AUSTRALIAN CASES INVOLVING QUESTIONS OF PUBLIC INTERNATIONAL LAW 1993

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1. Native title — Sovereignty

Coe v Commonwealth [the Wiradjuri Claim]

(1993) 68 ALJR 110; 118 ALR 193

High Court of Australia, Mason CJ

In 1992, in *Mabo v Queensland [No 2]*,[1] the High Court rejected any concept that Australia was *terra nullius* at the time of its annexation by the Crown, and held that the common law of Australia recognises 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.[2] Following this decision, there remained a number of uncertainties concerning the extent of common law native title, the circumstances in which it will be extinguished, and the validity of past acts done in ignorance of native title.[3] In response to the decision, and to address these uncertainties, the Commonwealth enacted the Native Title Act 1993 (Cth), which commenced operation on 1 January 1994.[4] The main objects of the Act

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1 (1992) 175 CLR 1. See (1993) 14 *Aust YBIL* at 321–25.

2 On this decision and its implications, see eg Simpson, "Mabo, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence" (1993) 19 *Melbourne University Law Review* 195; Manwaring, "A Small Step or a Giant Leap? The Implications of Australia's First Judicial Recognition of Indigenous Land Rights" (1993) 34 *Harvard International Law Journal* 177; Lumb, "Native Title to Land in Australia: Recent High Court Decisions" (1993) 42 *International and Comparative Law Quarterly* 84; Gray, "Planting the Flag or Burying the Hatchet: Sovereignty and the High Court Decision in *Mabo v Queensland*" (1993) 2 *Griffith Law Review* 39; Wheeler, "Common Law Native Title in Australia: An Analysis of *Mabo v Queensland [No 2]*" (1993) 21 *Federal Law Review* 271; Nettheim, "The Consent of the Natives: *Mabo* and Indigenous Political Rights" (1993) 15 *Sydney Law Review* 223; Bartlett, "Mabo: Another Triumph for the Common Law" (1993) 15 *Sydney Law Review* 178; Bartlett, "The Mabo Decision" (1993) 1 *Australian Property Law Journal* 236. See also *Pareroultja v Tickner* (1993) 42 FCR 32, discussed further below (text to nn 51–58).

3 See (1993) 14 *Aust YBIL* at 325.

4 Apart from Part 10, which provides for the establishment of a National Aboriginal and Torres Strait Islander Land Fund. The legislation with commentary has been published by the Australian Government Publishing Service: *Native Title* (1994). See also Bartlett, "Political and Legislative Responses to Mabo" (1993) 23

are described in section 3 to be to provide for the recognition and protection of native title, to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings, to establish a mechanism for determining claims to native title,[5] and to provide for, or permit, the validation of past acts invalidated because of the existence of native title.[6] The preamble states that the Act "is intended, for the purposes of paragraph 4 of article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination...to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians".[7]

The present proceedings were commenced in the High Court prior to the enactment of the Native Title Act. The plaintiff claimed to sue on behalf of the Wiradjuri tribe, being aboriginal people, and sought various declarations and consequential relief in respect of a large part of southern and central New South Wales. The first defendant, the Commonwealth of Australia, was sued as "the successor in title to the Colony of New South Wales, Victoria Regina, William IV, George IV and George III and as International Sovereign".[8] The second defendant, the State of New South Wales, was sued as "the purported owner and occupier of Crown lands within the area of the Wiradjuri Nation..."[9] The plaintiff sought declarations, *inter alia*, that "the Wiradjuri are a sovereign nation of people", "the Wiradjuri are a domestic dependent nation, entitled to self-government and full rights over their traditional lands, save only the right to alienate them to whoever they please" and that "the Wiradjuri are a free and independent people entitled to the possession of those rights and interests

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University of Western Australia Law Review 352; Butt, "The Native Title Act: A Property Law Perspective" (1994) 68 *Australian Law Journal* 285; Orr and Jeffery, "A New Land Title Regime" (1994) 29 (3) *Australian Lawyer* 34. The legislation is presently subject to a constitutional challenge.

5 The Act does not provide that this mechanism is the sole means by which the existence of native title can be determined. It would still be possible to bring court proceedings under the general law, seeking a declaration as to the existence of native title to particular land, as occurred in *Mabo [No 2]*.

6 In the second reading speech, the Prime Minister said that:

> The fact is that the High Court has handed this nation an opportunity...[W]e could make the Mabo decision an historic turning point: the basis of a new relationship between indigenous and other inhabitants...[R]ight from the start, we made our twin goals clear: to do justice to the Mabo decision in protecting native title and to ensure workable, certain, land management (House of Representatives, *Debates*, 16 November 1993, p 2878).

7 See further on the Native Title Act 1993, Practice Section, Chapter II, pp 398–405 of this volume.

8 68 ALJR 110 at 112.

9 Ibid.

(including rights and interests in land) which as such are valuable to them" (the "sovereignty" claim). In the statement of claim it was also alleged, *inter alia*, that:

> The second named Defendant [the State of New South Wales]—and George III, George IV, William IV, Victoria Regina and the Colony of New South Wales, being predecessors of the second named Defendant—and their servants and agents...by unprovoked and unjustified aggression including murder, acts of genocide and other crimes against humanity, and contrary to international customary law, wrongfully and unlawfully attempted by force to settle, the whole or part of the tribal lands of the Wiradjuri, and partially excluded the Wiradjuri people and the Plaintiff's forebears from the Wiradjuri land

and that the first and second defendants "have, by way of crimes including particularly genocide and other crimes against humanity, wrongfully benefited through their wrongful and unlawful seizure of Wiradjuri land" (statement of claim, paragraphs 9 and 10 (the "genocide" claim)). A declaration was sought that "the Plaintiff and the Wiradjuri nation and people are entitled to reparations for the acts of genocide and other crimes against humanity..." On the application of the defendants, Mason CJ ordered that the plaintiff's statement of claim be struck out, but granted leave to the plaintiff to file and serve an amended statement of claim within a specified time.[10]

In relation to the "sovereignty" claim, Mason CJ observed that:

> *Mabo [No 2]* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are "a domestic dependent nation" entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law. *Mabo [No 2]* denied that the Crown's acquisition of sovereignty over Australia can be challenged in the municipal courts of this country. *Mabo [No 2]* recognised that land in the Murray Islands was held by means of native title under the paramount sovereignty of the Crown. The principles of law which led to that result apply to the Australian mainland as the judgments make clear. The consequence is that pars 6, 7 and 8 which are the core of the plaintiff's claim do not disclose a reasonable ground for relief.
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> The allegation in par 7 that the Wiradjuri are a dependent domestic nation, entitled to self-government and full rights over their tribal lands, is but another way of putting the sovereignty claim. The allegation has no basis in domestic law. Likewise, the claim in par 8 that the Wiradjuri are a free and independent people is but another aspect of the sovereignty claim, having no independent legal significance.[11]

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10 The claim against the Commonwealth has since been discontinued. Proceedings against New South Wales are continuing.

11 68 ALJR 110 at 115, referring to *Mabo [No 2]*, (1992) 175 CLR 1 at 15, 31–32, 69, 78–79, 122, 179–80. On the concept of a domestic dependent nation, cf *Cherokee Nation v State of Georgia* (1831) 5 Pet 1 at 17 (30 US 1 at 12) (Marshall CJ).

He considered also that the decision of the High Court in *Coe v Commonwealth*[12] lent "no support whatsoever to a subsisting Aboriginal claim to sovereignty".[13]

In relation to the "genocide" claim, Mason CJ said:

> The plaintiff contends that the acts referred to in pars 9 and 10 [of the statement of claim] constitute acts of genocide within the meaning of the Convention on the Prevention and Punishment of the Crime of Genocide or were otherwise acts contrary to international customary law. An international convention to which Australia is a party does not give rise to rights under Australian municipal law in the absence of legislation carrying the convention into effect [referring to *Simsek v Macphee* (1982) 148 CLR 636]. No such legislation has been enacted and, in any event, the Convention post-dates most of the acts complained of. Many of them took place in the late 18th and early 19th centuries when New South Wales was a British colony. However, the plaintiff submits that municipal courts could have jurisdiction to try crimes against international law on the footing that the common law recognizes international law as part of the common law [referring to *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 566–67]. But, even if one accepts the propositions for which the plaintiff contends, the problem which confronts the plaintiff is to show how the acts pleaded in pars 9 and 10 generate an entitlement to damages or compensation in the plaintiff against the second defendant which was not a party to many of the alleged acts which occurred in the late 18th and early 19th centuries when the principles of customary international law differed from the principles accepted today. The plaintiff's entitlement as a representative of the Wiradjuri people to recover damages or compensation from the second defendant for these alleged wrongs is by no means evident. If the acts complained of gave rise to an entitlement to compensation at common law, that entitlement naturally would vest in the person or persons suffering loss or damage in consequence of those acts."

Mason CJ concluded that the pleading based on acts of genocide and breaches of customary international law was deficient in that it failed to identify what are the provisions or principles of law applicable when the acts alleged were committed and how it is that the second defendant was liable for acts committed before it came into existence.[14]

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12 (1979) 53 ALJR 403.

13 68 ALJR 110 at 114–15, referring to *Coe v Commonwealth*, n 12 above, at 408 (Gibbs J, with whom Aickin J agreed), 409–10 (Jacobs J), 412 (Murphy J).

14 68 ALJR 110 at 115–16. A number of other claims of the plaintiffs, which did not involve issues of public international law, were considered by Mason CJ at 116–19.

2. Treaties — Interpretation — General principles — Presumption against retrospectivity

Victrawl Pty Ltd v AOTC Ltd

(1993) 45 FCR 302; 117 ALR 347

Federal Court of Australia—Full Court

The issue arose in this case whether a person could invoke the limitation of liability provided for in the Convention on Limitation of Liability for Maritime Claims 1976 (the 1976 Convention),[15] in respect of an incident occurring before the date on which that Convention came into force for Australia. The proceedings had been brought under section 25 of the Admiralty Act 1988 (Cth), which provides that "A person who apprehends that a claim for compensation under a law...that gives effect to provisions of a Liability Convention may be made against the person by some other person may apply to the Federal Court to determine the question whether the liability of the first-mentioned person in respect of the claim may be limited under that law". Where such an application is made, the Federal Court may order the constitution of a limitation fund for the payment of claims in respect of which the applicant is entitled to limit his or her liability. "Liability Convention" is defined in section 3 of the Act to include "the Limitation Convention".

The 1976 Convention entered into force for Australia on 1 June 1991. This Convention replaces, as between the parties, the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships 1957 (the 1957 Convention).[16] The 1957 Convention was accordingly denounced by Australia with effect from 31 May 1991. To give effect in domestic law to Australia's accession to the 1976 Convention, the Limitation of Liability for Maritime Claims Act 1989 (Cth) was enacted, which commenced on 1 June 1991. Section 6 of this Act provides that the provisions of the 1976 Convention have the force of law in Australia.[17] This Act also repealed the provisions of the Navigation Act 1912 (Cth) which had previously given the force of law in Australia to the 1957 Convention. It also amended the definition of the "Limitation Convention" in section 3 of the Admiralty Act, so that it now meant the 1976 Convention rather than the 1957 Convention.

In these proceedings, the relevant occurrence took place before 1 June 1991 (the date on which the 1976 Convention came into force for Australia and the 1989 Act commenced), but the jurisdiction of the court had been invoked after that date. Both parties agreed that even though the plaintiff first applied for limitation pursuant to the 1957 Convention after the date on which the provisions of the Navigation Act giving the force of law to that Convention had

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15 London, 19 November 1976; Australian TS 1991, No 12; 16 ILM 606.

16 Brussels, 10 October 1957; Australian TS 1981, No 2. On the difficulties arising from the divergent interpretations given to the 1957 Convention and the circumstances leading to the 1976 Convention, see 45 FCR 302 at 304–06 and the references thereat.

17 Other than article 2.1(d) and (e). Pursuant to article 18.1, Australia made a declaration that it would not be bound by these paragraphs.

been repealed, the plaintiff was not precluded from invoking the provisions of that Convention.[18] There being no contradictor before the court, Gummow J (with whom Lockhart J and Cooper J agreed) considered it inappropriate to deal with this question.[19] The question was whether, having regard to the date of the relevant occurrence, the plaintiff was able to invoke the provisions of the 1976 Convention, and if so, whether the plaintiff could elect as between the two limitation regimes before judgment in the proceedings. The Court considered that the plaintiff was precluded from relying on the 1976 Convention.

Gummow J observed that the applicable rules of interpretation of the 1976 Convention are "those recognised by customary international law as codified by the Vienna Convention on the Law of Treaties of 1969".[20] He said that "the general rule under customary international law is that a treaty does not bind a Party in relation to any act or fact which took place before the date of entry into force of the treaty with respect to that Party",[21] and observed that article 28 of the Vienna Convention restated this position.[22] Although the Vienna Convention recognises that a different intention may appear from the treaty or be otherwise established, Gummow J did not consider that any different intention was established in the case of the 1976 Convention. He added that as a matter of statutory interpretation under municipal law, there were no considerations in the body of the 1989 Act which would displace the *prima facie* construction that it has only prospective operation, and did not attach new legal consequences to events occurring before its commencement.[23] He also indicated that as the 1976 Convention had only prospective operation, there was "much to be said for the view" that the 1989 Act would not be supported by the Commonwealth's legislative power with respect to external affairs if it had other than a prospective operation.[24]

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18 See 45 FCR 302 at 308.

19 Ibid.

20 Ibid, at 304, referring to *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 305 (see (1993) 14 *Aust YBIL* 342–46).

21 45 FCR 302 at 312, referring to Elias TO, *The Modern Law of Treaties* (1974), pp 46–49; *Halsbury's Laws of England*, 4th ed (1977), vol 18, p 927.

22 45 FCR 302 at 312.

23 Ibid, at 312–13.

24 Ibid, at 313. The High Court has granted special leave to appeal against the judgment of the Full Court of the Federal Court in this case.

3. Treaty — Interpretation — Right to conviction and sentence being reviewed by a higher tribunal — International Covenant on Civil and Political Rights, article 14.5

Young v Registrar, Court of Appeal [No 3]

(1993) 32 NSWLR 262

New South Wales Court of Appeal

The applicant in this case had been sentenced to six months imprisonment for contempt of court, involving defiance of an order of the Supreme Court. In accordance with the law of New South Wales, the trial for contempt of court had been by the Court of Appeal. The only possible appeal against the decision of the Court of Appeal was to the High Court of Australia, but under section 35 of the Judiciary Act 1903 (Cth), an appeal to the High Court from a State Supreme Court cannot be brought unless the High Court gives special leave to appeal. Section 35A of the Judiciary Act provides that in considering whether to grant an application for special leave to appeal, the High Court may have regard to any matters that it considers relevant, but shall have regard to whether the proceedings involve a question of law that is of public importance or in respect of which a decision of the High Court as the final appellate court is required to resolve differences of opinion as to the state of the law, or whether the interests of the administration of justice require consideration of the judgment by the High Court. In this case, the applicant had sought special leave to appeal to the High Court, but this had been refused.[25] The applicant then applied in the Supreme Court of New South Wales for a prerogative writ of *habeas corpus*, claiming that the mode of trial to which he had been subjected conflicted with article 14.5 of the International Covenant on Civil and Political Rights (ICCPR), which provides that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". He argued that deprivation of this right was either itself unlawful (if the ICCPR was part of domestic law in New South Wales), or that it was a consideration that could be taken into account by the Court in deciding whether to exercise its discretion under Part 55 rule 14 of the Rules of the Supreme Court (which provides that "[w]here a contemnor is committed to prison for a term, the Court may order his discharge before the expiry of the term").[26]

Kirby P was satisfied that punishment by way of imprisonment for a civil contempt was "conviction of a crime" for the purposes of article 14.5 of the ICCPR. Observing that the ICCPR must be construed "as international law requires" and not as an Australian statute, he said that article 14.5 "is to be viewed in the context of the global operation of the International Covenant" and that "it would be artificial in the extreme to import into the meaning of the provision the wholly artificial and unsatisfactory distinctions between civil and criminal contempt found in our law".[27] He considered that it applied to a case

25 Details of the special leave application are give in the judgment of Kirby P at 267–68.

26 Ibid, at 271.

27 Ibid, at 276–77.

such as this one "where the conviction has led to imprisonment, where the wilfulness of the behaviour of the person convicted was relevant to the punishment, and where there has been a review of detailed facts and legal principles which are susceptible to review by a higher tribunal".[28] On this point, Handley JA agreed with Kirby P,[29] although Powell JA said that he "remain[ed] to be persuaded that a finding of contempt for non-compliance with an order of the Court, without more, constitutes a '(conviction) of a crime'".[30]

Kirby P also concluded that the application for special leave to appeal to the High Court did not itself constitute sufficient "review" of the conviction and sentence for the purposes of article 14.5.[31] After referring to European and American authorities,[32] he said that in the hierarchy of Australian courts the High Court in deciding whether to grant special leave to appeal necessarily has regard to the public importance and national significance of a point to be argued. He considered that for the purposes of article 14.5, the review should be "divorced from the 'special' considerations which are inherent in a special leave application to the High Court" and that the focus should be "exclusively upon suggested error that has occurred".[33] He added that an appeal against conviction to the Court of Criminal Appeal provided an example of the kind of "review" contemplated by article 14.5. In contrast to this, Handley JA saw no reason why the procedure for special leave to appeal to the High Court from decisions in contempt cases tried at first instance by the Court of Appeal should not fall within Australia's "margin of appreciation" under which national authorities are allowed a measure of discretion in the way in which human rights are defined and regulated by domestic law.[34] He was therefore of the view that there had been no breach of article 14.5. Powell JA thought that as there were sufficient other reasons for disposing of the case, the Court should not express a view on whether there was any breach of article 14.5, but said that he "remain[ed] to be persuaded" that there had been any breach.[35]

Kirby P also noted that although New South Wales law provided for trial of contempt by the Court of Appeal, that Court could remit proceedings to a Division of the Supreme Court, from the decision of which an appeal could then be brought to the Court of Appeal. Kirby P did not think that the applicant in this case had waived his right under article 14.5 by not asking for such a procedure to be adopted. He said that "the duty to conform to fundamental

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28 Ibid, at 277.
29 Ibid, at 290.
30 Ibid, at 293.
31 Ibid, at 277–80.
32 Ibid, at 277–78, citing van Dijk P and van Hoof GJH, *Theory and Practice of the European Convention on Human Rights*, 2nd ed (1990), p 509; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in the Republic of Nicaragua* (1981), p 85f. Also Sieghart P, *The International Law of Human Rights* (1983), p 305.
33 Ibid, at 279.
34 Ibid, at 290. He also referred to the principle that "the modalities" governing the exercise of rights may be defined or regulated by law.
35 Ibid, at 292–93.

human rights principles devolves upon organs of government, including the courts, independently of the insistence of persons affected", and added that persons who were unrepresented or inadequately represented "may be unaware of their fundamental rights or unwilling to insist upon them".[36] Handley JA also disagreed on this point, and considered that the applicant had waived any entitlements under article 14.5 by acquiescing in a trial by the Court of Appeal.[37]

Thus, Kirby P concluded that the applicant had been denied the right under article 14.5 of the ICCPR "to his conviction and sentence being reviewed by a higher tribunal according to law". Handley JA concluded that there had been no breach of article 14.5, and Powell JA expressed no opinion, but said that he remained to be persuaded that there had been any breach.

However, although Kirby P found that there had been a breach of article 14.5 of the ICCPR, like Handley JA and Powell JA he agreed that the application for discharge should be dismissed. He considered that the ICCPR could not prevail over the express terms of the Supreme Court Act 1970 (NSW) and of the Judiciary Act 1903 (Cth).[38] Nor did he believe that the Court would have been warranted to order the applicant's discharge under Part 55 rule 14 of the Rules of the Supreme Court. He said that this power will usually be applicable only where the contemnor shows "remorse or contrition", and the applicant in this case had in his view "not evinced the requisite emotions to enliven the exercise of that power".[39] Furthermore, he said that even if it could be assumed that denial of the facility of full "review" of the original decision of the Court of Appeal constituted an irregularity for the purposes of domestic law, it was an irregularity of no proved significance, since no relevant error in the reasons of the Court could be shown.[40]

The result was interesting, in that Kirby P found a breach of the ICCPR, but considered that it could not be remedied by the Court. However, he made some concluding remarks on matters of law reform. He said that "in the ordinary run of contempt cases, otherwise than in the face of hearing of a court, it is not immediately plain why the inconvenient process of a three-judge trial is necessary. Such a process deprives the convicted contemnor of a basic right, accepted by international law and by the International Covenant ratified by this country." He said that consideration should be given by Parliament to an appropriate amendment to the Supreme Court Act 1970 (NSW), and that in the meantime consideration should be given to the practice of the Court of Appeal, to remit contempt proceedings to a Division of the Supreme Court, wherever that is appropriate.[41]

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36 Ibid, at 279. See also at 284.

37 Ibid, at 289–90. On the issue of waiver, Handley JA referred to a number of decisions of the European Court of Human Rights.

38 Ibid, at 280. See further on the relationship between international human rights treaties and Australian domestic law, this Chapter, pp 343–57 below, of this volume.

39 Ibid, at 283.

40 Ibid, at 284–85.

41 Ibid, at 286.

4. Treaties — Interpretation — Particular treaty provisions

In a number of other recent cases, Australian courts have interpreted and applied particular treaty provisions which have been incorporated into Australian law by legislation, or referred to in statutory provisions.[42]

In *Resort Condominiums International Inc v Bolwell*,[43] an issue arose whether orders of an interlocutory nature made by an arbitrator in an arbitration outside Australia could be enforced in Australia pursuant to section 8 of the International Arbitration Act 1974 (Cth). That section provides for the enforcement of a "foreign award", defined in section 3(1) as an arbitral award made in pursuance of an arbitration agreement in a country other than Australia, being an arbitral award in relation to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 applies. Lee J concluded that "the reference to arbitral award in the Convention does not include an interlocutory order made by an arbitrator but only an award which finally determines the rights of the parties".[44] He added that even if the Convention did extend to interim awards, "It does not appear that the Act or Convention contemplate any type of 'award' or 'order' of an arbitrator, other than an award which determines at least all or some of the matters referred to the arbitrator for decision...An interlocutory order which may be rescinded, suspended, varied or reopened by the tribunal which pronounced it, is not 'final' and binding on the parties..."[45] Under section 8(7)(b) of the Act, which reflects article V.2(b) of the Convention, a court may refuse to enforce a foreign award if it finds that to do so would be contrary to public policy. Lee J also concluded that under section 8(5) of the Act, "a general discretion exists whether to enforce a foreign award, although the general rule is that a valid foreign award is usually enforced if all the conditions are satisfied".[46] However, he ruled that if the orders sought to be enforced in this case did comprise a "foreign award" within the meaning of the Act, he would refuse to order their enforcement on the ground that to do so would be contrary to the public policy of Queensland, or in the alternative, in the exercise of his discretion.[47]

Alstergren v Owners of the Ship "Territory Pearl"[48] raised an issue of the interpretation of the words "actual fault or privity" in article 1.1 of the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957, which at the relevant time was applicable by virtue of

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42 See also *Case 23/93* (1993) 93 ATC 288 (Administrative Appeals Tribunal, McMahon BJ (Deputy President)), concerning the meaning of the expression "permanent establishment" in the 1972 double taxation agreement between Australia and New Zealand, set out in Schedule 4 to the Income Tax (International Agreements) Act 1953 (Cth). For a discussion of this case, see Still and Butterworth, "Lost in the Long White Cloud: The Decision in Case 23/93" (1993) 5 (5) *CCH Journal of Australian Taxation* 26.

43 (1993) 118 ALR 655 (Supreme Court of Queensland, Lee J).

44 Ibid, at 672.

45 Ibid, at 674.

46 Ibid, at 675–76.

47 Ibid, at 681.

48 (1992) 36 FCR 186; 112 ALR 133 (Federal Court of Australia, Heerey J).

section 333 of the Navigation Act 1912 (Cth).[49] Article 1.1 of the Convention provided for the limitation of the liability of the owner of a sea-going ship in respect of claims arising from specified occurrences, unless the occurrence giving rise to the claim "resulted from the actual fault or privity of the owner". Heerey J observed that under the Convention the onus lies on the defendant to establish that the plaintiff's loss was not caused by the defendant's "actual fault or privity",[50] and found that in the circumstances of this case, the defendants had failed to establish the absence of actual fault.

In *Pareroultja v Tickner*[51] the Full Court of the Federal Court held that the Racial Discrimination Act 1975 (Cth) did not operate to prevent the making of grants of land under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) in respect of land to which there attached a valid and subsisting common law native title, but found that native title is not extinguished by the making of such a grant.[52] The latter Act (the Land Rights Act) was enacted before the decision of the High Court in *Mabo [No 2]*,[53] at a time when it was not known that native title was recognised at common law. The Act provides for the granting of traditional Aboriginal land in the Northern Territory for the benefit of Aboriginal Australians, and provides for the creation of Land Trusts to hold the title to an estate in fee simple in Aboriginal land. Part II of the Racial Discrimination Act contains provisions for the prohibition of racial discrimination, but section 8(1) of the Act provides that that Part does not apply to, or in relation to the application of, special measures to which article 1.4 of the International Convention on the Elimination of All Forms of Racial Discrimination 1965 applies.[54] The Court found it unnecessary to consider the detailed arguments that were advanced with respect to the question whether there was any inconsistency between the Racial Discrimination Act and the Land Rights Act, since the Court considered it inconceivable that the Parliament intended the operation or effect of the Land Rights Act to be constrained by the earlier Racial Discrimination Act. Under the Land Rights Act, a later Act, Parliament had expressly authorised the act of issuing a land grant to a Land Trust, and to the extent of any inconsistency with the Racial Discrimination Act, the Land Rights Act prevailed.[55] However, the Court expressed the view that even if the Land Rights Act were to be read subject to the Racial Discrimination Act, the Land Rights Act constituted a "special measure" to which article 1.4 of the Convention applied.[56] Lockhart J referred to the four indicia of the concept

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49 See text to nn 15–17 above.

50 36 FCR at 187. See also *Christopher and Ors v The Motor Vessel "Fiji Gas"* (1992) Aust Torts Reports ¶ 81–168, esp at 61, 348–61, 349 (Supreme Court of Queensland, Cooper J).

51 (1993) 42 FCR 32; (1993) 117 ALR 206 (Federal Court of Australia—Full Court).

52 On common law native title, see case 1 above.

53 See n 1 above.

54 Subject to an exception in the case of measures to which section 10(3) of that Act refers.

55 42 FCR 32 at 45–46 (Lockhart J), 49 (O'Loughlin J and Whitlam J agreeing).

56 Ibid, at 46–47.

of a special measure described by Brennan J in *Gerhardy v Brown*,[57] and observed that in that case the High Court had held that the relevant provisions of the Pitjantjatjara Land Rights Act 1981 (SA) answered the description of "special measures". Lockhart J considered it "plain that the Land Rights Act answers the description for the purposes of Art 1(4) of a measure taken for the sole purpose of securing adequate advancement of Aboriginal Australians, requiring their protection in order to ensure that they equally enjoy and exercise human rights and fundamental freedom with non-Aboriginal Australians".[58]

5. Treaties — Treaty interpretation — Relationship between multilateral treaties — Hague Convention on the Civil Aspects of International Child Abduction — United Nations Convention on the Rights of the Child

Marriage of Murray and Tam

(1993) 16 Fam LR 982; (1993) FLC ¶ 92–416

Family Court of Australia—Full Court[59]

In this case, the Court considered an argument that the Hague Convention on the Civil Aspects of International Child Abduction was inconsistent with, and should be read as subject to, article 3 of the United Nations Convention on the Rights of the Child, which succeeded the former convention in point of time. It was argued that as a result, a general consideration of the issue of the welfare of the child was necessary in any Hague Convention application. This raised an interesting question of the potential effect of multilateral treaties, particularly human rights treaties, on the interpretation of other multilateral treaties. A similar issue arose in *Minister for Foreign Affairs and Trade v Magno*,[60] of the relationship between article 22.2 of the Vienna Convention on Diplomatic Relations (duty of the receiving State to prevent impairment of the dignity of a foreign mission), and the rights to freedom of speech and assembly under articles 19 and 21 of the International Covenant on Civil and Political Rights (ICCPR), in the context of demonstrations outside diplomatic missions.

However, the Court in this case found it unnecessary to deal with this general question, since it found no inconsistency between the two conventions. The Court considered it to be apparent from the preamble to the Hague Convention that it "is predicated upon the paramountcy of the rights of the child. It proceeds upon the basis that those rights are best protected by having issues as to custody and access determined by the courts of the country of the child's habitual residence, subject to the exceptions contained in Article 13". In other words, a Hague Convention application is concerned with "where and in what court issues in relation to the welfare of the child are to be determined".[61] The

57 (1985) 159 CLR 70 at 133–37.
58 42 FCR 32 at 47.
59 Special leave to appeal to the High Court from this decision was refused.
60 (1992) 37 FCR 298. (See (1993) *14 Aust YBIL* 342–46).
61 16 Fam LR 982 at 999–1000 (Nicholson CJ and Fogarty J), 1002 (Finn J agreeing).

Court added, though, that even if there were any inconsistency, the Hague Convention would prevail, in so far as it has been incorporated into Australian domestic law by section 111B of the Family Law Act 1975 (Cth) and the Regulations made under that section.[62]

The Court also considered that there was no inconsistency between the Regulations giving effect to the Hague Convention and section 64(1)(a) of the Family Law Act 1975 (Cth), which provides that "In proceedings in relation to the custody, guardianship or welfare of, or access to, a child...the court must regard the welfare of the child as the paramount consideration". The Court said that "the Hague Convention and the Regulations contemplate that it is in the best interests of the child for issues such as custody and access to be determined in the courts of the country of the child's habitual residence unless the exceptions referred to in regulation 16 [corresponding to article 13 of the Convention] are made out". The Court concluded that "The issue in the Hague Convention is purely one of forum, subject to those exceptions, and the paramountcy principle is accordingly not relevant".[63]

The Court rejected an argument that in this case it should refuse to order the return of the children under regulation 16(3)(b) of the Regulations (equivalent to article 13(b) of the Hague Convention), which provides that the Court may refuse to make an order if it is satisfied that "there is a grave risk that the child's return to the applicant would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". It was argued that if the wife were subject to violence by the husband in New Zealand, this would have a grave effect on the welfare of the children. The Court said:

> it must be remembered that the "applicant" for the purposes of the Regulations is not the husband, but the New Zealand Department of Justice and the children are proposed to be returned to it and not to the husband. Their disposition in New Zealand will be a matter for the New Zealand courts if they are returned to that country, and if the wife's allegations are accepted it would appear unlikely that they would be returned to the husband.[64]

The Court added that New Zealand has a system of family law and provides legal protection to persons in fear of violence, and that it would be "presumptuous and offensive in the extreme, for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand courts".[65] Nicholson CJ and Fogarty J considered that the operation of regulation 16(3) should be largely confined to situations where

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62 Ibid, at 1000. See the Family Law (Child Abduction Convention) Regulations (SR 1986, No 85, as amended). The text of the Convention is set out in Schedule 1 to those Regulations, and regulation 2(1) defines certain expressions used in the Regulations by reference to the meaning that they have in the Convention. However, the Convention itself is not as such expressed to have the force of law in Australia.

63 16 Fam LR 982 at 1000–1001.

64 Ibid, at 1001.

65 Ibid, at 1001–1002, referring to *Gsponer v Johnstone* (1988) 12 Fam LR 755.

such protections are not available,[66] and said that for the Court to do otherwise would "thwart the principal purposes of the Hague Convention, which are to discourage child abduction and, where such abduction has occurred, to return such children to their country of habitual residence so that the courts of that country can determine where or with whom their best interests lie".[67]

However, while the regulations may require the court to consider the effect of returning the child to the *applicant*, article 16.3(b) of the Convention, to which regulation 13(b) gives effect, in fact refers only to the child's "return", not the child's "return to the applicant". This difference in wording may arguably lead to an inconsistency in effect between the Convention and the Regulations.[68] Finn J went so far as to observe in this case that "it seems unfortunate that when the Commonwealth incorporated the Hague Convention into Australian law, it did not do so either simply by incorporation of the Convention as a whole or at least in terms identical to the terms of the Convention".[69]

The Court also gave consideration to the meaning of the concepts of "wrongful removal" and "wrongful retention" in the Convention. It found that these are alternative and discrete past events for the purposes of the Convention, and that both removal and retention are events occurring on a specific occasion. The Court agreed with Lord Brandon in *Re H and S*,[70] who said that:

> For the purposes of the Convention, removal occurs when a child, which has previously been in a state of habitual residence, is taken away across the frontier of that state, whereas retention occurs where a child, which has previously been for a limited period outside the state of its habitual residence, is not returned to that state at the expiry of such limited period.

Thus, the Court considered that under the Convention, in determining whether "removal" or "retention" was wrongful, the relevant time to look at was, in the case of a removal, the time when the removal occurred, and in a case of retention, the situation at the time that the retention first occurred.[71] Without finally determining the issue, the court regarded as persuasive the argument that once the judicial or administrative authority of the contracting State determines that the removal or retention has been wrongful and that the application is brought within 12 months, there is a positive duty to return the child subject only to the exceptions in article 13, notwithstanding any orders which may have been made subsequent to the child's wrongful removal or retention.[72]

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66 16 Fam LR 982 at 1002, referring to *Tahan v Duquette* (Superior Court of New Jersey, 24 June 1992, unreported); *In re A (A Minor) (Abduction)* [1988] 1 Fam LR (Eng) 365; *Re Evans* (Court of Appeal, England, 20 July 1988, unreported).

67 16 Fam LR 982 at 1002.

68 Cf *Re A (A Minor) (Abduction)*, n 66 above, in which Nourse LJ said (at 372) that:

> The intendment of art. 13(b) cannot be that the judicial or administrative authority of the requested state is to be blinkered against a sight of the practical consequences of the child's return.

69 16 Fam LR 982 at 1002.

70 [1991] 3 All ER 230 at 240.

71 16 Fam LR 982 at 991–94.

72 Ibid, at 995.

The Court also made certain observations about the status in Australian law of treaties which have not been expressed by legislation to have the force of law in Australia. These are discussed below.[73]

6. Unincorporated treaties — Influence on domestic law

In a number of cases decided in 1993 Australian courts have, in determining questions of Australian domestic law, referred to provisions of the International Covenant on Civil and Political Rights (ICCPR) and other international human rights treaties which have not been incorporated into Australian law by legislation. In recent years, similar references to international human rights instruments have been made in judicial decisions not only in Australia,[74] but also in the United Kingdom,[75] Canada[76] and New Zealand,[77] and they cannot now be regarded as anything unusual. These most recent Australian cases provide further useful examples of the circumstances in which the provisions of such treaties may be taken into account by the courts. However, although the possibility of reference to such international instruments is now well established, uncertainties remain concerning their precise status in Australian law.

As regards the situations in which such material may be referred to, there is now very strong support for the view that provisions of international human rights treaties may be taken into account by a court when construing provisions in legislation which are ambiguous.[78] A recent example of a case where this occurred is *Ganin v New South Wales Crime Commission.*[79] Here the New South Wales Court of Appeal considered the construction of section 18(2)(b) of

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73 See below, nn 102–04, and 150–63, and accompanying text.

74 For references to earlier Australian cases, see the judgment of Kirby P in *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 274–76 (case 3 above). See also Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol—A View from the Antipodes" (1993) 16 *University of New South Wales Law Journal* 363.

75 See Duffy, "English Law and the European Convention on Human Rights" (1980) 29 *International and Comparative Law Quarterly* 585; Higgins, "The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992) 18 *Commonwealth Law Bulletin* 1268; Staker (1993) 64 *British Yearbook of International Law* 447 at 455–63.

76 See Bayefsky AF, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (1992), esp pp 71–109.

77 Eg *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

78 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ) (see (1993) 14 *Aust YBIL* at 356–60). See also *Dietrich v The Queen* (1992) 177 CLR 292 at 306 (Mason CJ and McHugh J), 348–49 (Dawson J) (see (1993) 14 *Aust YBIL* at 351–53). In *Chu Kheng Lim*, the Court also reaffirmed the settled rule that unambiguous provisions in legislation must be given effect according to their tenor, even if inconsistent with international treaties: 176 CLR at 37–38 (Brennan, Deane and Dawson JJ), 52 (Toohey J), 74 (McHugh J). See also *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 276B–C (Kirby P) (case 3 above). The House of Lords has also recently affirmed that for resort to be had to treaties, an ambiguity in the legislation is requisite: *Attorney-General v Associated Newspapers Ltd* [1994] 2 WLR 277 at 288C.

79 (1993) 32 NSWLR 423 (NSW CA).

the New South Wales Crime Commission Act 1985 (NSW), which provides that a person appearing as a witness at a hearing before the Commission shall not, "without reasonable excuse", refuse or fail to answer a question that the person is required to answer by the member presiding at the hearing. Kirby P (with whom Meagher JA and O'Keefe A-JA agreed) said that "Although the International Covenant is not part of our domestic law, it may inform the approach taken to the exposition of the common law of this country, and to the construction placed upon ambiguous statutes, both Federal and State".[80] Having referred to the privilege against self-incrimination recognised in article 14.3(g) of the ICCPR and in "most statements of basic rights",[81] he then said:

> In accordance with orthodox canons of construction these words ["without reasonable excuse"] would not be given a narrow meaning. They appear in a provision which imposes a criminal sanction for its breach. They appear in an enactment which, as has been said, amounts to a drastic derogation from the ordinary liberties of citizens. They appear in a subsection which, giving ample meaning to the words "without reasonable excuse" will be defensive of fundamental rights recognised both by the common law and by international law.[82]

A second situation in which it has been said that the courts may take unincorporated treaties into account is in the development of principles of common law. In *Mabo v Queensland [No 2]*,[83] Brennan J said that "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".[84] In *Dietrich v The Queen*,[85] Mason CJ and McHugh J observed that "English courts may also have resort to international obligations in order to help resolve uncertainty or ambiguity in judge-made law", and assumed, without deciding, "that Australian courts should adopt a similar, common-sense approach".[86] In that case, Brennan J said that the ICCPR was "a legitimate influence on the development of common law",[87] Deane J said that it was "relevant to note" that Australia was a party to the ICCPR,[88] and Toohey J said that "Where the common law is unclear, an international instrument may be used by a court as a guide to that law".[89] In the recent case *Environment*

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80 Ibid, at 432.
81 Ibid.
82 Ibid, at 436, referring to *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412 at 420E (Kirby P), 433 (Clarke JA). See also *Director of Public Prosecutions (Cth) v Saxon* (1992) 28 NSWLR 263 at 274 (Kirby P).
83 (1992) 175 CLR 1. See above, text to nn 1–7.
84 Ibid, at 42. See also at 15 (Mason CJ and McHugh J agreeing).
85 (1992) 177 CLR 292 (see (1993) 14 *Aust YBIL* at 351–53).
86 Ibid, at 306.
87 Ibid, at 321.
88 Ibid, at 337.
89 Ibid, at 360. The ICCPR was also referred to in the judgment of Gaudron J (at 373). On the other hand, Dawson J said that whether treaties could be referred to in the resolution of uncertainty in the common law was "not so clearly established" (at 349).

Protection Authority v Caltex Refining Co Pty Ltd,[90] members of the High Court referred to the right not to be compelled to testify against oneself or to confess guilt embodied in article 14.3(g) of the ICCPR when considering the extent of the common law privilege against self-incrimination. A majority of the Court concluded that the privilege did not extend to an incorporated company.[91] Mason CJ and Toohey J said that:

> The language of that Covenant makes it clear that the purpose of its provisions is to protect individual human beings. As this Court has recognized, international law, while having no force as such in Australian municipal law, nevertheless provides an important influence on the development of Australian common law, particularly in relation to human rights...[92]
>
> Neither the fact that the privilege had its origin in the necessity of protecting human beings from compulsion to testify on pain of excommunication or physical punishment nor the modern justification of discouraging ill-treatment of individuals and dubious confessions requires that the privilege be available to corporations...Likewise, the modern and international treatment of the privilege as a human right which protects personal freedom, privacy and human dignity is a less than convincing argument for holding that corporations should enjoy the privilege.[93]

In this case, Brennan J[94] referred to the judgment of Murphy J in *Controlled Consultants Pty Ltd v Commissioner of Corporate Affairs*,[95] who had referred to article 14.3(g) of the ICCPR and concluded that "[t]he privilege is peculiarly a human right and thus not available to corporations or unincorporated associations or political entities". Brennan J added that "The tenderness of the law towards a natural person charged with an offence strikes a traditional balance between law enforcement and personal liberty. The balance between law enforcement and the interests of a corporation must be struck differently."[96] On the other hand, Deane, Dawson and Gaudron JJ, in a joint dissenting judgment said with reference to article 14.3(g) that although the privilege against self-incrimination may be classified as a "human right", it did not rest exclusively upon notions of personal freedom and human dignity, and they could find no sufficient reason in principle for saying that the doctrine, as it has developed in Australian law, has no application to corporations.[97]

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90 (1993) 178 CLR 477; 68 ALJR 127; 118 ALR 392.

91 It appears that the privilege is available to corporations in England and New Zealand, but not in the United States, and that in Canada it was available to corporations under the common law but not under the Canadian Charter of Rights and Freedoms: see 178 CLR 477 at 489–97 (Mason CJ and Toohey J), 539–42 (McHugh J).

92 Ibid, at 499.

93 Ibid, at 499–500.

94 Ibid, at 513–14.

95 (1985) 156 CLR 385 at 395.

96 178 CLR 477 at 514.

97 Ibid, at 532, 534.

A third situation in which a court may have occasion to consider human rights treaties is where the court is called upon to exercise a discretion. In *The Queen v Hollingshed and Rodgers*,[98] Miles CJ said:

> In *McKellar v Smith and Another* (1982) 2 NSWLR 950, I suggested that Australian courts might take judicial notice of the ratification by this country of ICCPR, the Declaration of the Rights of the Child and other international instruments which contain provisions and establish standards relevant to the exercise of the discretion to exclude evidence of a confession of a juvenile obtained unfairly. I see no reason not to adopt the same sort of approach in the sentencing process, where the discretionary factors to be taken into account are numerous and conflicting.[99]

In this case, however, Miles CJ did not consider himself able to make what would be "a judicial finding that the control and management of the prisons in New South Wales amounts to a breach of the ICCPR", saying that this would be "to condemn people without hearing their side of the case and indeed to deny them their own human rights to be given a hearing".[100] He added that a person claiming to be receiving inhumane treatment in a prison in New South Wales could have recourse to the New South Wales courts or the Human Rights Commissioner, or could petition the United Nations Human Rights Committee under the First Optional Protocol to the ICCPR.[101]

A possible fourth situation in which a court may have regard to unincorporated treaties was suggested in *Marriage of Murray and Tam*,[102] in which Nicholson CJ and Fogarty J said that the provisions of unincorporated treaties may be resorted to not only to resolve ambiguities in domestic primary or subordinate legislation, but also in order to fill lacunae in such legislation.[103] They considered that the United Nations Convention on the Rights of the Child, which has been ratified by Australia but has not been given any statutory recognition, can be used to resolve ambiguities in Australian legislation, and added that "If we are correct it can also be used to fill lacunae in such legislation and to resolve ambiguities and lacunae in the common law. As such it may well have a significant role to play in the interpretation of the Family Law Act 1975 and in the common law relating to children."[104]

Finally, there is the question whether an exercise by the executive of a statutory discretion may be amenable to judicial review on the ground that the decision-maker failed to have regard to, or exercised the discretion in a manner inconsistent with, international human rights treaties. Except in cases where the

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98 (Supreme Court of the Australian Capital Territory, Miles CJ, 11 May 1993, unreported.)

99 Ibid, at para 24.

100 Ibid, at paras 30–31.

101 Ibid, at paras 35–37. Another case involving a question of the exercise of a judicial discretion is *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 (case 3 above).

102 (1993) 16 Fam LR 982 (case 5 above).

103 Ibid, at 999, referring to *Jago v District Court of NSW* (1988) 12 NSWLR 558 (NSWCA, Kirby P).

104 16 Fam LR 982 at 999.

statute conferring the power itself requires an international convention to be taken into account when exercising the power,[105] earlier Australian authorities pointed towards a negative answer to this question,[106] a conclusion also reached by the House of Lords in 1991.[107] However, in *Irving v Minister for Immigration, Local Government and Ethnic Affairs*,[108] French J was of the view that human rights treaties may be relevant to the interpretation of statutory provisions conferring an administrative discretion. That case concerned the power of the Minister in certain circumstances effectively to prevent a person being eligible for a visa for Australia by determining that the person is "likely to become involved in activities disruptive to...the Australian community". French J said that:

> There is a threshold below which it could not be said on any view that communal response to the activities of a visitor to this country would involve disruption. Below that limit a proper protection of the social fabric shades into paternalism. The public interest criterion was not intended to provide a charter for denying entry to people wishing to visit Australia merely on the ground that they hold and are likely to express unpopular opinions, even if these opinions may attract vigorous expressions of disagreement and condemnation from some elements of the Australian community. This lower limit upon the operation of the criterion is consistent with Australia's established tradition of free expression and its international obligation to adhere to the guarantees of freedom of opinion and expression to be found in Art 19 of the International Covenant on Civil and Political Rights. That is subject, of course, to public order limits (Art 19(3)) and the prohibition on advocacy of national, racial or religious hatred: Art 20(2). That such international obligations may be regarded in the construction of domestic legislation is supported by dicta in *Polites v Commonwealth* (1945) 70 CLR 60 at 68 (Latham CJ), 78 (Dixon J) and 81 (Williams J).[109]

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105 Eg, Environment Protection (Sea Dumping) Act 1981 (Cth), section 19(6); Nuclear Non-Proliferation (Safeguards) Act 1987 (Cth), section 70(2). On the effect of such provisions, cf *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Samuel* (1989) 83 ILR 232 at 238 (England, Court of Appeal).

106 Crawford and Edeson, "International Law and Australian Law" in Ryan KW (ed), *International Law in Australia*, 2nd ed (1984), p 71 at 117–29. Also eg *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.

107 *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696, esp at 748 (Lord Bridge), 761–62 (Lord Ackner).

108 (1993) 115 ALR 125 (Federal Court of Australia, French J).

109 Ibid, at 139–40. See also *Fitti v Minister for Primary Industries and Energy* (1993) 40 FCR 286, 117 ALR 287 (Federal Court of Australia, O'Loughlin J), in which one question considered by O'Loughlin J was whether a Plan of Management determined by the Minister for prawn fishing in the Gulf of Carpentaria had been made for purposes which were ultra vires the Fisheries Act 1952 (Cth). He observed that s 5B of the Act, stating the purposes of the Act, reflected the language of Articles 61.2 and 62.1 of the United Nations Convention on the Law of the Sea and said (40 FCR 286 at 298):

> [t]he language of s 5B and that of the passages from Articles 61 and 62 of the UN Convention...show a clear community of purpose. The international aspect and the importance of harmony in international affairs should

However, French J found that in the present case, "the minister made clear that he had considered the freedom of speech issue".[110] It would appear from the passage quoted above that French J considered article 19 of the ICCPR as relevant in interpreting the words "activities disruptive to...the Australian community" in the Migration Regulations, and as supporting the conclusion that as a matter of construction, the mere expression of unpopular opinions would not be covered by these words. He does not appear here to go so far as to say that the provisions of the Act and Regulations conferring the power should be construed as requiring the power to be exercised by the Minister in accordance with the ICCPR, and that the courts on an application for judicial review can determine whether there has been a breach of the ICCPR by the Minister. This would thus appear to be another example of a case in which reference was made to the ICCPR in the context of statutory interpretation.[111]

While these examples demonstrate a variety of situations in which the courts have had regard to provisions of international human rights treaties in determining issues of domestic law, as indicated above, a number of questions concerning the principles governing the use of such instruments by the courts are still not capable of clear answer.

The most fundamental question concerns the precise legal status of such unincorporated treaties in Australian law. Given the settled principle that the executive, by entering into a treaty with a foreign State, cannot alter the law of this country,[112] and that the provisions of an international treaty, unless given effect in domestic law by legislation, are "res inter alios acta from which [individuals] cannot derive rights and by which they cannot be deprived of rights or subjected to obligations",[113] the question arises on what basis the court can take any notice at all of unincorporated human rights treaties.

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therefore remain a paramount consideration when considering the purpose and effect of s 5B.

However, in this case O'Loughlin J considered that the objectives of the Fisheries Act were not limited to the matters listed in s 5B of the Act and that a Plan of Management could validly be adopted for the purpose of achieving other objectives. The Convention was not referred to in a subsequent appeal from this decision: *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151; 119 ALR 108.

110 Ibid, at 140. The Full Court of the Federal Court allowed an appeal against this decision, but did not refer to the ICCPR or other human rights instruments: *Irving v Minister of State for Immigration, Local Government and Ethnic Affairs* (1994) 44 FCR 540.

111 But cf *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436. See also *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

112 See Crawford and Edeson, n 106 above, pp 85–97.

113 *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 500 (Lord Oliver). See also the dissenting judgment of Legoe J in *R v Ridgeway* (1993) 60 SASR 207 (Supreme Court of South Australia—Full Court), who, quoting *Bradley v Commonwealth* (1973) 128 CLR 557 at 582–83, referred to the principle that treaties which have not been carried into effect within Australia by appropriate legislation cannot be relied upon as a justification for executive acts that would otherwise be unjustified (at 216–17).

An obvious answer would be that such treaties, and decisions of international courts and bodies applying such treaties, are referred to by the courts as merely persuasive authority, and that they have the same status as, for example, decisions of courts of other countries, which are frequently taken into account by Australian courts in deciding questions in all areas of the law. It now seems clear that the types of treaties to which Australian courts may refer as persuasive authority are not limited to human rights treaties, or indeed, treaties to which Australia is a party. For instance, in cases involving Part IV of the Trade Practices Act 1974 (Cth) ("Restrictive Trade Practices"), reference has been made to decisions of the European Court of Justice under article 86 of the EC Treaty.[114] Australian courts have also referred to international human rights authorities, and other international authorities, as persuasive authority in cases not directly concerned with human rights at all. For instance, in *Minister of State for Resources v Dover Fisheries Pty Ltd*,[115] Gummow J (with whom Hill J and Cooper J seemed to be in general agreement)[116] said that "The concept of 'reasonable proportionality' as a criterion for assessment of validity in constitutional and administrative law appears to have entered the stream of the common law from Europe and, in particular, from the jurisprudence of the Court of Justice of the European Communities and the European Court of Human Rights."[117] He referred in particular to decisions of the latter concerning article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (freedom of expression), and to decisions of the former on article 30 of the EC Treaty (which prohibits between member States "quantitative restrictions on imports and all measures having equivalent effect"). He added that "in Australia the proportionality doctrine has taken root and, indeed, extended its reach into the heartland of federal constitutional law".[118] Additionally, it appears from the decision of the Full Court of the Family Court in *Marriage of Rensburg and Paquay*[119] that a multilateral convention to which Australia is a party may be referred to as persuasive authority in circumstances

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114 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 188–90 (Mason CJ and Wilson J), 210 (Toohey J); *QIW Retailers Ltd v Davids Holdings Pty Ltd* (1993) 42 FCR 255 at 264. See generally Vranken, "The Relevance of European Community Law in Australian Courts" (1993) 19 *Melbourne University Law Review* 431.

115 (1993) 43 FCR 565; 116 ALR 54.

116 43 FCR 565 at 582.

117 Ibid, at 575.

118 Ibid, at 576. See also *Minister for Immigration, Local Government and Ethnic Affairs v Batey* (1993) 40 FCR 493 at 499–500 (Federal Court of Australia—Full Court), a decision not involving the determination of refugee status, but in which reference was made by analogy with the concept of a "well founded fear" in article 1 of the Geneva Refugees Convention. And see *Secretary, Department of Social Security v "SRA"* (1993) 43 FCR 299 at 320–21 (Federal Court of Australia—Full Court), in which reference was made to the decisions of the European Court of Human Rights in *Rees v United Kingdom* (1986) 9 EHRR 56 and *Cossey v United Kingdom* (1991) 13 EHRR 622 in holding that a person described by the court as a "pre-operative male-to-female transsexual" is not a "woman" or "wife" for the purpose qualifying for a wife's pension under the Social Security Act 1947 (Cth).

119 (Family Court of Australia—Full Court, 18 March 1993, unreported).

involving another State which is not a party to that convention.[120] The use of international authorities in this way may simply be evidence of a more cosmopolitan outlook in Australian legal thinking generally.[121]

In cases where Australian courts have to decide new or uncertain points of Australian law which have implications for fundamental freedoms, it is possible that, here too, international human rights instruments are referred to as merely persuasive authority. Such an explanation seems to find support in the comment of Kirby P in *Jago v District Court of NSW*,[122] a case concerning the common law right to a speedy trial, that:

> I regard it to be at least as relevant to search for the common law of Australia applicable in this State with the guidance of a relevant instrument of international law to which this country has recently subscribed, as by reference to disputable antiquarian research concerning the procedures which may or may not have been adopted by the itinerant justices in eyre in parts of England in the reign of King Henry II...[W]here the inherited common law is uncertain, Australian judges, after the *Australia Act* 1986 (Cth) at least, do well to look for more reliable and modern sources for the statement and development of the common law.[123]

Support for this explanation of the status of human rights treaties in common law can also be found in the judgment of Einfeld J in *Premalal v Minister for Immigration, Local Government and Ethnic Affairs,*[124] a case concerning an application for judicial review of a decision of the Minister's delegate not to grant refugee status. Einfeld J said:

> It is fundamental to judicial integrity that judges do not review decisions simply according to personal conceptions of policy or according to their individual

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120 The Court said that "it is appropriate to pay regard to the policy of the Hague Convention [on the Civil Aspects of International Child Abduction] and the fact that Australia is a party to it in cases involving countries which are not parties to that Convention. The point is not that this court should apply the rules of that Convention by analogy since it clearly could not do so. But the ratification by Australia of the Convention and its acceptance of the accession of many other countries to the Convention flow from a public policy that unlawful removal of children across international borders is an evil which must be suppressed by denying the abductor the advantage of choosing his or her forum." (Para 21 of the joint judgment of Nicholson CJ, Nygh and Mullane JJ, referring to *Barrios and Sanchez* (1989) 13 Fam LR 477 at 484.)

121 Eg, in an address at the 12th Lawasia Conference in Perth in 1991, Sir Anthony Mason, the Chief Justice of Australia said that "Familiarity with the law and the legal systems of other nations can open our eyes and cause us to reflect upon the wisdom of our own approach to a variety of problems", and that "No nation, no lawyer, can now afford to take an insular approach to domestic law or to be confident in its superiority or sufficiency". He referred also to "the narrowness of vision which often accompanies preoccupation with the authorities which prevail in one's own jurisdiction". (Extracted in "Perspectives"(1991) 2 *Public Law Review* 219 at 219–20.)

122 (1988) 12 NSWLR 558.

123 Ibid, at 569. See also *Cachia v Hanes* (1991) 23 NSWLR 304 at 312–13 (Kirby P).

124 (1993) 41 FCR 117 (Federal Court of Australia, Einfeld J).

> moral systems. Decisions must be reviewed with an integrity which comes from a strictly legal though not necessarily formalistic approach to law...It is therefore appropriate, in reviewing refugee status decisions of this kind, to take into account the best available examples of objectivity in this field, namely the various international human rights principles and conventions to which Australia is a party.[125]

Further support can be found in an extracurial statement by the Hon Sir John Laws, a Justice of the Queen's Bench Division.[126] In the context of references by English courts to the European Convention on Human Rights (ECHR) and to decisions of the European Court of Human Rights, he asks:

> Why may the courts not have regard to the E.C.H.R. jurisprudence in precisely the same way as they look to the decisions of foreign courts in other fields? No one suggests that when the House of Lords reforms the common law by reference to a decision of the Supreme Court in a Commonwealth jurisdiction, it incorporates an alien text: nothing would be more jejune...And indeed, where the court cites an academic work with approval, no one complains that some illegitimate exercise is afoot: nor could they. Why is the E.C.H.R. different?[127]

In Australia, the fact that references have been made not only to human rights instruments to which Australia is a party, but also to decisions of the European Court on the European Convention to which Australia is not a party,[128] also suggests that such material is merely persuasive authority, as does the fact that in some judgments, reference is made simultaneously to decisions on similar issues by the courts of the United Kingdom, United States and Canada.[129]

On the other hand, there are some statements which indicate that as an influence on the development of the common law, international treaties to which Australia is a party may have a higher status than treaties which are not binding on Australia. In *Premalal*, Einfeld J spoke of "the various international human rights principles and conventions to which Australia is a party".[130] In *Dietrich*,

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125 Ibid, at 138.

126 "Is the High Court the Guardian of Fundamental Constitutional Rights?" [1993] *Public Law* 59.

127 Ibid, at 63.

128 For such references by the High Court, see *Street v Queensland Bar Association* (1989) 168 CLR 461 at 510 (Brennan J), 582 (McHugh J); *Dietrich v The Queen* (1992) 177 CLR 292 at 306–07 (Mason CJ and McHugh J), 334 (Deane J), 361 (Toohey J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 140 (Mason CJ), 154–55 (Brennan J), 211 (Gaudron J), cf 240 (McHugh J). It may be arguable that such decisions are referred to on the basis that they are in turn persuasive authority as to the interpretation of the ICCPR to which Australia is a party. In *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 (case 3 above), Kirby P and Handley JA referred to material on the European Convention in order to ascertain the meaning of article 14.5 of the ICCPR. The Canadian courts have also referred to international instruments to which Canada is not a party, but without indicating on what basis they are being considered: see Bayefsky, n 76 above, pp 111–28, esp 126.

129 See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 140 (Mason CJ), 211 (Gaudron J); *Dietrich v The Queen* (1992) 177 CLR 292 at 334 (Deane J), 361 (Toohey J).

130 See text to n 125 above.

Mason CJ and McHugh J spoke of the courts having regard to "international obligations" when resolving uncertainties in judge-made law.[131] In *Mabo v Queensland [No 2]*,[132] Brennan J suggested that it was the "opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol" to the ICCPR which "brings to bear on the common law the powerful influence of the Covenant and the international standards it imports".[133] And in *Young v Registrar, Court of Appeal [No 3]*,[134] Kirby P said that in *Dietrich*, "an important factor in the majority's reasoning was consideration of the obligation imposed upon Australia" by the ICCPR.

It might be argued that, as a matter of principle, where the common law is uncertain or legislation is ambiguous, a court should decide the case in a manner which is consistent with all of Australia's international obligations. Existing authorities do not rule out such an approach, and some support can be found for it.[135] However, two recent decisions of the Federal Court concerning the application of Australia's anti-dumping legislation might be an indication that in the interpretation of legislation, treaties other than human rights treaties will not be referred to with the same readiness as those which proclaim universal rights. In *Powerlift (Nissan) Pty Ltd v Minister for Small Business*,[136] Hill J said that "the applicants can gain no assistance from textual discussions of the GATT treaty. The present question must be determined by reference to the Australian legislation and not the treaty which provides merely the background to understanding it." However, he added that "In any event, perusal of the GATT treaty provides no answer to the present question."[137] In *Hyster Australia Pty Ltd v Anti-Dumping Authority*,[138] Hill J questioned the relevance of writings of economists detailing the "classical view" of the scope and purposes of anti-dumping measures in international law in interpreting Australia's anti-dumping legislation, saying that "It is not suggested that what is said in these articles led to the Anti-Dumping Code in the GATT Treaty, or that these articles in some way set out the mischief which was taken into account by the legislature when enacting anti-dumping legislation in Australia".[139]

A further possibility, then, is that human rights treaties generally have a higher status than other treaties as an influence on the development of the

131 (1992) 177 CLR 292 at 306.
132 (1992) 175 CLR 1.
133 Ibid, at 42.
134 (1993) 32 NSWLR 262 at 275 (case 3 above).
135 Some statements are to the effect that the courts should, in developing the common law or construing ambiguous statutory provisions, have regard to "international law" or "international obligations", without distinguishing between customary international law or treaties: see *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 (Brennan J); *Dietrich v The Queen* (1992) 177 CLR 292 at 306 (Mason CJ and McHugh J), cf 348–49 (Dawson J); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 499 (Mason CJ and Toohey J). See also Report Section, Part A(c)(ii), pp 238–41 of this volume.
136 (1992) 40 FCR 332; 113 ALR 339 (Federal Court of Australia, Hill J).
137 40 FCR 332 at 343.
138 (1993) 40 FCR 364; 112 ALR 582 (Federal Court of Australia, Hill J).
139 40 FCR 332 at 372–73. See also (1993) 14 *Aust YBIL* at 326–27.

common law and for the purposes of construing ambiguous legislation. For instance, in *Environment Protection Authority v Caltex Refining Co Pty Ltd*,[140] Mason CJ and Toohey J said that "international law...provides an important influence on the development of Australian common law, *particularly in relation to human rights*". In *Mabo [No 2]*,[141] Brennan J said that "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*". In *Young v Registrar, Court of Appeal [No 3]*,[142] Kirby P said that there is "much scope for judicial reference to international conventions, *particularly where they state universal principles of international law relating to fundamental human rights*".

If it is the case that human rights treaties have some special status, one potential explanation for this might be that the courts regard the norms established in such instruments as now reflecting customary international law, and that as such they are part of Australian law under the "incorporation" theory, by which customary international law is considered to form part of the common law.[143] However, in *Young v Registrar, Court of Appeal [No 3]*,[144] Kirby P expressly rejected the automatic incorporation doctrine, saying that "it had been uniformly accepted that international law does not become part of 'the law of the land', unless it is validly adopted by parliament, or incorporated by a decision of the judges".[145] He added that quite apart from legal authority, there were "reasons of principle and legal policy" supporting this conclusion. He noted that over the years various attempts to translate international human rights principles into domestic law by legislation or constitutional amendment had been unsuccessful, and said that "Where parliament and the people have declined to provide for the incorporation of the International Covenant as such, or provisions of the Covenant into Australian domestic law, it would not in my view be legitimate for a court to do so by judicial fiat".[146] The High Court has also indicated that international law does not form "part" of the law of Australia and has "no force as such in Australian municipal law", but is an "influence" on the development of the common law.[147] In any event, it cannot be assumed that all provisions of all human rights treaties reflect customary international law, so that on the view that international human rights standards are part of the

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140 (1993) 178 CLR 477 at 499 (emphasis added).

141 (1992) 175 CLR 1 at 42 (emphasis added).

142 (1993) 32 NSWLR 262 at 276 (case 3 above) (emphasis added).

143 On the "incorporation" and "transformation" theories, see Crawford and Edeson, n 106 above, at 72–80. See also Brownlie I, *Principles of Public International Law*, 4th ed (1991), pp 43–48.

144 (1993) 32 NSWLR 262 (case 3 above).

145 Ibid, at 273, referring to earlier Australian and English cases.

146 Ibid, at 273–74. See also at 289 (Handley JA), 293 (Powell JA).

147 Eg *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 (Brennan J); *Dietrich v The Queen* (1992) 177 CLR 292 at 321 (Brennan J); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 499 (Mason CJ and McHugh J). See also the recent extracurial statement by the Hon Sir Anthony Mason, the Chief Justice of Australia, referred to in Shearer, "International Legal Notes" (1994) 68 *Australian Law Journal* 147 at 147.

common law under the incorporation theory, the courts would first need to consider the status in customary international law of any treaty provision it referred to. In practice, the courts have not undertaken this kind of examination.

The special emphasis given to human rights treaties therefore does not necessarily mean that such treaties have a higher status in law than that of persuasive authority, but might rather be an indication that it is in the area of human rights in particular that international treaties are useful as persuasive authority, as "examples of objectivity" in determining what is an appropriate level of legal protection of individual rights.[148] In the context of statutory interpretation, international human rights standards may have a particular role as persuasive authority in light of the principle that Parliament is presumed not to intend to abrogate human rights and fundamental freedoms.[149]

In *Marriage of Murray and Tam*,[150] Nicholson CJ and Fogarty J considered the possibility that treaties which have been included in a schedule to an Act of Parliament, even if not expressed in the legislation to have the force of law in Australia, have a higher status in Australian law by virtue of that legislative recognition. In *Minister for Foreign Affairs and Trade v Magno*[151] Gummow J considered that this was not the case. He gave the example of the Charter of the United Nations, which is contained in the Schedule to the Charter of the United Nations Act 1945 (Cth). In that case, Gummow J observed that section 3 of that Act states that the Charter is "approved", but said that this was insufficient to render the Charter binding in Australian law.[152] Similarly, in *Dietrich v The Queen*[153] it was observed by some members of the High Court that although the text of the ICCPR is contained in Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (the Human Rights Act), this does not mean that this convention is part of domestic law as such, conferring directly justiciable rights on individuals.[154]

Nicholson CJ and Fogarty J referred[155] to the dissenting judgment of Einfeld J in *Magno*, who had said that in *Dietrich*, "[t]he argument does not appear to have been presented to the court that the Human Rights Act may be Australian legislation applying at least part of the ICCPR".[156] Reference was also made[157]

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148 Cf text to n 125 above.

149 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 (Brennan J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 43 (Brennan J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 183 (Dawson J). See also *Director of Public Prosecutions (Cth) v Saxon* (1992) 28 NSWLR 263 at 274 (Kirby P).

150 (1992) 16 Fam LR 982 (case 5 above).

151 (1992) 37 FCR 298 at 303–04 (see (1993) 14 *Aust YBIL* 342–46).

152 Ibid, at 304, referring to *Bradley v Commonwealth* (1973) 128 CLR 557 at 582; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 224 (Mason J).

153 (1992) 177 CLR 292.

154 Ibid, at 305 (Mason CJ and McHugh J), 359–60 (Toohey J). Also at 321 (Brennan J), 348 (Dawson J).

155 16 Fam LR 982 at 997.

156 (1992) 37 FCR 298 at 341.

157 16 Fam LR 982 at 998.

to the dissenting judgment of Nicholson CJ in *Re Marion*,[158] who said that it was "strongly arguable" that the rights defined in the international instruments contained in the schedules to the Human Rights Act "have been recognised by the Parliament as a source of Australian domestic law by reason of this legislation". Nicholson CJ and Fogarty J noted that this issue appeared not to have been considered by the High Court in the appeal from that decision,[159] and concluded that "it may be that this is still an open issue".[160] Some support for this view may also be found in the judgment of Kirby P in *Young v Registrar, Court of Appeal [No 3]*,[161] who said that the fact that the ICCPR is contained in a schedule to an Act of Parliament has been regarded by the courts "as a consideration relevant to the attention which should be paid to the International Covenant" but added that this does not, as such, incorporate the International Covenant into Australian domestic law. Similarly, in *Irving v Minister for Immigration, Local Government and Ethnic Affairs*,[162] French J said that the approach to construction which he took in that case was "strengthened...by the legislative recognition, albeit short of direct domestic force, given to the rights and freedoms under the covenant in the Human Rights and Equal Opportunity Act 1986 (Cth)".[163]

A further issue concerns the precise weight that the courts will give to the ICCPR and other international instruments in cases where they are referred to. It is established that notwithstanding any relevant international human rights norm, the courts must give effect to the clear language of a statute[164] or a settled principle of common law.[165] What is less clear is whether, in the event of an ambiguity in a statute or in the common law, the courts consider themselves bound to decide cases wherever possible in a manner consistent with international human rights law, or whether this is merely one consideration to be taken into account. The courts have tended not to address this question directly.

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158 (1990) 14 Fam LR 427 at 451; [1991] FLC 92–193 at 78, 303.

159 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

160 16 Fam LR 982 at 998. Section 111B of the Family Law Act 1975 (Cth) empowers the making of Regulations to enable performance by Australia of the Hague Child Abduction Convention. In this case, Nicholson CJ and Fogarty J thought it "at least arguable that this gives those parts of the Convention as a whole which are not specifically incorporated by the Regulations a higher status in domestic law" than provisions of a treaty which has been ratified by Australia but has not been the subject of any legislative incorporation into domestic law (at 999). They expressed the view that article 16 of the Convention, although not incorporated by the Regulations, "at the very least...was a matter which the judicial registrar should have taken into account in the exercise of his discretion to proceed to hear the matter" (at 988). Finn J (at 1002) did not express any view on this issue.

161 (1993) 32 NSWLR 262 at 274 (case 3 above).

162 (1993) 115 ALR 125 (discussed above in text to nn 108–11).

163 Ibid, at 140.

164 See n 78 above.

165 *Dietrich v The Queen* (1992) 177 CLR 292 at 306 (Mason CJ and McHugh J), 349 (Dawson J), 360 (Toohey J); *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 276B–C (case 3 above).

In some cases, there is merely passing reference to an international treaty,[166] or a general comment that provisions of Australian legislation reflect principles recognised in international treaties.[167] In other cases, the court may reject a submission based on the terms of an international treaty, without the need to indicate what relevance the treaty might otherwise have had.[168] In *Australian Capital Television Pty Ltd v Commonwealth*,[169] Mason CJ and Gaudron J referred to international human rights authorities to indicate the importance of the freedom of expression, but did not consider whether the legislation under review in that case in fact contravened international human rights standards.[170] In *Young v Registrar, Court of Appeal [No 3]*,[171] Kirby P expressly found that there had been a breach of the ICCPR, but thought that the Court was unable to remedy that breach, while Handley JA did not need to consider what weight should be given to the ICCPR because he considered that there had been no breach.

The answer may well be that the weight to be accorded to international human rights treaties in cases where they may be considered will vary, depending on the circumstances of the case. In circumstances where a court, by deciding a particular case in a particular way, might place Australia in breach of its international human rights obligations, it might be expected that greater weight would be given to international human rights law than in a situation where the case, in whichever way it is decided, would be consistent with minimum international standards. In cases of the latter type, international human rights law may still be persuasive authority as to the types of factors to which a court should have regard, but presumably would not be given overriding emphasis. Indeed, to make international standards the paramount consideration in such cases might have the consequence of actually reducing the protection of

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166 See eg *Tickner v Bropho* (1993) 40 FCR 183 (Federal Court of Australia—Full Court), French J at 211:

> The preservation of human cultural heritage as a public duty recognised in the laws of many nations...The duty is recognised at international law by the Convention for the Protection of the World Cultural and Natural Heritage to which Australia is a party.

167 In *Marriage of B and B* (1993) FLC ¶ 92–357 (Family Court of Australia—Full Court), the Court referred to various provisions of the Family Court Act which oblige courts exercising jurisdiction under that Act to protect the rights of children and to protect them from abuse and ill treatment. The Court then said that Australia's accession to the United Nations Convention on the Rights of the Child was "[a]lso of note" and indicated the view that the right to protection from physical and mental abuse laid down in that Convention was implied by sections 64(1)(bb)(va) and 70BA and BB of the Family Law Act 1975 (Cth) ((1993) FLC ¶ 92–357 at 79, 780).

168 See eg *Secretary, Department of Social Security v Clemson* (1993) 40 FCR 9 at 17 (Federal Court of Australia, Neaves J). See also *Marriage of Mahony and McKenzie* (1993) 16 Fam LR 803 at 806–07 (Family Court of Australia, Warnick J).

169 (1992) 177 CLR 106.

170 Ibid, at 140 and 211.

171 (1993) 32 NSWLR 262 (case 3 above).

individual rights under Australian law to the level of the minimum standards required by international law.[172]

Ultimately, however, these observations remain tentative. The relevant principles will continue to be developed and clarified by the courts in subsequent decisions.

7. Refugees — Definition — "Well founded fear of being persecuted" — Time of determination — "Membership of a particular social group" — Geneva Convention Relating to the Status of Refugees 1951, article 1.A(2)

Lek v Minister for Immigration, Local Government and Ethnic Affairs (No 2)

(1993) 45 FCR 418; 117 ALR 455

Federal Court of Australia, Wilcox J[173]

In the course of his judgment in this case, Wilcox J had occasion to consider the meaning of the expressions "persecuted" and "particular social group" in the Geneva Convention Relating to the Status of Refugees 1951. Article 1.A(2) of that Convention defines a refugee as any 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 judgment indicates that denial of the right to earn an income may constitute "persecution", and that a requirement that a person pay excessive bribes in order to earn an income may in some cases effectively constitute such a denial. Wilcox J indicated that this could be so where one ethnic group is targeted more often and more aggressively for the payment of bribes and if this significantly affects the ability of a member of that group to carry on his or her business activities.[174] Wilcox J also referred to the statement of McHugh J in *Chan*[175] that a single act of oppression may constitute persecution "[a]s long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class". Wilcox J considered that in the present case it had been open to the Minister's delegate to conclude that the imprisonment of a person for a week did not amount to persecution because it was not part of a course of systematic conduct directed against the person.[176]

Wilcox J also agreed with the Minister's delegate that the categories "young single women" and "single women [widows] whose husbands had anti-government affiliations" were too broad to constitute a "particular social group"

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172 See Report Section, pp 231–64 of this volume, and see also Staker, n 75 above, at 462–63.

173 For earlier proceedings, see *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100 (Federal Court of Australia, Wilcox J).

174 45 FCR 418 at 425–28.

175 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 430.

176 45 FCR 418 at 429.

for the purposes of the Convention. He did not think that it mattered that people within a claimed group "have different lifestyles, cultures or political leanings",[177] but observed that Lockhart J had said in *Morato v Minister for Immigration, Local Government and Ethnic Affairs*,[178] that there must be "some common or binding element" and "common social characteristics" that might attract persecution. On the other hand, he considered that an ethnic group constituting only a small proportion of the population of a country could be a "particular social group", notwithstanding the diversity of occupations, lifestyles and political leanings within that group.[179]

Wilcox J also rejected the contention that the relevant date for determining refugee status is the date of application, rather than the date of determination. He considered that it is necessary to consider events that have occurred since the applicant departed the country of nationality and since the applicant lodged his or her application for refugee status, and which bear upon the question whether the fear is well-founded at the date of determination.[180] However, he indicated that where a fear is well-founded at the time of departure from the country of nationality, it is correct to take this as the starting point and then ask whether the available evidence established that the position has since changed.[181] Similarly, in *Mok v Minister for Immigration, Local Government and Ethnic Affairs (No 1)*,[182] Keely J indicated that the correct approach is to determine whether the applicant's subjective fear was well-founded at the time he or she left the country of nationality and made an application for refugee status, and, if so, to accept that that fear is still well-founded at the time of determination of refugee status unless a substantial subsequent change in the circumstances has been established.[183]

In the present case, Wilcox J also thought that it was not the case that determination of refugee status primarily requires an evaluation of the applicants' statements rather than a judgment on the situation prevailing in the country of origin. He pointed out that the UNHCR *Handbook*[184] indicated that the qualification that a fear be "well-founded" requires that the person's frame of mind be supported by the situation in the country, objectively considered.[185] He also did not agree with the proposition that a fear is well-founded if the person has already been a victim of persecution for one of the reasons enumerated in the Convention. He said "There is nothing in the Convention to

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177 Ibid, at 432.
178 (1992) 39 FCR 401 at 416 (see (1993) 14 *Aust YBIL* at 354–56).
179 45 FCR 418 at 431.
180 Ibid, at 420–25, referring to *Chan*, n 175 above; *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100.
181 45 FCR 418 at 425.
182 (1993) 47 FCR 1 (Federal Court of Australia, Keely J).
183 Ibid, at 69–75, esp at 74.
184 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) at para 38.
185 45 FCR 418 at 439. Cf *Immigration and Naturalization Service v Cardoza-Fonseca* (1987) 480 US 421; *R v Secretary of State for the Home Department; Ex parte Sivakumaran* [1988] AC 958.

support this statement. Previous experience of persecution may give rise to a fear of repetition. It is another question whether that fear is well-founded at a relevant later date. This is something that will depend largely on matters outside the person's own experience."[186]

In *Mok* [187] Keely J added that in his opinion the question of whether there was a real chance of persecution if an applicant for refugee status returned to his or her country of origin "necessarily required the delegate to look at the future in so far as it was reasonably foreseeable at the time when he was making his decision. On the one hand the delegate was not required to look at the possibility of something occurring in 50 years time...On the other hand a delegate errs in law, in my opinion, if he confines his attention to whether there is a real chance of persecution on the day after an applicant's return."[188]

In a further decision of the Federal Court in 1993, Davies J considered that even if a person may have a well-founded fear of being persecuted if he or she returned to his or her home, the person would not fall within the Convention definition of a refugee if there was no real chance of such persecution if he or she went to live in another part of the State of origin.[189] Davies J quoted Hathaway, who says that "[b]ecause refugee law is intended to meet the needs of only those who have no alternative to seeking international protection, primary recourse should always be to one's own state".[190]

8. Citizenship — "Aliens" — British subjects

Kenny v Minister for Immigration, Local Government and Ethnic Affairs

(1993) 42 FCR 330; 115 ALR 75

Federal Court of Australia, Gummow J

The applicant in this case, who was born in 1923 in what was then the Irish Free State, had lived in Australia from 1946 to 1984. He left Australia in 1984, and re-entered in 1991 pursuant to a temporary entry permit. One of the issues in this case was whether the applicant required a valid entry permit to enter Australia and whether or not he became an illegal entrant after the expiration of his temporary entry permit. This in turn raised an issue whether the legislative powers of the Commonwealth Parliament with respect to "aliens" (Constitution, section 51(xix)) and with respect to "external affairs" (section 51(xxix)) supported section 14 of the Migration Act 1958 (Cth), in so far as it applied to the applicant.[191]

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186 45 FCR 418 at 439.

187 Note 182 above.

188 Ibid, at 66.

189 *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (Federal Court of Australia, Davies J, 8 December 1993, unreported).

190 Hathaway JC, *The Law of Refugee Status* (1991), p 133.

191 Section 14(1)(a) and (3) of the Migration Act provides that on entering Australia a non-citizen becomes an illegal entrant unless he or she is the holder of a valid entry permit, and that a non-citizen who is the holder of a valid entry permit becomes an illegal entrant if he or she stops being the holder of a valid entry permit while he or she is in Australia. In this case, the Minister did not rely on the

Gummow J observed that in 1901 when the Australian Constitution came into force, the common law rule was that every person was either a "British subject" or an alien.[192] He noted that in 1906, the High Court declined "to give any countenance to the novel doctrine that there is an Australian nationality as distinguished from a British nationality",[193] although the High Court did consider that the Commonwealth's legislative power with respect to immigration and emigration (Constitution, section 51(xxvii)) conferred a power of exclusion of British subjects not born or naturalised in Australia.[194] However, in 1948, a distinct Australian citizenship was established by the Nationality and Citizenship Act 1948 (Cth) (since renamed the Australian Citizenship Act 1948), which was part of a scheme by which Commonwealth countries each enacted legislation establishing their own citizenship and providing that their own citizens and the citizens of the other Commonwealth countries were "British subjects".[195] Thus, section 7 of the 1948 Act provided that a person who was an Australian citizen, or who was a citizen of one of the other Commonwealth countries specified in that section by a law in force in that other country, was a British subject by virtue of that citizenship. The concept of a British subject under Australian law ceased to exist with the repeal of section 7 in 1984,[196] by which time the concept had also been abandoned in other Commonwealth countries.[197]

Gummow J pointed out that in Irish law, by virtue of the Irish Nationality and Citizenship Act 1935 (Ireland), after 10 April 1935 no person who was an Irish citizen was also a British subject.[198] Notwithstanding this, it appears that under United Kingdom law a person born in the former Irish Free State continued to be regarded as a natural born British subject (by virtue of birth

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Commonwealth's power with respect to "immigration" (Constitution, section 51(xxvii)) (see 42 FCR 330 at 334).

192 42 FCR 330 at 336, referring to *Re Ho* (1975) 10 SASR 250 at 253.

193 *Attorney-General (Cth) v Ah Sheung* (1906) 4 CLR 949 at 951.

194 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518. See generally the discussion of Gummow J, 42 FCR 330 at 336–39. Section 26(1) of the British Nationality and Status of Aliens Act 1914 (Imp) acknowledged the power of a legislature or government of a "British Possession" to treat differently different classes of British subjects.

195 Gummow J referred to Jones, "British Nationality Act 1948" (1948) 25 *British Yearbook of International Law* 158 at 160, who said that under the new scheme, "British subjects, instead of being ascertained by reference to a common code, will simply be the sum-total of the citizens of all the Commonwealth countries". See also eg Pryles M, *Australian Citizenship Law* (1981), 25ff; Parry C, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* (1957), Ch 3.

196 By the Australian Citizenship Amendment Act 1984 (Cth).

197 The status of British subject does still exists under the British Nationality Act 1981 (UK), but "[s]ave in the case of certain Irish citizens, the status is now incompatible with any other form of nationality" and "will in the course of time disappear altogether": *Halsbury's Laws of England*, 4th ed reissue (1992), vol 4(2), p 62.

198 42 FCR 330 at 339–41, referring to Heuston, "British Nationality and Irish Citizenship" (1950) 26 *International Affairs* 77 at 81–90; Jennings I, *Constitutional Laws of the Commonwealth*, 3rd ed (1957), I at 146–47.

within the King's dominions). However, under the terms of section 1 of the Ireland Act 1949 (UK), "the part of Ireland heretofore known as Eire ceased...to be part of His Majesty's dominions" from 18 April 1949. Gummow J concluded that because the applicant in this case did not fall within the saving provision in section 5 of that Act, the result was that under British law he was to be treated as having ceased to be a British subject on 1 January 1949.[199]

Although Irish citizens ceased to be British subjects at that time, they did enjoy special treatment under the Australian Act as originally enacted. Under section 5(1), Irish citizens were excluded from the definition of an "alien". While sections 14–16 provided for "aliens" to acquire citizenship by naturalisation, sections 12–13 provided for British subjects and Irish citizens to acquire Australian citizenship by registration. Section 9(2) of the Act provided that until contrary provision was made, Commonwealth or territory laws passed prior to the commencement of that Act continued "to have effect in relation to Irish citizens who are not British subjects in like manner as they have effect in relation to British subjects".[200] Section 8(1) and (2) of the Act contained provisions by which certain Irish citizens would be deemed not to have ceased to be British subjects on giving notice to the Minister claiming to be a British subject on certain specified grounds.[201] However, as Gummow J observed, with the repeal of sections 7, 8 and 9 of the Act by the 1984 Act,[202] there ceased in Australia to be any provisions which attributed to Irish citizens in the applicant's position any of the characteristics of the status of British subject.[203]

In *Nolan v Minister for Immigration and Ethnic Affairs*[204] six members of the High Court were of the view that a person who was born outside Australia, whose parents were not Australian and who had not acquired Australian citizenship, was not precluded from being classified an "alien" under the power in section 51(xix) of the Constitution merely because he or she had the status of British subject by reason of citizenship of a different sovereign State. They considered that this was the result of "[t]he transition from Empire to Commonwealth and the emergence of Australia and other Dominions as independent sovereign nations within the Commonwealth".[205]

In this case, Gummow J said that it was unnecessary to resolve the question of "the stage at which, after British subjects settled in this country without becoming citizens of Australia, the constitutional relationship between Australia and other countries sharing the same sovereign reached the stage that one could say with certainty that the settlers had become aliens in this country".[206] This was because it was clear that Irish citizens ceased to be British subjects in

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199 42 FCR 330 at 341, referring to Keith AB, *The Dominions as Sovereign States* (1938), p 113; *Murray v Parkes* [1942] 2 KB 123.
200 Subject to an exception in section 9(1).
201 Corresponding to eg, British Nationality Act 1948 (UK), section 2.
202 See above, n 196.
203 42 FCR 330 at 344.
204 (1988) 165 CLR 178.
205 Ibid, at 184 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).
206 42 FCR 330 at 345.

1949,[207] and therefore became "aliens" in the Australian constitutional sense at that time.[208] It thus appears from this judgment that Irish citizens, although expressly excluded from the definition of "alien" in the Nationality and Citizenship Act 1948 at the time of its enactment, were nonetheless "aliens" within the meaning of section 51(xix) of the Constitution after 1949. Gummow J noted that in any event, in 1984 the expression "immigrant" in what is now section 14 of the Migration Act[209] was replaced by the term "non-citizen", with effect from 2 April 1984. He said that "whatever may have been the position at earlier times (in particular, when Mr Kenny arrived in Australia in 1946), by 2 April 1984 the consequence of Australia's emergence as a fully independent sovereign nation was that the term 'alien' in par (xix) of the Constitution had become synonymous with 'non-citizen'".[210]

Finally, Gummow J also considered that section 14 of the Migration Act would be supported by the Commonwealth's legislative power with respect to "external affairs" (Constitution, section 51(xxix)). He said that "the treatment by Australia of the nationals of other countries, whether by denial of entry to those persons or deportation from Australia, concerns Australia's relations with those other countries; accordingly a law upon these subjects is a law with respect to external affairs". He added that "legislation which dealt with the entry into Australia of British subjects and former British subjects (such as Irish citizens in the position of Mr Kenny) and the status of such persons in Australia dealt with a well-established head of 'external affairs'. This is the changing relationship between Australia and what once were other members of the British Empire".[211]

9. Extradition — "Extradition objection" — "Acquitted...in the extradition country"

Harris v Attorney-General (Cth)

(1993) 45 FCR 11; 117 ALR 487

Federal Court of Australia, Ryan J

For the purposes of the Extradition Act 1988 (Cth), section 7 defines the circumstances in which there will be an "extradition objection". Under section 7(e), there will be an extradition objection in relation to an extradition offence for which the surrender of a person is sought, *inter alia*, if the person "has been acquitted or pardoned by a competent tribunal or authority in the extradition country", or has undergone the punishment provided by the law of that country, in respect of the extradition offence. One question which arose in this case was whether section 7(e) applies in circumstances in which a person has been

207 See text to nn 198–99 above.

208 42 FCR 330 at 346.

209 See n 191 above.

210 42 FCR 330 at 346, referring to *Pochi v Macphee* (1982) 151 CLR 101; *Nolan v Minister for Immigration and Ethnic Affairs*, n 204 above; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 25 (Brennan, Deane and Dawson JJ).

211 Ibid, at 347–48, referring, *inter alia*, to *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351.

acquitted by a court in the extradition country, but in which a court of appeal in that country has subsequently revoked the acquittal and imposed a sentence of imprisonment. It was argued that Australian authorities established that in Australia an accused person has the right to be spared the jeopardy of an appeal from an acquittal after a hearing on the merits by a court of competent jurisdiction, and that the character of an acquittal could not be affected by an appeal, in the absence of express statutory intent.[212] Ryan J did not accept this argument. He said:

> On one view, the Act, because it visits penal consequences by way of extradition affecting the liberty of persons subject to it, including, as in this case, subjects of the Requested State, should be strictly construed so that those consequences are confined to as narrow a range of persons as the language of the statute reasonably permits. On the other hand, the statutory provisions have to be construed as part of an Act which is manifestly concerned to regulate arrangements for extradition between reciprocating countries. Those countries, in the nature of things, may accord markedly different consequences to a discharge or acquittal at first instance or some other initial, or early, stage in the administration of criminal justice...[E]ven in other common law jurisdictions, there may be an appeal against an acquittal if there is very clear statutory language to establish it: see, eg, *Benson v Northern Ireland Road Transport Board* [1942] AC 520 at 528. In my view, Article 118(6) of the Argentine Code of Procedure provides a distinct statutory authority for an appeal against the "acquittal...It was therefore open to the Attorney-General to conclude that the applicant had not been acquitted within the meaning of s 7(e) of the Act.
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> ...The two limbs of that subsection are acquittal or pardon, and undergoing of the punishment provided by law. Both limbs in mutually exclusive ways, contemplate the result that the person is no longer subject to prosecution or punishment in relation to the extradition offence. Seen in that light, the two limbs of s 7(e) reflect the nature of the obligation to extradite contained in Article 1 of the Treaty. The two classes of persons whom Argentina and Australia have agreed to subject to extradition are first, those wanted for prosecution and second, those who are wanted for the imposition or enforcement of a punishment. The obligation to extradite therefore requires that the subject be amenable to legal process and its enforcement. In my view, s 7(e) creates an extradition objection in circumstances where there is no obligation to extradite because the person is no longer amenable to legal process or punishment.
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> ...The applicant's contentions involve the proposition that "acquitted" in s 7(e) should be regarded as importing the concept of acquittal as it is understood and applied in Australian domestic law. However, in my view, the construction of s 7(e) which best gives effect to the intention of the Act and of the Treaty is one which interprets s 7(e) as requiring an assessment of whether there has been a final determination of the merits of the case.[213]

Ryan J also found that article 3.1(e) of the extradition treaty between Australia and Argentina, which provides that "Extradition shall not be granted...if the person sought cannot be prosecuted or convicted by reason of

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212 45 FCR 11 at 26.
213 Ibid, at 26–28.

any limitation, including the lapse of time, prescribed or imposed by the law of either Contracting Party", could have no application in a case where the person whose extradition was sought had already been convicted and was yet to complete a sentence.[214, 215]

10. Constitutional law — Matters "Arising under any treaty" — Matters "Affecting consuls or other representatives of other countries"

R v Donyadideh

(1993) 115 ACTR 1

Supreme Court of the Australian Capital Territory, Miles CJ

Section 75(i) of the Australian Constitution provides that the High Court shall have original jurisdiction in all matters "Arising under any treaty". Section 75(ii) provides that the High Court shall have original jurisdiction in all matters "Affecting consuls or other representatives of other countries". In this case, it was argued that the Supreme Court of the Australian Capital Territory lacked jurisdiction to try persons charged with offences under section 8 of the Crimes (Internationally Protected Persons) Act 1976 (Cth) (the IPP Act), because the charges fell within one or more of the categories of matters enumerated in section 75 of the Constitution in which the High Court has original jurisdiction. Under section 77 of the Constitution, Parliament may make laws conferring jurisdiction in relation to such matters on any federal court other than the High Court or on State courts invested with federal jurisdiction, but it was argued that the Supreme Court of the Australian Capital Territory was neither a federal court nor a State court invested with federal jurisdiction.

Section 7 of the IPP Act gives approval to the ratification by Australia of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973, the text of which is set out in the Schedule to that Act. Section 3(3) of the Act provides that except so far as the contrary intention appears, an expression used in the Act and the Convention has, in the Act, the same meaning as in the Convention. The term "internationally protected person" is defined in article 1 of the Convention.

In *Bluett v Fadden*,[216] McLelland J observed that under Australian law a treaty has no effect until carried into operation by domestic legislation, in which case "the rights can only be said to arise under the legislation and cannot be said

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214 Ibid, at 505. Ryan J also rejected an argument that there were deficiencies in the extradition request (at 497–500).

215 In another extradition case decided in 1993, *Holt v Hogan (No 1)* (1993) 44 FCR 572; 117 ALR 378 (Federal Court of Australia, Cooper J), consideration was given to the meaning of the words "special circumstances" in section 21(6)(f)(iv) of the Extradition Act 1988. Pursuant to that provision, where an application is made to a court for review of the magistrate's order committing a person to prison to await surrender, or release pursuant to section 22(5), the Court has jurisdiction, "if there are special circumstances justifying such a course", to order the release on bail of the person on such terms and conditions as the court thinks fit.

216 (1956) 56 SR(NSW) 254.

to arise under the treaty".[217] He considered that section 75(i) of the Constitution must "be taken to refer to cases where the decision of the case depends upon the interpretation of the treaty. In such cases, the matter in question arises under the treaty. It is, of course, primarily the legislation which has to be interpreted but, where the terms of the treaty have by legislation been made part of the law of the land, it is in a very real sense the treaty which is being interpreted."[218]

In this case, Miles CJ disagreed with this view. After referring to a decision of the High Court on the meaning of the words "Arising under any laws made by the Parliament" in section 76(ii) of the Constitution,[219] he concluded that "It is not enough that recourse is to be had to the treaty in order to decide the matter in issue. What is necessary is that the right, duty or liability in question 'owes its existence' to the treaty or depends upon the treaty for its enforcement, or has its source in the treaty."[220] He added that "Whilst the terms of the IPP Act itself require that recourse is to be had to the treaty for the purposes of construction and interpretation...that does not mean that a prosecution for an offence under the Act is a matter arising under the treaty".[221] He therefore concluded that charges under the IPP Act fell outside section 75(i) of the Constitution.

On the other hand, Miles CJ was of the view that prosecution for offences under section 8 of the IPP Act was a matter "Affecting...representatives of other countries", within the meaning of section 75(ii) of the Constitution. He did not consider that provision to be limited to cases in which a consul or other representative is a party or otherwise involved in the proceedings, and said that it was "difficult...to see that, in the contemporary scene, the alleged victim of a crime is not 'affected' by the prosecution of the offender".[222]

However, he found that although territory courts do not exercise any part of federal judicial power and may not be invested with federal jurisdiction, the jurisdiction of territory courts may include matters enumerated in section 75 of the Constitution, in relation to acts occurring within the Territory in question.[223] Section 4 of the IPP Act provides that the Act "extends to every Territory". Accordingly, the court declared that it had jurisdiction to try charges under section 8 of the IPP Act.

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217 Ibid, at 261.
218 Ibid.
219 *Felton v Mulligan* (1971) 124 CLR 367.
220 115 ACTR 1 at 6.
221 Ibid. Cf the discussion of section 75(i) in Quick J and Garran RR, *The Annotated Constitution of the Australian Commonwealth* (1901), pp 768–70; Lane PH, *Lane's Commentary on the Australian Constitution* (1986), pp 391–93; Lumb RD, *The Constitution of the Commonwealth of Australia Annotated*, 4th ed (1986), pp 266–67.
222 115 ACTR 1 at 6. Cf *United States v Ortega* (1826) 11 Wheat 467 (24 US 206); *Osborn v United States Bank* (1824) 9 Wheat 738 at 854–55 (22 US 326 at 376), which were referred to by Miles CJ.
223 115 ACTR 1 at 8–9.