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The Internationalisation of Australian law

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Abstract

On 23 June 2016, the then Solicitor-General of the Commonwealth of Australia, Justin Gleeson SC, launched the International Negotiation and Dispute Resolution Series. Hosted by the International Law Committee of the New South Wales Young Lawyers, the series examines emerging issues in international dispute resolution.

In his keynote address, Mr Gleeson outlined the history of the internationalisation of Australian law, from English and American influences at the time of federation to the growth of public international law presently underway.

The internationalisation of Australian law beyond its British roots arrived in three main waves.

The first wave

The first wave appeared on our shores around the time of Federation. The framers of Australia's Constitution drew upon English common law and its unwritten constitutionalism, but also had a close appreciation of the U.S. Constitution and jurisprudence over the preceding one hundred years. They also held a fairly detailed appreciation of Canadian jurisprudence and of emerging principles of public international law, then often referred to as 'the Law of Nations'. This is all evident from the detailed references in Quick and Garran's titular constitutional text.

In addition, the early jurisprudence of the High Court demonstrates that the Justices and counsel had a close familiarity with U.S., Canadian and international law sources, as well of course of U.K. authority.

One example is the High Court's decision in *Potter v Minahan*,[1] which is best remembered for O'Connor J's statement at 304:

> *'It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.'*

This is the origin of the principle of legality which the High Court reinvigorated about a decade ago as a very powerful tool of statutory construction.

But a further re-reading of this case reveals something more fundamental about the method of the early High Court. The case runs for 50 pages in the *Commonwealth Law Reports*, an extraordinary length for an ultimate appellate decision of its time. The Court considered whether the Commonwealth Parliament's power under s 51(xxvii) of the Constitution permitted it to treat the respondent as an 'immigrant' in circumstances where he had been born in Victoria and had lived with his mother until taken by his father to China. The respondent lived in China for 26 years.

[1] *Potter v Minahan* (1908) 7 CLR 277.

The Court surveyed the principles of what we would now call both public and private international law, authorities on the U.S. Constitution as well U.K. authorities in reaching the conclusion that, absent evidence that the person had positively abandoned his connection with Australia, he remained a member of the Australian community and could not be treated as an immigrant.

A little earlier, in 1904, in *D'Emden v Pedder*,[2] the Commonwealth Law Reports records 15 pages of counsels' argument and the Court's questioning of the significance of the decision of Marshall CJ in *McCulloch v State of Maryland*[3] to a proper understanding of the structural compact between Commonwealth and States embedded in the Australian Constitution. Griffith CJ famously said in the judgment:

> *'But we all think that it would need some courage for any Judge at the present day to decline to accept the interpretation placed upon the United States Constitution by so great a Judge [as Marshall CJ] so long ago as 1819, and followed up to the present day by the succession of great jurists who have since adorned the Bench of the Supreme Court at Washington. So far, therefore, as the United States Constitution and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance.'*

It must be said that the enthusiasm in Australia of intermediate and ultimate appellate courts for deriving assistance from foreign and international legal materials has not always remained constant since the first decade of the twentieth century. But in my appreciation, the last five years or so has seen a resurgent judicial interest in drawing upon foreign, comparative, and public international sources where they can assist in the proper disposition of the dispute at hand.

I provide four examples to illustrate this point.

First, in 2013, French CJ and Crennan J in the *Mining Tax Case*[4] placed some reliance on the U.S. constitutional jurisprudence surrounding Article 1, s 8 of the U.S. Constitution, which gives Congress the power to lay and collect taxes, duties, imposts and excises so long as they are 'uniform' throughout the U.S. On the strength of U.S. constitutional authority, their Honours separately concluded that a taxation law will not offend the prohibition on discrimination under s 51(ii) of our Constitution if its operation is general throughout the Commonwealth, even though it may not operate uniformly owing to different circumstances existing in different States, such as the decision of one State to set a higher royalty rate than another.[5]

Second, in 2013, the High Court in the ACT *Same-Sex Marriage case*[6] rejected the ACT's argument that its same-sex marriage law was 'consistent' within s 109 with the *Marriage Act 1961* (Cth) (**Marriage Act**). In ascertaining the scope of the Marriage Act, and of the underlying Constitutional power in s 51(xxi), the Court placed reliance upon the convention debates in which Australia's framers recognized that there was a substantial public interest in giving the Commonwealth Parliament the legislative ability to enact a uniform scheme with respect to marriage. This was particularly so in light of the U.S. experience prior to 1900 in which the absence of such a power had necessitated resort to complex rules of private international law to determine whether a marriage solemnised in one State was valid in another, or

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[2] *D'Emden v Pedder* (1904) 1 CLR 91.

[3] (1819) 4 Wheat 316.

[4] *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548.

[5] *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548 at [25] and [164]; cf [104].

[6] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

whether a marriage terminated in one State had likewise ended in another. The U.S. experience before 1900 had demonstrated that, to accept the ACT's argument that its form of marriage could sit comfortably side-by-side with the Commonwealth's form of marriage, would only return this subject matter to resolution by complex private international law rules that the framers had intended to avoid through the express legislative power in s 51(xxi) of the Constitution.[7]

Third, in 2015, the High Court in *McCloy*[8] considered the validity of certain NSW election donation laws. Nine U.S. Supreme Court decisions were discussed across the various judgments, in coming to an appreciation of the types of corruption that may arise through political donations, and in determining how far the implied freedom of political communication in our Constitution constrains the ability of a Parliament to regulate political donations. In particular, the Court grappled with whether the approach of the U.S. Supreme Court in the 2010 decision on the First Amendment of *Citizens United*[9] should be carried over to our Constitution. That decision, as is notoriously known, has radically transformed the political landscape there, such that one cannot hope to bid for the U.S. Presidency without a cool $1 billion plus in one's coffers.

Finally on this point, U.S. authorities can even be relevant in understanding general, non-constitutional legal questions. One of the key questions before the High Court in *Queensland Rail*[10] in 2015 was whether Queensland Rail was a corporation and thus amenable to regulation under s 51(xx) of the Constitution. Anterior to that question was the question 'what is a corporation?' One of the arguments advanced against Queensland Rail being a corporation was that the Queensland Act declared that Queensland Rail was not a 'body corporate'. The U.S. Supreme Court had in 1870 addressed a very similar question in the *Liverpool Insurance Co case*.[11] The Supreme Court held that a joint stock company formed under U.K. law was a corporation for the purposes of U.S. law, notwithstanding that its U.K. statute expressly denied it the status of a corporation. Its true character was that of a corporation. It was not a mere collection of natural person members, individually entitled to the protection of the privileges and immunities clause of the U.S. Constitution (Art IV, s 2, cl 1).

The point emerging from this discussion is that lawyers, and particularly young lawyers, need to acquire and maintain considerable dexterity in finding, understanding, and manipulating the overseas, and indeed international, material that may elucidate any legal problem they face.

The second wave

The second main wave of the internationalisation of our law came in the period immediately post World War II. During that time, Australia was closely involved in the foundation of the United Nations, its various organisations and Tribunals, and the making of key international agreements. The International Monetary Fund and the International Bank for Reconstruction and Development (or World Bank) were founded in 1945.[12] The United Nations and the International Court of Justice (**ICJ**) were established in

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[7] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at [7].

[8] *McCloy & Ors v New South Wales* (2015) 89 ALJR 857.

[9] *Citizens United v Federal Election Commission*, 558 U.S. 310 (2010).

[10] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 89 ALJR 434.

[11] *Liverpool Insurance Co v Massachusetts*, 76 U.S 566, particularly at [61]; cf [33]-[34].

[12] *Articles of Agreement of the International Bank for Reconstruction and Development, as amended 25 August 1965* (Article III) and 30 June 1987 (Article VIII(a)), opened for signature 31 December 1945 (entered into force 5 August 1947) [1947] ATS 15.

1945.[13] The General Agreement on Tariffs and Trade was signed in 1948.[14] The Four Geneva Conventions were signed in 1949.[15] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed in 1958.[16]

Sometimes overlooked is the leading role that Australia, and eminent Australians, played in these seminal events. Dr H V Evatt, a young Paul Hasluck as one of his aides and Sir Kenneth Bailey, Commonwealth Solicitor-General played a critical role at the San Francisco conference from 25 April to 26 June 1945 in the establishment of the United Nations and the ICJ. Australia was then forging what Judge James Crawford has described as a 'foreign policy distinct from that of the United Kingdom' with a 'liberal internationalism'.[17] Sir Percy Spender was our first judge on the ICJ nominated in 1957.

Our second came only with Judge James Crawford himself, elected in 2014.

The 1990s witnessed the establishment of additional, now critical, international organisations and obligations, such as the *UN Convention on the Law of the Sea* in 1994,[18] the World Trade Organization in 1994,[19] and the International Criminal Court in 1998.[20]

It is also not always appreciated the extent to which Australia's increasing engagement with the developing international legal order post WWII has seen us enter an ever varied and increasing range of international treaty obligations. Prior to WWII, treaty-making was more than a mere side-show. The *Australian Treaty Series* records a total of approximately 644 original or amending treaties in this period, or an average of 14.6 per year. However, in the 70 years since WWII, Australia has entered approximately a further 2232 original or amending treaties, or an average of 31.8 per year.

It is not merely the increase in numbers that is significant. It is the breadth of subjects covered now by treaties: international commerce, the environment, human rights, treatment of indigenous persons, the list goes on.

Of yet further significance, is it that it is well established since the High Court's decision in the *Tasmanian Dams Case*[21] in 1983 that the Commonwealth Parliament may under the external affairs power in s 51(xxi) enshrine Australia's treaty obligations into domestic law, even concerning matters done within Australia, and even at the risk of overriding State law.

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[13] *Charter of the United Nations*, opened for signature 26 June 1945 (entered into force 1 November 1945) [1945] ATS 1.

[14] *General Agreement on Tariff and Trade*, opened for signature 30 October 1947 (entered into force 1 January 1948) [1948] ATS 23.

[15] *First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Second Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Third Geneva Convention relative to the Treatment of Prisoners of War; Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949 (entered into force 14 April 1959) [1958] ATS 21.

[16] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958 (entered into force 24 June 1975) [1975] ATS 25.

[17] James Crawford, ''Dreamers of the Day': Australia and the International Court of Justice' (2013) 14 *Melbourne Journal of International Law* 520 at 522.

[18] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982 (entered into force 16 November 1994) [1994] ATS 31.

[19] *Marrakesh Agreement establishing the World Trade Organization*, opened for signature 15 April 1994 (entered into force 1 January 1995) [1995] ATS 8.

[20] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998 (entered into force 1 September 2002) [2002] ATS 15.

[21] *Commonwealth v Tasmania* (1983) 158 CLR 1.

A result is that, increasingly, legal disputes in our Courts concern the interpretation and application of domestic Statutes which implement international treaties. Increasingly, Australian courts are required to engage in a composite exercise. Australian courts must apply domestic principles of statutory construction, but in doing construe a statute that implements a treaty which will itself be interpreted under the principles established in 1969 through the Vienna Convention on the Law of Treaties (**VCLT**).[22] The VCLT permits States and other parties resort to subsequent state practice or agreement in construing a treaty: everything from simple interpretation to purported modification, even the existence or non-existence of a treaty.[23] Importantly, the VCLT also permits liberal resort to the preparatory works which produced a treaty.[24]

For example, our Courts have had to in recent years grapple with the interpretation of the *International Convention on the Elimination of All Forms of Racial Discrimination*[25] in 2013 in *Maloney v The Queen*;[26] and the *UN Convention on Privileges and Immunities*[27] in various cases in 2015 and 2016 concerning the immunity of diplomatic officials from domestic taxation.[28]

Our Courts have also had to grapple with how principles of customary international law have been brought into domestic law, such as in *Firebird*.[29] In 2015, the High Court in *Firebird* examined the scope of the commercial transactions exception to foreign state immunity, a customary international law principle brought into domestic law via the *Foreign State Immunities Act 1985* (Cth). That case required the High Court to analyse the ICJ's *Jurisdictional Immunities Case*[30] decided in 2012 on the scope of the customary international law principle of foreign state immunity.

In interpreting these treaties and customary international law obligations, Australian courts may be assisted by having regard to interpretations that foreign and international courts have given to the same treaties. Similar interpretations are likely to lead to legal certainty and predictability for actors who routinely operate across State borders, as well as for those who find their problems governed by international treaties in circumstances where activities that were once predominately local, such as family life, now increasingly involve more than one country.[31]

A further lesson for young Australians lawyers, then, is that they need to make themselves familiar and versatile with this range of material about international organisations, obligations and treaties which affect Australia. This material is increasingly coming to feature, indeed dominate, many disputes and many transactions. The material may not feature centrally in a law school curriculum, but will be important in practice.

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[22] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969 (entered into force 27 January 1980) [1974] ATS 2.

[23] See Sean Murphy, 'The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP, 2013) 82.

[24] VCLT, Article 31 and 32.

[25] *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 7 Mach 1966 (entered into force 4 January 1969) [1975] ATS 40.

[26] *Maloney v The Queen* (2013) 252 CLR 168.

[27] *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946 (entered into force 2 March 1949) [1949] ATS 3.

[28] *Macoun v Federal Commissioner of Taxation* (2015) 90 ALJR 93. See also *Commissioner of Taxation v Jayasinghe* [2016] FCAFC 79, in which special leave to appeal has been sought from the High Court.

[29] *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 90 ALJR 228.

[30] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99.

[31] Transcript of Proceedings, *Re WS* (Supreme Court of New South Wales, A019/2016, White J, 4 May 2016).

The third wave

Let me then come to the third wave, which is really only just unfolding as we speak. A number of additional or strengthened forces are coalescing, to move Australian law into an even more internationalised legal mode. I mention only two of these forces.

First, in the pure public international law space, we are starting to see the consequences of the Commonwealth Executive binding Australia over time to various international dispute resolution mechanisms. Australia's declarations of consent to ICJ jurisdiction in 1975 and 2002 enabled Australia to succeed against Japan in 2014 in the *Whaling case*;[32] yet in the same year also enabled an adverse result to Australia against Timor-Leste in the *Documents and Data Case*.[33]

In many treaties, Australia has expressly consented to inter-state arbitration. 2013 was the first year in which such a consent was activated, in an arbitration brought by Timor-Leste against Australia which is part heard.[34]

In the Investor-State Dispute Settlement (**ISDS**) space, Australia has signed over 20 Bilateral Investment Treaties since 1988, and more than 10 Free Trade Agreements. Many such treaties or agreements contain an express consent to arbitration of investment disputes. The first time that ISDS was pursued against Australia was in the *Phillip Morris Plain Packaging Arbitration*[35] in which an award was made in Australia's favour in December 2015 on jurisdictional grounds.[36]

These types of agreements will only increase: see for example the now ratified, but not yet in force, *Trans-Pacific Partnership Agreement*[37] in 2016, or the recent *China-Australia Free Trade Agreement*;[38] each of which has, in different terms, ISDS arbitration clauses.

These types of public international law claims will increasingly engage young lawyers. They illustrate that a legal problem may in fact be governed by two or more sets of legal norms, and potentially resolved differently in different forums; for example, whether one country can lawfully seize documents for a national security purpose from the local premises of a person who may act for a foreign State, or whether one country can lawfully impose local health or environmental requirements on foreign companies. In addition, if one is acting for a commercial client who may be negotiating a transaction for performance in a foreign country, the availability of ISDS protection in a treaty between Australia and that country may be a relevant factor.

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[32] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* [2014] ICJR 226.

[33] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, I.C.J., Order 11 June 2015.

[34] *Timor-Leste v Australia (Arbitration under the Timor Sea Treaty)* (PCA) (pending).

[35] *Phillip Morris Asia (Hong Kong) Ltd v Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015).

[36] *Phillip Morris Asia (Hong Kong) Ltd v Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) at 186.

[37] *Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam associated side letters and proposed Australian notification on tobacco control measures*, opened for signature 4 February 2016 (not yet in force) [2016] ATNIA 4.

[38] *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, opened for signature 17 June 2015 (entered into force 20 December 2015) [2015] ATS 15.

Secondly, in the international commercial arbitration space, we are now witnessing a growing body of case law where our Courts are called upon to recognise or enforce a foreign award, or to stay Australian court proceedings in favour of allowing the international arbitration to resolve the matter.

At the Court stage, one of the developing concepts is the scope of the 'public policy' exception to the presumptive finality of awards. This matter was canvassed by the Full Federal Court in the final Australian stage of the *TCL Air Conditioner*[39] saga. The Court reviewed the extensive international jurisprudence on the public policy exception in Art V of the New York Convention and Arts 34 and 36 of the Model Law, and concluded that its international context meant that the exception is 'limited to the fundamental principles of justice and morality of the state'. There was no purpose in incorporating some 'idiosyncratic national approach' to the public policy exception as referred to in ss 8(7A) and 19 of the *International Arbitration Act 1974* (Cth) (**IAA**):

> *'It is of the first importance to attempt to create or maintain, as far as the language employed by Parliament in the IAA permits,* ***a degree of international harmony and concordance of approach*** *to international commercial arbitration.'* (Emphasis added)

A question for practitioners and our Courts to reflect on is: which policies of the Australian law are so fundamental that they can trump presumptively binding foreign awards and judgments?

TCL Air Conditioner in the Full Federal Court demonstrates that practitioners will be increasingly required to adopt a comparative law and public international law mindset in their practices; to not only become familiar with non-domestic legal norms, but more particularly with the international legal texts which inform domestic (statutory) obligations (there, ss 8(7A) and 19 of the IAA).

At the transactional stage, a different challenge is posed by the presumptive finality provisions of the New York Convention and the IAA. Section 8(3A) of the IAA (as amended by the *International Arbitration Amendment Act 2010* (Cth)) provides that:

> *'The Court may only refuse to enforce the Final Award in circumstances mentioned in subsections (5) and (7)'.*

The IAA anticipates challenges to the arbitration agreement in enforcement proceedings (s 8(5)(b)) (based on Article V(1)(a) of the New York Convention) only in a very limited fashion. Section 8(5)(b) states that a court can only refuse to recognise to enforce a foreign award if the requesting party proves that:

> *the arbitration agreement is not valid under the law expressed* ***in the agreement to be applicable to it*** *or, where no law is so expressed to be applicable, under* ***the law of the country where the award was made***. (Emphasis added)

So, unless the law of the arbitration agreement is Australian law it would not be open for a party to rely on, say, a defence under the Australian Consumer Law, to impugn the validity of the arbitration agreement.

This confirms, as with any transactional exercise, the critical need to give attention to the selection of the law to govern the agreement as a whole, the law to govern the arbitration agreement within it, and as always the selection of the best dispute resolution mechanism for the client and the case.

The latter will not always or necessarily be arbitration. Depending on the case and the arrangements available for enforcement of judgments, there may be utility in the parties submitting to the jurisdiction of a domestic court, whether of one of the parties or some other country. And the work of the Hague

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[39] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 at [73]-[78].

Conference on Private International Law is encouraging in providing more options in this area. The *Convention on Choice of Court Agreements*[40] is now in force and is attracting more State party signatories. Work on the larger Judgments Project is also progressing with an important meeting of many countries occurring in The Hague in June of this year. Transactional lawyers have important choices to make in advising their clients on these options.

[40] *Australia's Accession to the Convention on Choice of Court Agreements*, opened for signature 30 June 20015 (not yet in force) [2016] ATNIF 23.