IX - INDIVIDUALS

Aliens - deportation of convicted non-citizens - Australian policy

On 25 May 1989 the Minister for Immigration, Local Government and Ethnic Affairs, Senator Robert Ray, said in part in answer to a question without notice (Sen Deb 1989, Vol 133, p 2692):

> This Government takes a very serious view on non-citizens who have become involved in serious crimes involving drugs or violence. Our policy on deportation was first set down on 4 May 1983 by Minister West and was again clarified by my statement in this chamber on 8 December 1988. ...
>
> Our statements and actions over a number of years demonstrate the seriousness we attach to our responsibility to exclude from this country those non-citizens who have seriously abused the privilege of residence accorded to them by the Australian community. Stated briefly, it is our policy that non-citizens who are convicted of the production or distribution of heroin or other hard drugs, organised criminal activity, serious sexual assault, violence, kidnapping or extortion and sentenced to more than 12 months in gaol are liable for deportation. Such deportation decisions, which of course are appealable to the Administrative Appeals Tribunal (AAT), take effect at the conclusion of the gaol sentence. ATT decisions on deportation are also subject to overruling in the national interest by ministerial statement to this Parliament.
>
> Whilst there is always consideration of compassionate and humanitarian circumstances in making any decision to deport, the overriding principle must be the general protection and well-being of the Australian community and its standards. This has meant that, since 1983, 143 non-citizens have been deported as a consequence of being involved in criminal activity. About one-third of these people have been involved in drugs.

Aliens - deportation of prohibited non-citizen to place where criminal charges are pending - need to avoid "disguised extradition"

On 4 March 1988 the Federal Court of Australia handed down its decision in *Schlieske v Minister for Immigration and Ethnic Affairs* 84 ALR 719. This was a case in which a deportee had claimed that a deportation order was invalid as being a "disguised extradition". Following are extracts from the judgment of the Court (Wilcox and French JJ, with whom Fox J agreed) (from 724-5, and 729-31

The concept of "disguised extradition"

> Section 18 of the Migration Act 1958 authorises the Minister to order the deportation of prohibited non-citizens. That authorisation is an expression of the power of the Parliament of the Commonwealth to make laws with respect to immigration and emigration: Constitution s 51(xxvii). The authority so conferred is not expressly qualified or conditioned in any way. Like all statutory discretions, however, it is to be exercised in accordance with the scope and purposes of the enactment which is its source: *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 620 (Latham CJ); *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J);

Murphyores Inc Pty Ltd v Commonwealth (1976) 9 ALR 199; 136 CLR 1 at 23 (Mason J) and *R v Australian Broadcasting Tribunal; Ex parte* 2HD *Pty Ltd* (1979) 144 CLR 45 at 49; 27 ALR 321. Such constraint may, like that considered in *Murphyores*, be a fragile foundation for building a conclusion that certain policy considerations and reasons fall within the scope of the Act and that others are excluded: see *Murphyores* (CLR) at 24. And it is the case that the discretion to deport non-citizens has traditionally been treated as a very wide one:

"The right of a nation to expel or deport foreigners, who have not been naturalised or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country": *Fong Yu Ting v United States* (1893) 149 US 698 at 707, cited with approval by Griffiths CJ in *Robtelmes v Brenan* (1906) 4 CLR 395 at 403.

The amplitude of the relevant statutory powers, both in Australia and in the United Kingdom, has tempted governments to use them not merely to deport undesirable aliens, but to effect their delivery into the hands of friendly foreign governments for trial on criminal charges or for other reasons which, on the face of it, have nothing to do with regulating the movement of persons to and from the deporting country: see generally O'Higgins, "Disguised Extradition: The Soblen Case" (1964) *27 Mod L Rev* 521 at 522–5. In the early years such conduct was sanctioned by the courts, but, in recent times and corresponding with the developing willingness of the courts to confine the exercise of statutory powers to the purpose for which they were granted, the courts of both countries have generated a distinction – which is difficult of practical application – between a deportation for the purpose of extradition ("disguised extradition") and a deportation for immigration control purposes which incidentally effects a *de facto* extradition.

The Court considered the English and Australian authorities, and continued:

Application of the principle of proper purpose

The relevant principle is that the power to deport a prohibited non-citizen, while wide and unqualified by any statutory condition, must be exercised for the purposes of the Migration Act, that is to say, in aid of the sovereign right of this country to determine who shall be permitted to enter it and who should be excluded therefrom.

Of course, in considering whether to exercise that power, the Minister may have regard to a wide range of matters personal to the particular prohibited non-citizen, such as that person's criminal record. It is less clear that the Minister may have regard to mere allegations of criminality. For the Minister to assume, from the mere circumstance that allegations had been made, that the person was in fact guilty of the alleged offences would be unreasonable. Such an assumption would overlook the possibility that the person may ultimately be found to be not guilty of the alleged offences. And, if the Minister is careful not to make any such assumption, it is difficult to see that the knowledge that

allegations have been made, which may or may not be well-founded, can usefully contribute to the decision whether to deport. (We emphasise that our comments refer to *mere* allegations. If the Minister has information which tends to support the truth of the allegations, that information is relevant to the decision whether to deport and – subject to the requirements of natural justice – may be taken into account.)

But, whatever the relevance of allegations to the question whether the prohibited person is one who ought to be deported from Australia, it is plainly extraneous to the decision to deport a person, and to deport that person to a particular country, that the person is wanted by the Government of that country upon criminal charges. It is not one of the purposes of the Migration Act to aid foreign powers to bring fugitives to justice. There is a distinct head of constitutional authority – namely the external affairs power – and a distinct mechanism – the extradition legislation – under which that object may be pursued.

As to the statutory powers in aid of the deportation process which are conferred by s 22 of the Act, those powers must also be used only for their proper purpose, namely to give effect to a deportation order in force.

The foregoing does not mean that the Minister is precluded from deporting a person to a country where, to the Minister's knowledge, the person is likely to face criminal proceedings. Having regard only to immigration considerations, deportation of the person to that country may be a proper course; most obviously so in a case, such as the present, in which the proposed deportee is a national of that country and has travel documents valid only for entry into that country. As s 22(3) makes plain, the question whether a proposed deportee will be permitted to enter a particular country of destination is relevant to the exercise of the deportation power.

It may be that a Government will choose to deport a fugitive to a country seeking to extradite him, and will do so in the face of the opportunity to deport to another country which is willing to receive him and to which he is willing to travel. Such a choice is not necessarily unlawful but it may, according to the circumstances of the case, give rise to an inference that the choice has been actuated by an improper purpose. In drawing that inference, the court may take into account official conduct outside that authorised by statute, for example the communication of flight arrival details. The court must be vigilant to ensure that procedures established by extradition laws to protect individual rights are respected and followed. The inconvenience which attends compliance with those procedures is a small price to pay to maintain the primacy that the liberty of the individual should have in our legal system.

In the present case a finding has been made that particular actions taken by officers of the Department of Immigration and Ethnic Affairs in July 1987 amounted to a "sham" extradition; that is that, although the officers purported to be acting in the enforcement of the Migration Act, they were at that time in fact actuated by the purpose of delivering Mr Schlieske to the West German authorities in order that he might be tried upon the charges pending against him

in that country. That finding does not mean that Mr Schlieske cannot now be deported to the Federal Republic. It does mean that, in implementing the deportation order, the Minister and his officers must pursue only the purpose of deportation. If the decision is made that it is proper to deport the appellant to the Federal Republic, the steps to be taken should be no more than appropriate to that purpose. Section 22 of the Migration Act envisages that a deportee may be escorted out of Australia by an authorised officer. The apparent purposes of this provision are, first, to ensure that the deportee does in fact leave Australia and, secondly, security; the deportee may be of a violent disposition. In a case where, for these reasons, it is deemed necessary to have a particular deportee escorted by an authorised officer it would not be a valid objection to that course that the deportee is wanted on criminal charges in the country of destination. But if, having regard to all of the circumstances other than the fact that the deportee is so wanted, it would not be necessary to provide an escort, it would be objectionable to provide an escort the better to ensure that the deportee arrives in that country and there faces the criminal charges. And, even if a decision is taken that a deportee should be escorted to the country of destination, it seems to us to be no part of the exercise of the deportation power for Australian officers to arrange for the surrender of the deportee to the authorities in that country. The task of the Australian escorting officer is complete when the deportee leaves the aeroplane in the country of destination.

The golden rule is that the Australian authorities are entitled, notwithstanding their knowledge that a particular deportee is wanted in the country of destination, to do everything which is necessary for the enforcement of the Migration Act and the proper implementation of the deportation order. But they are not entitled to go beyond that, and in purported exercise of powers under that Act, to take steps whose only purpose is the bringing to justice of the deportee in a foreign country. At that stage the Australian authorities would not be exercising deportation powers; they would be involved in an unlawful extradition.

Aliens – deportation of aliens – whether "British subjects" and "subjects of the Queen" are "aliens" – emergence of Australia as independent sovereign nation – effect on indivisibility of the Crown

On 13 September 1988 the High Court of Australia handed down its decision in *Nolan v Minister for Immigration and Ethnic Affairs* 80 ALR 561. The question, in short, was whether or not a citizen of the United Kingdom, being a "British subject" or "subject of the Queen", could be deported from Australia under the Migration Act 1958, an Act based on the legislative power of the Commonwealth in respect of (amongst other things) "aliens". The Court held that the person could be deported as an alien. Following is an extract from the judgment of the Court (Mason CJ, Wilson, Brennan, Deane, Dawson, and Toohey JJ) (from 563 to 566):

As a matter of etymology, "alien", from the Latin alienus through old French, means belonging to another person or place. Used as a descriptive word to describe a person's lack of relationship with a country, the word means, as a

matter of ordinary language, "nothing more than a citizen or subject of a foreign State" (*Milne v Huber* (1843) 17 Fed Cas 403 at 406 (US)). Thus, an "alien" has been said to be, for the purposes of United States law, "one born out of the United States, who has not since been naturalised under the constitution and laws" (*ibid*). That definition should be expanded to include a person who has ceased to be a citizen by an act or process of denaturalisation and restricted to exclude a person who, while born abroad, is a citizen by reason of parentage. Otherwise, it constitutes an acceptable general definition of the word "alien" when that word is used with respect to an independent country with its own distinct citizenship. The word could not, however, properly have been used in 1900 to identify the status of a British subject *vis-a-vis* one of the Australian or other colonies of the British Empire for the reason that those colonies were not, at that time, independent nations with a distinct citizenship of their own. At that time, no subject of the British Crown was an alien within any part of the British Empire. Even after Federation, Australia did not immediately enjoy the international status of an independent nation. The terms "British subject" and "subject of the Queen" were essentially synonymous. The British Empire continued to consist of one sovereign State and its colonial and other dependencies with the result there was no need to modify either the perception of an indivisible Imperial Crown or the doctrine that, under the common law, no subject of the Queen was an alien in any part of Her Majesty's dominions (see, eg, Co Litt 129a, 129b; Bract 427b; *Blackstone's Commentaries*, 8th ed, vol 1, p 366).

The transition from Empire to Commonwealth and the emergence of Australia and other Dominions as independent sovereign nations within the Commonwealth inevitably changed the nature of the relationship between the United Kingdom and its former Colonies and rendered obsolete notions of an indivisible Crown. A separate Australian citizenship was established by the Nationality and Citizenship Act 1948 (Cth), now known as the Australian Citizenship Act 1948. That Act and statutes of other Commonwealth countries, particularly the British Nationality Act 1948 (UK), reflected and formalised the diminished importance of the notion of "British subject". It became accepted as a "truism" that, although "there is only one person who is the Sovereign ... in matters of law and government the Queen of the United Kingdom ... is entirely independent and distinct from" the Queen of (for example) Canada or Australia (per May LJ, *R v Foreign Secretary, Ex parte Indian Association of Alberta* [1982] QB 892 at 928). The fact that a person who was born neither in Australia nor of Australian parents and who had not become a citizen of this country was a British subject or a subject of the Queen by reason of his birth in another country could no longer be seen as having the effect, so far as this country is concerned, of precluding his classification as an "alien". It is not that the meaning of the word "alien" had altered. That word is and always has been appropriate to describe the status, vis-a-vis a former colony which has emerged as an independent nation with its own citizenship, of a non-citizen who is a British subject by reason of his citizenship of a different sovereign

State. But the word is not and never has been appropriate to describe within any part of the territory (whether colonial or otherwise) of a single sovereign State the status of a person who is one of the subjects of that particular State.

...

It was submitted on behalf of the plaintiff that the references to the "Crown of the United Kingdom" in the preamble and (in an expanded form) in covering cl 2 of the Commonwealth of Australia Constitution Act 1900 (Imp) and to "subject of the Queen" in the Constitution itself (see ss 34(ii) and 117) were inconsistent with the notion that any subject of the Queen, be he citizen of the United Kingdom or of some other country of the Commonwealth which recognises the Queen as Head of State (eg, Canada, Jamaica or Mauritius), could be an "alien" in so far as this country is concerned. It is unnecessary to pursue that point beyond saying hat those references cannot alter, or avoid the consequences of, the emergence of Australia as an independent nation, the acceptance of the divisibility of the Crown which was implicit in the development of the Commonwealth as an association of independent nations and the creation of a distinct Australian citizenship. Those developments necessarily produced different reference points for the application of the word "alien". Inevitably, the practical designation of the word altered so that, while its abstract meaning remained constant, it encompassed persons who were not citizens of this country even though they might be British subjects or subjects of the Queen by reason of their citizenship of some other nation. We would add that, to the extent that there would otherwise be inconsistency in the use of the words "subject of the Queen" in the Constitution, it should be resolved by treating those words as referring, in a modern context, to a subject of the Queen in right of Australia (cf Royal Style and Titles Act 1973 (Cth)). ...

It follows that the provisions of s 12 of the Act and their application to the plaintiff are within the legislative competence of the Parliament under s 51(xix) of the Constitution.

On 19 September 1988 the Minister for Immigration, Local Government and Ethnic Affairs, Senator Robert Ray, issued a news release reassuring UK citizens in Australia. Part of his statement read as follows:

"The status quo for British citizens – for all residents of Australia – remains intact.

"All that has occurred is that the High Court, ruling by a six to one majority, reaffirmed the existing legal position under the Constitution for those who live in Australia but who are not Australian citizens", Senator Ray said.

He said non-Australian citizens from any country had for a long time been liable to deportation if within 10 years of permanent residence in Australia they were sentenced to 12 months' imprisonment or more for a serious offence.

"It has been the situation for some years in Australia that no non-citizen resident should have any special privilege or right above any other non-citizen", Senator Ray said.

Citizenship – Australian Monarch and Governor-General

On 3 November 1988 the Prime Minister, Mr Hawke, provided the following written answer to a question on notice which asked "Is it necessary for the (a) Governor-General and (b) Australian Monarch to be an Australian citizen?" (HR Deb 1988, Vol 163, p 2456):

(a) No, although the Governor-General is required to take an oath of allegiance to Her Majesty The Queen.

(b) No.

Discrimination – racial discrimination – International Convention on the Elimination of All Forms of Racial Discrimination – right to own and inherit property – certain Queensland Aborigines

On 8 December 1988 the High Court of Australia handed down its decision in *Mabo v. Queensland* 83 ALR 14. The question was whether or not a 1985 Queensland Act extinguishing the traditional legal rights over land of a particular group of Aboriginal people was inconsistent with the Commonwealth Racial Discrimination Act 1975, which gives effect within Australia to the International Convention on the Elimination of All Forms of Racial Discrimination. The Court held that it was. Section 10 of the Racial Discrimination Act 1975 reads, in part:

...

"10(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

"(2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention".

Following is an extract from the joint judgment of Brennan, Toohey and Gaudron JJ (from 32 to 34):

Section 10 relates to the enjoyment of a right, not the doing of an act. The "right" referred to in s10(1) is not, or is not necessarily, a legal right. Sub-section (2) directs attention to rights "of a kind referred to in Article 5 of the Convention", each of which may be a "right" for the purposes of s 10(1). The Convention is the International Convention on the Elimination of All Forms of Racial Discrimination. Article 5 provides, inter alia:

"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national, or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(d) (v) The right to own property alone as well

as in association with others;

(vi) The right to inherit."

The rights referred to in Art 5 are human rights for which, as the preamble to the Convention testifies, "universal respect and observance" are encouraged. Human rights are calculated to preserve and advance "the dignity and equality inherent in all human beings". The preamble states that the Convention was agreed to in furtherance of the purpose of the United Nations "to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion".

Section 10 of the Racial Discrimination Act is enacted to implement Art 5 of the Convention and the "right" to which s 10 refers is, like the rights mentioned in Art 5, a human right – not necessarily a legal right enforceable under the municipal law. The human rights to which s 10 refers include the right to own and inherit property. In the development of the international law of human rights, rights of that kind have long been recognised. Thus, the Universal Declaration of Human Rights 1948 Art 17 included the following:

"1. Everyone has the right to own property alone as well as in association with others.

"2. No one shall be arbitrarily deprived of his property."

(The word "arbitrarily" has been interpreted to mean not only "illegally" but also "unjustly"; see Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (1984), vol 1, p 122, fn 40.)

Although the human right to own and inherit property (including a human right to be immune from arbitrary deprivation of property) is not itself necessarily a legal right, it is a human right the enjoyment of which is peculiarly dependent upon the provisions and administration of municipal law. Inequality in the enjoyment of that human right may occur by discrimination in the provisions of the municipal law or by discrimination in the administration of the municipal law or by both. When inequality in enjoyment of a human right exists between persons of different races, colours or national or ethnic origins under Australian law, s 10 operates by enhancing the enjoyment of the human right by the disadvantaged persons to the extent necessary to eliminate the inequality. As the inequality with which s 10 is concerned exists "by reason of" a municipal law, the operation of the municipal law is nullified by s 10 to the extent necessary to eliminate the inequality.

The question which s 10 poses in the present case is whether, under our municipal law, the Miriam people enjoy the human right to own and inherit property – a right which includes an immunity from arbitrary deprivation of property – to a more limited extent than other members of the community. ("Property" in this context must embrace rights of any kind in or over the Murray Islands.) In respect of property rights arising under the Crown lands legislation, the answer must be no. A person who is a member of the Miriam people is entitled to own and inherit those property rights in the same way and to the same extent as any other Australian. Section 10(3) was enacted to override laws

which might have restricted the capacity of Aboriginals and Torres Strait Islanders to manage their own property.

But the 1985 Act destroys the traditional legal rights in and over the Murray Islands possessed by the Miriam people (and particularly by the plaintiffs) and, by an arbitrary deprivation of that property, limits their enjoyment of the human right to own and inherit it. If the assumption be made that traditional rights survived the annexation of the islands and were thereafter recognised by the common law, and if the effect of the 1985 Act be left aside, the general law of Queensland would now recognise two categories of legal rights to be enjoyed under the Crown in and over the Murray Islands: traditional rights and rights granted in pursuance of Crown lands legislation. Traditional rights are characteristically vested in members of the Miriam people; rights under Crown lands legislation are vested in grantees who may be of any race, colour or national or ethnic origin. However, it is not the source or history of legal rights which is material but their existence. It is the arbitrary deprivation of an existing legal right which constitutes an impairment of the human rights of a person in whom the existing legal right is vested. Leaving aside the 1985 Act, the general law leaves unimpaired the immunity of each person in whom any legal right in or over the Murray Islands is vested from arbitrary deprivation of that person's legal right. The relevant human right is immunity from arbitrary deprivation of legal rights in or over the Murray Islands. The 1985 Act operates in this context.

By extinguishing the traditional legal rights characteristically vested in the Miriam people, the 1985 Act abrogated the immunity of the Miriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. The Act thus impaired their human rights while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Miriam people. If we accord to the traditional rights of the Miriam people the status of recognised legal rights under Queensland law (as we must in conformity with the assumption earlier made), the 1985 Act has the effect of precluding the Miriam people from enjoying some, if not all, of their legal rights in and over the Murray Islands while leaving all other persons unaffected in the enjoyment of their legal rights in and over the Murray Islands. Accordingly, the Miriam people enjoy their human right of the ownership and inheritance of property to a "more limited" extent than others who enjoy the same human right.

In practical terms, this means that if traditional native title was not extinguished before the Racial Discrimination Act came into force a State law which seeks to extinguish it now will fail. It will fail because s 10(1) of the Racial Discrimination Act clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community. A State law which, by purporting to extinguish native title, would limit that immunity in the case of the native group cannot prevail over s 10(1) of the Racial Discrimination Act which restores the

immunity to the extent enjoyed by the general community. The attempt by the 1985 Act to extinguish the traditional legal rights of the Miriam people therefore fails.

Discrimination – women – Convention on the Elimination of All Forms of Discrimination Against Women – 10th anniversary

On 22 December 1989 the Leader of the Government in the Senate, Senator Button, said in answer to a question without notice (Sen Deb 1989, Vol 138, p 5146):

> The Convention on the Elimination of all Forms of Discrimination against Women, commonly referred to as CEDAW, is the most important international human rights instrument for women. It was adopted by the General Assembly on 18 December 1979 and was sent [sic] for signature on 1 March 1980. Australia signed it on 17 July 1980 and ratified it on 28 July 1983. Obviously, many important tenth anniversaries have been related to this Convention over the years. For the anniversary this December I am aware that the National Women's Consultative Council has organised Justice Evatt, Australia's independent expert on the committee, to give talks on the Convention in several States.
>
> The Government has taken its obligations under the Convention very seriously. We actually ensured that it was ratified soon after we came to office in 1983. We provided the resources to service our obligations under the Convention. Australia's initial report to the committee presented in 1988 was commended by the committee as a model report for other countries. In accordance with provisions contained in the Convention, this Government has passed major pieces of legislation, including the Sex Discrimination Act 1984 and the Affirmative Action and Equal Employment Opportunity Act 1986.
>
> The Government's national agenda for women provides a strategy for continued Government action aimed at raising the status of women in the context of the Convention. The Government is proud of the fact that Justice Evatt is the current chairperson of the committee and some assistance will be provided to her in fulfilling this role, but that is constrained by the need to guarantee her independence. Australia also plans to co-sponsor an information seminar on the Convention for South Pacific island states in late 1990.

Extradition – procedure in locating and extraditing fugitives – numbers of extradition requests since 1982

On 18 February 1988 the Attorney-General, Mr Lionel Bowen, provided the following written answer in part to a question on notice (HR Deb 1988, Vol 159, pp 348–9):

> The locating of fugitives overseas is primarily a matter for the police forces of the countries in which such fugitives are located. Those police forces act on a request made by a State or Territory police force, other law enforcement agency, or by the Australian Federal Police or the National Crime Authority communicated through the International Criminal Police Organisation (Interpol). The material necessary to support an extradition request is also prepared by the jurisdiction seeking the surrender. Assistance is normally given to the

law enforcement agency either by the State or Territory prosecutorial authorities or, in the case of the Australian Federal Police or the National Crime Authority, by the Director of Public Prosecutions and the Attorney-General's Department. Once that case is prepared and received the Commonwealth Attorney-General makes the formal request for the surrender of that fugitive on behalf of Australia and the request together with its supporting documentation is transmitted through the diplomatic channel by the Department of Foreign Affairs and Trade.

The actual processing of a completed request for the extradition of a criminal located overseas prepared by a State is normally completed within two weeks. That assumes that the material provided in support of the request complies with Australia's extradition law and the applicable treaty. ...

The Attorney-General's Department does not play a role in the location of fugitives, that being a police matter. My Department does however give such assistance as is requested by State and Territory law enforcement agencies and the Australian Federal Police and the NCA in the preparation of the supporting documentation for extradition requests.

On 22 August 1988 the Attorney-General, Mr Lionel Bowen, provided the following written answer to a question on notice asking how many extraditions Australia had sought since 1982 for criminals located overseas, and in each case, (a) what countries were involved, and (b) how many failed (HR Deb 1988, Vol 162, pp 45-6):

I have assumed that the honourable member's question refers to the number of formal requisitions made by Australia for the return of fugitives from other countries. On the basis of this assumption the answers are as follows:

(a)

1982 - No of Requisitions	4
Hong Kong	2
United States of America	2
1983 - No of Requisitions	6
United States of America	1
Malaysia	1
Hong Kong	2
Switzerland	1
Sri Lanka	1
1984 - No of Requisitions	7
United States of America	4
Switzerland	1
Ireland	1
United Kingdom	1
1985 - No of Requisitions	7
United States of America	2
France	1
Federal Republic of Germany	1
United Kingdom	3

1986 – No of Requisitions	8
United States of America	1
France	1
United Kingdom	3
Austria	1
Hong Kong	2
1987 – No of Requisitions	4
United States of America	1
United Kingdom	1
Luxembourg	1
Sri Lanka	1

During the relevant period 7 persons whose surrender was sought by Australia waived extradition proceedings and were returned to Australia. Of these 6 returned from the United States of America and 1 from Switzerland.

(b) Between 1 January 1982 and 31 December 1987, overseas courts have dealt with and refused a formal Australian requisition for extradition in two cases:

1985 Ireland

1986 UK

Genocide – Pol Pot – possibility of bringing Pol Pot to trial for the crime of genocide

On 27 November 1989 the Leader of the Opposition, Mr Peacock, issued the following press release:

The Coalition supports international legal action against Pol Pot and other Khmer Rouge leaders responsible for the murder and terror inflicted on the Cambodian people between 1975 and 1979.

Our purpose in doing so is to ensure that the Khmer Rouge leadership of that period – the then members of the Standing Committee of the Communist Party of Cambodia – are held accountable under international law.

To achieve this, the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (the 'Genocide Convention') should be invoked before the International Court of Justice (ICJ). Extensive international legal analysis indicates that there are no necessary procedural or jurisdictional obstacles preventing such an initiative.

Coalition policy on Cambodia is based on the unequivocal view that the barbaric Khmer Rouge leadership of the 1975 – 79 period must not return to power in Cambodia, and that Pol Pot and his deputies must be specifically excluded from any settlement.

Our support for international legal action taken to advance these objectives is fully consistent with UN resolutions on Cambodia and will enhance the prospects for a comprehensive settlement of the Cambodian dispute.

Since 1987, the Australian Government, through the Prime Minister and the Foreign Minister, has been approached directly on a number of occasions by international organisations to support an initiative based on the Genocide

Convention. It has equivocated and refuses to take a lead. Indeed, it is uncertain that this Australian Government would even support such an initiative were it taken by another Government.

The Coalition supports international moves for action in the International Court of Justice and in other UN Agencies that will:

- examine documentation supporting claims that the crime of genocide was inflicted on the Cambodian people between 1975 and 1979
- aim to remove those responsible from present and future involvement in Cambodian and international political life.

The United Nations unanimously adopted the Genocide Convention on 9 December 1948 to prevent and punish genocide, which it defined as an attempt to destroy a national ethnic, racial or religious group. Cambodia acceded to the Convention on 14 October 1950 and its accession has never been renounced. Australia has ratified the Convention without reservation to the ICJ's competence under Article IX of it (see below).

The Genocide Convention provides two means of international action against States suspected of Genocide.

- Article IX confers jurisdiction on the International Court of Justice with respect to the fulfilment or breach of the Convention's obligations including "State responsibility for genocide";
- Article VIII confers jurisdiction on the "competent organs of the UN "with respect to the "prevention or suppression of genocide".

Cases heard before the International Court of Justice are, by definition, between States, not governments.

To take an international lead, therefore, in invoking the provisions of the Genocide Convention against Pol Pot and his deputies would not constitute recognition of their regime as the Government of Cambodia. It would neither undermine support for the non-communist Cambodian resistance forces nor provide international support for the Hun Sen regime in Phnom Penh.

But it would show Australia to be serious about its international legal and humanitarian commitments. It would be an important show of support for the Cambodian people who want to govern themselves without fear of extermination.

The Australian Government has chosen the path of timidity and passivity in refusing to take an international lead in mobilising support for international legal action against Pol Pot and his deputies from the 1975–1979 period.

In government, the Coalition will rectify this inaction.

On 28 November 1989 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, said in answer to a question without notice (Sen Deb 1989, Vol 137, pp 3430–32):

> Mr Peacock, in a rather long and fierce press release which he issued yesterday, criticised the Government for 'timidity', 'passivity', and 'equivocating and refusing to take a lead' in initiating action against Pol Pot, and those who were his deputies in the 1975–79 period, in the International Court of Justice (ICJ) under the Genocide Convention. It was, of course, the Labour Government,

through Mr Hayden, that first internationally raised the possibility, in 1986, of establishing an appropriate international tribunal to determine the culpability of the Pol Pot leadership.

We continue to regard this proposal as an attractive one and are continuing to explore ways of implementing it. We do so not only because properly documented findings of guilt by a credible international tribunal would no doubt have a major impact on international public opinion, but also because it might help to define with more precision the identities of those who should under no circumstances be allowed to play a role in the future of any Cambodian administration – and, as such, would address one of the numerous practical problems that need to be addressed before free elections can be held.

However, if the proposal is to be implemented, a practical way of doing so must be found. It is the present judgment of the Government, based on detailed consideration in 1986 and subsequently by our own international lawyers, that, contrary to Mr Peacock's assertion, there are formidable procedural and jurisdictional obstacles standing in the way of the initiation of an action by Australia against Pol Pot and his deputies in the International Court of Justice. That is why Mr Hayden did not put the proposal forward in those terms and why it has not been pursued in the International Court since then.

Let me spell out the position a little further, Mr President. While it is true that cases heard by the ICJ involve states, rather than governments, bringing actions against each other, and while both Australia and Cambodia are states-parties to the Genocide Convention, for all practical purposes litigation has to take place between governments which are in effective control of the states in question. Even if the court were prepared to regard an action in the present matter as properly initiated against the Coalition Government of Democratic Cambodia (CGDK), which is only in effective control of the seat in the United Nations and not anything else in Cambodia, rather than the current Hun Sen administration on the ground in Phnom Penh, the Court, nonetheless, has made clear that it will pronounce judgment– and I quote from a 1960's case which is still, I believe, good law 'only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interest between the parties'. It will be remembered, for example, that in the French nuclear test case the court held that it would not consider Australia's claim for a declaration, given that France had undertaken not to conduct any more atmospheric tests.

So there is a very real question, accordingly, as to whether the court would accept jurisdiction where what would be involved, on Mr Peacock's idea, is Australia seeking to initiate an action against a regime which is no longer in effective control of the State of Cambodia, in relation to events more than 10 years old. There is, moreover, a very real political, or perhaps I should preferably say 'diplomatic', problem in the present environment for Australia, which has refused to give any formal recognition to the Pol Pot regime as the legitimate Government of the State of Cambodia, in effect doing so – if only for the formal purposes of this litigation.

However, having said that, if Mr Peacock does have access to what he describes as 'extensive international legal analysis' by reputable international lawyers credibly establishing that the various legal concerns I have expressed are ill-founded, and credibly establishing that there are no serious practical obstacles standing in the way of initiation of proceedings, I would be very glad if he would make that material available. Certainly, the Government would give very serious consideration to pursuing such a case if we genuinely thought it would not be rejected by the Court, just as we would, of course, be prepared to support any other Government which was willing and proved able to initiate such proceedings itself. Until such a case is established and not just asserted, it is proper to regard Mr Peacock's contribution to this debate – whether or not it was an attempt, as Senator Collins says, to recapture the high moral ground – as just another example of the politics of the grand empty gesture which he has made peculiarly his own.

I finish by saying that in the absence of the availability of the ICJ there are simply no other international courts or tribunals which could possibly play a relevant role. A more realistic approach to the question of determining Pol Pot's guilt has always seemed to the Government to be the establishment – preferably by multilateral international agreement but, failing that, on some ad hoc basis – of an essentially informal tribunal of senior, respected, international legal figures. There would be no authority in this context to compel anyone's presence or to apply sanctions of any kind, or even make a declaratory judgment of the weight that a judgment of that kind would have in the International Court. Nonetheless, presumably, some effective exercise in weighting and balancing the available evidence would possibly be undertaken.

Mr Hayden raised this possibility when discussing the issue internationally, as he did quite extensively after he first raised it at the Association of South East Asian Nations post-ministerial conference in 1986. At the time he was forced to conclude that there was not sufficient international support in practice to proceed with that proposal. It may be that in the present environment there would be more such support, and I will certainly take the opportunity to discuss the question in the course of my contacts with foreign ministerial and other relevant figures over the next few months.

Asylum – political asylum

On 18 February 1988 the Minister for Foreign Affairs and Trade, Mr Hayden, provided the following answer to the respective question on notice (HR Deb 1988, Vol 159, p 396):

1) How many applications for political asylum have been received by his Department since March 1983.

   Since March 1983 the Department has received 20 approaches which have been regarded as serious or substantive applications.

2) What nationalities were the applicants.

Israel, Federal Republic of Germany, Poland, India, Iraq, Iran, South Africa, Egypt, People's Republic of China, Chile, Singapore, Malaysia and "Palestine".

3) How many applications have been successful.
None.

Refugees – determination of refugee status – procedure

On 30 November 1988 Mr Holding, the Minister representing the Minister for Immigration, Local Government and Ethnic Affairs, said in part in answer to a question without notice (HR Deb 1988, Vol 164, p 3549):

> He will be aware that any applicant for refugee status makes his claim to the Determination of Refugee Status (DORS) Committee, which then advises the Minister after an exhaustive and extensive investigation of the claims made. Where the DORS committee recommends against refugee status, in almost all cases that advice is accepted by the Minister. ...
>
> There is the discretion on the part of the Minister in a section of the Act which enables the Minister, on humanitarian grounds, to grant residency on the basis of a view that could be expressed or considered in respect of the possible victimisation of the applicant if he returns to his country of origin.

On 14 June 1989 Senator Richardson, representing the Minister for Immigration, Local Government and Ethnic Affairs, said in part in answer to a question without notice (Sen Deb 1989, Vol 134, p 3980):

> The Government supports the principle that people who are determined as not being refugees under the 1951 United Nations Convention and the 1967 protocol relating to the status of refugees, to which Australia is a signatory, are expected to return to their country of origin under conditions of safety and dignity in accordance with international practice.

Refugees – Convention and Protocol on the Status of Refugees – meaning of a "well-founded fear of being persecuted for reasons of political opinion" – a "real chance" of persecution – relevance of a material change in the state of affairs in the applicant's country

On 12 September 1989 the High Court of Australia handed down its decision in *Chan v Minister for Immigration and Ethnic Affairs* 87 ALR 412. The case concerned an appeal from a decision of a delegate of the Minister that Mr Chan's fear of persecution was not "well-founded" and that he was therefore not a refugee within the meaning of the Convention and Protocol.The Court (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ) unanimously held that the decision was unreasonable and set it aside. It referred Mr Chan's application for refugee status back to the Minister for determination in accordance with the Court's reasons. Following are extracts from the separate reasons for decision of the members of the Court, first, on the meaning of "well-founded fear of persecution", and second, on the relevance of changed circumstances in the country of the applicant's nationality. Mr Chan's circumstances are set out in the first extract from the reasons of McHugh J.

(1) well-founded fear of persecution

McHugh J (with whom Mason CJ agreed) said at 440–1, and 446–50:

The appellant was born on 23 May 1951 in the People's Republic of China. He is a citizen of that country. In an interview with an officer of the Department of Immigration and Ethnic Affairs (the Department) in June 1986, he claimed that he joined the Red Guards after leaving school and for some time supported the policy and philosophy of Chairman Mao. Later he came to believe that Mao's ideas concerning inheritance and opposition to all "rich people" were wrong. He became sympathetic to the ideas of a section of the Red Guards who opposed Mao's ideas. After that faction lost the struggle for control of the Red Guards in the appellant's local area, its members were questioned by police. The appellant said that in 1968 he was detained for two weeks at a police station. Later his name was publicly listed in his local area as a person opposed to the policies and ideas of the State. He was assessed as "anti-revolutionary" and exiled by a local people's committee to another area.

The appellant said that, although his sympathy with the faction opposed to Mao caused him problems, "another reason could be my family background". His father had been a member of the Kuomintang which the Communist Party had overthrown. His father left China in 1950. However, the appellant's mother and other members of the family had remained in China. The appellant claimed that even before the Cultural Revolution the authorities had discriminated against his family which they regarded as anti-revolutionary. At factory meetings his mother had been asked to reform. She had been compelled to retire from work at an early age. The appellant said, however, that before the Cultural Revolution the authorities had not discriminated against him. He also conceded that his father returned to China from time to time to visit his mother.

The appellant said that he was free to move around the area to which he was sent. But he could not return to his home village: nor was he able to travel anywhere without a certificate from local officials. He claimed that between 1972 and 1973 he tried to escape from the area on three occasions and received increasing periods of detention after each capture. They ranged from three to seven months detention.He was warned that any further escape attempt would bring two years' detention in another part of China.

In 1974 the appellant escaped to Macau where his father organised the issue of a Macau identity card with the status of temporary resident. After some months, the appellant stowed away on a ship to Hong Kong where he applied for permanent residence in Hong Kong. He was imprisoned in Macau for 15 days. He immediately returned illegally to Hong Kong where he remained until he stowed away on a ship to Australia which he entered illegally in August 1980.

The appellant sought to explain an earlier statement that he preferred to be deported to China rather than Hong Kong or Macau by claiming that eventually he would be deported to China from either place and that he would "rather straightly [sic] be sent back to China". He conceded that he was not sure that what had happened in 1966–1967 in China was relevant in 1986. He said that

the Government would be different from that in 1966 "but basically it would not have changed very much". He knew that the Chinese authorities still paid attention to him and had opened letters which he had sent to members of his family. He said that in 1983 the police had questioned his sister concerning his whereabouts. He said that he was worried that he would be imprisoned for two years if he returned to China.

The appellant first applied for refugee status on 29 November 1982. ...

Writers who have examined the matter are agreed that many countries that are parties to the Convention and Protocol do not apply the interpretation of "refugee" which is set out in the Handbook. The interpretation of the term differs from country to country. Some countries interpret and apply the term literally; other countries interpret and apply it restrictively. See Avery, "Refugee Status Decision-Making: The Systems of Ten Countries", (1983) 19 *Stanford Journal of International Law* 235 at 244–356; Cox, "'Well-Founded Fear of Being Persecuted': The Sources and Application of a Criterion of Refugee Status", (1984) 10 *Brooklyn Journal of International Law* 333 at 353–78; Howland, "A Comparative Analysis of the Changing Definition of a Refugee", (1987) 5 *Journal of Human Rights* 33 at 42–69. In particular, there are considerable differences of opinion among the State parties as to what constitutes a "well-founded" fear of being persecuted.

Courts in the common law world have also given different interpretations to the term "well-founded fear" in contexts arising out of the Convention or Protocol. In *Immigration and Naturalisation Service v Cardoza-Fonseca* (1987) 94 L Ed 2d 434, the United States Supreme Court, citing its earlier judgment in *Immigration and Naturalisation Service v Stevic* (1984) 467 US 407 at 424–5, said (at 453) that in s 208(a) of the Immigration and Nationality Act 1952 (US), as amended by the Refugee Act 1980, a "moderate interpretation" of the term "well-founded fear of persecution" would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility". But in *R v Home Secretary; Ex parte Sivakumaran* [1988] AC 958, the House of Lords held (at 994, 996, 997, 1000) that "the requirement that an applicant's fear of persecution should be well-founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a Convention reason if returned to his own country". Lord Keith of Kinkel, who framed this definition, did so after referring to the passages which I have quoted from *Cardoza-Fonseca*. In that context, it seems likely that Lord Keith considered his own definition more restrictive than that of the United States Supreme Court. The House of Lords also unanimously rejected the holding of the Court of Appeal in that case that a well-founded fear was demonstrated by proving actual fear together with "good reason for this fear, looking at the situation from the point of view of one of reasonable courage circumstanced as was the applicant for refugee status" (at 964). In addition, Lord Goff of Chieveley, who also approved "the reasonable degree of likelihood" test, expressly rejected (at 998–9) the

argument that the applicant had only to show that on the objective facts his fear of persecution for a Convention reason was reasonable and plausible. Lords Bridge of Harwich, Templeman and Griffiths expressed their agreement with Lord Goff's speech.

Legal writers have also divided on the meaning of the expression "well-founded fear" of being persecuted. Thus Cox, op cit, argues (pp 351-2) that a fear is well-founded if it is based on reasonable grounds, and that such grounds are established if the applicant can give a plausible account of why he fears persecution and that account is supported to the extent reasonably possible. Grahl-Madsen, *The Status Of Refugees In International Law* vol 1 (1966), asserts (p 181):

..."the real test is the assessment of the likelihood of the applicant's becoming a victim of persecution upon his return to his country of origin. If there is a real chance that he will suffer persecution, that is reason good enough, and his 'fear' is 'well-founded'."

Goodwin-Gill, *The Refugee In International Law,* (1983), thinks (p 4) that terms such as "a reasonable chance", "substantial grounds for thinking" or "a serious possibility" are appropriate "for the unique task of assessing a claim to refugee status".

Opinions also differ as to what constitutes "being persecuted". One recent writer has criticised decisions of the Canadian Immigration Appeals Tribunal as requiring "harassment that is so constant and unrelenting that the victims feel deprived of all hope of recourse, short of flight, from government repression": Hathaway, "Selective Concern: An Overview of Refugee Law in Canada", (1988) 33 *McGill Law Journal* 676 at 709. But other decisions in countries including Canada demonstrate a more liberal approach in practice.

Since no particular definition or exposition of the phrase "well-founded fear of being persecuted" seems to have gained wide support, this court must construe the phrase for itself.

The examination of *travaux preparatoires* to construe a treaty is a legitimate and perhaps a necessary tool for construing such a document. "It may now be regarded as a settled principle of interpretation of treaties that tribunals, international and national, will have recourse, in order to elucidate the intention of the parties, to the records of the negotiations preceding the conclusion of the treaty, the Minutes of the conference which adopted the treaty, its successive drafts, and so on": Lauterpacht, *International Law,* vol 1 (1970). p 363. Unfortunately, the preparatory materials are of limited assistance in interpreting the present Convention and Protocol.

The definition of "refugee" in the Geneva Convention has been traced to the International Refugee Organisation (IRO) Constitution adopted by the General Assembly of the United Nations in 1946: Cox, op cit, p 338. The IRO Constitution stated that no refugee with "valid objections" should be compelled to return to his or her country of origin. One of the "valid objections" was persecution or "fear based on reasonable grounds of persecution because of race, religion, nationality or political opinion ...". The IRO Manual declared

that "reasonable grounds" were to be understood as meaning that the applicant has given "a plausible and coherent account of why he fears persecution". Subsequently, the Economic and Social Council of the United Nations in 1949 appointed an Ad Hoc Committee on Statelessness and Related Problems. The Committee drafted a provisional Convention in 1950 and this led to the Convention that was done at Geneva in July 1951. In its Final Report to the Council, the Committee declared that it had drafted the Convention to afford at least as much protection to refugees as had been provided by previous agreements. This declaration might suggest that a "well-founded" fear under the Convention is established, having regard to the IRO Manual interpretation, if the applicant gives a plausible and coherent account of why she fears persecution. But as Cox, op cit, has pointed out (p 351) the IRO approach was dictated by its inability to form an independent and objective view about conditions prevailing in the country of origin and the State parties to the Convention and Protocol will frequently have detailed knowledge of conditions in the country of the applicant's nationality. It is unlikely, therefore, that a State party was expected to grant refugee status to a person whose account, although plausible and coherent, was inconsistent with the State's understanding of conditions in her country of nationality. The practice of the IRO under its Constitution, therefore, is no guide to the meaning of "well-founded fear" in the Convention and Protocol definitions notwithstanding the declaration of the Ad Hoc Committee in its Final Report.

The Final Report of the Ad Hoc Committee also stated that "well-founded fear" meant "good reason" for fearing persecution: The English Court of Appeal in *Sivakumaran* referred to (at 964) and seems to have acted on this statement in formulating its definition of "well-founded fear". I have already pointed out that on appeal the House of Lords rejected this definition. Moreover, to substitute the notion of "good reason" for fear for that of "well-founded fear" does not assist in defining the latter term. It simply replaces one vague expression with another.

Courts, writers and the UNHCR Handbook agree, however, that a "well-founded fear" requires an objective examination of the facts to determine whether the fear is justified. But are the facts which are to be examined confined to those which formed the basis of the applicant's fear? In *Sivakumaran* the House of Lords, correctly in my view, held that the objective facts to be considered are not confined to those which induced the applicant's fear. The contrary conclusion would mean that a person could have "well-founded fear" of persecution even though everyone else was aware of facts which destroyed the basis of her fear.

The decisions in *Sivakumaran* and *Cardoza-Fonseca,* also establish that a fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. As the United States Supreme Court pointed out in *Cardoza-Fonseca* an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 percent chance that he will be shot, tortured or otherwise persecuted. Obviously, a far-

fetched possibility of persecution must be excluded. But if there is a real chance that the applicant will be persecuted, his fear should be characterised as "well-founded" for the purpose of the Convention and Protocol.

The term "persecuted" is not defined by the Convention or the Protocol. But not every threat of harm to a person or interference with his or her rights for reasons of race, religion, nationality, membership of a particular social group or political opinion constitutes "being persecuted". The notion of persecution involves selective harassment. It is not necessary, however, that the conduct complained of should be directed against a person as an individual. She may be "persecuted" because she is a member of a group which is the subject of systematic harassment: Gagliardi, "The Inadequacy of Cognisable Grounds of Persecution as a Criterion for According Refugee Status", (1987) 24 *Stanford Journal of International Law* 259 at 269; Goodwin-Gill, op cit, pp 44-5; Grahl-Madsen, op cit, pp 185-6; MA A26851062 *v Immigration and Naturalisation Service* (1988) 858 F 2d 210 (4th Cir) at 214; *Gunaleela v Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 543 at 563-4; 74 ALR 263; *Periannan Murugasu v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court, 28 July 1987, at 13). Nor is it a necessary element of "persecution" that the individuals should be the victim of a series of acts. A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, she is "being persecuted" for the purposes of the Convention. The threat need not be the product of any policy of the Government of the person's country of nationality. It may be enough, depending on the circumstances, that the Government has failed or is unable to protect the person in question from persecution: Goodwin-Gill, op cit, p 38; Hyndman, "The 1951 Convention Definition of Refugee: An Appraisal with Particular Reference to the Case of Sri Lankan Tamil Applicants". (1987) 9 *Human Rights Quarterly* 49 at 67; UNHCR Handbook, para 62; *McMullen v Immigration and Naturalisation Service* (1981) 658 F 2d 1312 (9th Cir) at 1315; MA A26851062, at 218; *Rajudeen v Minister of Employment and Immigration* (1984) 55 NR 129 at 134. Moreover, to constitute "persecution" the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute "persecution" for the purposes of the Convention and Protocol. Measures "in disregard" of human dignity may, in appropriate cases, constitute persecution: Weis, "The Concept of the Refugee in International Law", (1960) *Journal du Droit International* 928 at 970. Thus the UHNCR Handbook asserts that serious violations of human rights for one of the reasons enumerated in the definition of refugee would constitute persecution: para 151. In *Oyarzo v Minister of Employment and Immigration* [1982] 2 FC 779 the Federal Court of Appeal of Canada held (at 783) that on the facts of that case loss of employment because of political activities constituted persecution for the purpose of the definition of "Convention refugee" in the Immigration Act 1976 (Can), s 2(1). The court rejected (at 782) the proposition that persecution

required deprivation of liberty. It was correct in doing so, for persecution on account of race, religion and political opinion has historically taken many forms of social, political and economic discrimination. Hence, the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason: Goodwin-Gill, pp 38 et seq. In *R v Immigration Appeal Tribunal; Ex parte Jonah* [1985] Imm AR 7 Nolan J, sitting in the Queen's Bench Division, held as a matter of law that there was a well-founded fear of persecution when the adjudicator had found "that if the appellant on his return to Ghana sought to involve himself once again in union affairs, he could be in some jeopardy, but there is no acceptable evidence to indicate that he would be at any material risk if he was to resume his residence in his remote family village where he spent a year and a half immediately prior to coming to this country" (at 12). His Lordship held (at 13) that being "subjected to injurious action and oppression – by reason of his political opinion and membership of a social group opposed to the Government" constituted a well-founded fear of being persecuted "in the ordinary meaning of that word". In the United States, the Ninth Circuit has also taken a liberal view of the term "persecution". In *Kovac v Immigration and Naturalisation Service* (1968) 407 F 2d 102 (9th Cir), the Court of Appeals construed (at 107) the phrase "persecution on account of race, religion, or political opinion" in the Immigration and Nationality Act as meaning "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive". This definition of "persecution" was reaffirmed by the Ninth Circuit in *Moghanian v US Department of Justice* (1978) 577 F 2d 141 (9th Cir) at 142. In *Berdo v Immigration and Naturalisation Service* (1970) 432 F 2d 824 (6th Cir) at 845–7, the Sixth Circuit approved a similar construction.

Mason CJ said at 417–8 and 420:

The Convention and the Protocol do not define the words "being persecuted" in Art 1A(2). The delegate was no doubt right in thinking that some forms of selective or discriminatory treatment by a State of its citizens do not amount to persecution. When the Convention makes provision for the recognition of the refugee status of a person who is, owing to a well-founded fear of being persecuted for a Convention reason, unwilling to return to the country of his nationality, the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns. Obviously harm or the threat of harm as part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of membership of the group, amounts to persecution if done for a Convention reason. The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm, although I would not wish to express an opinion on the question whether any deprivation of a

freedom traditionally guaranteed in a democratic society would constitute persecution if undertaken for a Convention reason.

I agree with the conclusion reached by McHugh J that a fear of persecution is "well-founded" if there is a real chance that the refugee will be persecuted if he returns to his country of nationality. ...

I note in conclusion that I have not found the Handbook on Procedures and Criteria for Determining Refugee Status, (1979), (the Handbook) published by the Office of the United Nations High Commissioner for Refugees especially useful in the interpretation of the definition of "refugee". Without wishing to deny the usefulness or the admissibility of extrinsic materials of this kind in deciding questions as to the content of concepts of customary international law and as to the meaning of provisions of treaties (see, for example, *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 274, 279, 290–1, 294–6; O'Connell, *International Law,* 2nd ed (1970), vol 1, pp 261–2), I regard the Handbook more as a practical guide for the use of those who are required to determine whether or not a person is a refugee than as a document purporting to interpret the meaning of the relevant parts of the Convention.

Dawson J said at 423–5:

The phrase "well-founded fear of being persecuted" has occasioned some difference of opinion in the interpretation of the relevant Article of the Convention. Upon any view, the phrase contains both a subjective and an objective requirement. There must be a state of mind – fear of being persecuted – and a basis – well-founded – for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind: there must be a sufficient foundation for that fear. The differences which have arisen have largely stemmed from a desire to place a greater emphasis upon either the subjective or the objective element of the phrase. Paragraph 42 of the Handbook on Procedures and Criteria for Determining Refugee Status issued by the Office of the United Nations High Commissioner for Refugees in 1979 states that:

"In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there."

Perhaps the emphasis upon the subjective element in this view of the test was prompted by recognition of the fact that some member States of the Convention are reluctant to find an actual danger of persecution in another country for fear of damaging relations with that other country: see *R v Home Secretary; Ex parte Sivakumaran* [1988] AC 958 at 998. But "well-founded" must mean something more than plausible, for an applicant may have a plausible belief which may be demonstrated, upon facts unknown to him, to have no foundation. It is clear enough that the object of the Convention is not to relieve fears which are all in the mind, however understandable, but to facilitate refuge for those who are in need of it. Only limited recognition of this is given in the further observation in para 204 of the Handbook that an

applicant's statements must be "coherent and plausible, and must not run counter to generally known facts".

On the other hand, it is also clear enough that a fear can be well-founded without any certainty, or even probability, that it will be realised. ...

Whilst alternative verbal formulations of the correct test may be useful in identifying shades of meaning, none can ever offer complete precision. Nevertheless, for the sake of uniformity of approach I should express my preference for a test which requires there to be a real chance of persecution before fear of persecution can be well-founded. It is sufficient to justify that choice to point to the fact, as does the Chief Justice in his reasons for judgment, that it is a test which has been recently expanded by this court in another context in *Boughey v R* (1986) 161 CLR 10 at 21; 65 ALR 609, in a manner which is helpful in the present context. A real chance is one that is not remote regardless of whether it is less or more than 50 percent.

Toohey J said at 431-2:

The use of the adjectival expression "well-founded" must be taken as qualifying in some way the "fear of persecution". It is hard to conceive of a fear which has no objective foundation at all as well-founded, no matter how genuine the fear might be. If the test were entirely subjective, the expression "well-founded" would serve no useful purpose. On the other hand, it is fear of persecution of which Art 1A(2) speaks, not the fact of persecution. So it is apparent that while the requirement is not entirely subjective, it is not entirely objective. Both elements are present. There must be a fear on the part of the applicant and that fear must be of persecution. But what is meant by "well-founded"? ...

In the writings of commentators differing views have been expressed. Cox, "'Well-Founded Fear of Being Persecuted': The Sources and Application of a Criterion of Refugee Status", (1984) 10 *Brooklyn Journal of International Law* 333 at 352, considers that a fear is well-founded if it is based "on reasonable grounds" and that such grounds are established if the applicant "can give a plausible account of why he fears persecution" and the account "is supported to the extent reasonably possible". Goodwin-Gill, *The Refugee In International Law,* (1983), p 24, considers that, while terms such as "a reasonable chance", "substantial grounds for thinking" or "a serious possibility" lack precision, they "are appropriate ... for the unique task of assessing a claim to refugee status", Grahl-Madsen, p 181, makes this comment:

"But the real test is the assessment of the likelihood of the applicant's becoming a victim of persecution upon his return to his country of origin. If there is a real chance that he will suffer persecution, that is reason good enough, and his 'fear' is 'well-founded'."

It has been said, and rightly: "International instruments and national legislation in the protection field, while formulated in abstract terms, concern human fate, the fate of the refugees" (statement by Dr P Weis, Executive Committee of the High Commissioner's Programme, 16th Session, 147th

Meeting (1966), UN Doc A/AC 96/349, p 4). While the differences in some of the tests suggested above may be semantic only, it is clearly important that a determination of refugee status be made by the application of a test that is readily capable of comprehension and application. A plethora of tests, indeed what may amount to the same test though expressed in a variety of ways, can only lead to uncertainty and, all too likely, confusion in an area where the future of individuals is at stake.

The test suggested by Grahl-Madsen, "a real chance", gives effect to the language of the Convention and to its humanitarian intendment. It does not weigh the prospects of persecution but, equally, it discounts what is remote or insubstantial. It is a test that can be comprehended and applied. That is not to say that its application will be easy in all cases; clearly, it will not. It is inevitable that difficult judgments will have to be made from time to time.

If the test of "a real chance that he will suffer persecution" had been applied to the appellant, a determination refusing him refugee status is, in all the circumstances, one that could not reasonably have been made.

Gaudron J said at 435-6:

The Convention, in speaking of "well-founded fear of being persecuted", posits that there should be a factual basis for that fear. The words "well-founded fear" do not, as a matter of ordinary language, convey any precise relationship between fear and its factual basis. In the exercise of judicial power there is a natural tendency to invest an expression such as "well-founded fear" with some degree of specificity. And it is inevitable that a court, in considering the exercise of administrative powers involving the application of that expression, will seek to invest the expression with some specific content. ...

In *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 Lord Wilberforce said (at 152) that an international convention should be interpreted "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation". See also *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 281-2, 285, 293; *Shipping Corp of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142 at 159; 32 ALR 609. I accept that general approach and add that a convention should be interpreted in a manner that accords with its general international purpose and reflects the general range of circumstances in which it will fall for implementation.

The humanitarian purpose of the Convention, the fact that questions of refugee status will usually fall for executive or administrative decision and in circumstances which will often not permit of the precise ascertainment of the facts as they exist in the country of nationality serve, I think, to curb enthusiasm for judicial specification of the content of the expression "well-founded fear" as it is used in the Convention. Perhaps all that can usefully be said is that a decision-maker should evaluate the mental and emotional state of the applicant and the objective circumstances so far as they are capable of ascertainment, give proper weight to any credible account of those circumstances given by the

applicant and reach an honest and reasonable decision by reference to broad principles which are generally accepted within the international community.

(2) changed circumstances

Mason CJ said at 419:

While the question remains one for determination at the time of the application for refugee status, in the absence of facts indicating a material change in the state of affairs in the country of nationality, an applicant should not be compelled to provide justification for his continuing to possess a fear which he has established was well-founded at the time when he left the country of his nationality. This is especially the case when the applicant cannot, any more than a court can, be expected to be acquainted with all the changes in political circumstances which may have occurred since his departure.

Dawson J said at 425:

Of course, the circumstances in which an applicant for recognition of refugee status fled his country of nationality will ordinarily be the starting point in ascertaining his present status and, if at that time he satisfied the test laid down, the absence of any substantial change in circumstances in the meantime will point to a continuation of his original status.

Toohey J said at 430:

Of course, such an approach does not and cannot exclude consideration of an applicant's circumstances at the time he left the country of his nationality; these circumstances are a necessary starting point of the inquiry. All that the approach demands is that a determination whether a person has a well-founded fear of being persecuted is a determination whether that circumstance exists at the time refugee status is sought. If circumstances have changed since the applicant left the country of his nationality, that is a relevant consideration. In an appropriate case the change (such as a new Government) may remove any basis for a well-founded fear of persecution.

Gaudron J said at 437–8:

If an applicant relies on his past experiences it is, in my view, incumbent on a decision-maker to evaluate whether those experiences produced a well-founded fear of being persecuted. If they did then a continuing fear ought to be accepted as well-founded unless it is at least possible to say that the fear of a reasonable person in the position of the claimant would be allayed by knowledge of subsequent changes in the country of nationality. To require more of an applicant for refugee status would, I think, be at odds with the humanitarian purpose of the Convention and at odds with generally accepted views as to its application to persons who have suffered persecution.

McHugh J (with whom Mason CJ agreed) said at 451:

In many cases, the same result will be reached whether one begins by asking whether an applicant was a refugee when she left her country of nationality and

whether the circumstances have since changed or whether one simply examines the circumstances in the country of nationality at the time a claim for recognition is made on a State party. But in the present case the appellant claims that it is important to distinguish between the two approaches because if he was a refugee in 1974 there was no evidence that the circumstances which gave rise to him being a refugee at that time had ceased to exist. However, the delegate seems to have approached the case on the basis that the conditions which existed when the appellant left China have not changed. On that basis the delegate must have reached the same decision whichever of the two approaches he adopted.

[Note: for statistics from 1986 to 1989 of proceedings to review decisions on the granting of refugee status, including legal proceedings and their outcomes, see the written answer of 22 December 1989 of the Minister for Immigration, Local Government and Ethnic Affairs, Mr Holding, o a question on notice: HR Deb 1989, Vol 170, p 3670]

Refugees – refugees from particular countries – Vietnam, Somalia, China

On 1 December 1988 the Minister for Immigration, Local Government and Ethnic Affairs, Senator Robert Ray, said in part in answer to a question without notice (Sen Deb 1988, Vol 130, pp 3300–1):

Mr Binh arrived in Australia, I think, to attend a cultural function. It is quite clear from the interview with Mr Binh that, before he left Vietnam, he had always intended to apply for refugee status in Australia. He applied for refugee status. It was considered by the Determination of Refugee Status Committee, which unanimously rejected his refugee claims, including, I might add, in the technical sense also supported by the United Nations High Commissioner for Refugees. Having been refused at that level, it is now up to Mr Binh, under his legal obligations, to return to Vietnam.

Of course, this case differs from any other refugee cases in as much as it has had a lot of publicity. This gives us a long term problem in dealing with any of those cases. If someone is not a refugee by definition but, by attacking his homeland country in the media, he automatically becomes a refugee, that has long term implications for visitor programs to this country and our immigration policy. Everybody realises that Australia is a large immigration country. Everybody realises that, sadly, many people miss out in their application to come here. If it is seen that, by using refugee status, people can emigrate to Australia and miss the normal immigration criteria, we would be facing a serious situation.

I will come to some of the honourable senator's specific points in a moment. We can deal with this matter in a number of ways. We can say that we will allow no more visitors from this country, and I am certain that that could also be the reaction at the other end. We treat these refugee cases on an individual basis and not on a class basis. We do not have a class of refugees, such as Tamils, Vietnamese, or Lebanese. This is often confused.

Obviously, having refused Mr Binh's application for refugee status, we have had some concerns as to whether he would be persecuted. Having looked at his previous history in Vietnam, where he was not subject to any persecution – and that is quite clear from the evidence – discussions have taken place between Mr Simmington from my department and officials from the Vietnamese Embassy. Those discussions are continuing on a couple of points. The dialogue is continuing. The indication from the Vietnamese Government is fairly clearly that the gentleman concerned will not be subject to any abuse or maltreatment.

Probably the one remaining factor that is not clear in my mind yet from the discussions held between officials is whether the Vietnamese Government would put an artificial barrier in the way of Mr Binh's application to come to Australia. The relationships between the Government of Vietnam and Australia on immigration matters are continually improving. We now have an agreement for an orderly departure system, an immigration system, to Australia which is a big breakthrough. It means that many families in Vietnam that want to come to Australia no longer have to make the arduous march to camps or travel on boats, et cetera. We are establishing an orderly migration program for the reunification of relatives. This is not an easy case, but I believe that if it were handled incorrectly we would endanger that orderly departure program, and many more people would be potential sufferers.

The honourable senator asked me what guarantees I could give. No Minister can give an absolute guarantee. I cannot give an absolute guarantee that if I deport someone back to New York tomorrow that he will survive for the rest of his life without being knifed, mugged or something else. I cannot give absolute guarantees. One is required to use the best judgment available. When determining refugee cases I do not determine them directly we have an interdepartmental committee, as I think the previous Government did, which very carefully measures the case of any refugee. I point out that the process in Australia takes three months, and sometimes it is quicker. The process in other countries, through the courts, takes longer.

On 7 December 1988 the Minister for Immigration, Local Government and Ethnic Affairs, Senator Robert Ray, said in part in answer to a question without notice (Sen Deb 1988, Vol 130, pp 3682–3):

> I granted refugee status to these Somalis on 21 October 1988. At the time the Australian Government took the view that, as they arrived on an Italian naval vessel in Italian uniform and had been resident in Italy for some years, the Italian Government bore the major responsibility for their ultimate resettlement. Negotiations with the Italian Government were initiated on this basis. The Italian Government's lack of a substantial response and its prevarication were fairly disappointing, particularly in view of the history of cooperation over the years between our two countries. I am most concerned at the Italian Government's very uncooperative attitude on the fate of the Somalis. It would not even categorically rule out their involuntary return to Somalia, thus calling into question Italy's reputation as a humanitarian nation. In the circumstances,

> I have decided to approve in principle the grant of permanent resident status to the Somalis, thereby demonstrating that Australia is willing to live up to its obligations under the United Nations Convention and protocol relating to the status of refugees.

On 6 June 1989 the Minister for Immigration, Local Government and Ethnic Affairs, Senator Robert Ray, said in part in answer to a question without notice (Sen Deb 1989, Vol 134, p 3416):

> The Government has decided to extend the temporary entry permits of PRC nationals legally in Australia as at 4 June. Applications should be made at any Department of Immigration, Local Government and Ethnic Affairs office around Australia. Temporary entry permits will be extended until the end of July within the same category as the applicant currently holds, such as student visa or visitor visa. This will allow a breathing space while the situation in the People's Republic of China becomes clearer.
>
> It is still too early to talk definitely about refugee status in Australia. I must stress again that events in the PRC are still unfolding and accordingly the Government is not in a position to give its final response to the serious situation there. ...
>
> Applicants will be treated like any other applicant for refugee status. Applications will not be determined on the basis of a class of people, but on individual merits. They will be considered on the basis of individual claims. It has not been brought to my attention yet that anyone has applied for refugee status, although in some cases I would not think that that would be long in coming. It is estimated that some 15,000 people from the People's Republic of China are in Australia. Of those, 4,000 are visitors, 476 are on temporary permits, 10,600 are on student visas and there are 300 others, totalling about 15,405. If there were a substantial application rate we would need contingency plans to deal with them. The current system for processing onshore refugee claims, which amount to between 500 and 700 a year, would obviously have to be revamped.
>
> I suggest that it is still a little early to say what the situation is, but we will meet our international obligations under the 1951 United Nations Convention relating to the status of refugees and the 1967 protocols. We have no intention of not meeting them.

Human rights – protection of human rights in Australian foreign policy

On 19 May 1989 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, addressed the National General Meeting of Amnesty International Australia in Sydney. Part of his speech was as follows:

What the Government is doing

> The Government's human rights agenda covers both bilateral and multilateral efforts. In the multilateral field, our objective is threefold: to encourage adherence to existing human rights instruments; to ensure the effective

operation of monitoring machinery; and to expand the body of human rights treaties in specific areas.

We use our participation in multilateral forums, like the Commission on Human Rights and the Third committee of the United Nations General Assembly, to lend support to the foundation stones of international human rights standards: the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination the Convention on the Elimination of All Forms of Discrimination Against Women, the Declaration of the Rights of the Child, and Convention 111 of the International Labour Organisation covering discrimination in employment. Australia is a party to all these treaties and we encourage countries that have not yet ratified them to do so.

We take seriously our obligations to report to the international community on our implementation of these agreements. The machinery for monitoring adherence to international human rights agreements serves not only to verify that commitments are being kept, but also has an important role in establishing the principle that nations are accountable for their human rights performance. Certainly in our national reports we seek to meet the highest standards of international accountability.

The same is true for the special investigative machinery that operates under the auspices of the Commission on Human Rights. The appointment of Rapporteurs to investigate alleged human rights violations in particular countries is a means of bringing these violations to the attention of the international community. If the country concerned is prepared to cooperate – and we believe there is an obligation upon all governments to do so – the institution of the Rapporteur can also help to open up a constructive dialogue on the scope of the problem and on steps to improve the situation. Similarly, the appointment of special Rapporteurs to investigate broader issues like torture or arbitrary and summary executions can sometimes serve as catalysts for concerted international action in these areas. In human rights, no less than in engineering, effective machinery is often the key to success.

As well as consolidating existing standards and structures, Australian human rights policy also seeks to expand them. We accord particular priority to securing the adoption of a second optional protocol on the abolition of capital punishment to the International Convention on Civil and Political Rights. We are not only active at the multilateral level on the issue of capital punishment, we also raise it bilaterally, for example as part of our representations to the United States, Malaysia and China. The abolition of the death penalty is of course also a major item in Amnesty International's agenda and we see it as a recognition of Australia's leading role on this matter that Amnesty International has chosen Australia as the country in which to launch your global campaign for the abolition of the death penalty.

Australia has also been active in the UN in the negotiations on new instruments to cover the rights of the child, the rights of human rights defenders

and the rights of migrant workers. We have supported calls for the development of a set of international standards on the rights of indigenous populations, and have been active in the review of ILO Convention 107 on Indigenous and Tribal Populations. Australia has already indicated its intention to ratify the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. And we have affirmed our support for the practical measures for the prevention of torture recommended by the UN's Special Rapporteur on Torture, including the banning of incommunicado detention. Australia also shares Amnesty International's concern to publicise more widely the activities of the UN on human rights. After all, in order to exercise your rights you must know them.

In terms of bilateral human rights representations, Australia probably raises more individual cases than any country in the world. In the past twelve months alone, Australia has raised over 400 human rights cases with 68 different countries. These representations covered both the plight of particular individuals and situations of widespread and systematic abuse. Three quarters of the cases were brought to the Government's attention by the Amnesty International Parliamentary Group, which includes Senators and Members of the House of Representatives drawn from all political parties. It is a measure of the credibility of the AIPG, and its standing as a barometer of Australian community values, that the Government associates itself in this unique way with the concerns and activities of the Group.

[Note: for a detailed account of Australia's response to the abuse of human rights culminating in the massacre in China on 4 June 1989, see the written answer of the Minister for Foreign Affairs and Trade, Senator Gareth Evans, on 24 October 1989: HR Deb 1989, Vol 169, pp 1755–6]

Human rights – incorporation of international human rights instruments into Australian law – the absence of legislation

On 22 December 1988 the Family Court of Australia handed down its decision in *Re Jane* 85 ALR 409. The case concerned an application to have a mentally-retarded child sterilised without her consent. The Human Rights and Equal Opportunity Commission, in the exercise of its statutory power in legal proceedings involving human rights issues, intervened and submitted to the Court that the child had rights under certain international human rights instruments and that those rights would be infringed if the operation went ahead. The Court did not accept that the relevant instruments were part of Australian law. Following is an extract from the judgment of Nicholson CJ, who comprised the Court (from420 and 423–6):

> I turn now to consider whether, as contended by the Human Rights Commission, the girl has additional rights under international humanitarian law if and in so far as the same forms part of the domestic law of Australia. The Human Rights and Equal Opportunity Commission contends that she has those rights and that they will be infringed if the operation proceeds.

The Commission is established pursuant to the Human Rights and Equal Opportunity Commission Act 1986 (Cth). Its functions are set out in s 11 of that Act and include inquiry into any act or practice which may be inconsistent with or contrary to any human right. Section 11 (1) (o) provides:

"Where the Commission considers it appropriate to do so, with the leave of the Court hearing the proceedings and subject to any conditions imposed by the Court, to intervene in proceedings that involve human rights issues. ..."

The Schedules to the Act set out, inter alia, the International Covenant on Civil and Political Rights and certain declarations of the General Assembly of the United Nations, including the Declaration on the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons.

His Honour set out several relevant provisions of these instruments and continued:

The Commission concedes that the Act itself does not give any of the instruments set out in the Schedule the force of law.

However, it submits that Australian courts will treat customary international law as incorporated into the domestic law of Australia so far as it is not inconsistent with any applicable statute law or with any binding precedent. In support of this proposition, it cites *Buvot v Barbut* (1736) as approved by Lord Mansfield CJ in *Triquet v Bath* (1764) 3 Burr 1478 at 1481; 97 ER 936 at 938; *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529 per Lord Denning MR at 553–4; *Chung Chi Cheung v R* [1939] AC 160 at 167–8; *Chow Hung Ching v R* (1949) 77 CLR 449 at 477–9 per Latham CJ, 462–5 per Starke J and 470–1 per Dixon J; *Polites v Commonwealth* (1945) 70 CLR 60 per Williams J at 80–1.

The Commission further submits that in order to ascertain the nature of customary international law, the courts will have regard to international treaties and conventions, authoritative texts, the Charter of the United Nations, Declarations of the General Assembly and other international developments which show that a particular subject has become a legal subject of international concern. In support of this proposition, it cites *Polites v Commonwealth, supra*,and *Koowarta v Bjelke Petersen* (1982) 39 ALR 417; 153 CLR 168 at 218–21 per Stephen J and 234–5 per Mason J. In further support of this submission it relies upon s 11 (1)(o) of the Act to which I have already referred and says that this involves an implied recognition of the rights conferred by the instruments set out in the Schedules to the Act on the basis, so the Commission says, that it is unlikely that the Parliament would have given the Commission an intervener function unless the rights referred to in the Schedules of the Act were capable of being applied by a court on existing legal principles.

I am extremely doubtful to whether these propositions represent the law in Australia.

In *Jago v District Court of New South Wales* (Supreme Court of New South Wales (Kirby P Samuels and McHugh JJA), No 259 of 1987, 10 May 1988, unreported), Samuels JA discussed the status of international covenants and

declarations including the International Covenant on Civil and Political Rights to which Australia, with certain reservations and declarations, is a party. His Honour pointed out that accession to a treaty or international covenant or declaration does not incorporate the instrument into domestic law in the absence of express stipulation and cited *R v Secretary of State for Home Department, Ex parte Bhajan Singh* [1976] 1 QB 198 at 207; *R v Chief Immigration Officer Heathrow Airport; Ex parte Salamat Bibi* [1976] 1 WLR 979; *Sezdirmezoglu v Acting Minister for Immigration and Ethnic Affairs* (No 2) (1983) 51 ALR 575 at 577. His Honour discussed the statement of Scarman LJ in *R v Secretary of State for Home Department; Ex parte Phansopkar* [1976] 1 QB 606 at 626 to the effect that it was the duty of, inter alia, the courts in interpreting and applying the law to have regard to the European Convention on Human Rights and referred to subsequent criticisms of that statement contained in the judgments of Roskill LJ and Lord Denning in *R v Chief Immigration Officer Heathrow Airport; Ex parte Salamat Bibi* at 985–6 and 984–5 respectively. His Honour concluded:

"Certainly, if the problem offers a solution of choice, there being no clear rule of common law, or a statutory ambiguity, I appreciate that consideration of an international convention may be of assistance. It would be more apt in the case of ambiguity, although in either case it would be necessary to bear in mind not only the difficulties mentioned by Lord Denning, but the effect of discrepancies in legal culture. In most cases I would regard the normative traditions of the common law as a surer foundation for development."

Kirby P adopted a somewhat broader view. After citing English authority including *R v Secretary of State for Home Department; Ex parte Phansopkar, supra*, he said:

"The position in Australia is complicated by reason of the Federal Constitution. The precise relationship of Australian domestic law to international law remains to be settled in the future, cf *Chow Hung Ching* (1949) 77 CLR 449 at 462, 471 and 477: see also *Polites v Commonwealth* (1945) 70 CLR 60 at 81 and *Kioa v Minister for Immigration and Ethnic Affairs* (1984) 55 ALR 669 at 680. Note see Anderson and Rowe "Human Rights in Australia: National and International Perspectives" (1986) 24 *Archiv Des Volkerrechts* 56 at 83. Nonetheless, I regard it to be at least as relevant to search for the common law of Australia applicable in this State with the guidance of a relevant instrument of international law to which this country has recently subscribed as by reference to disputable antiquarian research concerning the procedures which may or may not have been adopted by the itinerant justices in eyre in parts of England in the reign of King Henry II.

"Our laws and our liberties have been inherited in large part from England. If an English or imperial statute still operates in this State, we must give effect to it to the extent provided by the Imperial Acts Application Act 1969, especially s 6, Sch 2 Pt I. But where the inherited common law is uncertain, Australian judges, after the Australia Act 1986 at least, do well to look for more reliable and modern sources for the statement and development of the common

law. One such reference point may be an international treaty which Australia has ratified and which now states international law."

In this context, it is of interest to note the comments of the learned authors of the article referred to by Kirby P at 80 in relation to the question of the incorporation of rules of public international law into the municipal law, so far as it is not inconsistent with rules enacted by statutes or finally declared by the courts. The learned authors say:

"Application of this doctrine immediately raises roblems. First, what are the principles sought to be thus incorporated? Most international human rights law is treaty based, and therefore referable to specific words. But they are not usually precise, or necessarily tailored to local conditions: precision and adaptation may need to be effected locally by the appropriate organ. To the extent that human rights derive from customary law, or from treaties which become to some extent customary, there is an even greater lack of authoritative definition. There is no international court with hierarchical authority to pronounce human rights law for the use of Australian courts. The International Court of Justice can decide according to international conventions, international custom, general principles of law recognised by civilised nations and judicial decisions and teachings of publicists, yet also (with the agreement of the parties) simply *ex aequo et bono.* Although comparisons might be drawn between these terms and the method of the common law, the ambit of these terms indicates a lesser degree of definition, and a lesser observance of a hierarchical curial authority than exists in and appear necessary to the working of the common law."

The learned authors go on to point out that other difficulties are that international law is primarily framed in terms of State conduct and that the status of an international principle once municipally incorporated, is not easy to determine. They comment:

"As an international principle, it is not subject to the doctrine of *stare decisis.* If at the municipal level, it is subject to the normal common law principles, including those of *stare decisis* (and the consequently limited and awkward processes of amendment) it presumably cannot continue directly to receive modifications from the international sphere."

The learned authors point out that the Australian position is that one is left with a number of judicial statements which taken together are inconclusive.

I do not think that the annexure of the relevant covenants as Schedules to the Human Rights and Equal Opportunity Commission Act takes the matter any further. The Commission seeks to draw some comfort from this fact, together with the intervener role which the Act gives to the Commission. However, as Samuels JA pointed out in *Jago's* case, *supra*, such instruments are not to be regarded as incorporated into domestic law in the absence of express stipulation. If there ever was an opportunity to expressly incorporate these instruments into domestic law, it was presented by the Human Rights and Equal Opportunity Commission Act and the Parliament chose not to do so. Accordingly, I can see no basis for drawing the inference relied upon by the

Commission: see also *Kioa v West* (1985) 62 ALR 321; 159 CLR 550 per Gibbs CJ at 570, Wilson J at 604 and Brennan J at 630.

I think that the better view of the law is that whilst it may be open to have regard to such instruments as an aid to determining what the common law is in the event of doubt about, for example, the existence of a particular right, they are not by their terms incorporated into Australian domestic law. It is, nevertheless, permissible and, I believe, useful to have regard to them in considering the exercise of discretion.

I am, accordingly, quite unable to agree with the Commission's proposition that in applying s 60D of the Family Law Act, a court is bound to apply the various provisions of these instruments in so far as they are not inconsistent with it. In fact, there are inconsistencies as is apparent on examination of the relevant provisions. For example, Principle 6 of the Declaration of the Rights of the Child states that: "Except in exceptional circumstances, a child of tender years should not be separated from his mother."

[Note: the New South Wales case referred to by Nicholson CJ was subsequently reported in (1988) 12 NSWLR 558: per Kirby P at 569–70, and Samuels JA at 580–1]

Human rights – Australian adherence to international instruments

On 13 December 1989 the Acting Minister for Foreign Affairs, Mr Duffy, issued a news release which read in part:

"Australia is widely recognised internationally as one of the most active countries in human rights, with a record of concern for and protection of human rights which is second to none", Mr Duffy said.

Mr Duffy commented that in the period between July 1987 and June 1989, the Australian Government raised 780 cases of alleged human rights abuse with over 70 foreign governments. It had also consistently taken a strong public stand in condemning incidents of major human rights abuses. ...

Mr Duffy said that for legal reasons Australia had not become a Party to a small number of international human rights instruments, for example where a Convention declares certain activities as criminal which would not be so regarded under our common law traditions. However, of the 22 existing United Nations human rights instruments, Australia was Party to 16. Amongst this number were all the major instruments dealing with human rights violations, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Elimination of all forms of Discrimination against Women. Australia was a Party to four Conventions dealing with slavery.

Human rights – action by individuals to enforce observance of human rights – International Covenant on Civil and Political Rights – Australia's reservations – First Optional Protocol

On 22 December 1989 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, provided the following written answers in part to questions on notice (Sen Deb 1989, Vol 138, pp 5213–4):

(5) When did the Government last give consideration to withdrawing these reservations.

The matter has not been considered formally by the Standing Committee of Attorney–Generals since 1984.

(1) Since human rights protection is for everyone, should not individuals be able to take legal action to prevent the abuse of human rights.

Certainly I believe that it should be the goal of every national system of law to allow individuals to take legal action in respect of breaches of their human rights. Under international law which is essentially the law between states, legal remedies available to individuals are limited. One mechanism exists under the Optional Protocol to the International Covenant on Civil and Political Rights. The Govern ment is currently giving consideration to becoming a Party to the Protocol. ...

Human rights – International Covenant on Civil and Political Rights – Articles 12 and 17 – International Covenant on Economic, Social and Cultural Rights – Article 15 – breach by Romania

On 24 May 1989 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, provided the following written answer in part to a question on notice (HR Deb 1989, Vol 167, pp 2884–5):

Australia has on several occasions protested to the Government of Romania over abuses of human rights, including in Transylvania, and over the policy known as Systematisation which involves the destruction of villages, particu–larly affecting Romania's ethnic Hungarian minority.

A number of Romanian Government policies and practices, including aspects of the Systematisation policy, are clearly in violation of international covenants relating to human rights, for example Articles 12 and 17 of the International Covenant on Civil and Political Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights. Such practices are, moreover, contrary to provisions of the Universal Declaration of Human Rights.

Human rights – the right of freedom of expression – threat against the author of *The Satanic Verses*

On 28 February 1989 the Prime Minister, Mr Hawke, said in part in answer to a question without notice (HR Deb 1989, Vol 165, p 11):

I thank the honourable member for Hotham for his question. I can assure him, this House and the people of Australia that Australia sets the highest value on

the rights of individuals to express their views freely and without threat of recrimination. This is a right which, as we know, is enshrined in the United Nations charter and it is not a right that we are prepared to compromise in the face of what the honourable member rightly describes as 'cultural terrorism'.

Threats against Salman Rushdie I believe offend all sensible and decent principles of international relations. It is utterly deplorable that threats have also been made against bookshops in Australia for stocking this book. I congratulate those in the Australian writing, publishing and book selling community who have indicated that they will not be intimidated by such threats.

Australia has responded in a strong and explicit manner to the threats against Salman Rushdie. I can inform the honourable member that on 24 February we called in the Iranian Ambassador and conveyed in a formal manner the Government's concerns, and we expressed in particular our abhorrence at the call by the Ayatollah Khomeini for the death of Rushdie and for those associated with the publication of *The Satanic Verses*.

Human rights – torture – Convention against Torture, 1985 – Australian legislation

On 23 March 1988 the Attorney–General, Mr Lionel Bowen, introduced the Crimes (Torture) Bill 1988 into Parliament (HR Deb 1988, Vol 160, pp 1227–8), and explained the purpose of the Bill as follows:

> The Crimes (Torture) Bill will enable Australia to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which was signed by Australia on 10 December 1985. The Convention, generally known as the Torture Convention, came into force on 26 June 1987, 30 days after the twentieth country, Denmark, deposited its instrument of ratification. As Attorney–General, I announced the Government's decision to ratify the Convention at the Human Rights Congress in Sydney on 25 September 1987. Ratification of the Convention by Australia has been the subject of consultation with the States in the Standing Committee of Attorneys–General and there is general agreement with this decision. Torture is an abhorrent practice and much work has been done in the councils of the United Nations to find practical ways of combating it. Australia has played a prominent part in such work and this Bill should be seen as a part of that process. In accordance with the provisions of the Convention, its main purpose is to deny a safe haven in Australia to any person who, while acting officially, or at the instigation or behest of a person so acting, is involved in the torture of a person in another country. There are currently 28 parties to the Convention, each of which has undertaken similar obligations to those embodied in the Bill.
>
> As a party to the International Covenant on Civil and Political Rights, Australia is already bound by the obligation in article 7 of that covenant, which provides:
>
> > No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The Government takes the view that the laws of the States and Territories are already adequate to fulfil this obligation and the obligations of the Torture Convention in so far as acts committed within Australia are concerned. The Bill does not, therefore, apply to acts within Australia. Instead, the substantive provisions in clause 6 of the Bill apply to any act of torture as defined in the Convention which is committed anywhere in the world outside Australia. The Bill does not apply retrospectively to acts of torture committed before the legislation comes into force. Australian domestic law will be applied to an Australian citizen and to any person present in Australia who has committed an act of torture as defined in the Convention. The law to be applied will, in substance, be the law of the State or Territory where the offender is prosecuted.

In the Government's view, adoption of the well-developed criminal law of the States and Territories is a preferable course to the creation of new Commonwealth law to deal with these very particular and, in the Australian context, hopefully rare circumstances. It should be noted, however, that the provisions of State and Territory legislation, and the relevant common law principles, will be applied as Federal law.

Clauses 8, 9 and 10 of the Bill make necessary incidental provision for the handling of any prosecutions which, by virtue of section 68 of the Judiciary Act, will be heard in State courts. Clause 11 will preclude the raising of defences of exceptional circumstances or uperior orders. Clause 13 recognises the obligation under article 6 of the Convention to allow an alleged offender who is not an Australian citizen access to his or her country's diplomatic or consular representatives. The remaining clauses ensure that State and Territory laws are not displaced, make appropriate provision for the Act's application and adopt the Convention's definition of torture.

It remains for me to explain why it was considered unnecessary to include certain other provisions which might appear to be called for by the Convention. The obligations under article 5 to establish jurisdiction when offences are committed on an Australian ship or aircraft are already fulfilled by the Crimes at Sea Act 1979 and the Crimes (Aircraft) Act 1963. The other categories in that article are, I believe, encompassed by the Bill or by existing State and Territory law. Obligations in relation to extradition are fulfilled by our extradition law, treaties and practice. Obligations under article 16 in relation to cruel, inhuman or degrading treatment or punishment which do not amount to torture are, in the Government's view, fulfilled by State and Territory criminal law, and the obligation under article 14 to provide for fair and adequate compensation for the victim of an act of torture is met by State criminal injuries compensation legislation and by common law rights in tort.

The passage of this Bill will be a significant step in the international effort to combat torture. Whether or not the occasion ever arises for the legislation to be invoked, its existence will be a clear indication to the international community that Australia will never become a safe haven for those who breach fundamental human rights. It will also provide a practical means of dealing

with any situation where a person who is alleged to have committed acts of torture overseas is found within Australian territory.

Human rights – hostage-taking – Convention Against the Taking of Hostages, 1979 – Australian legislation

On 1 December 1988 the Minister for Administrative Services, Mr West, introduced into Parliament, on behalf of the Attorney-General, Mr Lionel Bowen, the Crimes (Hostages) Bill 1988 (HR Deb 1988, Vol 164, pp 3692–3), and explained the purpose of the Bill as follows:

> The Bill will enable Australia to accede to the International Convention Against the Taking of Hostages, unanimously adopted by the United Nations General Assembly on 17 December 1979, which came into force on 3 June 1983. The Bill represents further evidence of Australia's participation in the international fight against terrorism. Other legislation implementing international treaties to which Australia has become a party in the area include the Crimes (Hijacking of Aircraft) Act 1972, the Crimes (Protection of Aircraft) Act 1973 and the Crimes (Internationally Protected Persons) Act 1976.
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> Recent initiatives of the Government in the very important area of international cooperation to combat terrorism include participation in the negotiating of international instruments aimed at suppressing terrorist acts at airports serving international aviation and terrorist attacks on international shipping and off-shore drilling platforms. The Government intends to introduce legislation to implement these instruments in the autumn sittings of the Parliament.
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> The question of the accession by Australia to the Convention has been the subject of consultation with the States and the Northern Territory and general agreement on it has been reached. Although some States have legislation which would most likely cover the offences of the kind envisaged by the Convention, this is not uniformly the case. Furthermore, State legislation does not have the extensive extra-territorial application required to fully implement the Convention. It is therefore more appropriate for the Commonwealth to enact legislation to allow Australia to fulfil its obligations under the Convention.
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> The Convention requires a State party to make punishable by appropriate penalties any person who seizes or detains, and threatens to kill, injure or further detain, a hostage in order to compel a third party to do or abstain from any act as a condition for release of the hostage. Attempts and participation as an accomplice are also to be made punishable by State parties. A State party is required to establish jurisdiction over these offences if committed in its territory and also to establish extra-territorial jurisdiction in some circumstances, for example, where the offences are committed by its nationals or where the act is committed to compel that State to do or abstain from any act or where the alleged offender is present in the territory of the State and it does not extradite the person.
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> Obligations under the Convention in relation to extradition are fulfilled by our extradition laws, treaties and practice. Provisions in the Acts Interpretation

Act 1901 ensure that a defendant does not face double jeopardy by reason that a particular act may be an offence under the Bill and under other Commonwealth laws or State and Territory laws. Similarly, under the Extradition Act 1988, a person would not be extradited to another country to face prosecution for an act of hostage-taking where the person had been dealt with by a court in that country or in Australia in relation to that act. Sub-clause 6 (2) prevents a person being convicted under the Bill for an act in relation to which the person has already been convicted under the law of another country. Prosecutions will be dealt with in State and Territory courts by virtue of section 68 of the Judiciary Act.

Clause 8 of the Bill creates the offence of hostage-taking and fixes the maximum penalty at imprisonment for life. It also establishes the limits of the jurisdiction claimed by Australia over the offences. In addition, by reason of the operation of clause 9 a person cannot be charged under the Bill where the act of hostage taking occurred in one country, the hostage and the alleged hostage taker are citizens of that country and the alleged hostage taker is found in that country. Clause 10 requires the consent of the Attorney-General to be obtained before a prosecution for an offence can be heard. This ensures that Australia can comply with its obligations under Article 7 of the Convention to communicate the final outcome of a prosecution under the Bill to the Secretary-General of the United Nations.

Clauses 11 and 12 deal with questions of venue for proceedings because of the requirement in section 80 of the Constitution that every trial on indictment shall be held in the State where the offence was committed. Clause 15 recognises the obligation under Article 6 of the Convention to allow an alleged offender who is not an Australian citizen access to his or her country's diplomatic or consular representatives. The remaining provisions of the Bill ensure that the operation of other Commonwealth laws and State and Territory laws are not displaced – sub-clause 6 (1) – and protect the jurisdiction of State and Territory courts, clause 14.

With the passage of the Bill Australia will remain in the forefront of international endeavours to suppress terrorism.