 and 32 of the Vienna Convention of the Law of Treaties 1969.[76] While the Court of Appeal refrained from articulating a finding of law as to where precisely the scope *ratione materiae* of these treaties lies in international law,[77] it did hold that the definition of slavery in the Code was similar enough to the Convention to be considered reasonably appropriate and adapted to implementing it.

Persons detained by the Commonwealth offshore on Nauru — whether Migration Act 1958 (Cth) constitutionally valid under the aliens and naturalisation, the immigration and emigration or the external affairs powers

Plaintiff P1/2003 v Ruddock
(2007) 157 FCR 518; [2007] FCA 65
Federal Court of Australia
Nicholson J

The plaintiff was an Afghani national who sought refugee status in Australia. He was detained in various detention facilities, including, for the majority of the time, a facility in Nauru. He commenced proceedings in the High Court of Australia, advancing several arguments concerning his treatment in detention. The matter was remitted to the Federal Court of Australia, and the plaintiff applied to amend his statement of claim. That application was resisted by the respondent Minister as obviously futile. This decision of Nicholson J held that the application was not obviously futile and thus should be allowed.

The arguments which the plaintiff advanced and which were held by the Court not to be obviously futile related in most part to the constitutional validity of sections 198A and 198B of the Migration Act 1958 (Cth). The combined effect of those provisions is to empower the Minister to remove an offshore entry person to a specified third country or to Australia, even by force if necessary. The plaintiff challenged the validity of those provisions by reference to the aliens and naturalisation power, the immigration and emigration power and the external affairs power in section 51 of the Constitution.

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74 Ibid [49].
75 [1958] ATS 3.
76 [1974] ATS 2.
77 [2007] VSCA 143 [38].

Although the Court doubted the efficacy of the plaintiff's submissions, it held that his proposed argument as to the scope of the aliens and naturalisation power and the immigration and emigration power was not obviously futile;[78] that he was not precluded by existing law from arguing that section 198A of the Act was disproportionate to the attainment of the aliens and naturalisation power; and that the argument that the Act was limited by the Immigration (Guardianship of Children) Act 1946 (Cth) was not obviously futile.[79] The Court did, however, hold that the plaintiff's proposed argument that sections 198A and 198B of the Act were not constitutionally supported by the external affairs power was bound to fail in the Federal Court, although it might succeed in the High Court if a retreat from the principle in *Polyukhovich v Commonwealth*[80] was endorsed by that Court.

Although international legal principle did not play a decisive role in this decision, international law was relevant to it in two ways. The first was that the source of the right which the plaintiff invoked was ultimately the Convention on the Rights of the Child 1989.[81] The Court held[82] that this source was sufficiently clearly identified in the pleadings of the plaintiff, and underpinned the at least arguable claim that the provisions of the Migration Act were restricted by the provision of the Immigration Act. Secondly, international concerns backgrounded the discussion of the external affairs power. In particular, the Court treated the *Polyukhovich* principle that an enactment is constitutionally valid pursuant to the external affairs power if it is merely geographically external to Australia (and irrespective of whether or not it has any other connection with Australia) as the governing principle in this area of law, despite the existence (and even growth) of some minority, dissenting or obiter statements which might evidence a retreat from that position.

Order by Parliamentary Secretary to the Treasurer that foreign national dispose of interest in Australian property — whether law supported by external affairs power — meaning of geographically external to Australia — whether procedural fairness afforded

Wight v Pearce
(2007) 157 FCR 485; [2007] FCA 26
Federal Court of Australia
Besanko J

Pursuant to sections 4(6) and 21A(4) of the Foreign Acquisitions and Takeovers Act 1975 (Cth), the Parliamentary Secretary to the Treasurer ordered Marie Wight to dispose of her interest in a property in South Australia. Section 21A(4) in effect provided that where a foreign person acquired an interest in Australian land and the Treasurer was satisfied that the acquisition was contrary to national interest, the

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78 [2007] FCA 65 [26], [41].
79 Ibid [52].
80 (1991) 172 CLR 501.
81 [1991] ATS 4.
82 [2007] FCA 65 [85].

Treasurer could direct the foreign person to dispose of that interest (assuming none of the other statutory limitations, such as prior approval in section 25, did not apply). Section 4(6) extended the meaning of "foreign person" to include a natural person not ordinarily resident in Australia. When this power was exercised in relation to Ms Wight, she challenged the constitutional validity of sections 4(6) and 21A(4) of the Act, and claimed that she had been denied procedural fairness in the Treasurer's making of the divestiture order.

Although the Court found[83] in favour of Ms Wight's claim that she had been denied procedural fairness in respect of the Treasurer's decision to make the divestiture order because the Treasurer did not provide notice to her that alleged visa violations might be taken into account and because the Treasurer failed to invite her to comment of those alleged violations, with the result that the decision to make the divestiture order was set aside, the Court rejected all of Ms Wight's other arguments. The Court found that section 21A, as expanded by section 4(6), was a valid law on the basis of the external affairs power, and that the limitation of the Act's scope *ratione personae* to conduct within Australia did not necessarily mean that it could not be supported by that head of federal power.[84] In addition, the Court held that so much of sections 21A and 4(6) that applied to non-citizens is constitutionally valid on the basis of the aliens and naturalisation power,[85] and that those provisions were not a law with respect to the acquisition of property on just terms under section 51(xix) of the Constitution.[86]

Although principles of public or private international law did not underlie the key findings of law in this case, the treatment of the external affairs power in the Constitution was influenced by a broad understanding of the relationship which Australia shares with the international community. By finding that section 51(xxix) of the Constitution can render constitutionally valid a law which only operates once certain conduct entirely internal to Australia is satisfied, the Court interpreted the requirement of externality (as set out in *Polyukhovich v Commonwealth*[87]) liberally, so that, even if a person who is not ordinarily resident in Australia according to the meaning of section 4(6) of the Act in this case, returns often to Australia, the matter is still one which is 'outside the geographical limits of Australia'.[88]

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83 [2007] FCA 26 [112].
84 Ibid [43].
85 Ibid [48].
86 Ibid [60].
87 (1991) 172 CLR 501.
88 [2007] FCA 26 [40].

Terrorism — interim control order — whether an impermissible exercise of federal judicial power — relevance of international human rights law

Thomas v Mowbray
(2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33
High Court of Australia
Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ

Joseph Thomas, having confessed to training with the terrorist organisation, Al Qa'ida, in Afghanistan, was convicted of intentionally receiving funds from a terrorist organisation and of possessing a false Australian passport. Those convictions were quashed and, before a retrial was ordered, the Australian Federal Police applied for, and Mowbray FM granted, an interim control order pursuant to section 104.4 of the Criminal Code Act 1995 (Cth). Mr Thomas commenced proceedings in the High Court of Australia seeking to quash the decision of Mowbray FM to grant the interim control order. He argued that Division 104 of the Criminal Code was constitutionally invalid because it conferred on a federal court a non-judicial power, authorised the exercise of judicial power not in conformity with Chapter III of the Constitution, and was not supported by a legislative head of power under the Constitution. The Commonwealth rejected these arguments, and claimed the provisions were supported by the defence power, the external affairs power, the reference power, the nationhood power and the incidental power.

The majority of the Court held that the defence power was not limited to defence against the aggression of a foreign nation or external threat, and could support measures designed to resist a threat such as the one posed by Mr Thomas. It was further held that either terrorism transcends national borders and acts of terrorism in Australia can affect its relations with other countries, meaning that Division 104 of the Code is supported by section 51(xxix) of the Constitution, or that the defence power could be relied upon to support the legislation. The majority did not rely on the defence power or held that it did not support the impugned legislation because a state could not renounce future legislative capacity by a reference to a majority decision of the other states. Given these findings of law, the majority did not express any substantial opinion on whether Division 104 of the Code was also supported by the nationhood or incidental powers. In addition, the majority dismissed Mr Thomas' submissions that Division 104 of the Criminal Code was invalid due to a conferral on a federal court of a non-judicial power contrary to Chapter III of the Constitution, observing that: the standard of 'reasonably necessary, and reasonably appropriate and adapted' in section 104.4(1)(d) was well-established in judicial usage and not repugnant to the exercise of judicial functions under the Constitution; [89] that the impugned legislation did not authorise the exercise of judicial power contrary to Chapter III since there was nothing in the nature of 'the threat of terrorism, or the matters of

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89 [2007] HCA 33 [27] per Gleeson CJ, [95]-[103] per Gummow and Crennan JJ, [651] per Heydon J[598]–[599] per Callinan J.

inference or predication involved in considering terrorist threats and control orders, that renders this subject non-justiciable or in some other way unsuited to be a subject of judicial review',[90] and since the courts which issue control orders do not act as mere instruments of government policy-making, but act with usual judicial power.[91]

Although the Commonwealth's arguments raised issues connected with Australia's international relations, principles of public international law were not central to the determination of this case. Nonetheless the Court offered some passing comments about international law. In particular, Kirby J, dissenting, stated that 'Australian legislation is not ordinarily taken to invade fundamental common law rights or to contravene the international law of human rights, absent a clear indication that this is the relevant legislative purpose.'[92] In addition, Kirby J stated that even though certain international law principles have not been incorporated into Australian federal law, this:

> does not mean that the principles are irrelevant to the functions of the courts. An Australian statute must be interpreted and applied, as far as its language admits, so as not to be inconsistent with established rules of international law. This Court will also refuse to uphold legislation that abrogates fundamental rights, recognised by civilised countries, unless the purpose of the legislature is clear, evidenced by unambiguous and unmistakable language.[93]

Justice Kirby went on to hold that since 'Div 104 of the Code directly encroaches upon rights and freedoms belonging to all people both by the common law of Australia and under international law', it was constitutionally invalid.[94]

Agreement to arbitration of disputes — whether or not such agreement reached by the parties through exchange of emails rather than written agreement — relationship between the International Arbitration Act 1974 (Cth) and the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958

APC Logistics Pty Ltd v CJ Nutracon Pty Ltd
[2007] FCA 136
Federal Court of Australia
Kiefel J

Several of the parties to proceedings before the Federal Court of Australia applied for a stay of those proceedings until the parties conducted an arbitration in respect of the dispute between them, pursuant to an arbitration agreement which the parties maintained was in place as between all the parties. The key issue in the case was whether an arbitration agreement existed as between all the parties, since any agreement would have, at best, emerged through the exchange of emails. The

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90 Ibid [28].
91 Ibid [30].
92 Ibid [208].
93 Ibid [380].
94 Ibid [208].

Court, applying *Pan Australian Shipping Pty Ltd v The Ship Commandate (No 2)*,[95] held[96] that the International Arbitration Act 1974 (Cth) 'does not require that the contract be formed by exchange of letters. Conduct might suffice. What is required is that the terms of the agreement and assent to those terms are in exchanged documents'. Upon inspection of the evidence in the case, the Court held that no such agreement had been reached by the parties, and so no agreement to arbitrate the dispute was in place. Therefore, section 7 of the Act did not compulsorily require that the proceedings be stayed until arbitration occurred.

Of significance from the perspective of international law was the recognition in this case of the relationship between the 1974 Act and the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958. [97] Although the decision was made on the basis of the Act, the crucial requirement that the assent to be bound by an arbitration agreement be expressed in exchanged documents stems from the treaty. While the requirements in the Act and common law are not as strict as those in the treaty and its associated documents – for example, the latter demands that an arbitration agreement be in writing, while the former accepts that conduct can evince assent – the need for agreement to refer disputes to arbitration before domestic dispute settlement is a matter primarily laid out in the international instruments, and subsequently implemented by the domestic enactment.

Extradition — surrender decision by foreign court — conduct of foreign proceedings — claim of bad faith or improper purpose — principle of non-adjudication — comity

Mokbel v Attorney-General (Cth)
(2007) 162 FCR 278; (2007) 244 ALR 517; [2007] FCA 1536
Federal Court of Australia
Gordon J

The applicant, an Australian citizen, was arrested in the Hellenic Republic on 5 June 2007, and his return to Australia was sought pursuant to a Request made on 21 June 2007. On 24 July 2007, a hearing in relation to the Request commenced before the Council of Appeals Court of Athens. At the conclusion of argument that day, the Court reserved its decision until 10am on 26 July 2007, at which time the Court ordered the surrender of the applicant to Australia. One basis upon which the applicant sought to impugn the Request was that certain email communications had been sent by the Australian Embassy in Athens to the Court while the matter was reserved for decision, with the intention of influencing the outcome of proceedings in Greece. The application was dismissed.

Justice Gordon held that the applicant's contentions were not supported by the facts. In addition, her Honour held that:

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95 [2006] FCA 1112.
96 [2007] FCA 136 [4].
97 [1975] ATS 25.

> …for an Australian Court to comment on, or intervene in, the manner in which the Greek Ministry of Justice Official dealt with the First Email, or for that matter, how the Athens Court of Appeals conducted the Request hearing, would run directly counter to fundamental principles of public international law.
>
> The courts of one country will not sit in judgment on the acts of the government of another done within its own territory. This principle of non-adjudication is consistent with the international rule of comity which refers to the respect or courtesy accorded by a country to the laws and institutions of another.[98]

In that regard, her Honour referred to the statement of principle by Fuller CJ in *Underhill v Hernandez*,[99] which has been repeated with approval by the High Court in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd*,[100] the House of Lords in *Buttes Gas v Hammer*,[101] and the Supreme Court of the United States in *Banco Nacional de Cuba v Sabbatino*.[102] In addition, her Honour adopted the observation of French J in *Cabal v United Mexican States (No 3)*,[103] that 'the general functioning of the judicial system of an extradition country is not a matter for this court.'

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98 [2007] FCA 1536 [58]-[59].
99 (1897) 168 US 250, 252.
100 (1988) 165 CLR 30, 40–1.
101 [1982] AC 888, 933.
102 (1964) 376 US 398, 416.
103 186 ALR 188 [104].