Australian Cases before Australian Courts and Tribunals Involving Questions of Public International Law 2009

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International Law in General

Constitutional interpretation and development of the common law – relevance of international law – Indigenous property rights

Wurridjal v The Commonwealth of Australia
(2009) 237 CLR 309; (2009) 169 LGERA 108; (2009) 252 ALR 232;
(2009) 83 ALJR 399; [2009] HCA 2
High Court of Australia
French CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ

This case involved a challenge to the Northern Territory National Emergency Response Act 2007 (Cth), on the basis that it infringed the Australian Constitution's guarantee that a Commonwealth law for the acquisition of property must provide just terms. The validity of the legislation was upheld.

Justice Kirby, in dissent, explained why, in his opinion, international law is relevant to both constitutional interpretation and the development of the common law. Justice Kirby observed that:

> Relevant sources of international law recognise the general right to property. Specifically, there is a growing body of international law that recognises the entitlement of indigenous peoples, living as a minority in hitherto hostile legal environments, to enjoy respect for, and protection of, their particular property rights. There is also express recognition of the cultural, religious and linguistic rights of indigenous peoples, including in United Nations treaties of general application to which Australia is a party. Commonly, such cultural, religious and linguistic rights are directly connected to the land of indigenous peoples, warranting protection of their property rights.
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> For an Australian court to accept the diminution or abolition of pre-existing legal interests of indigenous peoples with respect to land, communal and personal existence, culture, habits and traditions, as by treating them as "property" rights insusceptible to a constitutional guarantee of protection from "acquisition" without "just terms", would appear to contravene the foregoing expressions of international law. In my opinion, a position has been reached in Australian constitutional and

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common law where any such diminution or abolition could only be achieved by express provisions of municipal law that conform to the Australian constitutional norm of "just terms" as that provision reflects contemporary international principles. In particular, it would arguably appear to be contrary to the developing principles of international law for any pre-existing rights of indigenous peoples to be reduced or abolished without "positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them".[2]

Justice Kirby further argued that:

In the matter of the legal rights of its indigenous peoples, the Australian legal system can learn from the experience of other countries facing similar legal issues and from the insights of the international community more generally. It is not as if, in this area of the law, the previously expressed understandings of the legal rights of Australia's indigenous peoples were so developed, beneficial and protective that Australian courts have nothing to learn from comparative and international law in this field.[3]

Statutory interpretation — relevance of Convention on the Civil Aspects of International Child Abduction to interpreting the Family Law (Child Abduction Convention) Regulations 1986 (Cth) — relevance of judgments of foreign courts interpreting the Convention

LK v Director General, Department of Community Services (2009) 237 CLR 582; (2009) 253 ALR 202; (2009) 83 ALJR 525; (2009) 40 Fam LR 495; (2009) FLC ¶93-397; [2009] HCA 9
High Court of Australia
French CJ, Gummow, Hayne, Heydon and Kiefel JJ

At issue was the meaning of the term 'habitual residence' in the Family Law (Child Abduction Convention) Regulations 1986 (Cth), which implement the Convention on the Civil Aspects of International Child Abduction.[4] The Regulations provide that they are to be construed having regard to the principles and objects in the preamble and first article of that Convention, and that, unless the contrary intention appears, an expression used in the Regulations has the same meaning as in the Convention.

The Court noted that the expression 'habitual residence' has been used in numerous conventions, none of which define the term, and that the Explanatory Report accompanying the Convention states that 'the notion of habitual residence [is] a well-established concept in the Hague Conference, which regards it as a question of pure fact.'[5]

The Court continued:

International treaties should be interpreted uniformly by contracting states...It follows that, unless it is shown that the term is used in the statute law of other

2 (2009) 237 CLR 309, 411-12.
3 Ibid 412-13.
4 [1987] ATS 2.
5 (2009) 237 CLR 582, 584.

> contracting states in a sense different from the way in which it is used in the Abduction Convention, care is to be exercised to avoid giving the term a meaning in Australia that differs from the way it is construed in the courts of other contracting states. But it is no less important to recognise that, because the term is not defined in the Abduction Convention, and the absence of definition reflects the stated intention that it should be treated "as a question of pure fact", conclusions reached in the courts of other jurisdictions are not lightly to be treated as establishing principles of law which govern the term's meaning and application. Rather, they are to be read and understood as resolving the particular controversy tendered for decision.[6]

While noting that treating the question as one of fact has 'evident limitations' because 'some criteria must be engaged at some point in the inquiry,'[7] the Court stated that:

> Use of the term "habitual residence" to identify the required connection between a person and a particular municipal system of law amounts to a rejection of other possible connecting factors such as domicile or nationality.[8]

As such, the Court concluded that 'it would be wrong to attempt in these reasons to devise some further definition of the term intended to be capable of universal application.' [9]

Statutory interpretation – application of Vienna Convention on the Law of Treaties – maritime law

Qenos Pty Ltd v Ship 'APL Sydney'
(2009) 187 FCR 282; (2009) 260 ALR 692; [2009] FCA 1090
Federal Court of Australia
Finkelstein J

The APL Sydney was anchored in Port Phillip Bay when its anchor struck a submarine pipeline. In issue was whether liability was limited by the Convention for the Limitation of Liability for Maritime Claims 1976 [10] (1976 Convention), incorporated into domestic law by s 6 of the Limitation of Liability for Maritime Claims Act 1989 (Cth).

Quoting the United States Supreme Court, [11] Finkelstein J observed that a limitation provision implementing the 1976 Convention should be 'broadly and liberally construed in order to achieve its purpose to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner.'[12] Justice Finkelstein noted that the Vienna Convention on the Law of Treaties 1969[13] (VCLT) reflects customary international law and thus may be applied to interpreting treaties concluded before its entry into force in 1980.

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6 Ibid 596.
7 Ibid 592.
8 Ibid 593.
9 Ibid 598.
10 [1991] ATS 12.
11 *Just v Chambers* 312 US 383, 385 (1941).
12 (2009) 187 FCR 282, 285.
13 [1974] ATS 2.

Justice Finkelstein summarised the process of applying Article 31 of the VCLT:

> First, determine the ordinary meaning of a term. Second, ask whether that meaning (or one of several meanings) should be adopted having regard to the context. The context includes the Article in which the word is found, as well as the whole treaty (and may also include the previous treaties). Third, the purpose and object of the treaty must be considered. But the third step should not be undertaken in isolation from the terms of the treaty, but rather as part of the context which can shed light on the meaning of particular terms.
>
> When following this approach it is necessary to be unconstrained by principles of domestic law, which usually have no role to play in the construction of international conventions...[14]

Justice Finkelstein considered the *travaux préparatoires* of the 1976 Convention, noting that this is allowed by Article 32 of the VCLT when interpretation in accordance with Article 31 leaves the meaning ambiguous. In interpreting the phrase 'infringement of rights other than contractual rights' in the 1976 Convention, the Court considered a similar phrase in the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957,[15] and its *travaux préparatoires*. Justice Finkelstein concluded that the Convention did apply to the claims in issue.

Statutory interpretation — application of Vienna Convention on the Law of Treaties — dual taxation

Undershaft (No 1) Ltd v Federal Commissioner of Taxation
(2009) 175 FCR 150; (2009) 253 ALR 280; (2009) 74 ATR 888; [2009] FCA 41
Federal Court of Australia
Lindgren J

At issue was whether capital gains tax was 'income tax' for the purposes of double taxation agreements concluded by Australia with the United Kingdom and the Netherlands. The agreements were scheduled to the International Tax Agreements Act 1953 (Cth). Quoting Brennan CJ in *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 255, the Court said:

> If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty...To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.[16]

The Court reasoned that the Schedules should be interpreted in accordance with the VCLT, meaning that the text should be interpreted liberally and holistically. Although primacy must be given to the ordinary meaning of the words used, which are presumed to be 'the authentic representation of the parties' intentions,' the

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14 Ibid 288.
15 [1981] ATS 2.
16 (2009) 175 FCR 150, 159 quoting *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230-31.

Court said that 'treaties often fail to demonstrate the precision of domestic legislation and should thus not be applied with "taut logical precision."'[17]

Reference was made to the Organisation for Economic Co-operation and Development Model Convention on Income and Capital and related drafts and commentaries, as potentially relevant extraneous materials, as well as the 'Colonial Model Treaty [that] was used by the UK in treaties with Commonwealth countries.' The Court concluded that capital gains tax was a form of income tax for the purpose of the agreements.

Human Rights

Extradition — application for bail pending judicial review — fair trial

Zentai v Honourable Brendan O'Connor
(2009) 263 ALR 511; [2009] FCA 1597
Federal Court of Australia
McKerracher J

The applicant sought bail while awaiting judicial review of a decision to extradite him to Hungary for an investigation into allegations that he committed a war crime during the Holocaust.

Justice McKerracher granted bail, finding that special circumstances existed, including that Zentai was 88 years old and in poor health, and there was no flight risk. Justice McKerracher also considered that it was necessary to come to a preliminary view as to the strength of the application for judicial review, stating that:

> Given the serious nature of the reciprocal obligations owed under extradition treaties and the importance of such treaties to Australia, obviously weak or colourable claims would not attract a favourable exercise of the discretion to grant bail.[18]

Justice McKerracher noted that Zentai's judicial review application argued, *inter alia:* that the alleged war crime was not an 'extradition offence' under the Extradition Act 1988 (Cth); that he was not 'accused' of the offence because his extradition was sought for the purposes of an investigation only; and that the Minister could not reasonably be satisfied that Zentai would receive a fair trial in Hungary. In relation to the latter argument Zentai argued that:

> the request for extradition is based on depositions made by persons in proceedings in the (then Communist) Hungarian Peoples' Court in the late 1940's. If tried, Mr Zentai could not, as required by Art 8 of the European Convention on Human Rights 1950 (ECHR) and Art 14 ICCPR, confront and examine witnesses as to the veracity and voluntariness of their confessions. Mr Zentai has asked whether the Hungarian prosecution authorities are able to produce for cross-examination the deponents on whose statements the Hungarian authorities would rely to found any prosecution. No such information has been provided by the Republic of Hungary, nor has the

17 (2009) 175 FCR 150, 160.
18 (2009) 263 ALR 511, 518.

> Australian Government sought any assurances as to how a fair trial can be conducted in the absence of these principal witnesses.[19]

Justice McKerracher reasoned that:

> A relevant consideration is the obligation of Australia to comply with extradition treaty arrangements. However, that obligation is not an absolute one, but subject to the qualifying provisions of the Extradition Treaty, either requiring or permitting Australia to refuse extradition in particular circumstances...
>
> It is argued that if the grounds for review were made out, then the surrender of Mr Zentai to extradition would be unlawful and Australia would be in breach of its international obligations to one of its nationals, by denying him the benefit of [certain provisions of] the Extradition Treaty.[20]

Taking into account these and other matters, McKerracher J granted bail.

Extradition — discrimination on the basis on political opinion

Snedden v Croatia
(2009) 178 FCR 546; [2009] FCAFC 111
Federal Court of Australia
Bennett, Flick and McKerracher JJ

The appellant, a prominent Serbian political and military figure, opposed his extradition to Croatia on the grounds that an extradition objection applied under the Extradition Act 1988 (Cth). The objection, found in s 7(c) of the Act, was that:

> on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions.[21]

The appellant relied on Organisation for Security and Cooperation in Europe reports that 'ethnic origin continues to be a factor in determining against whom and what crimes are prosecuted, with discrepancies seen in the type of conduct charged and the severity of sentencing,' and that service in the Croatian army was treated as a mitigating factor in sentencing.[22]

The Court said that:

> The mitigating factor is not based on nationality, as it also seems to apply to Serbs who fought in the Homeland Army and does not apply to Croatians who fought with the Serb forces in support of an independent Republic of Krajina.
>
> The mitigating factor, however, operates by reference to 'political beliefs'. The appellant's political beliefs concern what he describes in his Statement as 'the self determination of Serbian people in the Balkans in those areas where they constitute a majority', in particular in the Krajina. Serbs constituted a majority in the Krajina until they were removed by Croatian military forces in 1995. The appellant says that '[t]here are hardly any Serbs left in the Krajina after 1995 and they have no influence or role in the Croatian justice system'. The appellant's political belief is

19 Ibid 519.
20 Ibid.
21 (2009) 178 FCR 546, 551.
22 Ibid 556-57.

> 'that the Krajina Serbs have a right to return to their homeland and are entitled to an independent state'. He played a significant role as a military commander in the military conflict in the former Yugoslavia that began at Knin in June 1991, particularly the battle for Glina. The extradition request refers in express terms to the armed conflict in Knin 'between the armed forces of the Republic of Croatia and the armed aggressor's Serbian paramilitary troops of the anti-constitutional entity the "Republic of Krajina"' in which the appellant was a commander. It follows that the mitigating factor is applied by reason of a person's political beliefs.[23]

The appellant also relied on statistics regarding the number of Serbians and Croatians charged with crimes, and differing conviction rates, and argued that he would be subject to prejudice at his trial. The Court, while indicating that the argument on these points was less persuasive, found it unnecessary to decide them.

Statutory Interpretation — Convention on the Rights of the Child

Australian Crime Commission v NTD8
(2009) 177 FCR 263; (2009) 257 ALR 445; [2009] FCAFC 86
Federal Court of Australia
Black CJ, Mansfield and Bennett JJ

NTD8, a pseudonym for an Aboriginal community-controlled health services provider, sought judicial review of the issue of a notice under the Australian Crime Commission Act 2002 (Cth) requiring production of the personal and health records of eight Aboriginal children. The respondent argued that the best interests of the children should have been a primary consideration in the decision to require production of the records. The Court said:

> Adoption of the Convention [on the Rights of the Child[24]] does not, of itself, create an obligation on the second respondent to consider the interests of the relevant children. The Convention is not part of Australian domestic law. A matter which can be discerned on the proper construction of the Act as a whole to be relevant in the exercise of that discretion, does not achieve that quality because the same matter is stipulated in an international treaty, or is the subject of one or more of Australia's international obligations. Thus, if, for example the right of the child of an applicant to acquire Australian nationality were relevant to the exercise of the Minister's discretion, the regard which the Minister should have to that right would not materially change because a similar right is recognised by a treaty.[25]

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23 Ibid 559.
24 [1991] ATS 4.
25 (2009) 177 FCR 263, 277.

Refugees

Statutory interpretation — Convention Relating to the Status of Refugees — interpretation of well-founded fear of persecution — relevance of conduct occurring after arrival in Australia

Minister for Immigration and Citizenship v SZJGV; Minister for Immigration and Citizenship v SZJXO

(2009) 238 CLR 642; (2009) 111 ALD 30; (2009) 259 ALR 595; (2009) 83 ALJR 1135; [2009] HCA 40

High Court of Australia

French CJ, Hayne, Crennan, Kiefel and Bell JJ

The respondents, both Chinese citizens, made unsuccessful applications for protection visas to the Minister, and were unsuccessful before the Refugee Review Tribunal. Each respondent had participated in activities of the Falun Gong after arriving in Australia, but the Tribunal found that the motivation for these activities was to strengthen each respondent's application for a protection visa, and made related adverse finding regarding each respondent's credibility.

Section 91R(3) of the Migration Act 1958 (Cth) provides as follows:

> For the purposes of the application of this Act and the regulations to a particular person:
>
> (a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;
>
> disregard any conduct engaged in by the person in Australia unless:
>
> (b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

The Full Court of the Federal Court upheld the respondents' appeals, holding that the Tribunal's consideration of their activities after arriving in Australia was precluded by s 91R(3). The High Court (French CJ, Crennan, Kiefel and Bell JJ, Hayne J dissenting) upheld the Minister's appeal from that decision, holding that the correct construction of s 91R(3) did not allow evidence of conduct engaged in Australia to be used to support a claim for refugee status unless s 91R(3)(b) was satisfied, but such evidence could be used to discredit such a claim without satisfying s 91R(3)(b).

In *obiter*, French CJ and Bell J also noted:

> As to what is necessary to satisfy the condition in par (b), we agree with Crennan and Kiefel JJ that an applicant seeking to rely upon conduct engaged in in Australia must show that the conduct was not engaged in solely to strengthen his or her claim. By way of example, conduct in Australia may reflect a continued commitment by the applicant to religious practices followed or political opinions held and expressed in his or her country of origin. It could not be said to have been engaged in solely to strengthen the claim to be a refugee. It might then be relied upon by a decision-

maker to infer prior commitment to a particular religious practice or political opinion in the country of origin.[26]

Statutory interpretation – relationship between Convention Relating to the Status of Refugees and domestic law – act of state doctrine – extraterritorial application of Australian law

Sadiqi v Commonwealth of Australia (No 2)
(2009) 181 FCR 1; (2009) 260 ALR 294; [2009] FCA 1117
Federal Court of Australia
McKerracher J

The plaintiff, then 16 years old, was rescued from a sinking vessel in international waters while trying to reach Australia to claim refugee status. He was detained by Australian authorities in various locations including on Nauru, subject to an agreement between the two governments. He was eventually granted refugee status and sought damages from the Australian government.

The Court addressed various preliminary questions under the Migration Act 1958 (Cth) and the Immigration (Guardianship of Children) Act 1946 (Cth). The plaintiff argued that 'refugee status exists by virtue of the person coming within the [Convention Relating to the Status of Refugees], not by the granting of a visa. The granting of a visa merely acknowledges the existence of the status,' but the Court rejected this argument, noting that the *Migration Act's* definitions of 'lawful non-citizens' and 'unlawful non-citizens' refer not to a person 'who is entitled to hold a visa but rather to one who holds a visa.'[27]

While rejecting an argument that the Immigration (Guardianship of Children) Act 1946 (Cth) imposes an actionable duty on the Minister in his or her capacity as guardian of un-accompanied non-citizen children in Australia, the Court did accept that the Minister must address their need for food, housing, health and education, recognised in international instruments including the Convention on the Rights of the Child.[28] The Court quoted Articles 38 to 40 of that Convention, which address the rights of children: in armed conflict; who are victims of neglect, exploitation, abuse, torture or cruel, inhuman or degrading treatment or punishment; and who are accused of infringing the law.

In relation to the plaintiff's claim that he was falsely imprisoned on Nauru the Court said:

> An allegation that a foreign sovereign state has acted unlawfully within its own territory will not be justiciable in an Australian court...
>
> [T]here may be exceptions to the act of state doctrine which is arguably part of international law. It will not be applicable in circumstances where the debate concerns chattels or where the validity of the 'act of the state' is only incidental to the issues in challenge...

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26 (2009) 238 CLR 642, 654.
27 (2009) 181 FCR 1, 34.
28 [1991] ATS 4.

> Nauru's segregation of non-citizens while refugee claims were being determined or pending their removal could not involve a clear violation of any international law. The right of any State to control who may enter its territory is firmly entrenched as an attribute of sovereignty subject, of course, to any obligations owed under international conventions...
>
> The defendants submit that the decisions by Nauru to grant visas, and the impositions and conditions on visas are acts of state. They are a manifestation of the exercise by Nauru of its control over the ability of persons to enter Nauru. By alleging that he was falsely imprisoned within the territory of Nauru, in circumstances where any restraints on his movement resulted from conditions imposed on the grant of permission to enter and remain in Nauru, the plaintiff is asking the Court to review the exercise of a central manifestation of Nauru's sovereignty. The act of state doctrine prevents that from being done in an Australian court.[29]

The appellant also argued that the deployment of Australian Protective Service officers at the Nauruan detention centres was not authorised under the Australian Protective Service Act 1987 (Cth) because 'the comity of nations requires that the legislature of one country is presumed not to deal with persons or matters the jurisdiction over which properly belongs to some other sovereign state.'[30] The Court rejected this argument, stating that 'it is no longer the law of Australia, if it ever was, that there is a presumption that legislation cannot have any extraterritorial effect.'[31]

Statutory interpretation — relationship between Convention Relating to the Status of Refugees and domestic law — forfeiture of property

Tran v The Commonwealth
(2009) 108 ALD 531; [2009] FCA 474
Federal Court of Australia
Cowdroy J

The applicant was the owner of a ship that entered Australian waters carrying people without valid visas. Section 261A of the Migration Act 1958 (Cth) provides for the forfeiture to the Commonwealth of a vessel used to bring unlawful non-citizens to Australia in contravention of the Act.

The applicant argued that s 261A did not apply because all persons on board the ship were later granted protection visas, and none had been convicted of an offence, the applicant himself having been found innocent of charges under the Migration Act after he established the defence of sudden or extraordinary emergency. However, the Court found that s 261A does not require the commission of an offence under the Act, it was sufficient that the Act had been contravened when the vessel entered Australian waters.

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29 (2009) 181 FCR 1, 53.
30 Ibid 54.
31 Ibid 59.

The applicant argued that s 261 should be interpreted in a manner that is consistent with the Convention Relating to the Status of Refugees 1951,[32] and not in a manner that punishes refugees. But the Court found that the words of s 261A are not susceptible to the interpretation contended for by the applicant. The Court further stated that:

> As the Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ found... in *NAGV*,
>
> > ...the Convention is an example of a treaty which qualifies what under classical international law theory was the freedom of States in the treatment of their nationals; but the Convention does not have the effect of conferring upon the refugees to which it applies international legal personality with capacity to act outside municipal legal systems.
> >
> > ...determination of the status of refugee is a function left by the Convention to the competent authorities of the Contracting States which may select such procedures as they see fit for that purpose. [footnotes omitted]

It follows that the legal concept of 'refugee' is a status which is not conferred upon a person merely by the existence of circumstances sufficient to support such a claim. This status must positively be found, and it must be found according to the standards set by the particular state, in this case, Australia. Such concept is consistent with international law only having effect within Australia by virtue of its positive adoption into municipal law. Accordingly, the passengers on the ship were not refugees until such time as they were granted that status from the Australian authorities...Therefore it could not be said that forfeiture of the ship would punish the applicant as a refugee, because at the relevant time he was not a refugee, and nor was anyone else on the ship.[33]

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32 [1954] ATS 5

33 (2009) 108 ALD 531, 544.