AUSTRALIAN CASES INVOLVING QUESTIONS OF PUBLIC INTERNATIONAL LAW 1992

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1. Acquisition of territory - Concept of *terra nullius* - Native title

Mabo v Queensland (No 2)

(1992) 175 CLR 1; 66 ALJR 408; 107 ALR 1

High Court of Australia

It was a principle of English colonial constitutional law dating from early times that where the Crown acquired sovereignty over new territory by settlement (as opposed to conquest), all English laws applicable to the colony were immediately in force there upon its foundation.[1] Judicial decisions since last century have determined that the Australian colonies were acquired by settlement, and that as a result of the doctrine of tenure in English land law,[2] all the land in these colonies became the Crown's demesne, and no person had any title to such land unless granted by the Crown.[3] From these principles, Blackburn J in *Milirrpum v Nabalco Pty Ltd*[4] drew the conclusion that whatever communal native title to land the Aboriginal population of Australia may have had prior to settlement, after settlement communal native title was not recognised by common law.

Although the decision in *Milirrpum* concerning non-recognition of native title appeared to be the inevitable result of established principles, the High

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1 *Calvin's Case* (1608) 7 Co Rep 1 at 17; 77 ER 377; *Campbell v Hall* (1774) 20 State Tr 239; 98 ER 1045; Blackstone, *Commentaries* I, pp 104-05 (1765).

2 That is, the doctrine adapted from feudal theory that all land is held mediately or immediately from the Crown.

3 *Attorney-General v Brown* (1847) 1 Legge (NSW) 312 at 316-20; *Cooper v Stuart* (1889) 14 App Cas 286 at 291; *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 428, 439; *Council of the Municipality of Randwick v Rutledge* (1959) 102 CLR 54 at 71; *New South Wales v Commonwealth (the Seas and Submerged Lands case)* (1975) 135 CLR 337 at 438-39; *Mabo v Queensland* (1988) 166 CLR 186 at 236 (Dawson J). See also *Re Phillips; Ex parte Aboriginal Development Commission* (1987) 72 ALR 508.

4 (1971) 17 FLR 141.

Court itself has previously never decided this issue.[5] In a decision of undoubtedly far-reaching significance, the High Court in the present case rejected the conclusion in *Milirrpum* and held that:

> the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands...[6]

None of the members of the court challenged the established principle of constitutional law that the annexation of territory by the Crown is an "act of State" involving the prerogative power of the Crown, which is not justiciable by the courts. The court would therefore not question the validity of the acquisition of the territory of Australia, and was concerned only with the effect of that acquisition on Aboriginal native title under domestic law.[7] Nonetheless, Brennan J (with whom Mason CJ and McHugh J agreed) was influenced by the principles of international law concerning acquisition of territory. He observed that at the time of the great voyages of European discovery, the European colonial nations applied the concept of *terra nullius* to the territory of "backward peoples", thus permitting the acquisition of sovereignty over such territory by occupation rather than conquest.[8] However, he noted that the International Court of Justice in its *Advisory Opinion on Spanish Sahara*[9] had rejected the view that territories inhabited by tribes or peoples having a social and political organisation were regarded as *terra nullius* in the nineteenth century.[10] He also quoted from the separate opinion of Judge Ammoun, who said that "the concept of *terra nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned".[11] He then said:

> If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of

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5 Cf *Coe v Commonwealth* (1979) 53 ALJR 403, especially at 408 per Gibbs J (the correctness of *Milirrpum* "would be an arguable question"), and at 412 per Murphy J.

6 175 CLR at 15. Only Dawson J dissented, finding that on annexation of the land in question in this case, "the Crown in right of the Colony of Queensland exerted to the full its rights in the land inconsistently with and to the exclusion of any native or aboriginal rights" (at 159).

7 See especially 175 CLR at 31–32 (Brennan J, citing *Post Office v Estuary Radio Ltd* [1968] QB 740 at 753; *New South Wales v Commonwealth (the Seas and Submerged Lands case)* (1975) 135 CLR 337 at 388; *Wacando v Commonwealth* (1981) 148 CLR 1 at 11, 21; *Coe v Commonwealth* (1979) 53 ALJR 403 at 410), and 78–79, 95 (Deane and Gaudron JJ).

8 175 CLR at 32–33, citing Lindley MF, *The Acquisition and Government of Backward Territory in International Law* (1926), Chs III and IV; Vattel E de, *The Law of Nations* (1797), Bk 1, pp 100–101.

9 ICJ Rep 1975, p 12 at 39.

10 175 CLR at 40.

11 Ibid, p 41, quoting ICJ Rep 1975, p 12 at 86.

> social organization" that it is "idle to impute to such people some shadow of the rights known to our law" can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.[12]

He added that Australia's accession to the First Optional Protocol to the International Covenant on Civil and Political Rights

> brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[13]

Brennan J said that common law recognition of the rights in land of the indigenous inhabitants of Australia would be precluded if recognition would "fracture a skeletal principle of our legal system".[14] However, he considered that this would not be the case. He referred to the distinction between acquisition by the Crown of territory (sovereignty, or *imperium*) and acquisition by the Crown of property (ownership, or *dominium*). He said that the former is chiefly the province of international law, the latter of the common law.[15] He found that while under the doctrine of tenure in English land law the Crown, as a "concomitant of sovereignty", had a "radical, ultimate or final title" to all land in the territory over which it acquired sovereignty, it did not necessarily acquire absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants.[16] It is established that in the case of territory acquired by cession or conquest, pre-existing private rights could be extinguished by the Crown as part of the act of State acquiring the territory, but that in the absence of express confiscation the change of sovereignty was presumed not to disturb pre-existing private rights.[17] He concluded that the existing case law did not establish that this principle was confined to territory acquired by cession and that "The preferable rule, supported by the authorities cited, is that a mere change of sovereignty does not extinguish native title to land... The preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony."[18]

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12 175 CLR at 41–42, quoting *In re Southern Rhodesia* [1919] AC 211 at 233–34.

13 175 CLR at 42. See also cases 2, 9 and 10 below.

14 Ibid, p 43.

15 Ibid, p 43–44, quoting Salmond J, *Jurisprudence*, 7th ed (1924), p 554; O'Connell DP, *International Law*, 2nd ed (1970), p 378.

16 Ibid, p 48.

17 Ibid, pp 54–56, considering, *inter alia*, *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 7 Moo Ind App 476; 19 ER 388; *Cook v Sprigg* [1899] AC 572; *In re Southern Rhodesia* [1919] AC 211; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399; *Vajesingji Joravarsingji v Secretary of State for India* (1924) LR 51 Ind App 357; *Winfat Ltd v Attorney-General* [1985] AC 733.

18 175 CLR at 57.

Thus, the Crown obtained absolute beneficial title to all land in a settled colony only where the land is "desert and uninhabited, truly a terra nullius".[19]

Toohey J adopted an approach similar to that of Brennan J.[20] In a joint judgment Deane and Gaudron JJ arrived at a similar conclusion, although in contrast to Brennan J, who thought that the conclusion could be reconciled with established "skeletal" principles, they indicated that they were re-examining and rejecting "fundamental propositions which have been endorsed by long-established authority and which have been accepted as a basis of the real property law of the country for more than one hundred and fifty years".[21] They added that these propositions

> provided the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands. The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices.[22]

They observed also that recognition of the interests in land of native inhabitants was seen by early publicists as a dictate of natural law,[23] and was supported by authorities relating to other former British Colonies.[24]

Although the court held that native title to land was recognised by the common law after settlement, it also held that the Crown had power to extinguish such title, by granting to third parties interests in land inconsistent with the continuing right to enjoy native title in respect of the same land, or by appropriating land to itself inconsistently with the right to continuing enjoyment of native title. Thus, to establish common law native title today, it is necessary to prove that an Aboriginal community had a traditional connection with the land prior to annexation by the Crown, that it has maintained that traditional connection (normally by demonstrating continuous use), and that the title has not subsequently been extinguished. By majority, the court held that extinguishment of native title by the Crown without clear and unambiguous statutory authority did not give rise to a right to a claim for

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19 Ibid, p 48.
20 Ibid, pp 180–84.
21 Ibid, p 109.
22 Ibid.
23 Ibid, p 83, citing Wolff C, *Jus Gentium Methodo Scientifica Pertractatum* (1764, trans. Drake 1934), vol II, pp 155–60, paras 308–313; Vattel E de, *The Law of Nations or Principles of the Law of Nature* (1797), pp 167–71; de Vitoria F, *De Indis et de Jure Belli Relectiones* (ed Nys, trans. Bate 1917), pp 128, 138–39; Grotius H, *Of the Rights of War and Peace* (1715), vol 2, Ch 22, paras 9–10.
24 New Zealand: *R v Symonds* [1847] NZPCC 387 at 391–92. Canada: *Calder v Attorney-General (British Columbia)* [1973] SCR 313 at 322–23, 328, 380–93; (1973) 34 DLR (3d) 145, 152, 156, 193–202; *Guerin v R* [1984] 2 SCR 335 at 376–78; (1984) 13 DLR (4th) 321 at 335–36. Papua: *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 397.

compensatory damages,[25] although any State legislation enacted after 1975 extinguishing native title without providing appropriate compensation would probably be invalid due to inconsistency with the Racial Discrimination Act 1975 (Cth).[26] By analogy, grants made since 1975 under State legislation may be invalid, or subject to native title, if appropriate compensation was not provided for any native title that would otherwise have been extinguished. Applying the new principle to the present case, the court held that the Meriam people were entitled as against the whole world to possession, occupation, use and enjoyment of certain lands of the Murray Islands in the Torres Strait, subject to the possibility of subsequent extinguishment.

The judgment in this case has given rise to an enormous amount of public discussion and activity. At present, it is not certain what its precise implications are. There is uncertainty, for instance, as to the circumstances in which native title can be said to have been extinguished. It is possible that State legislation granting grazing leases or licences to prospect for minerals in respect of land would not be inconsistent with, and would not extinguish, all of the rights attaching to native title to the land. On one view, substantial portions of Australia, particularly Western Australia, are potentially subject to claims of common law native title.[27] It is also unclear whether the form of native title recognised by the common law includes rights in minerals and other natural resources in the land which were not traditionally exploited. Another uncertainty is whether native title can extend offshore. Concerns have been expressed by the mining and pastoral industries over these uncertainties. Conversely, concerns have been expressed in relation to the vulnerability and inferiority of the form of native title recognised by the court.[28] In the wake of the judgment, the Prime Minister made a statement describing the decision as "a threshold and positive one for the nation" which has "provided a new basis for relations between indigenous and other Australians and given impetus to the process of reconciliation".[29] At the same time, the Prime Minister acknowledged that "The Court's judgment is complex, and its implications are equally complex". It was announced that a committee of Ministers, chaired by the Prime Minister, would undertake consultations with State and Territory governments, key Aboriginal and Torres Strait Islander organisations and the mining and pastoral industries on the implications of the decision. Commonwealth legislation in response to the decision is expected to be introduced in late 1993.

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25 175 CLR at 15–16. Deane, Toohey and Gaudron JJ disagreed on this point.

26 See *Mabo v Queensland* (1988) 166 CLR 186.

27 See eg Bartlett, "The Aboriginal Land Which May Be Claimed at Common Law: Implications of *Mabo*" (1992) 22 *UWALR* 272.

28 For example, O'Connor, "Aboriginal Land Rights After Mabo" (1992) 66 *Law Institute Journal* 1105 at 1107.

29 Statement by the Prime Minister the Hon PJ Keating MP (27 October 1992). See also Practice Section, Chapter II pp 393–96 and 405–06 of this volume.

2. Treaties – Aid to statutory interpretation

ICI Australia Operations Pty Ltd v Fraser

(1992) 34 FCR 564; 106 ALR 257

Federal Court of Australia – Full Court

The court in this case commented on the relevance of GATT Codes in the interpretation of Part XVB of the Customs Act 1901 (Cth) and the Customs Tariff (Anti-Dumping) Act 1975 (Cth). The court noted that the relevant second reading speeches indicated that the latter Act was enacted to give effect to Australia's decision to become a signatory to the GATT Anti-Dumping Code, and was revised in 1981 to enable Australia to become a signatory to the revised GATT Anti-Dumping Code and the GATT Code on Subsidies and Countervailing Duties. It added:

> However, the GATT, and the GATT Codes, are part of the Australian municipal law only to the extent that the Australian Acts are a domestic implementation by the Commonwealth Parliament of Australia's ratification of them: see *Tasman Timber Ltd v Minister for Industry and Commerce* [(1983) 67 FLR 12] (at 15–16); *Swan Portland Cement Ltd v Minister for Small Business and Customs* (1991) 28 FCR 135 at 146.
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> In construing the 1975 legislation, and the amendments which have followed, it is permissible to have regard to extrinsic materials to discover the purpose or object of the legislation and to confirm that the literal meaning was intended, or, if a provision is ambiguous or obscure, to determine the meaning of the provision: see s 15AB(1) of the Acts Interpretation Act 1901 (Cth); *Gardner Smith Pty Ltd v Collector of Customs (Vic)* (1986) 66 ALR 377 at 383–384. The extrinsic material may include any treaty or other international agreement that is referred to in the Act, and the Second Reading Speech: see s 15AB(2)(d) and (f). See also *GTE (Aust) Pty Ltd v Brown* (1986) 14 FCR 309 at 334. Reference has already been made to the GATT and Second Reading Speeches to identify the purpose of the 1975 legislation in which s 269TG has its origin. Neither counsel for the appellant, nor counsel for the respondents, submitted that the GATT or other extrinsic material would assist the Court in construing the provisions presently under consideration. Counsel argued that the meaning could and should be ascertained from the language of the legislation. If that language is unambiguous it must prevail: see *Re Coleman; ex parte Billing* (1986) 61 ALJR 37 at 39–40; *Barry R Liggins Pty Ltd v Comptroller-General of Customs* (1991) 32 FCR 112 at 120–121.[30]

In the *Liggins* case, Beaumont J (with whom Lockhart and Gummow JJ agreed) had indicated that although under section 15AB of the Acts Interpretation Act the court may consider an international treaty referred to in an Act where that statute is ambiguous, a doubt could not be created by the use

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30 34 FCR at 568, 569–70.

of the treaty in order to have that doubt settled by reference to that same treaty.[31]

This seems a correct statement of the position under the Acts Interpretation Act, but it may also be possible to have regard to the text of a treaty under common law rules of statutory interpretation. In England, at a time when as a general rule the courts could not have regard to extrinsic materials in interpreting statutes,[32] Lord Diplock said in *Garland v British Rail Engineering Ltd* that:

> it is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it.[33]

Under this common law principle, the English courts may refer to a treaty that legislation was specifically intended to implement, even in the absence of ambiguity in the legislative text when taken in isolation.[34] *Garland* was referred to with approval by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[35]

It may also be that in the case of an ambiguity in any legislation, even if not enacted for the purpose of implementing a treaty, the courts will favour a construction that is consistent with Australia's obligations under international human rights treaties.[36] This may be an aspect of a more general principle of statutory interpretation that a court will interpret statutes in the light of a presumption that the parliament does not intend to abrogate human rights and

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31 32 FCR at 120. See also *Toyota Tsusho Australia Pty Ltd v Collector of Customs* (Federal Court of Australia, Full Court, 14 May 1992, unreported); *Liebert Corporation of Australia Pty Ltd v Collector of Customs* (Federal Court of Australia, Foster J, 26 February 1992, unreported).

32 Cf *Pepper v Hart* [1992] 3 WLR 1032.

33 [1983] 2 AC 751 at 771.

34 Brownlie I, *Principles of Public International Law*, 4th ed (1990), p 49, and authorities cited thereat.

35 (1992) 176 CLR 1 at 38 (case 12 below). See also Crawford and Edeson, "International Law and Australian Law" in Ryan KW (ed), *International Law in Australia*, 2nd ed (1984), p 71 at 111–17, and the earlier High Court cases discussed thereat.

36 See *R v Home Secretary; Ex parte Brind* [1991] 1 AC 696, referred to in *Dietrich v R* (1992) 109 ALR 385 at 392 (Mason CJ and McHugh J), 426 (Dawson J) (case 10 below). Also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ) (case 12 below), referring to *Derbyshire CC v Times Newspapers Ltd* [1992] QB 770 at 811–12, 822–23, 829–30; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 (case 8 below), per Einfeld J; *Cachia v Haines* (1991) 23 NSWLR 304 at 312–13 (New South Wales Court of Appeal, per Kirby P).

fundamental freedoms.[37] In the case of legislation conferring a statutory discretion, a decision-maker may have regard to the provisions of international human rights treaties in exercising the discretion.[38] However, it appears to be established that a decision will not be amenable to judicial review on the grounds that the decision-maker failed to have regard to, or to give effect to, such treaties.[39] For instance, another case decided in 1992, *Ali v Minister for Immigration, Local Government and Ethnic Affairs*,[40] concerned an appeal from a decision of the Immigration Review Tribunal refusing to grant an entry permit to the father of a child who was an Australian citizen. Heerey J said:

> In support of an attack based on unreasonableness, reliance was placed on Art 9, cl 1 of the Convention [on the Rights of the Child] which requires party states to ensure a child is not separated from his or her parents against their will, unless it is in the best interests of the child.
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> The short answer is that, as was admitted, the Convention does not form part of Australian municipal law.[41]

3. State immunity - Common law rules - Restrictive doctrine

Reid v Republic of Nauru

[1993] 1 VR 251

Supreme Court of Victoria, Vincent J

It is well known that despite the trend during the course of this century towards the adoption by States of a doctrine of "restrictive" State immunity,[42] the English courts for a long time adhered to the principle that at common law, the immunity of a foreign State from the jurisdiction of the local courts was

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37 *Potter v Minahan* (1908) 7 CLR 277 at 304; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 (Brennan J); *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 108 ALR 577 at 629 (Dawson J) (case 9 below); *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681 at 700 (Brennan J).

38 See eg *Re Secretary, Department of Social Security and Underwood* (1992) 15 AAR 81 and *Re Secretary, Department of Social Security and Kumar* (1992) 15 AAR 75 (Administrative Appeals Tribunal, O'Connor J).

39 *R v Home Secretary; Ex parte Brind*, n 36 above; *Sezdirmezoglu v Acting Minister for Immigration and Ethnic Affairs (No 2)* (1983) 51 ALR 575; *Kioa v Minister for Immigration and Ethnic Affairs* (1984) 4 FCR 40 at 51–53; Crawford and Edeson, n 35 above, pp 117–29.

40 (1992) 38 FCR 144.

41 Ibid, p 151. The appeal was allowed on other grounds.

42 The restrictive doctrine was first applied by the Italian and Belgian courts in the nineteenth century. See generally Sucharitkul, "Immunities of Foreign States Before National Authorities" (1976-I) 149 *Hague Recueil* 87 at 126–70; Sinclair, "The Law of Sovereign Immunity: Recent Developments" (1980-II) 167 *Hague Recueil* 113 at 121–34, 146–96; Trooboff, "Foreign State Immunity: Emerging Consensus on Principles" (1986-V) 200 *Hague Recueil* 235 at 252–66.

absolute.[43] The same principle was applied by the courts of other common law countries,[44] including Australia.[45] The restrictive doctrine, although long espoused by Lord Denning,[46] only became firmly established as part of the English common law in actions *in personam* in 1983.[47] By that time the restrictive doctrine had already been adopted as part of English law by statute.[48]

Since the 1970s, the restrictive doctrine has also been applied as part of the common law in several other common law countries, including Canada,[49] Ireland,[50] Malaysia,[51] New Zealand,[52] Pakistan,[53] and Zimbabwe.[54] In

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43 For example *The Cristina* [1938] AC 485; *USA and France v Dollfus Mieg & Cie* [1952] AC 582; *Baccus SRL v Servicio Nacional del Trigo* [1957] 1 QB 438.

44 Canada: *Dessaulles v Republic of Poland* [1944] SCR 275; [1944] 4 DLR 1; *Mehr v Republic of China* [1950] OWN 218; *Municipality of St John v Fraser–Brace Overseas Corp* [1958] SCR 263; (1958) 13 DLR (2d) 177. India: *Royal Nepal Airline Corp v Legha* (1966) AIR Calcutta 319; 64 ILR 430. Singapore: *Olofsen v Government of Malaysia* (1966) 55 ILR 409. Ireland: *Saorstat v Rafael de las Morenas* [1945] IR 291 (but cf *Zarine v Owners of the SS Ramava* [1942] IR 148).

45 *Van Heyningen v Netherlands Indies Government* [1948] QWN 22; *United States of America v Republic of China* [1950] QWN 6; *Grunfeld v United States of America* [1968] 3 NSWR 36; Government statement, HR Debs (6 June 1968), pp 2080–81; Australian Law Reform Commission, Report No 24, *Foreign State Immunity* (1984), pp 7–9, para 10.

46 *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 (per Lord Denning); *Thai–Europe Tapioca Service v Government of Pakistan* [1975] 1 WLR 1485 (per Lord Denning MR); *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529 (per Lord Denning MR and Shaw LJ).

47 *I Congreso del Partido* [1983] 1 AC 244. The restrictive doctrine was previously held to be part of common law in actions *in personam* in the *Trendtex* case, n 46 above; *Hispana Americana Mercantil SA v Central Bank of Nigeria* [1979] 2 Lloyd's LR 277 (CA) and *Planmount* v *Republic of Zaire* [1980] 2 Lloyd's LR 393 (QBD). However, the Queen's Bench Division in *Uganda Co (Holdings) Ltd v Government of Uganda* [1979] 1 Lloyd's LR 481, declined to follow the *Trendtex* case on the grounds that it was inconsistent with earlier decisions of the Court of Appeal. Restrictive State immunity had been applied in proceedings *in rem* by the Privy Council in 1977 in *The Philippine Admiral* [1977] AC 373.

48 State Immunity Act 1978 (UK).

49 In Canada, the Supreme Court has to date neither expressly approved nor rejected the proposition that the restrictive doctrine is part of common law: see *Democratic Republic of the Congo v Venne* (1971) 22 DLR (3d) 669; *Re Canada Labour Code* (1992) 91 DLR (4th) 449 at 485–86. However, the restrictive doctrine has been applied by the lower courts: *Zodiak International Products Inc v Polish People's Republic* (1977) 81 DLR (3d) 656; *Cargo ex the Ship Astra v Lorac Transport Ltd* (1986) 28 DLR (4th) 309. But cf *Tritt v United States of America* (1989) 68 OR (2d) 284.

50 *Government of Canada v Employment Appeals Tribunal* (Supreme Court, 12 March 1992).

51 *Commonwealth of Australia v Midford (Malaysia) Sdn Bdh* (1990) 86 ILR 640 (Supreme Court). The absolute doctrine was adhered to by the High Court of Malaya as recently as 1987: *Village Holdings Sdn Bdh v Her Majesty the Queen in Right of Canada* (1987) 87 ILR 223 at 238.

Canada and Pakistan, as in the United Kingdom, the restrictive doctrine has now been given a statutory basis.[55]

A restrictive doctrine of State immunity was also introduced into Australian law by the Foreign States Immunities Act 1985 (Cth). However, by virtue of section 7(1), the provisions of the Act dealing with immunity from jurisdiction do not apply to contracts made, events occurring, acts done or obligations coming into existence before commencement of the Act. Actions concerning such contracts, events, acts or obligations continue to be governed by the common law rules. During the last decade, the common law position has been uncertain. There has never been a decision of the High Court on a question of foreign State immunity, and in view of recent developments in other common law jurisdictions, the previous decisions of the lower courts applying the absolute doctrine were of doubtful authority.

The present case, although only a decision of a single judge of a State Supreme Court, indicates that restrictive State immunity is now also part of the common law in Australia. The case concerned an action brought against the Republic of Nauru and others alleging breaches of various contracts of employment under which the plaintiff worked as a pilot for Air Nauru. The Republic of Nauru sought an order to set aside the writ or to stay permanently the proceedings on the ground of sovereign immunity. Vincent J found that as all of the contracts had been entered into prior to commencement of the Foreign States Immunities Act, immunity from jurisdiction, even in respect of an alleged breach occurring after the commencement of the Act, was governed by common law.[56] He assumed, without any consideration of the question, that at common law the restrictive doctrine was applicable. Rather, he expressed the issue before the court as follows: "Given, as would now appear to be beyond dispute, that the right of a sovereign state to claim immunity from suit in the courts of Victoria is not absolute, is it sufficiently wide to encompass the particular matter under consideration?"[57]

Vincent J noted, referring to the decision of the House of Lords in *I Congreso del Partido*,[58] that under the restrictive theory, a foreign State has immunity from jurisdiction in respect of its acts *iure imperii* ("sovereign or

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52 *Marine Steel Ltd v Government of the Marshall Islands* [1981] 2 NZLR 1 at 6; 64 ILR 539 and 562; *Buckingham v The Aircraft Hughes 500D Helicopter C-GPNN* (1982) 64 ILR 551; *Reef Shipping Co Ltd v The Ship Fua Kavenga* [1987] 1 NZLR 550; 90 ILR 556.

53 *USA v Gammon-Layton* (1971) 23 PLD (Karachi) 315; 64 ILR 567; *Qureshi v USSR* [1981] PLD (SC) 377; 64 ILR 585.

54 *Barker McCormac (Pvt) Ltd v Government of Kenya* (1983) 84 ILR 18; [1986] LRC (Const) 215.

55 State Immunity Act 1981 (Canada); State Immunity Ordinance 1981 (Pakistan). See also State Immunity Act 1979 (Singapore) and Foreign States Immunities Act 1981 (South Africa).

56 [1993] 1 VR at 257–58.

57 Ibid, p 252.

58 [1983] 1 AC 244 at 262 (Lord Wilberforce).

public" acts), but not in respect of its acts *iure gestionis* ("private" acts). He noted also that on the view taken by Lord Denning in the *Trendtex* case, characterisation of an act depends on its private law nature, rather than the foreign State's motive or purpose,[59] and observed that the United States Foreign Sovereign Immunities Act of 1976 expressly defines a "commercial activity" by reference to its nature rather than its purpose.[60]

However, Vincent J was unwilling to embrace wholeheartedly a test which precluded any reference to the purpose of an act. He said:

> In some situations, for example, the divorcement of act, motive, or purpose may not be possible. In other words, the motive or purpose underlying particular conduct may constitute part of the definition of the act itself, while in others the nature or quality of the act performed may not be ascertainable without reference to the context within which it is carried out. Further, even if the "relevant act" can be isolated, a plethora of possible relationships to the exercise of sovereign power can exist, the character and proximity of which would be dependent upon the perception held or policy adopted within the jurisdiction in which the matter arises as to attributes of sovereignty itself.[61]

He referred to the decision of the UK Employment Appeal Tribunal in *Sengupta v Republic of India*,[62] in which Browne-Wilkinson J said that while a contract of employment is by its nature a private act, performance of the contract may be part of the discharge by the foreign State of its sovereign functions, and that a contract to work in a diplomatic mission in the work of that mission is a contract to participate in the public acts of the foreign sovereign.

Nevertheless, while accepting that there may be some situations in which this approach would be required, Vincent J considered that not every act of employment of persons by the Government of Nauru could be regarded as attracting an entitlement to sovereign immunity, and said that he saw

> no real justification for the recognition of a claim for immunity in the present matter where the tasks to be performed by the plaintiff were not in themselves connected with the exercise of sovereign power, and on the basis of the evidence adduced not very different in any significant respect from those performed by a commercial pilot in private employment.[63]

He considered that the question whether the plaintiff was a member of the public service of Nauru was "not particularly important". He added that while the decisions of the Government of Nauru to commit a large part of its annual

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59 [1977] QB at 558: "If a government department goes into the market places of the world and buys boots or cement – as a commercial transaction – that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods."

60 See ss 1603(d) and 1605(a)(2) of that Act.

61 [1993] 1 VR at 253.

62 [1983] ICR 221; 64 ILR 352.

63 [1993] 1 VR at 257.

budget to Air Nauru may involve the assertion and exercise of governmental authority, "they are, nevertheless, decisions to pursue state objectives through engagement in an essentially commercial enterprise".[64] He added that even if the operation of the airline itself was a sovereign act because of the important functions it carried out, activities incidental to it, such as the purchase of equipment or fuel, the cost of catering, or, indeed, the engagement of staff, would not generally be elevated to the status of acts *iure imperii*. The defendant's application was accordingly dismissed.

The decision in this case that the restrictive doctrine of State immunity is part of the common law in Australia, which one can expect would be followed by other Australian courts, may be of limited significance in practice, given the length of time that the Foreign States Immunities Act has now been in force. However, the decision is a contribution to the general corpus of case law from a variety of common law countries in which the restrictive doctrine has been applied as part of common law, which will clearly be of persuasive authority in other common law jurisdictions where the question has not yet been decided. Furthermore, while the issue of State immunity in this case would have been a straightforward matter to determine under the Foreign States Immunities Act,[65] other provisions of that Act, in particular the "commercial transactions" exception in section 11, may still require the courts to undertake a characterisation of an act as either "commercial" or "sovereign", and in that context, the issues considered in this case may be of some continuing relevance.

4. State immunity – Immunity from substantive law

Tasita Pty Ltd v Sovereign State of Papua New Guinea

(1991) NSW ConvR 55–610

Supreme Court of New South Wales, Equity Division, Young J[66]

At the time when the absolute doctrine of sovereign immunity was part of common law, the question of the extent to which sovereign States were subject to the substantive law of other States obviously rarely arose. However, in those countries applying the restrictive doctrine, it was generally assumed that the substantive rights and liabilities of a foreign State under local law were the same as those of any foreign person.[67] The United States Foreign Sovereign

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64 Ibid. Counsel for Nauru had argued that because of the isolation of the island of Nauru and its lack of a deep-water harbour, the operation of Air Nauru was necessary for the provision of a variety of essential services to the community of Nauru, for the conduct of international relations and the maintenance of its economic system, and to provide employment for local residents. The airline had never returned a profit.

65 See section 12, dealing with contracts of employment.

66 For a summary, see [1992] ACL Rep 245 NSW 3.

67 See eg *Hamspohn c Bey di Tunisi* (Italy, Court of Appeal, Lucca, 1887), extracted in (1932) 26 *AJIL* Supp 451 at 480–481: "... when ... the [foreign] government, as a civil body, descends into the sphere of contracts and

Immunities Act of 1976 contains an express statement that in cases in which a foreign State is not entitled to immunity "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances".[68] The Australian Law Reform Commission report on which the Foreign States Immunities Act 1985 (Cth) was based assumed that "In general when a foreign state performs acts within Australia it does so subject to Australian law".[69] International treaties also appear to assume that this is the case.[70] The decision in this case on the question of State immunity is thus somewhat surprising.

The facts were simple. The Sovereign State of Papua New Guinea leased part of a building it owned in Sydney to a travel agency for three years. The premises became too small for the lessee's operations, and the lessee vacated them before the term of the original lease had expired. The issue was whether Papua New Guinea was entitled to the rent since vacation. The lessee claimed that as a result of various conversations between its chief executive and the Consul-General of Papua New Guinea prior to vacation of the premises, in which the Consul-General had agreed to early vacation, there had been a surrender of the lease by operation of law, or alternatively, that by some principle of estoppel the lease had come to an end. Young J held that on the facts there was no surrender of the lease by operation of law. However, he found that what the Consul-General had said had caused the lessee to alter its position, and that in equity Papua New Guinea was therefore estopped from denying that the lease had come to an end.

A further claim of the lessee had been that it should be released from any further obligation to pay rent after the date of its vacation under the Fair Trading Act 1987 (NSW). Section 42(1) of that Act provides that "A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". Young J rejected this claim on the grounds that a foreign State is not a "person" for the purposes of that Act, and therefore not bound by it. With respect, it is difficult to see precisely on what basis he reached this conclusion. He noted that the word "person" while not defined in that Act, is defined in section 21(1) of the Interpretation Act 1987 (NSW) to include "an individual, a corporation and a body corporate or politic". However, he appeared to consider that the presumption that statutes do not bind the Crown was applicable in the present case. He said that section 3 of the Fair Trading Act provides that the Act binds the Crown in right of the

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transactions so as to acquire rights and to assume obligations, just as a private person might do,... it is a question solely of private acts and obligations which are to be governed by the rules of the general law."

68 Section 1606.

69 Australian Law Reform Commission, Report No 24, *Foreign State Immunity* (1984), p 1, para 2.

70 For example, Vienna Convention on Diplomatic Relations, article 41.1, which provides that diplomatic immunities are not exemptions from the duty to respect the laws and regulations of the receiving State.

State of New South Wales up to a certain extent, but that it says "nothing about the Act binding the Crown in the right of the Commonwealth or in the right of any other part of Her Majesty's Dominions or of the Act binding any foreign government which may be trading in New South Wales". He considered that there may be some circumstances in which the Crown or a foreign government may be a "person" within the meaning of a statute,[71] but added that this "seems to be the exception rather than the rule". He said also that "Although Papua New Guinea is a member of the British Commonwealth of Nations under the Crown, I think the same result would follow even if this were not the case".

The suggestion that the presumption that statutes do not bind the Crown extends also to foreign States is admittedly not entirely unprecedented. In *R v Inland Revenue Commissioners; Ex parte Camacq Corp,*[72] Dillon LJ, without deciding, was inclined to take the view that statutes imposing taxation on property are *prima facie* presumed not to apply to foreign States.[73] However, even if such a presumption were found to exist in the case of statutes imposing taxation, in the absence of any settled authority there would seem to be no reason for extending the presumption any further. The position of the Crown under domestic law is an inappropriate analogy for determining the position of a foreign State.[74] Furthermore, such an analogy is unnecessary. In so far as it is desirable not to subject a foreign State to local jurisdiction, this is achieved by the rules on immunity from jurisdiction embodied in the Foreign States Immunities Act. It would undermine the purposes of that Act if the exceptions to immunity which it establishes were in practice eroded by immunities from substantive law. Of course, given another rule of construction that a statute is to be interpreted as far as its language admits in a manner not inconsistent with international law,[75] a statute of general application should be presumed not to be intended to apply to a foreign State where this would be contrary to international law. It is suggested that in any other case, it should be presumed that a statute of general application is intended to apply to foreign States, unless the express or implied intention of the Act is that it should not do so. If in future cases the courts continue to apply a general presumption that statutes

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71 He referred to *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633. However, this was a case in which the Crown in right of Queensland was held to be a "person" for the purposes of a Queensland statute.

72 [1990] 1 All ER 173 at 189–90 per Dillon LJ.

73 He referred to an earlier decision of the Supreme Court of Canada: *Municipality of St John v Fraser-Brace Overseas Corp* [1958] SCR 263 at 281–82. However, that case must be considered in light of the doctrine of absolute State immunity which then prevailed. In *Camacq*, Kennedy J at first instance took the view that observations in this Canadian case "may well have represented the law of Canada in 1958, but it does not follow that they reflect the law of the United Kingdom 30 years later" ([1990] 1 All ER at 182).

74 See text to n 93 below. The presumption that statutes do not bind the Crown has itself in any event been considerably narrowed by the High Court in *Bropho v Western Australia* (1990) 171 CLR 1.

75 *Polites v Commonwealth* (1945) 70 CLR 60 at 68–69, 74, 76, 79, 81.

do not bind foreign States, it may be desirable to amend the Foreign States Immunities Act to include a provision analogous to section 1606 of the United States legislation.[76]

This case also raised a question of the extent to which a foreign government is bound by an agreement entered into by its Consul-General. It was not strictly necessary to decide this, since Papua New Guinea had agreed for the purposes of the proceedings that if the alleged statements were made by the Consul-General, they were made with the authority of Papua New Guinea. Young J referred to the Government Contracts Act (PNG), suggesting that the question is governed by Papua New Guinea law, although he also stated as a general proposition that in view of the ordinary functions of a consul, "I would not think that merely because a person occupied the office of Consul General that that in itself would make a person contracting with the Consul General consider that there was implied authority to contract on behalf of a government whom he or she represents". However, he considered that the position was different here, where it seemed to him that in all the circumstances the Consul-General was held out by the Government of Papua New Guinea as being its agent for the purposes of making contracts.

5. State immunity - Personal injuries claim - Injury inflicted by employee of consular post

Tokic v Government of Yugoslavia

Supreme Court of New South Wales, Common Law Division, McInerney J, 12 December 1991, unreported

In November 1988, the plaintiff, then a 19-year-old youth, received a bullet wound in the neck while taking part in a demonstration outside the Yugoslav Consulate-General in Sydney.[77] The plaintiff brought an action for damages for personal injury against the Government of Yugoslavia in respect of the incident in the Supreme Court of New South Wales. The Government of Yugoslavia originally made an application to have the proceedings dismissed on the basis that it was entitled to sovereign immunity. The court (James J) dismissed this application on 27 November 1988,[78] in light of section 13 of the Foreign States Immunities Act 1985 (Cth), which provides:

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76 See text to n 68 above. Cf case 6 below, in which a foreign State was found to be subject to local planning legislation.

77 At the time, the Australian Government described the shooting as "intolerable and totally unacceptable". The Australian Government believed that there was sufficient evidence to justify a serious criminal prosecution against an employee of the Yugoslav Consulate-General in respect of the incident. The refusal of the Yugoslav Embassy to surrender that person into the custody of the New South Wales police resulted in the decision of the Australian Government to close the Yugoslav Consulate-General in Sydney. Its reopening was subsequently allowed in 1990. For further details, see (1988-89) 12 *Aust YBIL* 455-63; (1990-91) 13 *Aust YBIL* 372-74.

78 See (1990-91) 13 *Aust YBIL* 258.

> A foreign State is not immune in a proceeding in so far as the proceeding concerns –
>
> (a) the death of, or personal injury to, a person; or
>
> (b) loss of or damage to tangible property,
>
> caused by an act or omission done or omitted to be done in Australia.

Following the dismissal of this application, the Government of Yugoslavia filed no defence and did not appear at the hearing of the matter, which proceeded *ex parte*. Judgment was given by McInerney J on 12 December 1991. He inferred from the evidence given on behalf of the plaintiff that the shot had been fired by one of two persons whom a witness had noticed inside the grounds of the consulate holding firearms. He was satisfied that the firing of the shot was a negligent act. He further inferred that the persons inside the consulate were employees of the Government of Yugoslavia who were at the time in the course of their employment, and found that the Government of Yugoslavia was therefore vicariously liable for the injuries. He noted that section 13 of the Foreign States Immunities Act enabled the defendant to be sued. Damages of $46,854 were awarded, together with costs.

The conclusion in this case, that on the facts as found the defendant foreign State was not entitled to immunity, clearly gives effect to the intention of section 13 of the Foreign States Immunities Act,[79] and is consistent with cases in other countries holding that damages may be awarded against foreign States in respect of personal injuries caused by tortious acts in the forum State by members of the diplomatic mission or consular post of the defendant State.[80] However, while it was possible to obtain judgment in this case, it may in practice prove to be impossible for the plaintiff to enforce the judgment debt against the defendant State if there are no assets of that State located in Australia which are not immune from execution under the Foreign States Immunities Act, the Diplomatic Privileges and Immunities Act 1967 (Cth) or the Consular Privileges and Immunities Act 1972 (Cth), although there is at least in theory the possibility of enforcing the judgment in another country where commercial assets of the defendant State may be found. A further complication in the present case is that it is not yet clear which are the successor States to the Socialist Federal Republic of Yugoslavia, which was the entity the Sydney Consulate-General represented at the time of the incident which gave rise to the judgment. Any enforcement of the judgment in this case may need to await resolution of this issue of State succession.[81]

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79 See Australian Law Reform Commission, Report No 24, *Foreign State Immunity* (1984), pp 67–69, para 115.

80 *Holubek* case (Austria 1961) 40 ILR 73; *Ciniglio v Indonesian Embassy* (Italy 1966) 65 ILR 268 (alleged negligent driving of embassy vehicle); *Olson v Republic of Singapore* 636 F Supp 885 (1986) (alleged negligence as the occupier of embassy premises); *Gerritsen v de la Madrid Hurtado* 819 F 2d 1511 (1987) (alleged assault by members of a consular post).

81 See Practice Section, Chapter III pp 417–18 of this volume.

6. State immunity - Planning laws - Application to consular premises

City of Brunswick v Sunay, Eroktem and Republic of Turkey

Administrative Appeals Tribunal of Victoria, Planning Division, 27 February 1992, unreported

These were curious proceedings, which highlight the still to some extent uncertain relationship in Australian law between the restrictive regime of State immunity under the Foreign States Immunities Act 1985 (Cth) and consular immunity under the Vienna Convention on Consular Relations. The City of Brunswick brought proceedings in the Victorian Administrative Appeals Tribunal against the Republic of Turkey and the Turkish Consul-General, seeking an order under the Planning and Environment Act 1987 (Vic) that the respondents cease to use the site of the Turkish Consulate-General in Melbourne as an office and consulate. The use of the premises for that purpose was claimed to contravene the Brunswick Planning Scheme, as it was located in a residential zone. Initiating process was served under Part III of the Foreign States Immunities Act. The Consul-General himself was found by the Tribunal to be immune from the jurisdiction of the Tribunal by virtue of article 43 of the Vienna Convention on Consular Relations,[82] which is given the force of law in Australia by section 5(1) of the Consular Privileges and Immunities Act 1972 (Cth). However, the Tribunal found that as far as the Republic of Turkey itself was concerned, the application was authorised by section 14(1) of the Foreign States Immunities Act, which provides:

> A foreign State is not immune in a proceeding in so far as the proceeding concerns –
>
> (a) an interest of the State in, or the possession or use by the State of, immovable property in Australia; or
>
> (b) an obligation of the State that arises out of its interest in, or its possession or use of, property of that kind.

The Tribunal noted that nothing in that Act limits the actions that may be brought against a foreign State to personal monetary actions. Noting that section 29(1) of the Act empowers a court to make any order against a foreign State not inconsistent with an immunity under the Act, including an order for interim relief, the Tribunal concluded that in proceedings under section 14 it could order relief in the form of a restriction of activity, which was the relief sought in the present case. The Tribunal was satisfied on the evidence that the premises were being used as a consulate contrary to the planning scheme, and ordered that the Republic of Turkey cease to use the premises as a consulate or office within three months of the date of service of the order.

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82 Article 43.1: "Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions."

It would seem correct that section 14 of the Foreign States Immunities Act does enable proceedings to be brought against a foreign State to enforce local planning laws.[83] Nothing in the Act expressly establishes an exception in the case of property in use as the premises of a consular post. Section 6 provides that the Act does not affect any immunity or privilege that is conferred by the Consular Privileges and Immunities Act 1972, but nothing in that Act or in the Vienna Convention on Consular Relations, to which it gives effect, contains any provision dealing expressly with the issue of whether a sending State is subject to the planning laws of the receiving State in respect of the use of its consular premises, or is subject to the jurisdiction of the courts of the receiving State in the enforcement of those laws. On the one hand, article 55 of the Vienna Convention, which provides that it is the duty of all persons enjoying consular privileges and immunities to respect the laws and regulations of the receiving State, suggests that the sending State itself may also be under an obligation to respect local planning laws in respect of the use of the premises of its consular mission, subject to specific provisions of the Convention.[84] There is some State practice which supports the view that the building and zoning laws of the receiving State may be applied in respect of the construction, repair or alteration of *embassy* buildings.[85] On the other hand, it can be argued that in cases where a consular post has been established at a particular location with the consent or acquiescence of the receiving State, it would be inconsistent with the purposes of the Vienna Convention for the receiving State (via an order of a domestic court or tribunal) unilaterally to require the sending State to change the location of the consular post at short notice. Furthermore, it could be argued that it is implicit from article 4 of the Vienna Convention that once a consular post has been established with the consent of the receiving State, changes in the location of the consular post require the consent of both the receiving and sending States, again subject to other provisions of the Convention.[86] Given the increasing number of States

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83 See Australian Law Reform Commission, Report No 24, *Foreign State Immunity* (1984), p 69, para 116: "Such a provision should be interpreted broadly ... [and] ... is intended to cover such things as actions for nuisance and occupier's liability, and actions requiring the repair or demolition of dilapidated property".

84 For example, article 29, which provides that the sending State may fly its national flag and display its coat of arms on the building occupied by the consular post. However, that article provides that even in the exercise of this right, "regard shall be had to" the laws, regulations and usages of the receiving State.

85 See Whiteman MM, *Digest of International Law*, vol 7 (1970), pp 367–72.

86 For example, article 31.4, which permits the receiving State to expropriate the consular premises in certain circumstances, subject to payment of adequate compensation. In the present case, it is not clear from the Tribunal's reasons to what extent the Australian Government had agreed to, or acquiesced in, the establishment of the consular post at that particular location.

which now adopt a restrictive doctrine of State immunity, it is surprising that this issue has so rarely arisen in cases before domestic courts.[87]

In any event, whether or not the Tribunal correctly decided in this instance that it had jurisdiction to make the order, it is clear that the order is completely unenforceable. Under section 133 of the Victorian Planning and Environment Act, there is a power of entry to enforce an enforcement order of the Tribunal, but the exercise of this power would be precluded by article 31.2 of the Vienna Convention,[88] which is given the force of law by section 5(1) of the Consular Privileges and Immunities Act. Failure to comply with the order of the Tribunal is an offence (Planning and Environment Act, section 122), but prosecution for such an offence would be prevented by section 34 of the Foreign States Immunities Act.[89] Thus, even if the exercise of jurisdiction by the Tribunal in the present proceedings is consistent with the Vienna Convention, as a matter of Australian law, it is questionable whether the exercise of jurisdiction should be permitted by the Foreign States Immunities Act, when it merely results in an unenforceable order. Given the present lack of clarity in the law, and given the possibility of divergent policies of Commonwealth, State and local governments on the issue of the location of consular posts, it would seem desirable for legislation to be enacted to clarify the position.[90]

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87 Cf *McArthur Area Citizens Association v Republic of Peru* 809 F 2d 918 (1987). In this case the Court of Appeals held that the United States Foreign Sovereign Immunities Act of 1976 did not permit an action for damages to be brought against a foreign State in respect of its occupation of a building as a chancery, in alleged violation of local zoning laws. The judgment in this case was based on the wording of the exceptions to immunity under that Act, rather than on considerations of diplomatic immunity, although it is noteworthy that the court considered that the establishment of a chancery was not a "commercial activity" within the commercial activities exception to immunity, and that it was a "discretionary function", and therefore not within the "tortious act" exception.

88 Article 31.2: "The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State."

89 Section 34: "A penalty by way of fine or committal shall not be imposed in relation to a failure by a foreign State or by a person on behalf of a foreign State to comply with an order made against the foreign State by a court."

90 Cf the Diplomatic and Consular Premises Act 1987 (UK). Under this Act, a foreign State must apply to the Secretary of State for consent to land being used as diplomatic or consular premises. When determining whether to give consent, the Secretary of State must have regard, *inter alia*, to town and country planning. Consent, once given, presumably would override inconsistent local government planning laws, assuming they would otherwise be applicable.

7. State immunity – Separate entity of a foreign State

Adeang v Nauru Phosphate Royalties Trust

Supreme Court of Victoria, Hayne J, 8 July 1992, unreported[91]

The Nauru Phosphate Royalties Trust (the Trust) is a body corporate established by legislation of the Republic of Nauru. It administers a number of trusts, including the Nauruan Land Owners' Royalty Trust Fund. It has significant assets in a number of countries, including Australia. The beneficiaries of the trust funds are for the most part Nauruans, and in the view of Hayne J in this case, the nature and extent of the duties owed by the Trust to its beneficiaries is a matter wholly regulated by the law of Nauru. The plaintiff in this case, a Nauruan who claimed to be a beneficiary of the Land Owners' Trust, sought, *inter alia,* injunctions restraining the Trust from advancing moneys to the Republic of Nauru, the Republic of Nauru Finance Corporation (RONFIN), or the Bank of Nauru; orders that the Trust enforce the terms of any existing loan to those bodies in the event of any default; and an order that the Trust make its books and papers available to an auditor nominated by the plaintiff. The plaintiff alleged that the Trust had acted in breach of its common law and statutory duties by lending money to the Republic of Nauru, RONFIN and the Bank of Nauru, by failing to call up the loans and by making fresh loans notwithstanding that the borrowers had defaulted. The Trust applied to set aside the writ on the grounds that it was entitled to the immunity of the Republic of Nauru.[92] Alternatively, it pleaded *forum non conveniens*. Because Hayne J granted an order that the proceedings be stayed on the grounds of *forum non conveniens*, it was strictly unnecessary to consider the question of sovereign immunity, but he did deal briefly with some of the major points that arose.

The first main question was whether the Trust was a "separate entity" of the Republic of Nauru, entitled to its immunity by virtue of section 22 of the Foreign States Immunities Act. Section 3(1) of that Act defines a "separate entity" essentially as an "agency or instrumentality of the foreign State" that "is not a department or organ of the executive government of the foreign State". The Trust was clearly not a department or organ of the executive government of the Republic of Nauru. The question was whether it was a "agency or instrumentality" of that State. Although counsel for both parties relied by analogy on cases relating to the availability under domestic law of Crown immunity to statutory corporations, Hayne J considered that such

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91 For a summary, see [1992] ACL Rep 85 Vic 2.

92 The application for an order to set aside the writ was also made on the grounds that "the conduct, which is the subject of the proceedings, is conduct of the Republic of Nauru, an independent foreign state, and not justiciable by this Court". This aspect of the application, which raises the "act of State doctrine", was not considered by the court. But cf *Buttes Gas and Oil Co v Hammer* [1982] AC 888; *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 371–72; (1988) 83 ALR 265 at 287–88.

analogies were not wholly apt.[93] He considered that the question presented by the Act "is one which does invite consideration of the degree of control that can be exerted by the executive government of the foreign state over the entity in question, and of the nature of the functions that are performed by that entity".[94] On that basis he considered it to be arguable that the Trust was an agency of the Republic of Nauru, given that it is subject to considerable control by the Republic, that it administers moneys derived from the conduct of phosphate mining by the Republic, and that some of the funds it administers can be classified as funds of a public character.

Assuming that the Trust was a "separate entity", the next question was whether the present action fell within the "commercial transactions" exception to immunity in section 11 of the Act. Section 11(3) defines "commercial transaction" to mean "a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged", and to include, *inter alia*, "(b) an agreement for a loan or some other transaction for or in respect of the provision of finance". Hayne J considered it arguable that the present action fell within section 11(3)(b). He noted that although section 11(3) speaks of transactions in which a State "has engaged",

> it would be an unusual result if future transactions did not fall within the ambit of that exception, for it would seem to lead to the conclusion that this Court might award damages with respect to breaches of past transactions, but could not intervene before the making of a transaction, to restrain what by hypothesis would be an unauthorised or otherwise unlawful transaction.

A third question was whether the present action fell within section 14(3) of the Act, which provides that a foreign State "is not immune in a proceeding in so far as the proceeding concerns: ... (b) the administration of a trust, of the estate of a deceased person or of the estate of a person of unsound mind". The Trust acknowledged that the complaints made by the plaintiff were complaints of breach of trust, but argued that this provision merely gave statutory effect to the previously existing common law rule "under which the Courts of Chancery would administer a trust and determine rights to trust property if, but only if, there were a trust fund or other item of trust property within the jurisdiction of the Court, notwithstanding that a foreign sovereign might be known to be a possible, or a certain claimant to an interest in the property".[95] Hayne J considered that although reference to the Law Reform Commission Report on

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93 He referred to *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 at 559, per Lord Denning MR: "It cannot be right that international law should grant or refuse absolute immunity according to the immunities granted internally".

94 For approaches to this question adopted in other States, see Schreuer C, *State Immunity: Some Recent Developments* (1988), Chapter 5, and the literature cited thereat.

95 Reference was made to *United States of America v Dollfus Mieg et Cie* [1952] AC 582 at 617–18 per Lord Radcliffe.

which the legislation was based may lend some support to this view,[96] the section should not be limited in that way. He noted that the provision is expressed to apply to any proceeding which "concerns" the administration of a trust, not merely one which seeks the administration of a trust. Moreover, he considered that the view that the word "administration" is used as a word of general application is reinforced by the fact that it applies not only to a trust but also to the estate of a deceased person, and to the estate of a person of unsound mind. He therefore concluded that it was "strongly arguable" that the exception to immunity in either or both of sections 11 and 14 applied.

8. Diplomatic privileges and immunities - Demonstrations outside diplomatic missions - Vienna Convention on Diplomatic Relations, articles 22.2 and 29

Minister for Foreign Affairs and Trade v Magno

(1992) 37 FCR 298

Federal Court of Australia - Full Court[97]

In November 1991, a demonstration was conducted and maintained outside the Indonesian Embassy in Canberra by three groups protesting against the "Dili massacre" which had occurred several days before.[98] Members of one of the groups placed 124 white crosses about 50 centimetres high on the grass verge next to the footpath outside the embassy, and subsequently refused to remove them. In January 1992, the Diplomatic Privileges and Immunities Regulations (Amendment) (SR 1992, No 7) were made by the Governor-General under the Diplomatic Privileges and Immunities Act 1967 (Cth). A new regulation 5A(1) empowered the Minister to certify "that in his or her opinion removal of a prescribed object described in the certificate from prescribed land or premises described in the certificate would be an appropriate step within the meaning of Article 22 or 29" of the Vienna Convention on Diplomatic Relations. "Prescribed land or premises" was defined to mean "land or premises belonging to the Commonwealth or a State or Territory to which the public has access". "Prescribed object" was defined to mean "an object or structure that is on prescribed land or premises within 100 metres of the premises of a [diplomatic] mission or of the residence of the head, or another diplomatic agent, of a mission". A new regulation 5B authorised a member of a police force or of the Australian Protective Service, "with such force as is necessary and reasonable", to remove a prescribed object described in a certificate from the prescribed land or premises, after first giving the person in control of the

96 Australian Law Reform Commission, Report No 24, *Foreign State Immunity* (1984), p 69, para 117.

97 Reversing *Magno v Minister for Foreign Affairs and Trade* (1992) 35 FCR 235 (Federal Court of Australia, Olney J).

98 On 12 November 1991, members of the Indonesian armed forces opened fire on pro-independence demonstrators in Dili, East Timor, killing between 60 and 180 people: see *Keesing's Record of World Events* (November 1991), pp 38,579-80 and Practice Section, Chapter IX pp 533-38 of this volume.

object a reasonable opportunity of removing it.[99] On the day the regulations came into force, the Minister signed a certificate in respect of the crosses outside the Indonesian Embassy, and the crosses were removed by the Australian Federal Police. These proceedings were brought to challenge the validity of both the regulations and the certificate. This stage of the proceedings was concerned solely with the validity of the regulations.

The issue for determination was whether the making of the regulations was a valid exercise of the power under section 15 of the Diplomatic Privileges and Immunities Act to make regulations "not inconsistent with this Act, prescribing all matters ... necessary or convenient to be prescribed for carrying out or giving effect to this Act". That Act was enacted to give the force of law in Australia to certain provisions of the Vienna Convention on Diplomatic Relations (see section 7). All judges agreed that the regulations would only be valid if they were "necessary or convenient" to be prescribed for giving effect to Australia's obligation under article 22.2 of the Vienna Convention to take "all appropriate steps" to prevent "any disturbance of the peace" of a mission or "impairment of its dignity", or to Australia's obligation under article 29 to take "all appropriate steps" to prevent any attacks on the "dignity" of a diplomatic agent.

Olney J at first instance held the regulations to be invalid on the grounds that regulation 5A(1) authorised the signing of a certificate whenever the Minister formed the *opinion* that removal of a prescribed object would be an "appropriate step" within the meaning of article 22 or 29. He said that not every "prescribed object" would constitute a "disturbance of the peace" of a mission or "impairment of its dignity", within the meaning of the Vienna Convention. He found that the regulation-making power in section 15 of the Act did not authorise the making of regulations defining or expanding the meaning of terms used in the Act, or authorising the Minister or other person to be the arbiter of what constitutes a threat to the peace, or impairment of the dignity, of a mission, or of what steps are "appropriate steps".[100]

On appeal, the Full Court by majority reversed the decision at first instance. Gummow J was of the view that as a matter of construction, regulation 5A did not authorise the Minister to form an opinion which errs in law and therefore does not carry out or give effect to the Act. In other words, the regulations only authorised the formation of an opinion which was consistent with the Act.[101] Similarly, French J considered that the regulations

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99 See also Practice Section, Chapter X pp 571–75 of this volume.

100 35 FCR at 245. In February 1992, the regulations were amended again to delete the reference to the Minister's opinion in regulation 5A(1): Diplomatic Privileges and Immunities Regulations (Amendment) (SR 1992, No 41). Regulations 5A and 5B were subsequently further reworded: Diplomatic Privileges and Immunities Regulations (Amendment) (SR 1992, No 118). However, the court in these proceedings was concerned with the validity of the regulations at the time the crosses were removed.

101 37 FCR at 310–11.

did not purport to empower the Minister to do anything more than consider whether removal of an object would be an appropriate step. He said that the regulations did not make the Minister's opinion conclusive, and that if in a particular case the Minister's opinion is formed and steps are taken for a purpose other than that contemplated by the Act, then that particular exercise of power will be *ultra vires* the Act and the regulations.[102] Thus, although the decision in this case holds the regulations to be valid, it does not decide the question whether removal of the crosses outside the Indonesian Embassy was a valid exercise of the power under the Act and regulations. As French J said, "That will depend upon the limits of the notions of dignity of the mission and the dignity of the relevant diplomatic agent".[103] This aspect of the case has not been decided.

French J also made several observations on the concepts of "peace" and "dignity" used in articles 22.2 and 29 of the Vienna Convention. He noted that neither term was defined in the Convention or discussed in the commentary. He referred to older authorities which appear to suggest that under those provisions a receiving State has an obligation to protect diplomatic missions against demonstrations.[104] However, he observed that in recent years government, judicial and academic opinion in the United Kingdom had taken a more robust approach to article 22, under which demonstrations outside embassies were considered permissible, provided they do not imperil the safety or efficient work of the mission, or involve abusive or insulting behaviour.[105] Support for such an approach could also be found in Australia[106] and the United States of America.[107] French J then said:

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102 Ibid, pp 328–29.

103 Ibid, p 329.

104 37 FCR at 322, referring to Harvard Draft Convention on Diplomatic Privileges and Immunities, article 3(2) and commentary, (1932) 26 *AJIL* Supp 15 at 19–20, 56–57; *Satow's Guide to Diplomatic Practice*, 4th ed (1957), para 354; Jenks CW, *International Immunities* (1961), p 48; Hardy M, *Modern Diplomatic Law* (1968), p 46.

105 37 FCR at 322–24, referring to First Report of the House of Commons Foreign Affairs Committee, (1984–1985) HC 127, p xvii; Cmnd 9497, Misc No 5 (1985); *R v Roques* (Bow Street Magistrates Court, 15 June 1984, referred to in Harris DJ, *Cases and Materials on International Law*, 4th ed (1991), 333); Higgins, "The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience" (1985) 79 *AJIL* 641 at 650–51; Higgins, "UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report" (1986) 80 *AJIL* 135 at 136. Also Lee LT, *Consular Law and Practice*, 2nd ed (1990), pp 406–13.

106 37 FCR at 324, referring to *Wright v McQualter* (1970) 17 FLR 305 at 321–22 (Supreme Court, Australian Capital Territory, Kerr J) ("If there were in the last analysis no more in this case than a quite peaceful gathering on the lawn of persons shouting slogans and carrying placards of the kind in question here, with no risk of intrusion or damage to the premises, I would have some doubt whether there was any basis for believing that such action in such a place could reasonably amount to impairing the dignity of the mission, which is, after all a political body. As such it must presumably accommodate itself to the existence

Neither State practice nor the writings of jurists nor judicial decisions have exposed an exhaustive definition of the peace and dignity in respect of which a diplomatic mission is entitled to the protection of the receiving State. Protection against intrusion and damage fall well within the entitlement but they are, in any event, explicitly mentioned in par (2) of the Article. The concepts of disturbance of the peace and impairment of the dignity of the mission are wider. The commission of a nuisance which interferes with the quiet of a mission would no doubt constitute a disturbance of its peace. The prolonged broadcast by a public address system of loud speeches or music in the vicinity of the mission premises could fall into that category. Sustained chanting of slogans or the organised passing and repassing of people outside the premises in such a way as to compromise or deter access to them would also be capable of amounting to a disturbance of the peace of the mission. The rights to undisturbed peace and unimpaired dignity overlap. However, the dignity of the mission may be impaired by activity that would not amount to a disturbance of its peace. Offensive or insulting behaviour in the vicinity of and directed to the mission may fall into this category. The burning of the flag of the sending State or the mock execution of its leader in effigy if committed in the immediate vicinity of the mission could well be construed as attacks upon its dignity. So too might the depositing of some offensive substance and perhaps also the dumping of farm commodities outside mission premises in protest against subsidy policies of the sending State. Any such incident would have to be assessed in the light of the surrounding circumstances. But subject to protection against those classes of conduct, the sending State takes the receiving State as it finds it. If it finds it with a well established tradition of free expression, including public comment on matters of domestic and international politics, it cannot invoke either Art 22(2) or 29 against manifestations of that tradition. And beyond the particular circumstances of the domestic culture such activity is an expression of the human rights and fundamental freedoms of speech and assembly accepted in a number of international conventions and specifically asserted in Arts 19 and 20 of the *Universal Declaration of Human Rights* (adopted and proclaimed by General Assembly Resolution 217A(III) of 10 December 1948) and Arts 19 and 21 of the *International Covenant on Civil and Political Rights* which entered into force on 23 March 1976 and to which Australia is a party. It does not seem that a protest or demonstration conducted outside the premises of a diplomatic mission would by reason of its critical content and mere proximity to the mission amount to an impairment of its dignity. On similar reasoning it would not amount to an attack on the dignity of the relevant diplomatic agent. Whether proximity might give rise to the possibility of impairment of the

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of strong disagreement with some of the policies of its government and to the direct and forceful verbal expression of such disapproval."); Bray, "Diplomatic and Consular Immunities and Privileges in Australia" in Ryan KW (ed), *International Law in Australia*, 2nd ed (1984), p 345 at 350 ("It is a difficult path for the police to tread in controlling a demonstration to find a balance between reasonable freedom to protest and the proper duty of the Australian government under Art. 22 of the Convention.").

107 37 FCR at 325–26, referring to *Finzer v Barry* 798 F 2d 1450 at 1484–87 (1986) (Chief Judge Wald, dissenting); *Boos v Barry* 485 US 312 (1988).

> dignity of the mission or an attack upon the dignity of the agent is another question. But it is difficult to see how the lawful placement of a reproachful and dignified symbol on public land in the vicinity of a mission would amount to a disturbance of its peace or an impairment of its dignity or an attack upon the dignity of its officers. Subject to those general considerations however, the notions of peace and dignity in this context involve evaluative judgments and are not amenable to clear rules of definition.[108]

In a dissenting judgment, which also gave prominence to the right to freedom of expression, Einfeld J said that the regulations were invalid. He considered that the intention of the Act was that the obligation to take "appropriate steps" only arises "when conduct is occurring or threatened which is so undignified and ungracious to visiting foreign diplomats as to impede or bear down on their capacity to carry out the particular tasks they are in Australia to perform", and that "such steps must minimise as far as possible interference with, and take full account of, the fundamental right of every person in this country to freedom of speech".[109] He said that the Act did not permit regulations to determine generally how or where peaceful protests shall be conducted, nor permit the executive government "by regulation to determine how much of a human right shall be allowed".[110] He found that the manifest intention of the regulations was to "permit or authorise a procedure for the removal of passive objects causing no interference in the conduct by embassies of their legitimate business", and as such they were unauthorised by the Act.[111] He added that article 22.2 of the Vienna Convention should be interpreted "in a way sensitive to" the right to freedom of expression recognised in article 19.2 of the International Covenant on Civil and Political Rights and other international instruments, and said that "The test is not what the foreign country or its mission considers impairs its dignity; it is not the subjective reaction of its government or diplomats to the protest or the objects, or any offence which is taken, that is caught by the Convention". He approved of the approach adopted by the United States and the United Kingdom, particularly that of the United States, under which it seems "that action to protect dignity is only required where the conduct in question constitutes coercion, threats and harassment of the diplomats".[112]

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108 37 FCR at 326–27. See also Gummow J at 303.
109 Ibid, p 350.
110 Ibid, pp 350–51.
111 Ibid, p 351.
112 Ibid, pp 338–39.

9. Human rights - Freedom of expression - Political advertising in the electronic media

Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)

(1992) 66 ALJR 695; 108 ALR 577

High Court of Australia

Proceedings were brought by a number of broadcasters and the State of New South Wales to challenge the constitutional validity of Part IIID (sections 95–95U) of the Broadcasting Act 1942 (Cth), which was inserted into that Act by the Political Broadcasts and Political Disclosures Act 1991 (Cth). Essentially, the effect of Part IIID was to prohibit the broadcasting of paid political advertisements on radio and television during election periods for Commonwealth, State, Territory and local government elections. During such election periods, broadcasters continued to be able to broadcast news and current affairs items, comments on such items, and talkback radio programs. Division 3 of Part IIID provided for the obligatory grant of "free time" by broadcasters to political parties, such that 90 per cent of the available free time would be allocated to political parties already represented in parliament or the relevant legislature, in proportion to their respective voting shares at the last election. Division 4 of Part IIID permitted a broadcaster to broadcast the policy launch of a political party free of charge once during the election period, provided that reasonable opportunity was also given to every other party for the broadcasting of its policy launch.

The purpose of these provisions was to address the problems: (i) that the high cost of broadcast advertising makes political parties potentially vulnerable to corruption or undue influence by substantial donors; (ii) that the high cost of broadcast advertising precludes all but the major political parties and wealthy interest groups from getting their message across; and (iii) that brief advertisements relying on emotive manipulation "trivialised" political debate.[113]

A number of arguments were advanced for invalidity. The argument of present interest, and the one on which the case was decided, was that the legislation violated an implied constitutional right to freedom of communication about political matters.[114]

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113 108 ALR at 599 (Mason CJ), 601–02 (Brennan J). See HR Debs (9 May 1991), pp 3477–80; *Political Broadcasts and Political Disclosures Bill 1991*, Report by the Senate Select Committee on Political Broadcasts and Political Disclosures (The Senate, Canberra 1991), sections 2.1, 3.1–3.7 and 4.11; Parliament of the Commonwealth of Australia, *Who Pays the Piper Calls the Tune,* Inquiry into the Conduct of the 1987 Federal Election and 1988 Referendums, Report No 4 of the Joint Standing Committee on Electoral Matters (AGPS, Canberra 1989), pp xi, 86–88.

114 Other arguments for invalidity were that the legislation was an interference with the freedom of interstate trade, commerce and intercourse guaranteed by

Of course, the Australian Constitution, unlike the constitutions of many other countries, contains no Bill of Rights. As Dawson J said in his dissenting judgment in this case, "those responsible for the drafting of the Constitution saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process... Their model in this respect was, not the United States Constitution, but the British Parliament, the supremacy of which was then settled by constitutional doctrine."[115] However, in recent years, members of the High Court have taken the view, both in judgments and in extrajudicial pronouncements, that certain individual rights may be protected by implication in the Constitution.[116] In this case, all members of the court, other than Dawson J, decided that it is implicit in the system of representative government embodied in the Constitution, under which members of the legislature and executive are directly chosen by the people, that the Constitution guarantees the freedom to communicate with respect to political matters, since such a freedom is essential to sustain representative government.[117] The court did not indicate the existence of any wider constitutional freedom of communication generally, and it is not clear how broadly the court will apply the concept of "political discourse" in future cases.[118]

It was recognised that this implied freedom of political discussion was not absolute. The court said that it had to balance the public interest in free communication against the competing public interest which the legislation was designed to serve, and had to determine whether the restriction was "reasonably necessary" or "proportionate" to the achievment of that public

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section 92 of the Constitution; that the legislation effected an acquisition of property otherwise than on just terms, contrary to section 51(xxxi) of the Constitution; and that it burdened the functioning of the States, in contravention of the principle in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31. These arguments are not dealt with here.

115 108 ALR at 631. Also at 592 (Mason J). See also eg Sir Owen Dixon, "Two Constitutions Compared" in *Jesting Pilate* (1965), p 100 at 102.

116 See cases 10 and 12 below, especially notes 136, 163–166 and accompanying text; Justice John Toohey AC, "A Government of Laws, and Not of Men?", paper delivered at the Conference on Constitutional Change in the 1990s, Darwin, 4–6 October 1992.

117 108 ALR at 592–97 (Mason CJ), 603 (Brennan J), 617 (Deane and Toohey JJ), 649–54 (Gaudron J), 664–69 (McHugh J).

118 Judgment in this case was given together with judgment in *Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658; 108 ALR 681. In the latter case, the High Court held section 299(1)(d)(ii) of the Industrial Relations Act 1988 (Cth) to be unconstitutional. That provision made it an offence "by writing or speech [to] use words calculated ... to bring a member of the [Australian Industrial Relations] Commission or the Commission into disrepute". Brennan, Deane, Toohey and Gaudron JJ decided the case on the basis of an implied freedom to discuss political matters.

interest.[119] McHugh J said that laws which seek to prohibit or regulate the content of electoral communications can only be upheld on grounds of a "compelling justification".[120] Five members of the court (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) considered that there was no reasonable justification for the restrictions on freedom of communication imposed by Part IIID.[121]

Although the case concerned an issue of constitutional law rather than international law, Mason CJ and Gaudron J did refer to decisions of the European Court of Human Rights,[122] to demonstrate the fundamental importance of the freedom of political discussion.[123] References by Mason CJ, Brennan, Deane and Toohey JJ to what is reasonably "necessary" and "proportionate" appear also to be borrowed directly from the terminology of international human rights law.[124] Brennan J, adopting another expression from the European Court of Human Rights, said that the court must allow the parliament a "margin of appreciation".[125] Yet, at the same time, it is clear that this was not a case in which the court was referring to international human rights law in order to resolve a doubt or ambiguity in Australian law.[126] Of the judges who held the legislation to be invalid, Mason CJ, Deane, Toohey and Gaudron JJ gave no consideration to the question whether or not the legislation was in fact inconsistent with the International Covenant on Civil and Political Rights (ICCPR) or other international law standards. On the other hand, Brennan J, while agreeing that the implied constitutional guarantee existed, observed that paid political advertising, for various reasons, is not permitted during election times in a substantial number of liberal democracies,[127] and that many of these countries had constitutional provisions guaranteeing the right to freedom of expression.[128] Furthermore, the European Commission of

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119 108 ALR at 598 (Mason CJ), 603–64, 609 (Brennan J), 618, 622 (Deane and Toohey JJ). Gaudron J refers to legislation which is "reasonably and appropriately adapted" to achieve an objective: at 656–59.

120 108 ALR at 669–70.

121 108 ALR at 598–601 (Mason CJ), 622–23 (Deane and Toohey JJ), 656–59 (Gaudron J), holding Part IIID to be invalid in its entirety, 670–72 (McHugh J, holding only the provisions relating to Territory elections to be valid).

122 108 ALR at 595–96 (Mason CJ citing *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754; *Sunday Times Case* (1979) 2 EHRR 245; *Lingens v Austria* (1986) 8 EHRR 407 at 418; *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153 at 191, 200, 206–07, 216–18; *The Sunday Times v United Kingdom (No 2)* (1991) 14 EHRR 229 at 247); 651–52 (Gaudron J).

123 References were also made to cases from the United Kingdom, Canada and the United States.

124 See eg *The Sunday Times Case*, n 122 above, at para 62; *Barthold v Germany* (1985) 7 EHRR 383, para 55; *Lingens v Austria*, n 122 above, at paras 39–40.

125 108 ALR at 610, referring to *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153 at 178.

126 Cf case 2 above and cases 10 and 12 below.

127 108 ALR at 606, referring to United Kingdom, Ireland, France, Norway, Sweden, Denmark, Austria, the Netherlands, Israel and Japan.

128 Denmark, Ireland, Japan, the Netherlands, Norway and Sweden.

Human Rights had held that the ban on political advertising on television in the United Kingdom was not contrary to article 10 of the European Convention guaranteeing freedom of expression.[129] While not treating this as determinative, Brennan J reached the conclusion that the restrictions imposed by the legislation were "comfortably proportionate to the important objects which it seeks to obtain", and that the "obtaining of those objects would go far to ensuring an open and equal democracy".[130] In contrast, McHugh J, while noting the position in these other countries, considered that the European Convention and ICCPR afforded "no valid analogy".[131]

This case raises an interesting dilemma. On the one hand the court was seeking to protect the principle of representative democracy. On the other hand, the court's judgment itself might be criticised as inconsistent with that very principle, in that it fails to give effect to the will of a democratically elected parliament, which considered that the legislation would promote the democratic political process. It is true that in an age in which fundamental human rights are universally recognised, the doctrine of parliamentary sovereignty in its pure Diceyan form has lost much of its intellectual appeal. Support for a constitutionally entrenched Bill of Rights in Australia may be expected to grow, although its achievement still seems unlikely in the foreseeable future. It is understandable that the court should have regard to international human rights standards when developing principles of common law or when construing ambiguous provisions in legislation.[132] There may even be a body of support for the view that in the absence of a constitutional Bill of Rights, the courts may nonetheless refuse to give effect to legislation which would be condemned universally as contrary to internationally acceptable standards, such as legislation implementing policies of genocide or torture.[133] However, during the passage of the political broadcasts legislation through parliament, a Senate committee expressly considered whether it complied with the International Covenant on Civil and Political Rights, and a majority was satisfied that it did.[134] None of the members of the court found in this case that there was any breach of international human rights law, and in fact, it was observed that the legislation was consistent with the practice of

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129 108 ALR at 607, referring to *X and the Association of Z v United Kingdom* (European Commission of Human Rights, 12 July 1971).

130 108 ALR at 612.

131 Ibid, p 674.

132 See case 2 above, and cases 10 and 12 below.

133 Cf *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398 (Cooke J).

134 See Report by the Senate Select Committee on Political Broadcasts and Political Disclosures, n 113 above, pp 26–29, 67–68, 105–09. Mr Henry Burmester, Principal International Law Counsel in the Attorney-General's Department, gave a legal opinion that the legislation was consistent with the ICCPR. Concerns on international human rights grounds were expressed by Professor Philip Alston of the Centre for International and Public Law, Australian National University, and Mr Brian Burdekin, Federal Human Rights Commissioner. See Practice Section, Chapter IX pp 526–32 of this volume.

certain other liberal democracies. Moreover, while the legislation was controversial, the judgment of Brennan J demonstrates that reasonable minds may differ as to whether the effect of the legislation was to enhance or restrict democracy. In the circumstances, the question arises whether it is consistent with the principle of representative democracy for the court to substitute its own view for that of the parliament. So far, commentators have shown surprisingly little interest in this issue.[135]

10. International human rights - Influence on common law principles - Right to be represented in criminal proceedings

Dietrich v R

(1992) 67 ALJR 1; 109 ALR 385

High Court of Australia

This application for special leave to appeal raised the question whether the applicant's trial in the County Court at Melbourne had miscarried by virtue of the fact that he was unrepresented by counsel. He had insufficient resources to fund legal representation for himself, and the Legal Aid Commission of Victoria would only have provided assistance for a plea of guilty. His application for the appointment of counsel under section 69(3) of the Judiciary Act 1903 (Cth) had been dismissed on the grounds that it had been brought out of time.

A majority of the court held that the common law of Australia does not recognise the right of an accused to be provided with counsel at public expense, but that the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial. The majority concluded that as a general proposition and in the absence of special circumstances, a trial of an indigent person accused of a serious crime will be unfair if, by reason of a lack of means and the unavailability of other assistance, he or she is denied legal representation.[136] Accordingly, the appeal was allowed. In dissenting judgments, Brennan and Dawson JJ considered that no entitlement to be provided counsel at public expense presently existed under common law, and that the fact that an accused is unrepresented in such circumstances cannot of itself amount to a miscarriage of justice.[137]

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135 But see Zines L, *Constitutional Change in the Commonwealth* (1988), pp 47–52.

136 See especially 109 ALR at 386, 399–400 (Mason CJ and McHugh J), 417 (Deane J), 435–36 (Toohey J). Gaudron J (at 445) considered that "legal representation should be considered as essential for the fair trial of serious offences unless the accused chooses to represent himself". Deane J (at 408) and Gaudron J (at 436) considered that the right to a fair trial is entrenched in the Constitution by the implicit requirement in Chapter III that judicial power be exercised in accordance with the judicial process.

137 Brennan J indicated, however, that the "desirability of according legal aid is manifest" (at 401), and said that he "would favour ... reform" (at 404).

One of the applicant's arguments in this case was that the right of an indigent accused to be provided with counsel at public expense was guaranteed by article 14.3(d) of the International Covenant on Civil and Political Rights (the ICCPR), to which Australia is a party.[138] It is, of course, well established that treaties to which Australia is a party do not give rise to individual rights under Australian law,[139] and the provisions of the ICCPR have not been expressly implemented in Australian law by legislation.[140] However, in *Jago v District Court of New South Wales*[141] Kirby P expressed the view that where the common law is uncertain, judges may look to an international treaty such as the ICCPR as an aid to the explication and development of the common law. In *Derbyshire County Council v Times Newspapers Ltd*[142] the English Court of Appeal took a similar view in relation to international human rights treaties. The High Court in this case expressed no clear view on the point, but was sympathetic to this approach. Mason CJ and McHugh J said that "Assuming, without deciding, that Australian courts should adopt a similar, common-sense approach", this nevertheless did not assist the applicant because in this case the court was "being asked not to resolve uncertainty or ambiguity in domestic law but to declare that a right which has hitherto never been recognised should now be taken to exist".[143] Similarly, Dawson J found that it was unnecessary to consider the question, because the common law was not uncertain in this case.[144] Brennan J merely said that "Although this provision of the Covenant is not part of our municipal law, it is a legitimate influence on the development of the common law"[145] and Deane J said that "it is relevant to note that Australia, as a nation, is a

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138 Article 14.3 provides: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

139 109 ALR at 391 (Mason CJ and McHugh J referring to *Bradley v Commonwealth* (1973) 128 CLR 557 at 582; *Simsek v MacPhee* (1982) 148 CLR 636 at 641–44; *Kioa v West* (1985) 159 CLR 550 at 570–71). See also at 404 (Brennan J) and 434 (Toohey J).

140 The Human Rights and Equal Opportunity Commission Act 1986 (Cth) does not have this effect, even though the text of the ICCPR is contained in Schedule 2 to that Act. But cf *Re Marion* (1990) 14 Fam LR 427; (1990–91) 13 *Aust YBIL* 353–58, per Nicholson CJ.

141 (1988) 12 NSWLR 558 at 569. See also eg *Re Jane* (1988) 85 ALR 409; (1990–91) 13 *Aust YBIL* 349–53; *Re Marion* (1990) 14 Fam LR 427; (1990–91) 13 *Aust YBIL* 353–58; *Cachia v Haines* (1991) 23 NSWLR 304 at 312–13 (Kirby P).

142 [1992] QB 770.

143 109 ALR at 392.

144 Ibid, p 426.

145 Ibid, p 404, referring to *Mabo v Queensland* (1992) 66 ALJR 408 at 422 (see case 1 above).

party" to the ICCPR.[146] Toohey J stated expressly that "Where the common law is unclear, an international instrument may be used by a court as a guide to that law", although he too considered that there was no ambiguity in this case.[147]

Mason CJ and McHugh J observed that under article 14.3(d) of the ICCPR, as well as under article 6.3(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR) and under the Canadian Charter of Rights and Freedoms, there is no absolute right of an indigent accused to be provided with counsel at public expense, but that a right to funded counsel will arise in cases where representation of the accused is essential to a fair trial.[148] They considered that this approach is similar to the approach now taken by the Australian common law.[149]

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146 109 ALR at 416.

147 Ibid, p 434. Cf also *R v Shrestha* (1991) 173 CLR 48 in which Deane, Dawson and Toohey JJ rejected a submission that it can never be appropriate for a foreign offender who has no ties to this country, and whose sole purpose in entering Australia is to commit serious crimes, to be eligible for release on parole. They said (at 71): "[This country] has a responsibility, both moral and under international treaty, to treat all who are subjected to criminal proceedings in its courts or imprisonment in its gaols humanely and without discrimination based on national or ethnic origins (see, e.g., International Convention on the Elimination of All Forms of Racial Discrimination: (1965), Art. 5(a); *Reg.* v. *Binder*, [1990] VR 563, at pp 569–570). To deny foreign offenders of the kind in question the opportunity for the amelioration of their situation and the incentive for reform and rehabilitation which the parole system offers is not to differentiate by reference to degrees of criminality or prospects of rehabilitation. It is to discriminate against prisoners of that class because of their origins, their place of residence and their family ties." On the other hand, Brennan and McHugh JJ said (at 64) that the public interest will "seldom be served" by the early release of such a person. In *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's* case) (1992) 175 CLR 218; 66 ALJR 300; 106 ALR 385, the High Court considered whether the parents of an intellectually disabled child could authorise the carrying out of a sterilisation procedure on the child without an order of a court. Brennan J said (175 CLR at 266) "Human dignity is a value common to our municipal law and to international instruments relating to human rights... The inherent dignity of *all* members of the human family is commonly proclaimed in the preambles to international instruments relating to human rights: see the United Nations Charter, the International Covenant on Civil and Political Rights (which declares 'the right to ... security of person': Art 9), the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child... Thus municipal law satisfies the requirement of the first paragraph of the 1971 United Nations Declaration on the Rights of Mentally Retarded Persons which reads: 'The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings'."

148 109 ALR at 393–95, referring to *Pinto v Trinidad and Tobago*, UN Human Rights Committee, CCPR/C/39/D/232/1987 (ICCPR, article 14.3(d)); *Monnell and Morris v United Kingdom* (1987) 10 EHRR 205 at 225; *Granger v United Kingdom* (1990) 12 EHRR 469 at 480–82 (ECHR, article 6); *Deutsch v Law Society of Upper Canada Legal Aid Fund* (1985) 48 CR (3d) 166; *R v*

11. Refugees - Definition - "Membership of a particular social group" - Geneva Convention Relating to the Status of Refugees 1951, article 1.A

Morato v Minister for Immigration, Local Government and Ethnic Affairs

(1992) 39 FCR 401; 111 ALR 417

Federal Court of Australia - Full Court[150]

The appellant in this case sought judicial review of decisions of the Minister's delegate that the appellant not be granted refugee status or a domestic protection (temporary) entry permit. The primary question was whether there had been any error with respect to the determination that the appellant was not a refugee within the meaning of the 1951 Geneva Convention Relating to the Status of Refugees or the 1967 Protocol Relating to the Status of Refugees. Article 1.A of the Refugees Convention defines a refugee as a person who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ...

The appellant, a citizen of Bolivia, had been sentenced to a term of imprisonment in Australia for an offence relating to the importation of cocaine into Australia. The appellant gave evidence for the prosecution at the trial of his co-accused, who was convicted and sentenced to imprisonment. The appellant claimed that he feared for his life if he returned to Bolivia, on the grounds that his co-accused was a member of a family which the appellant asserted was heavily involved in the drug trade in Bolivia and had powerful connections in that country. It was not in dispute that the appellant had a well-founded fear of being persecuted. The question was whether he feared persecution for reasons of membership of a particular social group. Counsel for the appellant argued that he was a member of a particular social group within the meaning of article 1.A of the Refugees Convention, defined as the group of persons who have provided information to the police and have given evidence in support of the police. The Full Court, agreeing with Olney J, unanimously rejected this argument.

Black CJ, with whom French J agreed, said:

> The convention definition ... requires that there be a fear of being persecuted for one of the specified reasons.... A critical element in the present case is that the fear of persecution relied upon must be a fear for reasons of *membership* of

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Rowbotham (1988) 41 CCC (3d) 1 at 65-66 (Canadian Charter). See also 109 ALR at 425 (Dawson J, referring to *Frank Robinson v Jamaica*, UN Human Rights Committee, CCPR/C/35/D/223/1987); 435 (Toohey J, referring also to *Artico v Italy* (1980) 3 EHRR 1 at 13-15).

149 109 ALR at 393.

150 Affirming (1992) 34 FCR 321; 106 ALR 367 (Federal Court of Australia, Olney J).

> a particular social group. It is not enough to establish only that persecution is feared by reason of some act that a person has done, or is perceived to have done, and that others who have done an act of the same nature are also likely to be persecuted for that reason. The primary focus of this part of the definition is upon an aspect of what a person *is* – a member of a particular social group – rather than upon what a person has done or does.[151]

He observed that there must be many people in the world who, being involved in criminal activities themselves, have assisted the police and given evidence against others, but that these people "exhibit an almost limitless diversity in their personal characteristics and in their interaction with society", and that the only thing they had in common was, "by definition, that they have acted on an occasion or occasions in a particular way with respect to the enforcement of the criminal law".[152] On the other hand, the expression "social group" was said to connote at the very least "a cognisable group in a society, and cognisable to the extent that there may be a well-founded fear of persecution by reason of *membership* of such a group".[153] He indicated also that to characterise any person who had engaged in an activity as a member of a "social group" comprising others who had engaged in the same activity would be to render almost meaningless the separate reasons for fear of being persecuted enumerated in article 1.A of the Refugees Convention – it would mean that any person who feared persecution by reason of an act done could claim to be a refugee by doing no more than pointing to the existence of other persons who had done the same thing.[154] Similarly, Lockhart J found that the expression "particular social group" referred to "a recognisable or cognisable group within a society that shares some interest or experience in common",[155] and that "there is nothing in the present case to suggest that there is an identifiable group, either in Bolivia or elsewhere, which has a common experience or characteristic which they share together of police informers or persons who have turned Queen's evidence".[156] Olney J at first instance had said "There is no suggestion that he is a member of a group of such people, social or otherwise, who share similar characteristics. In my opinion the application for refugee status was doomed to failure from the very outset."[157]

At the same time, Black CJ acknowledged that it may be possible that "over a period of time and in particular circumstances, individuals who engage in similar actions can become a cognisable social group".[158] Lockhart J added

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151 39 FCR at 404.
152 Ibid, p 405.
153 Ibid, p 406.
154 Ibid, pp 405–06.
155 Ibid, p 416.
156 Ibid, p 417.
157 34 FCR at 335.
158 39 FCR at 406. Black CJ noted that the Canadian and United States courts and tribunals had adopted different approaches to the definition of "particular social group": ibid, p 404, citing Hathaway JC, *The Law of Refugee Status* (1991), pp 157–69; Parish, "Membership in a Particular Social Group Under the Refugee

that the expression "particular social group" called for no narrow definition, and that social groups may have interests in common as diverse as education, morality and sexual preference. Examples were said to include "the nobility, land owners, lawyers, novelists, farmers, members of a linguistic or other minority, even members of some associations, clubs or societies".[159] Black CJ said that this "can give rise to difficult questions", but that this was far removed from the present case.[160]

12. Refugees - Detention pending determination of refugee status

Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs

(1992) 176 CLR 1; 67 ALJR 125; 110 ALR 97

High Court of Australia

The plaintiffs in this case were Cambodian nationals who had arrived by boat in Australian territorial waters in two groups, in November 1989 and March 1990. None of them entered Australia holding valid entry permits, and all were detained in custody following their arrival. After arrival each applied for refugee status, and in each case the application was rejected. Proceedings were then commenced in the Federal Court of Australia, seeking judicial review of the decisions to reject the applications for refugee status. In April 1992, a judge of the Federal Court set aside each of the decisions, and referred the

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Act of 1980: Social Identity and the Particular Concept of the Refugee" (1992) 92 *Columbia L Rev* 923. North American authorities referred to by Lockhart J (at 413–15) included *Sanchez-Trujillo v Immigration and Naturalization Service* 801 F 2d 1571 (1986) (young, urban, working-class Salvadorian males of military age who had not joined the armed forces or expressed overt support for the Salvadoran government held not to be a "particular social group"); *Matter of Acosta* (US Board of Immigration Appeals, 1 March 1985, Interim Decision 2986) ("particular social group" refers to "a group of persons all of whom share a common immutable characteristic", including "a shared past experience such as former military leadership or land ownership"); *Attorney-General of Canada v Ward* (1990) 67 DLR (4th) 1 (the State's complicity in the persecution or fear of persecution must be established); Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar - *Sanchez-Trujillo*" (1987) 62 *Wash L Rev* 913; Helton, "Persecution on Account of Membership in a Social Group as a Basis for Refugee Status" (1983) 15 *Columbia Human Rights Law Rev* 39. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979), para 77, indicates that "particular social group" "normally comprises persons of similar background, habits or social status".

159 39 FCR at 416.

160 Ibid, p 406. In another case decided in 1992, the Federal Court (Olney J) held that a person is not by virtue of Article 1.E excluded from the definition of a "refugee" for the purposes of the 1951 Refugees Convention by the mere fact of having been granted refugee status in another country, unless it is found that the domestic law of the foreign country recognises refugees as having the same rights and obligations as its nationals: *Nagalingam v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 38 FCR 191.

matter back to a delegate of the Minister for redetermination. The judge also ordered that the outstanding applications made by the plaintiffs for orders that they be released from custody be adjourned for hearing commencing 7 May 1992.[161]

Two days before the hearing of these applications for release from custody was due to commence, the Migration Amendment Act 1992 (Cth) was enacted, and was assented to and became operative the following day. The Act inserted a new Division 4B into Part 2 of the Migration Act 1958. Division 4B was expressed to apply to a "designated person", defined in section 54K as a non-citizen who had been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992, had not presented a visa, was in Australia, had not been granted an entry permit, and had been given a designation by the Department of Immigration, Local Government and Ethnic Affairs. Section 54L provided that after commencement of Division 4B, a designated person must be kept in custody, and was to be released if, and only if, he or she was removed from Australia under section 54P or was given an entry permit. Section 54P provided that a designated person must be removed from Australia as soon as practicable if the designated person asked to be removed, had been in Australia for at least two months without applying for refugee status or an entry permit, or if the person's application for refugee status or an entry permit had been refused and all appeals finalised. Section 54Q provided that sections 54L and 54P ceased to apply to a designated person who was in Australia on 27 April 1992 if that person had been in custody under Division 4B for a period or periods totalling 273 days (approximately nine months), although provision was made for this period to be suspended where processing of applications was delayed by circumstances outside the control of the Department – for example, where court proceedings had been commenced and not finalised. Section 54R provided that "A court is not to order the release from custody of a designated person".

The plaintiffs brought these proceedings in the High Court, which raised the question of the constitutional validity of sections 54L, 54N and 54R.[162] All

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161 In *Minister for Immigration, Local Government and Ethnic Affairs v Msilanga* (1992) 34 FCR 169; 105 ALR 301, it was held that the Federal Court has power to order the interim release of a non-citizen detained under the Migration Act 1958 pending determination of an application for judicial review of a custody or deportation decision. See also *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 410; *Seeto v Department of Immigration, Local Government and Ethnic Affairs* (Federal Court, Burchett J, 7 September 1992, unreported).

162 Although the present proceedings were concerned only with the validity of Division 4B, which clearly purported to authorise such detention, Brennan, Deane and Dawson JJ expressed the view (176 CLR at 20–22) that the other provisions of the Migration Act were not sufficient to justify the plaintiffs' detention for a period prior to commencement of Division 4B. They said that under the common law of Australia, an alien who is in this country, whether lawfully or unlawfully, is not an outlaw, and cannot be detained except under

members of the court agreed that the provisions of Division 4B *prima facie* fell within the scope of the legislative power with respect to "aliens" conferred on the parliament by section 51(xix) of the Constitution. However, the plaintiffs argued that Division 4B was unconstitutional on two grounds.

The plaintiffs' first argument was that Division 4B was inconsistent with the doctrine of the separation of judicial from executive powers, to which Chapter III of the Constitution ("The Judicature") gives effect. It is a well-settled proposition in Australian constitutional law that federal judicial power may be conferred only on Chapter III courts, and that no part of the judicial power of the Commonwealth may be conferred on the Executive. More recently, the High Court has also expressed the view that it would be inconsistent with the separation of judicial power for legislation to require Chapter III courts to act in a manner which is inconsistent with the essential character of a court or with the nature of judicial power. Thus, it has been said that it would be unconstitutional for parliament to enact *ad hominem* penal legislation, such as a bill of attainder or a bill of pains and penalties.[163] This principle was developed further in the present case by Brennan, Deane and Dawson JJ,[164] who said that it would be beyond the power of the parliament "to invest the Executive with an arbitrary power to detain citizens in custody" because "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".[165] They considered that Division 4B would clearly have been unconstitutional if it had not been confined to non-citizens.[166] However, they observed that under international law, every State has the right to exclude or expel even a friendly alien,[167] and that the High Court had consistently recognised that the power of parliament to make laws with respect to aliens extended to authorising the Executive to restrain an alien in custody to the

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some positive authority conferred by the law (subject to an exception in the case of an enemy alien in wartime), and that the detention during that period was therefore unlawful. See also at 42–44 (Toohey J) and 62–64 (McHugh J).

163 See *Polyukhovic v Commonwealth* (*The War Crimes Act* case) (1991) 172 CLR 501 at 534–40 (Mason CJ), 612–13, 623–26 (Deane J), 648–51 (Dawson J), 685–86 (Toohey J), 706–07 (Gaudron J), 721 (McHugh J), referring, *inter alia*, to *Liyanage v The Queen* [1967] 1 AC 259.

164 Gaudron J expressed her "general agreement" with the judgment of Brennan, Deane and Dawson JJ, subject to certain additional observations on the extent of the legislative power with respect to "aliens" under section 51(xix) of the Constitution.

165 176 CLR at 27. This observation was expressed to be subject to several established exceptions, eg, the arrest under warrant of a person accused of a crime to ensure he or she is available to be dealt with by the court, and involuntary detention in the case of mental illness or infectious disease.

166 Ibid, p 29.

167 Ibid, pp 29–30, referring to *Attorney-General (Canada) v Cain* [1906] AC 542 at 546.

extent necessary to make a deportation effective.[168] By analogy, they considered that parliament could confer on the Executive power to detain an alien in custody, for the purposes of executive powers to receive, investigate and determine an application for an entry permit, and thereafter to admit or deport.[169] Sections 54L and 54N were thus upheld on the grounds that the detention which they required was limited to what is reasonably capable of being seen as necessary to enable an application for an entry permit to be made and considered.[170] They also rejected the argument that those sections were, in effect, *ad hominem* legislation "enacted to affect the outcome of known or prospective legal proceedings" brought by specific individuals.[171]

However, the majority considered that, as a matter of construction, section 54R purported to prevent the courts from ordering the release of a person who was detained under Division 4B but whose detention was no longer authorised. That section was therefore held invalid on the grounds that it derogated from the judicial power directly vested in the court by the Constitution to control *ultra vires* acts of the Executive.[172] The minority,[173] which held that none of the provisions were inconsistent with Chapter III of the Constitution, construed section 54R as applying only in the case of a person whose detention was still authorised by Division 4B.

The plaintiffs' second argument for the invalidity of Division 4B concerned its consistency with provisions of the 1951 Geneva Convention Relating to the Status of Refugees and 1967 Protocol, and the International Covenant on Civil and Political Rights. This argument was dealt with very briefly by the court. While accepting the proposition that the courts should, in the case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty, the court found the provisions of Division 4B to be quite unambiguous, and it was therefore unnecessary to consider the question.[174] However, it is generally accepted that it is consistent with article 31 of the Geneva Refugees Convention for persons who would otherwise be illegal immigrants to be detained pending determination of refugee status, if such detention is "necessary" (for example, if it is feared that the persons will disappear if not detained, or that they may falsify or destroy evidence, or that they may constitute a risk to national security, public order or public health).[175] At the time this legislation was

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168 176 CLR at 30–31, giving as an example *Koon Wing Lau v Calwell* (1949) 80 CLR 533. Also at 10 (Mason CJ), 46–47 (Toohey J), 64–67 (McHugh J).

169 176 CLR at 32.

170 Ibid, pp 33–34. Also at 10 (Mason CJ), 46–47 (Toohey J), 66–67 (McHugh J).

171 Ibid, pp 34–35. Also at 49–50 (Toohey J) and 69–74 (McHugh J).

172 Ibid, pp 35–37.

173 Mason CJ (ibid, pp 10–14), Toohey J (at 50–51) and McHugh JJ (at 68–69).

174 Ibid, pp 37–38 (Brennan, Deane and Dawson JJ). Also at 51–52 (Toohey J) and 74–75 (McHugh J).

175 See Robinson N, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (1953), p 154; Grahl-Madsen A, *The Status of Refugees in International Law*, vol II (1972), pp 209–11, 363, 417–19;

enacted, the Australian Government expressed the view that the legislation was consistent with Australia's obligations under the Refugees Convention and Protocol.[176]

13. Dual citizenship - Disqualification from being elected as a member of Parliament

Sykes v Cleary

(1992) 176 CLR 77; 67 ALJR 59; 109 ALR 577

High Court of Australia

Section 44 of the Australian Constitution provides that:

> Any person who –
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> (i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or
>
> ...
>
> (iv) Holds any office of profit under the Crown ...
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

A candidate in a by-election for a seat in the House of Representatives disputed the poll on the grounds that the candidate declared to be elected held an office of profit under the Crown, and on the grounds that two other candidates were subjects or citizens or entitled to the rights or privileges of a subject or a citizen of a foreign power. By majority, the court declared the election to be void on the grounds that the successful candidate was disqualified under section 44(iv). The court also considered the application of section 44(i) to two of the other candidates. One of these candidates was born in Switzerland, the other in Greece, and each was a citizen by birth of that country. Both had subsequently migrated to Australia and become naturalised Australian citizens, but neither had thereby lost his former citizenship. The question was whether these candidates were disqualified from being elected by

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Tsamenyi M, *The Vietnamese Boat People and International Law*, Griffith University, Centre for the Study of Australian-Asian Relations, Research Paper No 14 (1981), p 53; Goodwin-Gill, The Refugee in International Law (1983), 158; Martin, "The New Asylum Seekers" in Martin DA (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (1988), p 1 at 13; *Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme*, No 44 (XXXVII) ("Detention of Refugees and Asylum Seekers"). See also Hamerslag, (1989) 3 *Int J Refugee Law* 395 at 400; Aleinikoff TA and Martin DA, *Immigration: Process and Policy*, interim 2nd ed (1991), pp 430-32, 439-43, 455-56, 859-62. And see the comments of the New Zealand Court of Appeal in *D v Minister of Immigration* [1991] 2 NZLR 673 at 676.

176 HR Deb, 5 May 1992, p 2372.

virtue of their dual nationality. A majority of the members of the court held that they were.

The court noted that the common law recognises the concept of dual nationality,[177] and that at common law, the question of whether a person is a citizen or national of a particular foreign State is generally determined according to the law of that foreign State.[178] This common law principle was said to reflect international law.[179] A majority of the court, while acknowledging that the International Court of Justice had recognised the "real and effective nationality" as that which gave rise to a right to exercise diplomatic protection,[180] rejected the argument that section 44(i) of the Constitution referred only to a person whose "real and effective" nationality is that of a foreign State.[181] Mason CJ, Dawson, Toohey and McHugh JJ said that the words in section 44(i) precluded such an approach.[182] Brennan J said that the concept of "real and effective nationality" may apply in municipal law in cases where it is necessary to choose between the competing claims of two *other* States asserting the nationality of an individual, but not in cases where the issue is simply whether an individual *is* a national of a foreign power.[183]

Brennan J indicated that there was an exception to this principle, permitting the courts to pay no regard to the conferral by a foreign State of its nationality on a person "who had no connexion or only a very slender connexion with it", since in such cases the foreign State is "acting beyond the bounds of any jurisdiction in matters of nationality which international law would recognize".[184] Thus, he said:

> To take an extreme example, if a foreign power were michievously to confer its nationality on members of the Parliament so as to disqualify them all, it would be absurd to recognize the foreign law conferring foreign nationality. Section 44(i) is concerned to ensure that foreign powers command no

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177 176 CLR at 105 (Mason CJ, Toohey and McHugh JJ), 110 (Brennan J), 135 (Gaudron J), citing *Oppenheimer v Cattermole* [1976] AC 249 at 261, 263–64, 267, 278–79.

178 176 CLR at 105–06 (Mason CJ, Toohey and McHugh JJ), 112 (Brennan J), 127 (Deane J), 131 (Dawson J), 135 (Gaudron J) citing *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 649, 673; *Ex parte Korten* (1941) 59 WN(NSW) 29 at 30.

179 176 CLR at 106 (Mason CJ, Toohey and McHugh JJ), 110–12 (Brennan J), 131 (Dawson J), citing *Nottebohm Case (Liechtenstein v Guatemala)* ICJ Rep 1955, p 4 at 20; Convention on Certain Questions Relating to the Conflict of Nationality Laws (12 April 1930), 179 LNTS 89.

180 176 CLR at 106–07, citing *Nottebohm Case*, n 179 above, at 22–24. See also eg Iran–US Claims Tribunal, Case No A/18 (1984) 23 ILM 489 at 497–501; *Mergé* claim (1955) 22 ILR 443 at 449–57.

181 The Attorney–General for the Commonwealth and the Australian Electoral Commission had intervened in the proceedings in support of this argument.

182 176 CLR at 107 (Mason CJ, Toohey and McHugh JJ). Also at 131 (Dawson J).

183 176 CLR at 111–12.

184 Ibid, p 112, quoting *Oppenheimer v Cattermole*, n 177 above, at 277. Cf also Dawson J (at 131), who refers to "extreme examples of foreign nationality or citizenship being foisted upon persons against their will".

> allegiance from or obedience by candidates, senators and members of the House of Representatives; it is not concerned with the operation of foreign law that is incapable in fact of creating any sense of duty, or of enforcing any duty, of allegiance or obedience to a foreign power.[185]

However, he added that "there are few situations in which a foreign law, conferring foreign nationality or the rights and privileges of a foreign national, is incapable in fact of creating a sense of duty, or is incapable of enforcing a duty, of allegiance or obedience to a foreign power".[186]

However, all members of the court also found that section 44(i) would not disbar an Australian citizen who had taken all reasonable steps to divest himself or herself of any conflicting allegiance.[187] Mason CJ, Toohey and McHugh JJ noted that the purpose of section 44(i) was to ensure "that members of Parliament did not have a split allegiance and were not, as far as possible, subject to any improper influence from foreign governments". Given that the Constitution "was enacted at a time, like the present, when a high proportion of Australians, though born overseas, had adopted this country as their home", they considered that "it could scarcely have been intended to disqualify an Australian citizen for election to Parliament on account of his or her continuing to possess a foreign nationality, notwithstanding that he or she had taken reasonable steps to renounce that nationality".[188] Deane J and Dawson J took a similar view.[189] Brennan J considered that a case in which a person had done all that lies reasonably within his or her power to renounce the rights and obtain a release from the duties of the foreign citizenship was one of those cases in which the foreign nationality law "is incapable in fact of creating a sense of duty, or is incapable of enforcing a duty, of allegiance or obedience to a foreign power".[190]

As to what amounts to the taking of reasonable steps to renounce foreign nationality, the court found that this must depend on all the circumstances of the case, such as the situation of the individual, the requirements of the law of the foreign State and the extent of the connection between the individual and the foreign State.[191] In the present case, all members of the court other than Deane J and Gaudron J concluded that the two candidates were disqualified by

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185 Ibid, p 113. See also at 127 (Deane J).

186 Ibid, p 113.

187 Ibid, pp 107–08 (Mason CJ, Toohey and McHugh JJ), 113–14 (Brennan J), 127–28 (Deane J), 131–32 (Dawson J), 139–40 (Gaudron J).

188 Ibid, p 107.

189 Ibid, p 127–28 (Deane J), 131–32 (Dawson J).

190 Ibid, p 113.

191 Ibid, p 108 (Mason CJ, Toohey and McHugh JJ), 131–32 (Dawson J). Thus, as Dawson J indicates, a person may not be disqualified under section 44(i) if the law of the relevant foreign State does not permit a person to relinquish the nationality of that State, or if the authorities of the foreign State have refused to exercise a discretion to allow the person to relinquish the nationality of that State.

section 44(i) because they had failed to take steps reasonably open to them under Swiss and Greek law to renounce their citizenship of those countries.

Gaudron J preferred a different approach to the rest of the court. She said that although in general the question of foreign citizenship is governed by the law of the foreign State concerned, "the Parliament could enact a law to the effect that foreign law should not be decisive of the question whether, for the purposes of Australian law, a naturalized Australian should be treated as a citizen of a foreign country".[192] For her the question in the instant case was not one of reading down the words of section 44(i), but of determining to what extent foreign nationality laws were decisive for the purposes of Australian law. She oberved that in 1975, when one of the candidates was naturalised, the Australian Citizenship Act 1948 (Cth) required an oath or affirmation, beginning with the words "I, A B, renouncing all other allegiance ...". In her view the effect of the Act at that time was that for the purposes of Australian law, the question of the person's entitlement to the citizenship so renounced was to be determined by the law of the foreign State if, and only if, that person had subsequently reasserted that citizenship; otherwise, for the purposes of Australian law, it was effectively renounced.[193] At the time the other candidate was naturalised in 1960, the oath or affirmation of allegiance did not require the renunciation of prior allegiance, although he had in fact formally renounced all other allegiance at his naturalisation ceremony. Gaudron J considered that in view of the terms and purpose of section 44(i), "regard must ... be had to foreign law in any case where nothing has been done to renounce foreign citizenship or, if renounced, it has, in some way, been reasserted".[194] Like Deane J, she considered that the two candidates were not disqualified by section 44(i).

The decision in this case provoked considerable public response.[195] However, as one commentator has pointed out, the decision of the court in relation to section 44(i) "gives effect to what the words of the Constitution seem most obviously to say", and "[i]f there is a culprit ... on this occasion it would seem to be the text of the Constitution itself".[196] In 1988, the Constitutional Commission recommended that section 44(i) be deleted and not replaced.[197]

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192 Ibid, p 136.

193 Ibid, pp 133–38.

194 Ibid, p 139.

195 For example, the independent member of the House of Representatives Mr Edward Mack, MP, said: "It seems that Australian citizenship is not by itself sufficient qualification to stand for parliament. This creates two classes of citizenship for Australia. It affects the rights of millions of Australians born overseas and many of their children born in Australia. It has major overtones for policy on multiculturalism": HR Debs (26 November 1992), p 3671.

196 Saunders, "The *Cleary* Case: Who Should be Eligible to Stand For Parliament?", Constitutional Centenary, vol 1, No 3 (December 1992), 1 at 14.

197 *Final Report of the Constitutional Commission* (AGPS, Canberra 1988), vol 1, paras 4.770, 4.793–4.797.

14. Extradition - Whether a "mere allegation" justifies surrender

Calabro v Director of Public Prosecutions

(1991) 5 WAR 327

Supreme Court of Western Australia, White AJ

Australia's extradition laws were consolidated and amended by the Extradition Act 1988 (Cth).[198] Subject to the terms of particular extradition treaties, under the new Act it is no longer necessary to establish a prima facie case against the person whose extradition is sought. The role of the magistrate is confined essentially to determining whether the conduct in respect of which extradition is sought would, if it had taken place in Australia, have constituted an offence punishable by imprisonment for more than 12 months, and to determining whether there is any "extradition objection", as defined in the Act.[199] The person whose extradition is sought is not entitled to adduce, and the magistrate may not receive, evidence in support of the submission that the person did not do that which is alleged.[200] One submission put on behalf of the applicant in this case was that to permit a person's arrest under the Act on the basis of a mere unsupported allegation by the requesting State was arbitrary, contrary to article 9 of the International Covenant on Civil and Political Rights, and contrary to the presumption of innocence which prevails in this country. White AJ rejected the submission, saying that "it seems quite clear that the procedure which has been followed has been duly prescribed by a properly passed law of the Commonwealth and the procedure is, in express terms, not concerned to determine the guilt or innocence of the applicant. It cannot, therefore, by its nature, conflict with the presumption of innocence."[201]

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198 The 1988 Act combines the operation of the former Extradition (Foreign States) Act 1966 (Cth) and the Extradition (Commonwealth Countries) Act 1966 (Cth).

199 Section 19(2)(c) and (d). Section 7 defines "extradition objection", which will exist, *inter alia*, where extradition is sought for a political offence, for the purposes of prosecuting or punishing a person on account of the person's race, religion, nationality or political opinion, for the purposes of prosecuting or punishing a person for an offence which under Australian law is an offence solely under military law, and in cases where the person has already been acquitted, pardoned or punished in respect of the offence in Australia or in the extradition country.

200 Section 19(5). See *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282 at 299 (Federal Court, Full Court).

201 5 WAR at 334–35. See also case 2 above.

15. Extradition - Discretion of magistrate to stay proceedings on grounds of abuse of process

Forrest v Kelly

(1992) 34 FCR 74; 105 ALR 573

Federal Court of Australia, Full Court[202]

The Full Court held in this case that the provisions of the Extradition Act 1988 (Cth) confer no power on a magistrate to dismiss an application under Part II for the surrender of a person on the ground that it represents an abuse of process or that delay would cause any trial in the requesting country to be unfair.[203] This was decided as a simple point of statutory interpretation: there was no provision in Part II corresponding to section 34(2) in Part III, dealing with extradition to New Zealand. Section 34(2) provides that if a magistrate is satisfied that "because ... a lengthy period has elapsed since that offence was committed or allegedly committed; or for any other reason, it would be unjust, oppressive or too severe a punishment to surrender the person to New Zealand, the magistrate shall order that the person be released". The court noted that under section 22(3)(f) of the Extradition Act, the Attorney-General has a general discretion to decline extradition for any reason which he or she thinks appropriate, and did not doubt that the Attorney-General may take delay, and any consequential hardship, into account in determining whether to surrender a person to the requesting State. The result in this case was said to be supported by a decision of the Supreme Court of Canada.[204] It is also consistent with the approach taken by the House of Lords in relation to the Extradition Act 1870 (UK),[205] although section 11(3) of the Extradition Act 1989 (UK) now contains a provision enabling the High Court on an application for habeas corpus to order a person committed under the Act to be discharged if it appears to the court that in all the circumstances it would be unjust or oppressive to return the person, by reason of the trivial nature of the offence, the passage of time since the crime was allegedly committed or the fact that the accusation is not made against the person in good faith or in the interests of justice.

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202 Affirming (1991) 32 FCR 558; 105 ALR 397 (Federal Court of Australia, O'Loughlin J).

203 34 FCR at 79. Part II deals with extradition from Australia to countries other than New Zealand.

204 *Republic of Argentina v Mellino* (1987) 33 CCC (3d) 334, holding that the Canadian Charter of Rights and Freedoms did not entitle an extradition judge to stay an extradition application because of delay by the country seeking extradition.

205 *Atkinson v United States of America Government* [1971] AC 197; *R v Governor of Pentonville Prison; Ex parte Sinclair* [1991] 2 AC 64; (1991) 62 BYIL 441–44; *R v Governor of Pentonville Prison; Ex parte Alves* [1992] 3 WLR 844 at 852. See 32 FCR at 577–79 (O'Loughlin J).