Cases before Australian Courts and Tribunals Involving Questions of Public International Law 2008

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Family law and child welfare — adoption — application for orders — dispensing with consent

In The Matter of an Adoption of D
[2008] ACTSC 44; 39 Fam LR 345
Supreme Court of the ACT
Refshauge J

The applicant in this case applied to adopt a child who had been born to the applicant's life partner and another man who no longer had contact with either the mother or the child. The applicant had formed a strong and loving relationship with the birth mother and the child and had accepted financial responsibility for supporting the child. In applying to adopt the child, the applicant requested an order dispensing with the requirement of the birth father's consent pursuant to section 35(1) of the Adoption Act 1993 (ACT) (the Act).

In granting the application, Refshauge J noted that to make an order for adoption and sever the family ties with a child's parent is an interference of a very serious order, and that such a step must be supported by sufficiently sound and weighty considerations in the interests of the child.[1] In support of this proposition, Refshauge J referred to section 11 of the Human Rights Act 2004 (ACT) which amounts to a right to family life, as well as Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms which provides a right to respect for privacy and family life.[2] Justice Refshauge went on to note that this cautious approach does not, however, mean that adoption is

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1 [2008] ACTSC 44 [6].

2 213 UNTS 222.

inconsistent with the rights of children to have respected the right to protection including the protection of the family.[3] In relation to this proposition Refshauge J referred to the United Nations Human Rights Committee General Comment No 17 on Article 24 of the International Covenant on Civil and Political Rights (ICCPR) [4] which stated that:

> in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be separated from his (sic) family when circumstances so require.

Justice Refshauge also referred to Article 21 of the 1989 United Nations Convention on the Rights of the Child[5] which recognises that adoption is a means for appropriate protection of children in proper circumstances.

It was held that the child's birth father had clearly failed, without reasonable excuse, for not less than a year to discharge the obligations of a parent of the child, thus satisfying section 35(1)(d) of the Adoption Act and thus Refshauge J made the requested order to dispense with the birth father's consent.

Foreign state immunity — whether exception in civil proceedings in respect of torture by foreign government official

Zhang v Zemin & Ors
[2008] NSWSC 1296
Supreme Court of New South Wales
Latham J

The plaintiff commenced proceedings against the former President of the Peoples Republic of China and other Chinese defendants claiming damages for acts of torture and other human rights abuses allegedly suffered while the plaintiff was in China between 1999 and 2000. The statement of claim was served through diplomatic channels pursuant to section 24 of the Foreign States Immunities Act 1985 (Cth) (the Act). As there was no response to the originating process the plaintiff sought default judgment, at which time the Commonwealth Attorney-General filed a Notice of Motion seeking leave to intervene for the purposes of asserting the immunity of the defendants from the jurisdiction of the Court under the Act.

The Minister for Foreign Affairs issued a certificate pursuant to section 40(1)(c) of the Act to the effect that the first defendant was the President of China, the second defendant (the Falun Gong Control Office) an organ of the Chinese government, and the third defendant (Luo Gan, a high-ranking member of the Communist Party of China) was a member of several committees of the Communist Party of China and of the Chinese government. The Minister further certified that

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3 [2008] ACTSC 44 [8].

4 [1980] ATS 23.

5 [1991] ATS 4.

the defendants were all part of the government of a foreign state within the meaning of the Act at the time of the wrongs alleged to have been committed.

Justice Latham observed that under section 9 of the Act a foreign state is granted immunity from the jurisdiction of the courts of Australia in a civil proceeding. By operation of section 3(3), a foreign state includes the head of a foreign state, or of a political subdivision of a foreign state, in his or her public capacity and includes the executive government or part of the executive government of a foreign state. As a consequence, sections 9 and 3(3) confer immunity upon the defendants because of the effect of the section 40 certificate which constitutes conclusive evidence of the status of the defendants as officials of the Chinese government. Section 27 of the Act, which provides that a default judgment shall not be entered unless the Court is satisfied that the foreign state is not immune, does not allow the Court any discretion when deciding if the servants or agents of a foreign state are immune. The section contemplates that the foreign state is immune, unless there is a feature of the defendants that leads to the opposite conclusion.

The principles in the Act are consistent with the international law of foreign state immunity. Justice Latham emphasised that that immunity 'promotes comity and good relations through mutual respect for State sovereignty'.[6] It is an immunity that extends to members of the foreign government through which the foreign state acts. Both Australia and China are parties to the Convention Against Torture,[7] which defines torture in Article 1 to be an act 'at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.' According to Latham J an act of torture is by definition 'an act committed by a public official or a person acting in an official capacity.'[8] There was nothing in the plaintiff's statement of claim that established that the alleged acts of the defendants were not carried out in an official capacity.

The plaintiff contended that there is an exception to foreign state immunity for civil proceedings alleging acts of torture committed in a foreign state. Citing *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*,[9] *Al Adsani v United Kingdom*,[10] and *Bouzari v Islamic Republic of Iran*,[11] Latham J held that there is no such exception. Justice Latham made orders granting leave to the Attorney-General to appear as intervenor, and a declaration that the defendants are immune from the jurisdiction of the Court.

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6 [2008] NSWSC 1296 [22].

7 [1989] ATS 21.

8 [2008] NSWSC 1296 [27].

9 [2006] 2 WLR 1424.

10 (2002) 34 EHRR 273.

11 (2002) 124 ILR 428.

Foreign state immunity – whether exception in civil proceedings in respect of torture by foreign government official

Pan v Bo
[2008] NSWSC 961
Supreme Court of New South Wales
McCallum J

The plaintiff was a Falun Gong practitioner from the People's Republic of China who alleged that he was tortured in China in 2000 because of his beliefs. In 2001 the plaintiff came to Australia and subsequently became an Australian citizen. He commenced proceedings against the Chinese Minister of Commerce seeking damages for wrongful arrest, battery and false imprisonment. The defendant was part of a Chinese delegation that visited Australia in 2007, during which time the plaintiff served the statement of claim on the defendant personally in Canberra. Default judgment was subsequently entered in the plaintiff's favour. The Commonwealth Attorney-General sought leave to intervene in the proceedings, and an order from the Court that judgment be set aside because the defendant is entitled to immunity under the Foreign States Immunities Act 1985 (Cth) (the Act).

Justice McCallum adopted the reasoning of Simpson J in *Yan Xie v Chen Shaoji,*[12] which considered the appropriateness of intervention by the Attorney-General in a similar case brought by Falun Gong practitioners against Chinese government officials. Justice Simpson had observed in her reasons that leave to intervene may be granted in circumstances where it will assist the court in reaching a correct determination, such as where one party has not appeared and presented argument. Justice Simpson considered the special capacity of the Commonwealth to assist the court on matters relating to the sovereignty of foreign states, and held that the case was one in which the prerogatives of government are engaged, which permitted the Attorney-General to intervene either by right or by leave. Justice McCallum found that the same considerations applied in this case.

On the issue of foreign state immunity, McCallum J referred to two executive certificates issued by the Commonwealth under section 40(1) of the Act detailing the roles held by the defendant in the Chinese government at the relevant times. Justice McCallum held that these established conclusively that the defendant is to be taken to be a foreign state for the purposes of the Act. It was further held by McCallum J that the service on the defendant was effected in accordance with Part III the Act, which required service to be through agreement or through diplomatic channels. Service otherwise than through these methods is made ineffective by section 25. In addition, section 27 provides that judgment in default of appearance is not to be entered unless it is established that service was made in accordance with the Act, and that the court is satisfied that the foreign state is not immune. These requirements were not met in this case, and default judgment was entered contrary to the Act. The plaintiff contended that only China, as the relevant foreign state, could move to have the judgment set aside. Justice McCallum rejected that

12 [2008] NSWCA 224.

submission, concluding that as the irregularity had been drawn to the attention of the Court it was appropriate for the Court to exercise its discretion in setting aside the judgment.

The plaintiff also submitted that setting aside the judgment would be contrary to Australia's obligations under the Convention Against Torture.[13] Justice McCallum observed that a competing consideration is that the plaintiff obtained the default judgment after failing to draw the Court's attention to the provisions of the Act and that it is more appropriate for the Commonwealth Attorney-General than the Court to make judgments about issues concerning Australia's sovereignty and its relations with foreign states.

Foreign state immunity — incumbent head of state immunity in respect of property

Thor Shipping A/S v The Ship 'Al Duhail'
[2008] FCA 1842
Federal Court of Australia
Dowsett J

The plaintiff owned the vessel 'Southern Pearl NZ' which was chartered by Amiri Yachts of Doha, Qatar, to ship the 'Al Dulhail', a sports fishing vessel, from Auckland to the Seychelles. Amiri Yachts was the charterer as agent for His Highness Sheikh Hamad Bin Khalifia Al Thani, the Amir of Qatar and the head of state of the State of Qatar. The plaintiff commenced proceedings against the Al Dulhail seeking damages for breach of the charterparty. The Amir appeared in the proceedings under protest, and applied for release of the ship on several grounds, including that he had immunity from suit and execution.

Justice Dowsett noted that the extent to which a foreign state enjoys immunity from the jurisdiction of Australian courts is determined by the Foreign States Immunities Act 1985 (Cth) (the Act) and the Diplomatic Privileges and Immunities Act 1967 (Cth). The approach taken in Australia on head of state immunity is based upon that taken in the United Kingdom, and the practical effect of the Act is virtually identical to that of State Immunity Act 1978 (UK). Under the Act a head of a foreign state in his or her public capacity generally enjoys the same immunity as does a foreign state. Section 35 addresses the immunity enjoyed by foreign heads of state in their private capacity, which extends the Diplomatic Privileges and Immunities Act to foreign heads of states with such modifications as are necessary. None of the exceptions contained in the 1961 Vienna Convention on Diplomatic Relations (VCDR),[14] the relevant provisions of which are implemented in Australia by the Diplomatic Privileges and Immunities Act, apply in this case. The only exception that might apply is that in Article 31(1)(c) of the VCDR, which exempts from immunity actions relating to any professional or commercial activity in the receiving state outside official functions. The Amir had not been involved in

13 [1989] ATS 21.

14 [1974] ATS 2.

any professional or commercial activity in Australia (there was no suggestion that he had ever entered Australia).

The plaintiff sought to rely on Article 39 of the VCDR, which provides that persons entitled to privileges and immunities enjoy them from the moment the person enters the territory of the receiving state until the time that the person's official functions end, and the person leaves the country. Justice Dowsett held that the plaintiff's characterisation of Article 39 as a geographical limitation was erroneous. The geographical references reflected the nature of the diplomatic agent's duties that normally require the agent to be in the receiving state to perform them. The immunity however applies while the agent is in his or her post, regardless of the location. That degree of immunity must also extend to heads of state by operation of section 36 of the Act. That immunity applies to a serving head of state in his or her public or private capacity. As such the Amir was found to enjoy immunity from civil suit in Australia, subject to exceptions none of which were applicable in this case.

Human rights — racial discrimination

Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury
[2008] QSC 305
Supreme Court of Queensland
Jones J

Aurukun Shire Council and Kowanyama Aboriginal Shire Council (the applicants) argued that a 2008 amendment to section 106(4) of the Liquor Act 1992 (Qld) (the Act) was invalid on the basis that it was inconsistent with section 10 of the Racial Discrimination Act 1975 (Cth) (RDA) and its adoption of the International Convention on the Elimination of all Forms of Racial Discrimination.[15] The amendment provided that local government entities could no longer hold a general liquor license. While the amendment was of general application, the reality was that the only local government entities holding general licenses were Aboriginal Councils such as Aurukun Shire Council which controlled the Three Rivers Tavern, the only place where alcohol may be legally sold within the Aurukun Aboriginal Community.

Section 10 of the RDA provides that where a Commonwealth or state law limits the enjoyment of a particular right for persons of a particular race, these persons shall enjoy that right to the same extent as persons of other races.[16] The rights protected by section 10 include a reference to a right of a kind referred to in Article 5 of the Convention.[17] The plaintiffs relied upon three specific articles in the Convention: Article 5(d)(ix) (right to freedom of peaceful assembly and association), Article 5(e)(vi) (right to equal participation in cultural activities), and

15 [1975] ATS 40.

16 Racial Discrimination Act 1975 (Cth) s 10(1).

17 Racial Discrimination Act 1975 (Cth) s10(2).

Article 5(f) (right of access to any place or service intended for use by the general public).

It was acknowledged that section 10 is directed at the practical operation and effect of legislation.[18] It was therefore not necessary for the Act to make a distinction based on race or have a discriminatory purpose. Nonetheless, Jones J found against the applicants. The Tavern was frequented by Aboriginal and non-Aboriginal people making the prohibition a blanket prohibition which 'does not result in persons of a particular race not being able to enjoy a right that is enjoyed by persons of another race'.[19]

In addition, Jones J was not convinced that the amendment infringed the Convention rights relied upon by the plaintiffs.[20] Justice Jones noted that in *Gerhardy v Brown* it was held that article 5 of the Convention is not a comprehensive statement of the rights protected by the RDA, but that these rights extend beyond those listed and include 'human rights and fundamental freedoms with which the Convention is concerned'.[21] The precise content of these rights and freedoms are not established in the Convention. Despite this, Jones J held that neither the terms of the amendment or the facts gave rise to any inconsistency with the RDA.

Human rights — racial discrimination — Aboriginal and Torres Strait Islanders — property rights — civil and political rights

Bropho on behalf of the Members of the Swan Valley Nyungah Community Aboriginal Corporation and Aboriginal Inhabitants of Reserve 43131 v Western Australia and Others
[2008] FCAFC 100; 249 ALR 121
Federal Court of Australia
Ryan, Moore and Tamberlin JJ

The appellant, Bella Bropho, was a former resident of Reserve 43131, and a member of the Swan Valley Nyungah Community Aboriginal Corporation (the SVC). The SVC had effective control over the reserve until the enactment of the Reserves (Reserve 43131) Act 2003 (WA), which came into effect on 12 June 2003 and placed the care, management and control of the reserve with the Aboriginal Affairs Planning Authority. The Act was a response to concerns about the safety of women and children on the reserve. Ms Bropho brought proceedings in the Federal Court, claiming that the Reserves Act and the conduct of the administrator pursuant to it were in contravention of the Racial Discrimination Act 1975 (Cth). Her claim was dismissed and she appealed to the Full Federal Court.

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18 *Western Australia v Ward* (2002) 213 CLR 1, 103 per Gleeson CJ, Guadron, Gummow and Hayne JJ.

19 [2008] QSC 305 [25].

20 [2008] QSC 305 [26].

21 *Gerhardy v Brown* (1985) 159 CLR 70, 101 per Mason J.

The appellant relied primarily on sections 9, 10 and 12 of the Racial Discrimination Act. Sections 9 and 12 prohibit acts of racial discrimination. Section 10 concerns equality before the law. Both sections 9 and 10 make explicit reference to Article 5 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination.[22] Article 5(d)(v) requires states to guarantee, without distinction as to race, '[t]he right to own property alone as well as in association with others'.

The Court held that section 9 was inapplicable to Acts of Parliament, including the Reserves Act.[23] Furthermore, it was stated that:

> the act of the administrator ... was not taken by reference to the appellant's race. It was taken by reference to her (and others) as a member of a dysfunctional community in which the young had been, and continued to be, at risk of serious harm.[24]

This 'provide[d] a complete answer' to the case founded on sections 9 and 12.[25]

In considering section 10, the Court discussed what constituted property rights for the purposes of Article 5. In doing so, it looked to the jurisprudence of the Inter-American Court of Human Rights,[26] and determined that:

> there is no textual foundation in either the [Racial Discrimination] Act or [the International Convention on the Elimination of All Forms of Racial Discrimination] for concluding that rights to property must be understood as ownership of a kind analogous to forms of property which have been inherited and adapted from the English system of property law or conferred by statute.[27]

Nevertheless, the Court found that although 'there is no basis for distinguishing between different species of ownership of property, no property right, regardless of its source or genesis, is absolute in nature,' and that 'all rights in a democratic society must be balanced against other competing rights and values'.[28] In this case, the interference with property rights was 'effected in accordance with a legitimate public interest ... to protect the safety and welfare of inhabitants at Reserve 43131'.[29] The appeal was dismissed.

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22 [1975] ATS 40.

23 249 ALR 121 [67].

24 Ibid [71].

25 Ibid [72].

26 Ibid [79].

27 Ibid [78].

28 Ibid [83], [81].

29 Ibid [83].

Human rights — freedom of religion

Evans and Another v New South Wales
(2008) 168 FCR 576; [2008] FCAFC 130
Federal Court of Australia
French, Branson and Stone JJ

This case concerned a challenge to the validity of the World Youth Day Act 2006 (NSW) and Regulations on the basis that they were *ultra vires* and/or acted to infringe the implied freedom of political speech. In 2008 World Youth Day was held in Sydney. Thousands of people from around the world travelled to the city to participate and to see His Holiness Pope Benedict XVI. The NSW government enacted the World Youth Day Act (the Act) and subsequent regulations were created (the Regulations)[30] to ensure the smooth running of the event. The event attracted a large number of protestors, including the two applicants. The applicants were concerned that the Act and Regulations would prohibit them carrying out planned protest activities. The particular sections and clauses of concern were those restricting any conduct that may cause annoyance or inconvenience to a World Youth Day participant[31] and those prohibiting the selling of certain prescribed articles, such as stationery, textiles and accessories.[32]

With one exception, it was held that the all of the impugned provisions of the Act and the Regulations did not impinge upon the applicants' implied freedom of political communication. The exception was clause 7(1)(b) of the Regulations which provided that an authorised person could direct a person within a World Youth Day declared area to cease engaging in conduct that caused annoyance or inconvenience to World Youth Day participants. The Court held that this clause was invalid to the extent that it applied to conduct which 'causes annoyance' but valid to the extent to which it applied to conduct which 'causes inconvenience', as the latter is a term which can reasonably be construed as limited to matters amenable to objective judgment.

The Court noted that it was necessary to acknowledge alongside the freedom of expression the freedom of religious belief and expression, recognised in section 116 of the Constitution, the Universal Declaration of Human Rights[33] and the ICCPR.[34] In regards to this freedom the Court restricted itself to mentioning that:

> No doubt conduct could validly be regulated which involves disruption of, or interference with, the free expression of religious beliefs by participants in WYD events.[35]

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30 World Youth Day Regulation 2008 (NSW).

31 Ibid, cl 7.

32 World Youth Day Act 2006 (NSW) s 46(3).

33 GA Res 217A (III) (10 December 1948).

34 [1980] ATS 23.

35 [2008] FCAFC 130 [80].

Ultimately the case was decided by reading down the Act and Regulations to ensure compatibility with the implied freedom of political expression and striking out those sections considered to impact such freedoms in a way not supported by the statutory power conferred by the Act.

Human rights — admissibility of evidence obtained through contravention of rights

Habib v Nationwide News Pty Limited
[2008] NSWSC 181
New South Wales Supreme Court
McClellan CJ at CL

The plaintiff, Mamdouh Habib, sued Nationwide News Pty Ltd for defamation in relation to an article printed in the *Daily Telegraph* on 15 February 2005, which claimed that Mr Habib 'knowingly made some false claims'[36] in relation to treatment during his arrest and detention in Pakistan, Egypt and Guantanamo Bay, Cuba. Nationwide News pleaded truth, stating that the plaintiff had made false claims.

Before considering the defence of truth, the Court first considered the issue of admissibility of the record of two interviews which the defendant claimed contained relevant admissions by the plaintiff. These interviews were conducted by Australian government officials when the plaintiff was detained in Pakistan and Guantanamo Bay. The plaintiff claimed that the admissions had been obtained in contravention of Article 9 of the 1966 International Covenant on Civil and Political Rights (ICCPR),[37] which states that no one shall be subject to arbitrary arrest or detention, and that anyone who is arrested shall be informed of any charges against them, and upon arrest shall promptly be brought before a judge to stand trial.

The plaintiff relied on section 138 of the Evidence Act 1995 (NSW). Section 138(1) provides that:

> Evidence that was obtained improperly or in contravention of Australian law, or in consequence of an impropriety or of a contravention of Australian law, is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

Section 138(3)(f) allows the Court to consider 'whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the [ICCPR].'

Issues concerning international law were raised in relation to the Guantanamo Bay interview. The plaintiff argued that section 138 of the Evidence Act rendered the evidence inadmissible as his detention was in breach of Article 9 of the ICCPR and therefore improper. The Court found that while the conditions in Guantanamo

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36 [2008] NSWSC 181 [3].

37 [1980] ATS 23.

Bay 'defied basic human rights' they did not 'influence the plaintiff to make the admissions relied on by the defendant. Nor was any admission obtained as a consequence of any improper conduct or contravention of an Australian law.'[38] In addition, McClellan CJ made the following comment:

> Even if I was satisfied for the purpose of s 138 that the admissions were obtained by some impropriety, questions of discretion would again arise. The evidence is highly probative of some of the issues which must be determined in these proceedings. I was given no evidence as to the justification for Mr Habib's detention. Difficult questions as to whether or not his detention was governed by Cuban law or the law of the United States may arise. Although not fully argued it would seem that a breach of Article 9 of the International Covenant on Civil and Political Rights occurred. However, in the absence of a finding of relevant impropriety these questions need not be determined.[39]

Human rights — racial discrimination — disability discrimination

Qantas Airways Ltd v Gama
(2008) 167 FCR 537; (2008) 101 ALD 459; (2008) 247 ALR 273; (2008) EOC ¶93–493; [2008] FCAFC 69
Federal Court of Australia
French, Branson and Jacobson JJ

The respondent, Mr Gama, was born in India and immigrated to Australia in 1982. He worked for Qantas from 1984 to 2002, when his employment was terminated on medical grounds. He had suffered a series of injuries in the course of his employment, for which he had made worker's compensation claims. On 18 July 2002, Mr Gama made a complaint to the Human Rights and Equal Opportunities Commission (HREOC) on the basis that he had suffered racial and disability discrimination in the course of his employment. The complaint was dismissed, and he made an application to the Federal Magistrates Court of Australia (the FMCA) to adjudicate on the matter. The FMCA found that some of the grounds of discrimination had been made out. Mr Gama was awarded $71,692.70 in damages and compensation.

One of the grounds of appeal before the Full Federal Court was that the FMCA erred in finding that a remark made in the workplace could constitute a contravention of section 9(1) of the Racial Discrimination Act 1975 (Cth). Section 9(1) makes unlawful any act:

> involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom...[40]

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38 [2008] NSWSC 181 [82].

39 [2008] NSWSC 181 [83].

40 Racial Discrimination Act 1975 (Cth) s 9(1).

It explicitly protects the rights referred to in Article 5 of the 1969 International Convention on the Elimination of All Forms of Racial Discrimination,[41] including Article 5(e)(i) which enumerates:

> The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration...

Justices French and Jacobson, with whom Branson J agreed, dismissed this ground of appeal. Their Honours stated that the issue before the Court was 'whether two or three racist remarks over a period of time' could have the effect of impairing a person's 'enjoyment of his or her right to work or to just and favourable conditions of work.'[42] Their Honours held that this was a question of fact, and that the judgment made by the magistrate was open to him on the facts.[43]

The appellant also argued that the FCMA had erred in finding that Mr Gama had suffered from discrimination on the grounds of disability. This ground of appeal was upheld. Justices French and Jacobson found that Mr Gama did not 'identify the relevant disability nor the particular way in which the remarks constituted less favourable treatment because of the disability.'[44] However, since the 'substance of the damages assessed does not turn upon any distinction between the findings in relation to racial discrimination and those in relation to disability discrimination', no alteration was made to the sum of damages awarded.[45] All other grounds of appeal and cross-appeal were dismissed.

Human rights — right to a fair trial — conditions of imprisonment

R v Benbrika (Ruling No 20)
(2008) 18 VR 410; (2008) 182 A Crim R 205; [2008] VSC 80
Supreme Court of Victoria
Bongiorno J

This matter involved twelve accused who were arrested between November 2005 and March 2006 and were standing trial in the Supreme Court of Victoria on terrorism related charges. The Commonwealth DPP had estimated that the trial, for which the jury had been empanelled from 4-8 February 2008, would last six to nine months. The accused applied for a stay of the trial on the grounds that the circumstances of their imprisonment in a maximum security prison 60km from central Melbourne and the manner of their transportation to and from court breached their right to a fair trial. The accused relied on the International Covenant on Civil and Political Rights[46] (ICCPR) in claiming a right to a fair trial.[47] Justice

41 [1975] ATS 40.
42 (2008) 167 FCR 537 [77].
43 Ibid [78].
44 Ibid [91].
45 Ibid [121].
46 [1980] ATS 23.

Bongiorno did not apply the ICCPR, because 'the law relating to the so-called right to a fair trial has been stated and developed by the High Court in a number of cases in recent times'.[48] Justice Bongiorno referred to the reasoning of Mason CJ and McHugh J in *Dietrich v R*,[49] who, he noted:

> drew upon international instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms as enshrining a basic minimum right of an accused in a criminal trial as the right to have adequate time and facilities for the preparation of his or her defence.[50]

Justice Bongiorno held that the accused were 'currently being subjected to an unfair trial because of the ... circumstances in which they [were] being incarcerated ... and the circumstances in which they [were] being transported to and from court',[51] but that 'no material disadvantage [had] yet accrued'. There was thus no need to recommence the trial. His Honour outlined the minimum alterations to the conditions of incarceration and travel that would be required to remove the unfairness.[52]

Human rights — equality before the law — right to fair hearing of criminal charges

Ragg v Magistrates' of Victoria & Corcoris
[2008] VSC 1
Supreme Court of Victoria
Bell J

Jarrod Ragg is an officer of the Australian Federal Police who brought charges of tax evasion against Nicholas Corcoris, a property developer in Melbourne. Mr Corcoris issued two witness summonses to Mr Ragg to produce documents to the Magistrates' Court. Mr Ragg applied for orders striking out most paragraphs of the summonses and the magistrate refused. In these proceedings Mr Ragg sought judicial review of that decision. The proceedings were brought before the commencement of the relevant provisions of the Charter of Human Rights and Responsibilities Act 2006 (Vic), which was 1 January 2008.

Justice Bell dismissed the application for judicial review. Justice Bell considered that international human rights were relevant in deciding whether the magistrate committed an error of law because they 'inform the scope and application of the court's power to strike out summonses to produce issued by, as well as the related duty of a prosecutor to disclose materials to, the defence in

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47 (2008) 18 VR 410 [15].

48 Ibid.

49 (1992) 177 CLR 292.

50 (2008) 18 VR 410 [89]; European Convention on Human Rights (4 November 1950), 213 UNTS 222, art 6(3)(b).

51 (2008) 18 VR 410 [91].

52 Ibid [100].

criminal cases'.[53] In this respect the relevant rights are those to equality and to a fair trial as set out in Article 14(1) and (3) of the International Covenant on Civil and Political Rights.[54] In assisting the court in criminal proceedings in ensuring that justice is done between the accused and the state, the prosecutor is required to disclose relevant documents.

In the course of his reasons, Justice Bell referred to his decision in *Tomasevic v Travaglini,*[55] in which the right to a fair trial was also relevant. He held in that case that international human rights may be relevant for the exercise of judicial powers and discretion, and made the following remarks:[56]

> Apart from the Charter, the ICCPR does not "operate as a direct source of individual rights and obligations" because it has not otherwise been incorporated into Australian law. But, like other international instruments to which Australia is a party, the ICCPR has an independent and ongoing legal significance in Australian and therefore Victorian domestic law, a significance which is not diminished, but can only be enhanced, by the enactment of the Charter.
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> What is that significance? Subject to certain limitations and to an evolving extent, the ICCPR, and … other [international] instruments, may at least inform the interpretation of statutes (so as to be consistent with and not to abrogate international obligations), the exercise of relevant statutory and judicial powers and discretions, the application and operation of the rules of natural justice, the development of the common law and judicial understanding of the value placed by contemporary society on fundamental human rights.

Human rights — *Charter of Human Rights and Responsibilities Act* 2006 (Vic) — presumption of innocence — whether applies only in criminal proceedings

Sabet v Medical Practitioners Board of Victoria
[2008] VSC 346
Supreme Court of Victoria
Hollingworth J

The Medical Practitioners Board of Victoria suspended the registration of Dr Ahmed Sabet as a medical practitioner due to allegations made against him by two female patients. Dr Sabet challenged the decision alleging, among other things, that the Board failed to comply with the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter) by failing to give proper consideration to the presumption of innocence afforded by section 25(1) of the Charter.

Section 38 of the Charter makes it unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. Justice Hollingworth observed that

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53 [2008] VSC 1 [35].

54 [1980] ATS 23.

55 [2007] VSC 337.

56 Ibid at [72] – [73] (footnotes omitted).

the intention of the Charter is not to create new causes of actions against public authorities, but rather to provide an alternative ground on which to seek relief or remedy where the person otherwise has a right to seek relief or remedy on the grounds that the public authority's decision was unlawful. Justice Hollingworth adopted the Solicitor-General's submission that three questions needed to be addressed in such cases. First, it must be determined whether a Charter right has been engaged. Secondly, it must be determined whether the public authority imposed any limitation on the right. Thirdly, it must be determined whether the limitation was reasonable and justified in the circumstances as provided in section 7(2) of the Charter.

Justice Hollingworth held that section 25 of the Charter is only intended to apply in criminal proceedings. Justice Hollingworth had regard to the law of other jurisdictions, including the United Kingdom, and international human rights law to support this conclusion. Even if section 25 was to be given a very broad interpretation, it would not embrace disciplinary proceedings in which no finding of guilt is to be reached. Even if the presumption applied in this case, the plaintiff failed to establish that the Board imposed any limitation on the presumption.

Human rights — right to a fair trial — freedom of expression

X v General Television Corp Pty Ltd
(2008) 187 A Crim R 533; [2008] VSC 344
Supreme Court of Victoria
Vickery J

The plaintiff, 'X', sought orders against General Television Corporation Pty Ltd prohibiting the publication, broadcasting or exhibition of the 'Underbelly' television programme until after the criminal trials of 'X' had been completed. X was charged with murder in relation to the death of Lewis Moran, and the Underbelly series was based on this incident and others in the so-called 'Gangland Wars' in Melbourne between 1995 and 2004. Central to the application was the effect that a foreshadowed broadcast of the program might have upon the trial of X. A key issue for resolution was the conflict between the right to fair trial and the right to freedom of expression in Articles 14 and 19 respectively of the 1966 International Covenant on Civil and Political Rights.[57] Article 14(1) provides for the right to a fair trial and the right to have the press or the public excluded from 'all or part of a trial to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

Justice Vickery found that the broadcasting of episode 6 of the Underbelly series prior to the trial of X on his murder charge would prejudice the trial of X and held that it would constitute a contempt of court. In the course of his judgment, Vickery J pointed out that the right of freedom of expression reflected in Article 19(2) of the ICCPR is not absolute, but rather subject to limitations which that Article itself recognises. Article 19(3) states that Article 19(2) may be subject to

57 [1980] ATS 23.

certain restrictions if they are 'provided by law and are necessary' to respect the rights or reputations of others, or for the protection of national security or of public order, health or morals. Justice Vickery summed up the case in the following terms:

> In this case there is a competing human right, that of the right of X to a fair trial. The right to a fair trial is central to a free and democratic society. I adopt the view of Richardson J in *Gisborne Herald Co Ltd v Solicitor-General*: The present rule is that, where on the conventional analysis freedom of expression and fair trial rights cannot be fully assured, it is appropriate in our free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial.[58]

Law of the sea — continental shelf — sedentary fisheries — Fisheries Management Act 1991 (Cth)

ACO and Others v The Queen
(2008) 220 FLR 159; [2008] NTSC 33
Supreme Court of the Northern Territory
Riley J

These proceedings arose from a challenge to the interpretation of sections 12, 100 and 101 of the Fisheries Management Act 1991 (Cth) (the Act). The applicants had been found in possession of fishing boats equipped for fishing Trepang, a marine animal also known as a 'sea cucumber' found on the ocean floor. When found, the boats were within the limits of the Australian Continental Shelf but outside the Australian Fishing Zone (the AFZ). The location was also within the Indonesian Exclusive Economic Zone (the EEZ). The applicants were charged under section 101 of the Act, which the respondents claimed made it an offence to be in possession of a boat equipped for fishing for sedentary organisms on any part of the continental shelf not within the AFZ. This preliminary decision concerned the interpretation of the Act.

Section 101 of the Act makes it an offence to possess a foreign boat equipped for fishing within the AFZ. Section 12(2) extends the Act to include, to the extent that it is capable of doing so, the Continental Shelf outside the AFZ in regards to sedentary organisms. The applicants argued that the respondent's interpretation of the Act violated international law, in particular Indonesia's rights within the EEZ under 1982 United Nations Convention on the Law of the Sea (LOSC).[59] A central issue was the coexistence of the rights of Indonesia in regards to the EEZ and Australia's rights regarding its continental shelf. Indonesia's rights over the EEZ include making regulations as to the licensing of fisherman, fishing vessels and equipment.[60] However, Article 77 of the LOSC provides that the jurisdiction to legislate in relation to sedentary organisms lies with the coastal state exercising control over the continental shelf. It was argued, however, that the effect of section

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58 [2008] VSC 344 [40], making reference to the decision in [1995] 3 NZLR 563 [575].

59 [1994] ATS 31, in particular arts 62 and 78.

60 Ibid, art 62.

101 of the Act would be to result in an unjustifiable interference with navigation and other rights and freedoms of other states contrary to Article 78 of LOSC.

Justice Riley rejected the applicants' submission that the Act should be construed so as to ensure it operates consistently with international law, in particular, Australia's limited sovereignty in the area. Justice Riley noted that:

> (T)he primary obligation in interpreting the subject sections is to give effect to the legislative intent and promote the object underlying the provisions as revealed in the legislation. In this case there is no ambiguity that needs to be resolved.[61]

Justice Riley held that the phrase 'to the extent that it is capable of doing so' was in no way ambiguous nor could it be read as bringing in international law concerns. Rather it referred to the practicalities of applying other provisions to the issue of sedentary organisms in the continental shelf. Justice Riley likewise rejected the argument that sections 12 and 101 were in any way inconsistent with international law, stating that no evidence had been provided to show that the Act resulted in any unjustifiable interference with navigation and other rights and freedoms of Indonesia. Justice Riley noted that, even if it had been inconsistent with international law:

> It is a matter for the Legislature whether it legislates strictly in accordance with international law. Even if … [the] submissions regarding the status of international law and the prospect, which I do not accept, that the [Fisheries Management Act], if not restricted to application within the AFZ, may theoretically cause a dispute of some unidentified kind with Indonesia or some other State, that is a matter for others to resolve and mechanisms are in place under [the LOSC] to facilitate that process. Such a circumstance would not require the application of the sections to be narrowly confined as the applicants submit.[62]

Finally, a separate submission was made on behalf of the applicant Semarani, as it was alleged his vessel was apprehended inside the Joint Petroleum Development Area (JPDA).[63] It was argued that within this area the continental shelf boundary had not been delimited and was the subject of dispute. Justice Riley noted that while there may not be an identified agreement on the boundary, this does not mean there is a dispute for the purposes of LOSC or this case. Justice Riley held that, in fact, pursuant to the Act and its importation of Article 76(1) of LOSC, the continental shelf clearly extends beyond the northern boundary of the JPDA.

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61 (2008) 220 FLR 159, 164.

62 (2008) 220 FLR 159, 165.

63 Established under art 3 of the *Timor Sea Treaty* [2003] ATS 13.

Law of the Sea — jurisdiction — Australian Whale Sanctuary

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd
(2008) 165 FCR 510; (2008) 99 ALD 534; [2008] FCA 3
Federal Court of Australia
Allsop J

This case concerns an application for injunctive relief and declarations under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the Act) in relation to the whaling activities of the respondent in the Australian Whale Sanctuary.

The respondent was accused of undertaking activities in contravention of sections 229 and 230 of the Act which make it an offence to kill, injure, intentionally take or otherwise deal with a cetacean in the Australian Whale Sanctuary. The respondent engaged in activity pursuant to the Japanese Whaling Research Program under Special Permit in the Antarctic (JARPA), issued under Article VIII of the International Convention for the Regulation of Whaling,[64] (the Whaling Convention) and monitored by the International Whaling Commission (IWC). While the Public Prosecutor declined to prosecute, in the absence of prosecution, section 475 of the Act gives an interested person, in this case the Humane Society, the right to apply for an injunction to restrain conduct that would amount to an offence. These proceedings followed a number of previous hearings in regards to service and substituted service. [65]

The applicant's claim was that the respondent intentionally engaged in activities in contravention of the Act and that these activities were done in accordance with JARPA under Article VIII of the Whaling Convention but that JARPA is not a recognised foreign authority for the purposes of section 7(1) of the Antarctic Treaty (Environment Protection) Act 1980 (Cth) (Antarctica Act). As such the respondent is not permitted or authorised to take, kill, injure or otherwise interfere with whales under the Act. The applicant contended that, without an injunction, the respondent will continue its activities. The respondent refused to accept service or attend the hearing as it did not recognise Australia's jurisdiction over the waters in question.

Justice Allsop held that the evidence did support the allegation that the respondent was responsible for the actions of the whaling fleet for the purposes of the Act. Further, he held that the respondent is not a recognised authority under the Antarctica Act, although his reasons are to be found in earlier hearings. The respondent was thus held to have contravened the Act.

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64 [1948] ATS 18.

65 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124.

The final issue concerned Australia's jurisdiction in the Whale Sanctuary and the Judge's discretion to order an injunction. Under LOSC[66] the EEZ extends to no more than 200 nautical miles from the baseline from which the territorial sea is measured. The Whale Sanctuary is within 200 nautical miles of the Australian Antarctic Territory, although Australia's claim to the Australian Antarctic Territory is recognised by only four nations. Japan is not one of these nations and does not recognise Australia's jurisdiction in this area, claiming it to be the high seas. As such, there was a question as to whether the Judge ought to grant an injunction in a situation where such an injunction would be futile, due to the likelihood that it will be disobeyed and lack of enforcement mechanisms. Justice Allsop drew on decisions of both the NSW Supreme Court[67] and the Full Federal Court[68] in concluding that practical difficulty (if not impossibility) of enforcement is no reason to withhold relief, particularly given the public interest nature of the claim.[69]

Law of the sea — vessel-source pollution — jurisdiction over foreign-flagged vessels

Livestock Transport & Trading v Australian Maritime Safety Authority (No 2)
[2008] FCA 1544
Federal Court of Australia
Siopis J

The applicant owned and operated the Kuwaiti flagged vessel, the 'Al Messilah'. The vessel carried livestock between Australian posts and the Middle East. On 1 October 2008 the respondent's representative issued a notice preventing the vessel from loading livestock in Fremantle Port.

Annex IV of the 1973 International Convention on the Prevention of Pollution from Ships (MARPOL 73/78)[70] prescribes sewage systems for ships,[71] and provides that the primary responsibility for enforcing compliance lies with the flag state.[72] The Navigation Act 1912 (Cth) empowered the respondent to enforce Annex IV in respect of Australian ships. Section 267ZQ of the Act allowed the respondent to deal with foreign flagged vessels only in circumstances where the vessel poses some risk to the environment. Section 257(1) provided for the making of regulations with respect to the 'loading, stowing or carriage of cargo in ships or the unloading of cargo from ships'. Section 425(5C) stated that:

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66 [1994] ATS 31, art 57.

67 *Vincent v Peacock* [1973] 1 NSWLR 466, 468.

68 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 431–2.

69 (2008) 165 FCR 510, 525.

70 [2004] ATS 9.

71 Ibid regs 9, 10.

72 Ibid reg 4.

> Where a provision of an order is inconsistent with a provision of this Act or the regulations, the latter shall prevail and the former shall, to the extent of the inconsistency, be of no force or effect.

Order 12 of the then current Marine Orders[73] stated that vessels must either comply with Appendix 4,[74] or supply a risk analysis that is not inconsistent with Annex IV of MARPOL 73/78.[75] However Appendix 4 required vessels to have a holding tank or treatment plant complying with Annex IV of MARPOL after 27 September 2008.[76] Thus these orders, taken in conjunction, essentially enforced Annex IV of MARPOL against all ships. The applicant argued that these orders were inconsistent with section 267ZQ of the Navigation Act because they sought to enforce the provisions of Annex IV of MARPOL in respect of foreign-flagged vessels. Justice Siopis found that under section 425(5C),

> no matter what the regulatory source relied upon for making an order ... the order must not be inconsistent with a provision of the [Navigation Act]. In this case, the impugned orders are inconsistent with the legislative scheme in Div 12C of the Act, to the extent that they enforce compliance with the provisions of Annex IV on foreign-flagged vessels.[77]

The application was granted.

Refugee Convention — definition of refugee — membership of particular social group

SZMKY v Minister for Immigration and Citizenship
[2008] FCA 1924
Federal Court of Australia
Spender J

This appeal arose out of a failed attempt by the appellant, a citizen of the People's Republic of China, in her application for a Protection (Class XA) Visa with the Department of Immigration and Citizenship. The appellant's application was founded on her claim that she would face persecution because of her violation of the 'one-child' policy in force in China.

Under the Refugee Convention[78] an asylum seeker's fear of persecution must relate, among other things, to persecution by reason of membership of 'a particular social group'. Justice Spender approached the key issue in this case as being whether the Refugee Review Tribunal (RRT) was obliged to conclude that fear of a forced abortion for breach of China's one-child policy constituted a well-founded fear of persecution for the purposes of the Convention, and that in failing so to

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73 Pt 43, Issue 6.

74 O 12.2.

75 O 12.2 (a).

76 Appendix 4 6.6.

77 [2008] FCA 1544 at [29].

78 Convention Relating to the Status of Refugees [1954] ATS 5.

conclude erred in the exercise of its jurisdiction by applying the wrong test. Justice Spender held that the RRT was correct in reaching the conclusion that, while the appellant had been persecuted in the past, such fear does not constitute persecution for a Convention reason because the definition of a refugee 'looks to the future' and she had failed to point to any harm which would amount to persecution which she feared she will suffer for one or more of the five Convention reasons if returned to China. Mistreatment for the breach of China's one-child policy is not persecution because of membership of 'a particular social group' for the purposes of the Convention.

Statutory interpretation — intellectual property — 1883 Paris Convention for the Protection of Intellectual Property

Chiropractic Bedding Pty Ltd v Radburg Pty Ltd
[2008] FCAFC 142
Federal Court of Australia
French, Rares and Besanko JJ

Chiropractic Bedding Pty Ltd (the appellant) brought a claim against Radburg Pty Ltd (the respondent) claiming that the respondent had infringed its mattress design, which had been registered under the Designs Act 1906 (Cth) (the Act). The respondent claimed the design was not novel, as it had been featured in an exhibition before the priority date. The dispute was whether the design was protected under section 47(1) of the Act which states that the fact that a design has been exhibited at 'an official or officially recognised international exhibition' does not prejudice or prevent its registration if the application for registration is made within six months of the exhibition. The issue was the extent to which Article 11(1) of the 1883 Paris Convention for the Protection of Industrial Property[79] may be used in the construction of the words 'an official or officially recognised international exhibition'. The Court stated that unless the statute intended to give effect to an international agreement, the provisions of an international agreement cannot control or influence municipal law. An intention to give effect to an international agreement may be indicated in the following ways: an express statement that a word or provision in municipal law is to have the same meaning as under the international agreement,[80] a statement to that effect in the preamble of the Act,[81] or by the Act adopting the Convention's nomenclature.[82]

In this instance it was held that the Act did not indicate an intention to give effect to the Convention. Article 11(1) of the Paris Convention could be used as an aid to interpreting section 47(1) of the Act but should not have been used as the starting

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79 [1972] ATS 12.

80 For example see *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 22. See also the *Vienna Convention of the Law of Treaties* [1974] ATS 2, arts 31, 32.

81 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

82 *D & R Henderson (MFG) Pty Ltd v Collector of Customs for the State of New South Wales* (1974) 48 ALJR 132.

point for its proper construction. In addition, the Court held that Article 11(1) was not of any assistance in determining the proper construction of section 47(1), and that its proper meaning could be deciphered by examining its statutory context.

However the Court noted that:

> The Court is not here concerned with the canon of construction that where legislation is susceptible of a construction which is consistent with the terms of an international instrument and the obligations which it imposes on Australia then that construction should prevail: *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273 at 287-288 per Mason CJ and Deane J. Australia was not under an international obligation in terms of Art 11(1) at the time the 1906 Act was passed (see *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1 at 27-28 [19]). Furthermore, this is not a case where one construction of s 47(1) is consistent with Art 11(1) and the other is not; both constructions are consistent with Art 11(1) and the only difference is that the construction favoured by the trial judge extends the protection to an official non-international exhibition.[83]

83 [2008] FCAFC 142 [41].

Statutory Interpretation — external affairs power — 1926 International Convention to Suppress the Slave Trade and Slavery — 1957 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery

The Queen v Tang
(2008) 237 CLR 1; [2008] HCA 39
High Court of Australia
Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ.

This case concerned five women, all of whom were Thai nationals, who voluntarily came to Australia illegally to work as prostitutes. The accused, Wei Tang, held a 70 per cent share in a syndicate that purchased four of the complainants for $20,000 from a recruiter in Thailand. Each of the complainants acknowledged a 'debt' of between $42,000 and $45,000. The debt was to be paid off by working six days a week at Tang's brothel. The complainants, while not kept under lock and key, were effectively restricted to the premises. At first instance Tang was convicted of five counts of intentionally possessing a slave and five counts of intentionally exercising over a slave a power attaching to the right of ownership, contrary to section 270.3(1) of the Criminal Code Act 1995 (Cth). The conviction was quashed by the Victorian Court of Appeal.[84] The Crown was granted leave to appeal to the High Court and Tang cross-appealed. The respondent, Tang, argued that 'slavery' under international law referred to traditional or chattel slavery, differentiating slavery from other forms of servitude such as 'debt bondage'. She argued that the provisions of the Criminal Code should be interpreted likewise. Any broader interpretation would render the Criminal Code unconstitutional as it would fall outside the Commonwealth's power to legislate with respect to external affairs under section 51(xxix) of the Constitution.

The Court held that the definition of slavery was not restricted to chattel slavery and included the conduct of the accused, and that the provisions of the Criminal Code were validly enacted under section 51(xxix) of the Constitution as being reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under the 1926 International Convention to Suppress the Slave Trade and Slavery.[85] Chief Justice Gleeson and Hayne J delivered the leading judgments with which Gummow J, Heydon J, Crennan J and Kiefel J agreed.

In interpreting the concept of slavery under the Criminal Code, Gleeson CJ had regard to the two slavery conventions, the *travaux préparatoires* to the 1926 Convention to Suppress the Slave Trade and Slavery,[86] decisions of the International Criminal Tribunal for the Former Yugoslavia[87] and the European

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84 *R v Wei Tang* (2007) 16 VR 454.

85 [1927] ATS 11.

86 Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (2008).

87 *Prosecutor v Kunarac*, Case No IT-96-23-T and IT-96-23/1-T, 22 February 2001

Court of Human Rights[88]. The conventions and *travaux* made clear that they were intended to cover slavery de facto as well as de jure and to prevent forced labour from developing into conditions analogous to slavery. As Gleeson CJ observed:

> Without doubt, chattel slavery falls within the definition in Art 1 of the 1926 Slavery Convention, but it would be inconsistent with the considerations of purpose, context and text (of the convention) ... to read the definition as limited to that form of slavery.[89]

Justice Hayne agreed with Gleeson CJ:

> The language of the Convention, whether in its definition of slavery or otherwise, cannot be read as if it gave effect to or reflected particular legal doctrines of ownership or possession developed in one or more systems of municipal law. Nothing in the preparatory materials relating to the Convention suggests that it was intended to embrace any particular legal doctrine of that kind and the text of the Convention itself does not evidence any such intention. Rather, slavery (both as a legal status and as a factual condition) was defined only by a description that assumed an understanding, but did not identify the content, of "the powers attaching to the right of ownership". Yet for the purposes of creating particular norms of individual behaviour enforceable by application of the criminal law, the definition of slavery that is adopted in s 270.1 of the Code takes as its origin the definition of slavery, as a condition, that was given in the Convention.[90]

A further issue in the case turned on the fault element, and whether it was necessary for the prosecution to establish that the accused knew or believed that the powers she was exercising over the women were those attaching to the right of ownership. The majority, with Kirby J dissenting, held that the prosecution was not required to prove such knowledge. In his dissenting judgment Kirby J held that in implementing Australia's obligations under international law there must be considered alongside such implementation the general principles of Australian law and the elements traditionally considered necessary for a criminal act. Grave international crimes as 'slavery' should not be banalised by applying them to circumstances that are no more than seriously exploitative employment relationships without clear statutory authority, as such, the element of intention should be construed as a substantial rather than trivial intention.[91] As such, Kirby J held that the Victorian Court of Appeal's approach, which required that the accused have an appreciation of the character of her own actions, was appropriate.

(Trial Chamber); and Case No IT-96-23 and IT-96-23/1-A, 12 June 2002 (Appeals Chamber).

88 *Siliadin v France* (2006) 43 EHRR 16 [122].

89 [2008] HCA 39 [27].

90 Ibid [137].

91 Ibid [112] per Kirby J.