NEW SOUTH WALES COURT OF APPEAL

CITATION:
Zhang v Zemin [2010] NSWCA 255

FILE NUMBER(S):
2009/00298096

HEARING DATE(S):
28 June 2010

JUDGMENT DATE:
5 October 2010

PARTIES:
Cuiying Zhang (Appellant)
Jiang Zemin (First respondent)
610 Office (Falun Gong Control Office (Second respondent)
Luo Gan (Third respondent)
Attorney-General of the Commonwealth (Fourth respondent)

JUDGMENT OF:
Spigelman CJ Allsop P McClellan CJ at CL

LOWER COURT JURISDICTION:
Supreme Court

LOWER COURT FILE NUMBER(S):
SC No 20331/ 2005

LOWER COURT JUDICIAL OFFICER:
Latham J

LOWER COURT DATE OF DECISION:
14 November 2008

LOWER COURT MEDIUM NEUTRAL CITATION:
[2008] NSWSC 1296

COUNSEL:
J Gleeson SC and C Withers (Appellant)
H Burmester QC (Fourth respondent)

SOLICITORS:
Gibsons Lawyers (Appellant)
Australian Government Solicitor (Fourth respondent)

CATCHWORDS:
STATUTES - acts of parliament - interpretation - relevance of international law for interpretation of domestic statute - Foreign State Immunities Act 1985 (Cth)
JURISDICTION - immunity - Foreign State Immunities Act 1985 (Cth) s 9 - no exception for acts of torture contrary to international law
JURISDICTION - immunity - Foreign State Immunities Act 1985 (Cth) - immunity of individuals and former officers

LEGISLATION CITED:
Acts Interpretation Act 1901 (Cth)
Diplomatic Privileges and Immunities Act 1967 (Cth)
Foreign States Immunities Act 1985 (Cth)

CASES CITED:
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Attorney-General (Queensland) v Riordan (1997) 192 CLR 1
Australian Federation of Islamic Councils Inc v Westpac Banking Corporation (1988) 17 NSWLR 623
Re Bolton; Ex parte Beane (1987) 162 CLR 514
Bouzari v Islamic Republic of Iran (2004) 71 OR (3d) 675
R v Bow Street Magistrate; Ex parte Pinochet (No 3) [2000] 1 AC 147
Bray v F Hoffman-La Roche Ltd [2002] FCA 243; (2002) 118 FCR 1
Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1
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Compania Naviera Vascongado v Steamship “Christina” [1938] AC 485
Corporate Affairs Commission v Bradley [1974] 1 NSWLR 391
Dole Food Company v Patrickson 123 S.Ct 1655; 538 US 468
Duff Development Co Ltd v Kelantan [1924] AC 797
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Federated Amalgamated Government Railway and Tramway Service Association v The NSW Railway Traffic Employees’ Association (1906) 4 CLR 488
Federated Engine Drivers and Firemen’s Association of Australasia v Broken Hill Pty Co Ltd (1911) 12 CLR 398
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I Congreso del Partido [1980] 1 Lloyd’s Law Reports 23
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JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1989] 3 WLR 969; [1989] 1 Ch 72
Jones v Ministry of Interior of Saudi Arabia [2006] UKHL 26; [2007] 1 AC 270
Jones v Ministry of Interior of Saudi Arabia [2004] EWCA Civ 1394; [2005] 2 WLR 808

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Kartinyeri v The Commonwealth (Hindmarsh Island Bridge Act Case) [1998] HCA 22; (1998) 195 CLR 337
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Minister for Foreign Affairs and Trade v Magno (1992) 37 FCR 298
Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273
NABL v Minister for Immigration and Multicultural Affairs [2002] FCA 102
Old UGC v Industrial Relations Commission of New South Wales [2006] HCA 24; (2006) 225 CLR 274
The Philippine Admiral v Wallem Shipping [1977] AC 373
Playa Larga v I Congreso del Partido [1983] 1 AC 244
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R v Young [1999] NSWCCA 166; (1999) 46 NSWLR 681
Rahimtoola v The Nizam of Hyderabad [1958] AC 379
Residual Assco Group Limited v Spalvins [2000] HCA 33; (2000) 202 CLR 629
Samantar v Yousuf 130 S.Ct 2278 (2010)
Trendtex Trading Corporation v Central Bank of Nigeria [1977] 1 QB 529
United States of America v Dollfus Mieg Et Cie SA and Bank of England [1952] AC 582
Verlinden BV v Central Bank of Nigeria 461 US 480; 103 S.Ct 1962
Zoernsch v Waldock [1964] 1 WLR 675

TEXTS CITED:

DECISION:
1 Leave to appeal granted
2 Appeal dismissed

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

2009/00298096

SPIGELMAN CJ

ALLSOP P
McCLELLAN CJ at CL

Tuesday 5 October 2010

Cuiying Zhang v Jiang Zemin

FACTS

The appellant instituted proceedings in the Supreme Court of New South Wales seeking damages for acts of torture, assault, false imprisonment and wrongful arrest alleged to have been committed against her in China in 1999-2000 by or on behalf of the first to third respondents, who are the former President of the People's Republic of China ('PRC'), a department of the government of the PRC known as the Falun Gong Control Office and a member of the politburo of the Communist Party of China.

The Attorney-General of the Commonwealth was granted leave to be joined as a party and sought a declaration, which Latham J made, that the first to third respondents were immune from the jurisdiction of the Court under the provisions of the *Foreign States Immunities Act* 1985 (Cth) *('Immunities Act')*. The Minister for Foreign Affairs provided a certificate under s 40 of that Act to certify that the respondents were part of the government of a foreign state within the meaning of the *Immunities Act* at the time of the alleged acts which formed the basis of the appellant's claims.

The issues on appeal were whether the immunity in the *Immunities Act* had to be invoked by the foreign state or by the persons asserting its application; whether the first and third defendants were entitled to immunity on the basis that they were no longer members of the government of the PRC at the time of institution of proceedings; and whether immunity could exist under the *Immunities Act* for civil claims alleging acts of torture.

HELD
(*Spigelman CJ, Allsop P agreeing with comment, McClellan CJ at CL agreeing*)

The application of the *Immunities Act*

1 The general immunity, contained in s 9 of the *Immunities Act* is self-executing. It is not necessary for the foreign state to take any specific steps under the *Immunities Act*. The immunity in s 9 of the *Immunities Act* is jurisdictional. [31] [34]-[35] [157] [174]

2 The Court must satisfy itself that it has jurisdiction, whether or not a jurisdictional issue is raised by a party. [31] [37] [48] [157] [174]

Australian Federation of Islamic Councils Inc v Westpac Banking Corporation (1988) 17 NSWLR 623*; Federated Engine Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398 applied.

Cockle v Isaksen (1957) 99 CLR 155; *Federated Amalgamated Government Railway and Tramway Service Association v The NSW Railway Traffic Employees' Association* (1906) 4 CLR 488; *The King v Blakeley; Ex parte The Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54; considered.

Attorney-General (Queensland) v Riordan (1997) 192 CLR 1; *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243; (2002) 118 FCR 1; *Clyne v The New South Wales Bar Association* (1960) 104 CLR 186; *NABL v Minister for Immigration and Multicultural Affairs* [2002] FCA 102; *Old UGC v Industrial Relations Commission of New South Wales* [2006] HCA 24; (2006) 225 CLR 274; *Residual Assco Group Limited v Spalvins* [2000] HCA 33; (2000) 202 CLR 629 referred to.

3 An issue of jurisdiction should be determined as a preliminary matter. [33] [157] [174]

Hearne v Street [2008] HCA 36; (2008) 235 CLR 125; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 3 WLR 969; [1989] 1 Ch 72; *Khatri v Price* [1999] FCA 1289; (1999) 95 FLR 287 referred to.

The scope of immunity under the *Immunities Act*

4 This ground of appeal was not raised below and is fundamentally inconsistent with the way the proceedings below were conducted. The appellant relied on the challenged status of the first to third respondents in order to prove service under the *Immunities Act*. It is not appropriate for the status of those respondents to be raised for the first time on appeal. [57]-[59] [157] [174]

5 Furthermore, individual officers are encompassed within the scope of foreign state immunity at common law and under the *Immunities Act*. Heads of state are expressly provided for, and s 3(3)(c) encompasses individuals acting for, or indeed as, each of the government entities referred to therein. [71] [72] [77] [157] [174]

Grunfeld v United States of America [1968] 3 NSWLR 36; *Jones v Ministry of Interior of Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270; *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611; *Rahimtoola v The Nizam of Hyderabad* [1958] AC 379 considered.

Samantar v Yousuf 130 S.Ct 2278 (2010) distinguished.

6 In light of the text and the legislative scheme, and the range of purposes served by foreign state immunity, the relevant time at which to determine the status of an individual or entity as comprising part of the foreign state is the time of the conduct sought to be impugned. Those purposes are not confined to considerations of 'convenience' or 'chilling effect'. The purposes

of the *Immunities Act* would be circumvented if individuals could be sued in respect of conduct undertaken in their official capacity after the individual ceased to hold that office. [86] [106]-[107] [157] [174]

Compania Naviera Vascongado v Steamship "Christina" [1938] AC 485; *Playa Larga v I Congreso del Partido* [1983] 1 AC 244; *Rahimtoola v Nizam of Hyderabad* [1958] AC 379; *R v Bow Street Magistrate; Ex parte Pinochet (No 3)* [2000] 1 AC 147; *Zoernsch v Waldock* [1964] 1 WLR 675 considered.

Dole Food Company v Patrickson 123 S.Ct 1655; 538 US 468; *Juan Ysmael v Government of the Republic of Indonesian* [1955] AC 72; *Rahimtoola v Nizam of Hyderabad* [1958] AC 379; *United States of America v Dollfus Mieg Et Cie SA and Bank of England* [1952] AC 582; *Verlinden BV v Central Bank of Nigeria* 461 US 480; 103 S.Ct 1962 referred to.

The application of immunity to civil claims alleging torture

7 An Australian court must apply an Australian statute in accordance with its terms, even if doing so may conflict with a principle of international law. However, the court applies all principles of statutory interpretation, including the principle that where an ambiguity (in the broad sense of the term) exists, the court will seek to give effect to Australia's international obligations, including rules of customary international law. [125] [128] [157] [160] [174]

Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1; *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309; *Kartinyeri v The Commonwealth (Hindmarsh Island Bridge Act Case)* [1998] HCA 22; (1998) 195 CLR 337; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Polites v The Commonwealth* (1945) 70 CLR 60; *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681 followed.

8 The terms of s 9 of the *Immunities Act* "except as provided by or under this Act …" do not permit an exception based upon international law, such as an exception based on torture being contrary to a rule of jus cogens. That section represents the adoption by Australia of an absolute immunity subject to a comprehensive list of exceptions, as explained by ALRC Report 24 on Foreign State Immunity, upon which the legislation was based. [130] [136]-[138] [147]-[149] [157] [158] [162] [164] [174]

Re Bolton; Ex parte Beane (1987) 162 CLR 514; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 applied.

Bouzari v Islamic Republic of Iran (2004) 71 OR (3d) 675; *Jones v Ministry of Interior of Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270; *Playa Larga v I Congreso del Partido*

[1983] 1 AC 244; *Samantar v Yousuf* 130 S.Ct 2278 (2010) referred to.

(*Allsop P, concurring*)

9 The international community views torture as morally illegitimate and a criminal abuse of State power, that is the exercise of power through acts of officials or others in an official capacity. However, the terms of the Immunities Act are concerned with the capacity in which the act is done, not with its moral illegitimacy. An analysis which seeks to say that torture is not a public act or an official act or not an exercise of sovereign authority conflates the characterisation of the act with its moral illegitimacy and does not assist in removing foreign state immunity from such acts. [169]-[171]

ORDERS

1 Leave to appeal granted.

2 Appeal dismissed.

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

2009/00298096

SPIGELMAN CJ
ALLSOP P
McCLELLAN CJ at CL

Tuesday 5 October 2010

Cuiying Zhang v Jiang Zemin

Judgment

1 **SPIGELMAN CJ**: The appellant seeks leave to appeal from a judgment of Justice Latham in which her Honour, on the application of the Attorney-General intervening, made a declaration that the first three respondents were immune from the jurisdiction of the Supreme Court of New South Wales. The draft Notice of Appeal before the Court, as amended, contains three alternative grounds to which I will refer. The Court heard the application for leave and the appeal concurrently.

2 The appellant instituted proceedings by Statement of Claim claiming damages for assault, false imprisonment, wrongful arrest and acts of torture alleged to have been committed by or on behalf of the first to third respondents, on various occasions between December 1999 and August 2000, while the appellant was in China.

3 The first to third respondents are, respectively, the former President of the People's Republic of China (PRC), a department of the government of the PRC known as the Falun Gong Control Office and a member of the Politburo of the Communist Party of China. The fourth respondent is the Attorney-General of the Commonwealth.

4 Service was effected upon the embassy of the People's Republic of China pursuant to s 24 of the *Foreign States Immunities Act* 1985 (Cth) ("the *Immunities Act*").

5 Latham J dealt with two notices of motion. The first, filed on behalf of the appellant, sought default judgment for non-appearance. The second, filed on behalf of the Commonwealth Attorney-General ("the Attorney"), sought leave to intervene in the proceedings and a declaration that the first to third respondents were immune from the jurisdiction of the Court, under the provisions of the *Immunities Act*.

6 Her Honour granted the Attorney leave to intervene. The Attorney was added as a party to the proceedings, becoming the fourth respondent. Her Honour made the declaration sought by the Attorney. Her Honour's findings and the declaration were sufficient to dispose of the appellant's application for default judgment.

7 The parties have made submissions as to whether leave to appeal is required. I do not find it necessary to resolve this issue. The matters raised are of sufficient significance that, if leave is required, it should be granted.

8 The appellant also proceeds on a Notice of Motion seeking leave to withdraw a concession made before Latham J that the appellant did not intend to press the case against the first respondent. On the evidence, this concession was made by counsel at trial without instructions. However, I note that the concession was repeated in written submissions filed in this Court on 7 December 2009.

9 Again, I do not believe it is necessary to determine whether leave is required. It is appropriate, in view of the significance of the issues raised, to proceed on the basis that a matter which arose on the pleadings, but was not pressed below, is raised on appeal.

The Legislative Scheme

10 The principal provision applicable to the present proceedings is s 9 of the *Immunities Act* which provides for immunity from jurisdiction. Sections 10-20 of the *Immunities Act* identify exceptions to s 9. None apply to the circumstances of this case. Section 9 states:

> "9 Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding."

11 It will be necessary to refer to a number of other sections of the *Immunities Act* in this judgment. It is

convenient to set out the sections at the outset.

"3(1) In this Act, unless the contrary intention appears:

…

foreign State means a country the territory of which is outside Australia, being a country that is:

(a) an independent sovereign state; or

(b) a separate territory (whether or not it is self-governing) that is not part of an independent sovereign state;

…

proceeding means a proceeding in a court but does not include a prosecution for an offence or an appeal or other proceeding in the nature of an appeal in relation to such a prosecution;

…

(3) Unless the contrary intention appears, a reference in this Act to a foreign State includes a reference to:

(a) a province, state, self-governing territory or other political subdivision (by whatever name known) of a foreign State;

(b) the head of a foreign State, or of a political subdivision of a foreign State, in his or her public capacity; and

(c) the executive government or part of the executive government of a foreign State or of a political subdivision of a foreign State, including a department or organ of the executive government of a foreign State or subdivision;

but does not include a reference to a separate entity of a foreign State.

…

10(7) A foreign State shall not be taken to have submitted to the jurisdiction in a proceeding by reason only that:

(a) it has made an application for costs; or

(b) it has intervened, or has taken a step, in the proceeding for the purpose or in the course of asserting immunity.

…

23 Service of initiating process on a foreign State or on a separate entity of a foreign State may be effected in accordance with an agreement (wherever made and whether made before or after the commencement of this Act) to which the State or entity is a party.

24(1) Initiating process that is to be served on a foreign State may be delivered to the Attorney-General for transmission by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department.

…

25 Purported service of an initiating process upon a foreign State in Australia otherwise than as allowed or provided by section 23 or 24 is ineffective.

…

27(1) A judgment in default of appearance shall not be entered against a foreign State unless:

(a) it is proved that service of the initiating process was effected in accordance with this Act and that the time for appearance has expired; and

(b) the court is satisfied that, in the proceeding, the foreign State is not immune.

(2) A judgment in default of appearance shall not be entered against a separate entity of a foreign State unless the court is satisfied that, in the proceeding, the separate entity is not immune.

…

36(1) Subject to the succeeding provisions of this section, the *Diplomatic Privileges and Immunities Act 1967* extends, with such modifications as are necessary, in relation to the person who is for the time being:

(a) the head of a foreign State; or

(b) a spouse of the head of a foreign State;

as that Act applies in relation to a person at a time when he or she is the head of a diplomatic mission.

(2) This section does not affect the application of any law of Australia with respect to taxation.

(3) This section does not affect the application of any other provision of this Act in relation to a head of a foreign State in his or her public capacity.

(4) Part III extends in relation to the head of a foreign State in his or her private capacity as it applies in relation to the foreign State and, for the purpose of the application of Part III as it so extends, a reference in that Part to a foreign State shall be read as a reference to the head of the foreign State in his or her private capacity.

…

40(1) The Minister for Foreign Affairs may certify in writing that, for the purposes of this Act:

(a) a specified country is, or was on a specified day, a foreign State;

(b) a specified territory is or is not, or was or was not on a specified day, part of a foreign State;

(c) a specified person is, or was at a specified time, the head of, or the government or part of the government of, a foreign State or a former foreign State; or

(d) service of a specified document as mentioned in section 24 or 28 was effected on a specified day.

…

42(1) Where the Minister is satisfied that an immunity or privilege conferred by this Act in relation to a foreign State is not accorded by the law of the foreign State in relation to Australia, the Governor-General may make regulations modifying the operation of this Act with respect to those immunities and privileges in relation to the foreign State.

(2) Where the Minister is satisfied that the immunities and privileges conferred by this Act in relation to a foreign State differ from those required by a treaty, convention or other agreement to which the foreign State and Australia are parties, the Governor-General may make regulations modifying the operation of this Act with respect to those immunities and privileges in relation to the foreign State so that this Act as so modified conforms with the treaty, convention or agreement."

The Judgment of Latham J

12 In the proceedings before Latham J a certificate pursuant to s 40 of the *Immunities Act* by the Minister for Foreign Affairs dated 7 April 2008 was tendered. I set out the certificate in full:

"1. I, STEPHEN FRANCIS SMITH, Minister for Foreign Affairs, hereby certify, pursuant to section 40(1)(c) of the *Foreign States Immunities Act 1985* (FSI Act), that JIANG ZEMIN, the '610 OFFICE (FALUN GONG CONTROL OFFICE)' and LUO GAN against whom allegations are made in the legal proceedings in the New South Wales Supreme Court (Court number 20331 of 2004) (the proceedings), held the following positions and/or performed the following functions between 2000 and 2001, being the period relevant to the alleged tortious act(s) set out in the plaintiff's statement of claim in the proceedings:

a. JIANG ZEMIN was President of the People's Republic of China, General Secretary of the Communist Party of China (CPC) and Chairman of the Central Military Commission;

b. THE '610 OFFICE (FALUN GONG CONTROL OFFICE)' (plaintiff's nomenclature) was an organ of the Chinese Government established to implement the Government's policy towards the Falun Gong; and

c. LUO GAN was a Member of the CPC Political Bureau, Deputy-Secretary of the Political and Legislative Affairs Committee of the CPC Central Committee, State Councillor and Chairman of the National Frontier Defence Committee.

2. Having considered the following facts and matters:

a. the Chinese Government's assertion to the Department of Foreign Affairs and Trade (including through Diplomatic note no. 148/2007) that by virtue of their position and function in the Chinese Government, the defendants are immune from

prosecution under Australian law;

b. the positions and functions undertaken by the three defendants listed above;

c. the leading role of the CPC in the Government of the People's Republic of China, as established in practice and provided for by the Constitution of the People's Republic of China;

d. the Australian Government's long-standing official recognition, including through diplomatic practice, of CPC officials and organs as part of the Government of the People's Republic of China;

e. the established international recognition, through the practice of the international community, of CPC officials and organs as part of the Government of the People's Republic of China; and

f. the provisions of the FSI Act which define 'foreign State', particularly subsections 3(3)(b) and (c) of the FSI Act.

I further certify, that JIANG ZEMIN, THE 610 OFFICE (FALUN GONG CONTROL OFFICE) AND LUO GAN were all part of the government of a foreign State within the meaning of the FSI Act at the time of the alleged acts which form the basis of the plaintiff's claim."

13 Section 40 of the *Immunities Act* provides for such a certificate. At trial the admissibility of the certificate was contested. A ground of appeal raising the issue of admissibility has been abandoned. It is unnecessary to set out the way Latham J dealt with that matter. I observe that the Diplomatic note no 148/2007, referred to in par 2(a) of the Certificate was not tendered.

14 Latham J referred to the relevant provisions of the *Immunities Act* and to international authorities, to which I will refer further below. Her Honour dealt with the issue of immunity on both the application for default judgment (on which the appellant bore the onus) and on the Attorney's application for a declaration (on which the Attorney bore the onus).

15 After admitting the s 40 certificate over objection, Latham J identified the issues raised as follows:

"[13] The admission of the certificate, as already noted, is potentially fatal to the plaintiff's cause of action. The plaintiff submits that the acts of torture perpetrated upon her by the defendants, because of her adherence to Falun Gong, were not carried out in a public or official capacity. In other words, it is contended that the acts were the private acts of persons who occupied certain offices in the Peoples Republic of China and the CPC. In addition, it is submitted that immunity cannot prevail in the face of the generally recognised norm of international law prohibiting torture. The Attorney General submits that the contents of the certificate, which now constitute evidence in the proceedings, together with the operation of the FSI Act, confer immunity on the defendants. Further, the Attorney General maintains that there is no exception to immunity provided by the Act, or by international law, for acts of torture carried out in an official capacity, and that the acts alleged against the defendants clearly were of an official nature."

16 After citing relevant authorities, her Honour said:

"[29] How then, does the plaintiff seek to establish that the acts of the defendants, which

she acknowledges as acts of torture under the Convention, were not carried out in an official capacity? The short answer is that there is nothing contained within the Statement of Claim that provides a foundation for such a finding. To the contrary, the particulars tend to support the characterisation of the relevant acts urged upon the Court by the Attorney General.

[30] Each of the five incidents of trespass to the person alleged in the Statement of Claim involved the arrest of the plaintiff 'for being a Falun Gong practitioner'. Each of them refer to the imprisonment of the plaintiff in a detention centre or an army camp, where the alleged acts of torture took place. By their very nature, these activities were 'exercises of police, law enforcement and security powers [and therefore] … exercises of governmental authority and sovereignty.': *Bouzari v Islamic Republic of Iran* (2002) 124 ILR 428 at [28].

[31] The plaintiff acknowledges that the first defendant was, at the relevant time, the President of the Peoples Republic of China, and that he ordered the persecution of Falun Gong practitioners. The second defendant is an officer of the CPC, charged with carrying the policy of the first defendant into effect. The third defendant is an office-holder of the second defendant. The pleadings thereby recognise that these individuals and an agency have implemented State policy, that is, they have acted as agents of the State.

[32] It is no answer to this proposition to say that there is no evidence that the defendants were acting within the scope of the authorisation of the CPC or the Peoples Republic of China, or that the s 40 certificate does not assert that the defendants were acting under the authority of the State. The role of the s 40 certificate is limited by the terms of s 40(1) which specifies what the Minister may certify. The fact that the defendants were authorised to so act is not one of the matters that may be certified. The question is whether the Court is satisfied, on all of the evidence before it, that the defendants, as part of a foreign State, are not immune."

17 It was common ground before Latham J that the defendants had been served and, accordingly, no issue arose under s 27(1)(a). Her Honour determined the s 27(1)(b) case against the appellant and went on to reject the appellant's case on the issue of indemnity irrespective of the issue of onus, to which she referred as the "second limb", as follows:

"[34] Accordingly, the Court is not satisfied that [the] defendants are not immune. There is nothing about the circumstances under which the conduct of the defendants was carried out to suggest that they were not acting as agents of the Peoples Republic of China.

[35] The second limb of the plaintiff's argument has been determined against the plaintiff in a number of decisions which cannot be relevantly distinguished and which this Court should follow. Those cases establish that, whilst there are limited exceptions to State immunity, such as the commercial activities of foreign States, there is no exception to foreign State immunity for civil proceedings alleging acts of torture committed in a foreign State … "

18 Her Honour referred to the authorities in support of this proposition and rejected "the plaintiff's argument".

The First Ground

19 The first ground of appeal is:

"The court erred in concluding that the first, second and third defendants were entitled to immunity under s 9 of the *Foreign States Immunities Act* ("the Act") because the first, second and third defendants had not invoked the immunity."

20 This ground of appeal raises an issue which was not before Latham J. The appellant submits that the immunity can only be invoked if the foreign state and/or other defendants to proceedings make an application to set aside the originating process. Section 10(7)(b) of the *Immunities Act* permits a foreign state to appear for that purpose, without submitting to the court's jurisdiction.

21 The appellant contends that the immunity for which the *Immunities Act* provides must be invoked. She submits that the only procedural mechanism for doing so is s 38 which requires, relevantly, an application by the foreign state. Section 38 provides:

> "Where, on the application of a foreign State or a separate entity of a foreign State, a court is satisfied that a judgment, order or process of the court made or issued in a proceeding with respect to the foreign State or entity is inconsistent with an immunity conferred by or under this Act, the court shall set aside the judgment, order or process so far as it is inconsistent."

22 The principal submission of the Attorney is that the immunity does not need to be invoked. Section 9 applies of its own force.

23 In the present case, the issue of whether the first to third respondents were entitled to immunity was clearly before the Court on the appellant's own motion for default judgment. Section 27 is found in Pt III of the *Immunities Act* entitled "Service and Judgments". It prohibits the exercise by a court of the power to enter judgment in default of the appearance unless two conditions are satisfied. The first concerns service and the second, contained in s 27(1)(b), provides that the Court shall not make such an order unless "it is satisfied that … the foreign State is not immune". Latham J expressly held that she was not so satisfied.

24 Her Honour's analysis of the scope and application of the immunity was necessary for the purpose of determining the appellant's motion with respect to the application for default judgment. The respondents did not have to "invoke" the immunity. On its notice of motion, the appellant had to prove the negative proposition in s 27(1)(b).

25 Nothing in s 27 or its context suggests that the section requires an appearance by the foreign state pursuant to s 10(7)(b), or otherwise. Applications for default judgment are often made ex parte, as the Parliament would have been aware when enacting s 27. Indeed, one of the purposes of shifting the onus of proof on the issue of immunity is the recognition that, in this particular context, ex parte applications will occur often and indeed, perhaps, in the usual case.

26 Latham J did not only form the negative opinion that she was not satisfied, in accordance with s 27(1)(b). Her Honour also formed the positive opinion that the respondents were entitled to immunity. That issue was raised by the Commonwealth as intervenor.

27 In oral submissions Mr J Gleeson SC, who appeared for the appellant, submitted that, if the foreign state does not itself claim immunity, the Court is constrained by s 27. It could refuse the application

to enter default judgment but it could not go further. Specifically, Latham J ought not to have made the declaration sought by the Attorney without appearance by the respondents or the People's Republic of China.

28 However, the Attorney was joined as a party without objection. He sought and obtained a declaration, not in an *amicus* role, but as a party. He was entitled to do so because these proceedings involved the interests of the Commonwealth with respect to the exercise of the prerogative in the conduct of foreign relations. (See, eg, *Levy v Victoria* (1997) 189 CLR 579 at 601; *Duff Development Co Ltd v Kelantan* [1924] AC 797; *Engelke v Musmann* [1928] AC 433; *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 at 400.)

29 No suggestion was made at trial that the Attorney was not a proper party. He was entitled to seek a declaration. The declaration disposed of both the appellant's application for default judgment and the proceedings. No further order is required.

30 The appellant's written submissions asserted that s 38 was the only procedural mechanism by which an immunity can be invoked. That section requires the foreign state to make an application.

31 The Attorney's submission that s 9 does not need to be invoked, should be accepted for two alternative reasons. First, on the correct interpretation of the legislative scheme, s 38 is not some form of mini-code for determining an issue of immunity. Secondly, where any issue concerning its jurisdiction appears to arise in proceedings, a court must be satisfied that it does have jurisdiction, whether raised by a party or not.

32 Section 9 appears in Pt II of the Act entitled "Immunity from Jurisdiction". Section 38 appears in Pt V of the Act entitled "Miscellaneous". Section 38 is not concerned with the issue of jurisdiction. It is directed to the circumstance where a court has wrongly exercised jurisdiction, leading to a "judgment, order or process of the court". Section 38 is concerned, and concerned only, with a situation in which the court has in fact exercised the jurisdiction resulting in a formal manifestation of that exercise. Section 38 does not, in my opinion, establish an exclusive process by which (absent an application for default judgment under s 27) a challenge to the jurisdiction can be made.

33 In my opinion, s 9 is intended to have effect prior to the purported exercise of a jurisdiction to which it is addressed. In the usual case, the issue of jurisdiction should be determined as a preliminary matter. (See *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 3 WLR 969; [1989] 1 Ch 72 at 194G. See also in a cognate area *Khatri v Price* [1999] FCA 1289; (1999) 95 FLR 287 at [14]; *Hearne v Street* [2008] HCA 36; (2008) 235 CLR 125 at [17].)

34 Where s 9 applies a court is deprived of jurisdiction to hear and determine the matter. Section 9 has effect *prior* to any "judgment, order or process of the court". Section 9 is, as the Attorney submitted, self-executing.

35 Nothing in s 38 impliedly, let alone expressly, suggests that it is the sole mechanism for dealing with the issue of jurisdiction. In its terms, s 38 indicates that it is not. It applies only when there has been a "judgment, order or process" which is "inconsistent with an immunity" under the Act. The peremptory terms of s 9, and the whole of Pt II of the Act, suggest that the protection of s 9 is intended to apply *in limine* and not only after a "judgment, order or process" has issued from the court.

36 This conclusion is, in my opinion, reinforced by a purpose of the legislative scheme, one of which is to prevent foreign states from being subject to the necessity to participate in proceedings at any stage. That is one reason why s 9 is directed to the jurisdiction of the courts, rather than to the powers of the courts. Imposing a necessity on a foreign state to contest the issue of immunity in all circumstances is inconsistent with the attainment of that object.

37 A further, alternative, reason for rejecting the appellant's contentions is that there is a long line of authority that a court must satisfy itself that it has jurisdiction, whether or not a jurisdictional issue is raised by a party.

38 As Mr H Burmester QC, who appeared for the Attorney, submitted, the Court would have had to address this issue even if the Attorney had not intervened and even without the application for default judgment.

39 The determination of whether or not it has jurisdiction has been described as the "first duty" of a court. (See *Federated Engine Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398 at 415 per Griffith CJ.) That case involved a legislative scheme providing for a jurisdictional fact. As Isaacs J said in that context at 454:

> "What [the court] has to do at the outset is to satisfy its mind that it is not overstepping the bounds which Parliament has laid down for it."

40 To similar effect are the observations of Barton J when he said at 428:

> "Where the jurisdiction is disputed, adequate and careful inquiry is still the duty of the superior Court. On the other hand, where the jurisdiction is not contested by the party defending, very slight inquiry may be adequate, and many cases will to the mind of the tribunal be so plainly within its competence that it will rightly forego inquiry unless the objection is taken, and the objector tenders proof of facts in its support."

41 The observations of Griffith CJ and Barton J in *Federated Engine Drivers* supra, were applied by Fullagar J in *The King v Blakeley; Ex parte The Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54 at 90-91, where his Honour accepted of the language of "duty".

42 In *Cockle v Isaksen* (1957) 99 CLR 155, neither party wished to challenge the jurisdiction of the High Court to hear a particular appeal. However, the Court permitted the Commonwealth to intervene to argue the issue of validity, without, in that case, becoming a party. In the joint judgment Dixon CJ,

McTiernan and Kitto JJ, said at 161:

> " … we were not prepared to entertain the appeal simply because the parties wished us to do so."

43 (See also *Clyne v The New South Wales Bar Association* (1960) 104 CLR 186 at 205; *Attorney-General (Queensland) v Riordan* (1997) 192 CLR 1 at 48; *Residual Assco Group Limited v Spalvins* [2000] HCA 33; (2000) 202 CLR 629 at [68]; *Old UGC v Industrial Relations Commission of New South Wales* [2006] HCA 24; (2006) 225 CLR 274 at [51]; *Hearne v Street* supra at [17]; *Khatri v Price* supra at [14]; *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243; (2002) 118 FCR 1 at [187]-[188]; *NABL v Minister for Immigration and Multicultural Affairs* [2002] FCA 102 at [2].)

44 The observations of Barton J in *Federated Engine Drivers*, quoted at [40] above, indicate that it is not essential for an issue of jurisdiction to be raised by a party to proceedings. That matter had earlier been determined by the High Court in the course of a preliminary application in *Federated Amalgamated Government Railway and Tramway Service Association v The NSW Railway Traffic Employees' Association* (1906) 4 CLR 488. Objection had been taken to a point being raised by an intervenor concerning the validity of the statute, on the basis that such a point should not be raised except in litigation between parties, where it is necessary to determine the issue of validity. Griffith CJ, with whom Barton and O'Connor JJ agreed, said at 495:

> "A point of jurisdiction, when it is seriously raised or, if it suggests itself to the Court without being taken by a party, cannot properly be disregarded."

45 In my opinion these observations are directly applicable to the present case. The issue of immunity under s 9 does not need to be raised by a party. Even in ex parte proceedings, when an issue of jurisdiction arises, the court has to resolve the matter.

46 The position is as held by Cole J in *Australian Federation of Islamic Councils Inc v Westpac Banking Corporation* (1988) 17 NSWLR 623, in a case where a bank holding money under the control of a foreign state sought a stay on the basis of immunity. In rejecting an argument that the bank could not seek the stay, Cole J said at 633:

> " … [A]s the question of immunity goes to jurisdiction of the court, once matters are established by any party indicating an absence of jurisdiction, it [is incumbent] upon the court to stay the proceedings of its own motion."

47 The Australian Law Reform Commission in its Report 24: *Foreign State Immunity* (1984), Australian Government Publishing Service, Canberra ("the ALRC Report"), to which I will refer in some detail below, regarded the position as clear. It said at [26]:

> "If the foreign state does not appear in response to a writ … [I]t is left to the court to raise the issue of immunity of its own motion."

It did not suggest any legislative provision was required in this respect.

48 For this alternative reason, the appellant's contention that the immunity provided by the *Immunities Act* provides could not arise unless invoked by one of the first three respondents, or by the foreign state itself, should be rejected.

49 Mr Gleeson SC also submitted, without purporting to raise any kind of constitutional issue in this respect, that it was in some way contrary to the judicial process for a party to be granted immunity when it has not asserted that right. No authority was cited in support of this contention. Nor was any essential aspect of the judicial process identified.

50 It could not be suggested that there was any denial of procedural fairness. The appellant was fully heard and no relevant complaint is made in this respect, other than, perhaps, a suggestion that a plaintiff has some kind of right to invoke the Court's processes such as discovery and subpoenas to investigate the issue of immunity. No such right has ever been recognised in this, or any other context. It is contrary to long established procedures for summary dismissal. In a case where a real question of the jurisdiction of the court has arisen, the recognition of any such "right" would be perverse and contrary to the purpose of the *Immunities Act*.

51 Ground 1 should be rejected.

The Second Ground

52 The second ground of appeal also raises an issue that was not relied upon before Latham J. It is:

> "The Court erred in concluding that the first and third defendants were entitled to immunity under s 9 of the Act because the first defendant is not the head of a foreign State and the third defendant is not an officer within the executive government or part of the executive government of a foreign State within the meaning of s 3(3) of the Act."

53 The appellant contends that none of the respondents are entitled to the immunity under s 9 because it only applies to a person or entity that falls within the definition of "foreign State" at the time of the commencement of the proceedings. If the *Immunities Act* does not apply to former officers then, the appellant contends, the first and third respondents do not fall within the concept of "foreign State" as defined in s 3(1) and s 3(3) of the *Immunities Act.* In the course of oral submissions the appellant extended this ground beyond its terms. She submitted that s 3(3)(c) did not apply to individuals at all.

54 The Attorney conceded that the first respondent no longer held office as President. However, there was no concession as to when, or whether, he ceased to hold office as Chairman of the Central Military Commission, or was no longer "part of the government", to both of which the s 40 certificate, set out at [12] above, also referred. There was no evidence or concession that the third respondent no longer held the positions referred to in the certificate.

55 The s 40 certificate addresses, and addresses only, the status of the first three respondents as at the date

of the conduct alleged in the Statement of Claim. This was the basis on which the proceedings were conducted before Latham J. The time at which to assess the status of the respondents is not a matter that should be permitted to be raised for the first time on appeal. It could have been the subject of evidence as to the positions, if any, of the respective respondents as at the date of the commencement of proceedings.

56 This conclusion is reinforced by a further aspect of the trial.

57 This ground of appeal not only raises a new issue, it is inconsistent with the position taken before Latham J. The contention in this Court is that the first and third respondents are not within the definition of "foreign State" in the *Immunities Act*. However, service of the Amended Statement of Claim was effected pursuant to s 24 of the *Immunities Act*. That section authorises service through diplomatic channels upon a "foreign State".

58 Accordingly, the appellant could only prove service on the assumption that the first and third respondents did fall within the concept of a "foreign State" within the meaning of the *Immunities Act*. Proof of service under s 27(1)(a) was common ground before Latham J. On the material before this Court, if the appellant were successful on this second ground of appeal, it could not prove service on the first and third respondents.

59 This Court should not permit a ground which is fundamentally inconsistent with the way the proceedings below were conducted to be raised for the first time on appeal. By reason of this inconsistency it is not appropriate to remit the matter for consideration of the issue of service, as requested by the appellant.

60 I would reject this ground of appeal on the above basis. However, as the matter may go further, it is appropriate to deal with the substantive submissions.

61 It is convenient to deal first with the submission of Mr Burmester QC, for the Attorney, that officers, including former officers, are encompassed in the concept of "foreign State", within the meaning of s 3(1) the *Immunities Act*. Alternatively, he submitted that such officers fall within the extended, inclusive definition in s 3(3). The Attorney contended that this is so, in the case of the first respondent, by force of par (b) of that subsection. Further, the Attorney contended that each of the first and third respondents fall within par (c) of the subsection, as "part of the executive government" of the foreign state.

62 In my opinion, the words "foreign State" in s 3(1) should be confined to the sovereign entity itself. Section 3(3) was intended to state comprehensively the component parts of government that are entitled to claim the same immunity as the state itself. The purpose of s 3(3) was to resolve what the ALRC Report, identified as a "vexed question" about "what entities apart from the State, head of state and central government should be entitled to the shield of foreign State immunity" (at [20]).

63 Furthermore, the words in s 3(3)(b) qualifying the reference to head of state to "in his or her public capacity" are words of limitation. They are interrelated with the extension, by s 36 to the person who is "for the time being" the head of state, of the immunity conferred by the *Diplomatic Privileges and Immunities Act* 1967 (Cth). It is not, in my opinion, consistent with these words of limitation in s 3(3)(b) for the head of state to also fall within the concept of "foreign State" in s 3(1).

64 In respect of the third respondent, the appellant submits that the *Immunities Act,* save in the case of a serving head of state, does not apply to individuals at all.

65 This submission can be rejected on the basis of the text. Section 40(1)(c) empowers the Minister to certify that "a specified person is, or was at a specified time … part of the government of a foreign State". This provision would have no work to do if individuals were not encompassed within the scope of the immunity for which the Act provides.

66 Furthermore, there is authority that individual officers were entitled to the benefit of state immunity at common law. Nothing in the text, scope and purpose of the *Immunities Act* suggests that it was intended to change this position. Indeed, in my opinion, this proposition would, if accepted, render the legislative scheme, and the principles of international law which it was clarifying and implementing, virtually devoid of practical significance.

67 The *Immunities Act* was enacted in the form recommended by the ALRC Report. Perhaps atypically with respect to such extrinsic material, the ALRC Report is a useful source of instruction about the purpose of the *Immunities Act* or, in earlier terminology, about the mischief to which it was directed.

68 With respect to the position of individuals and instrumentalities of the state, the ALRC Report said:

> "[20] *Organs, Agencies and Instrumentalities*
>
> Apart from the basic distinction between immune and non-immune conduct or transactions, the most vexed question in foreign State immunity has been what entities apart from the State, head of state and central government should be entitled to the shield of foreign State immunity. This is not an area in which executive certificates are available to resolve difficulties. With respect to individuals, once it is shown that a person acted 'for the purposes of the foreign State itself' rather than a personal capacity, immunity can be claimed."

69 With respect to this last sentence, the ALRC Report cited as authority the judgments in *Grunfeld v United States of America* [1968] 3 NSWLR 36 at 38 and *Rahimtoola v The Nizam of Hyderabad* [1958] AC 379.

70 In *Grunfeld* supra at 37-38, Street J held that the arm of the executive government of the United States known as the R & R Office, and its Commanding Officer, both located in Sydney, were entitled to immunity with respect to an alleged breach of a contract entered into as agents of the United States of America. The reference to "agency" was a direct application of the observations of Viscount Simonds in *Rahimtoola v The Nizam of Hyderabad* supra at 393.

71 The manner in which the ALRC Report addressed what it described as this "most vexed question" was by recommending the enactment of what became s 3(3). In my opinion, s 3(3)(c) was intended to encompass individuals acting for, or indeed as, each of the government entities therein referred.

72 With respect to the head of state, when discussing the definitions proposed in the annexed legislation, the ALRC Report considered the definition of "foreign State" in terms of sovereign entities (at par [67]). With respect to the "central government and head of state" the ALRC noted: "little needs to be said on this point" (at [70]). It acknowledged that proceeding against the government or head of state was proceeding against the state itself. With respect to the subcategory "Agencies, Instrumentalities and Other Special Entities", the ALRC Report acknowledged "There is no simple test" for determining those entitled to claim immunity (at [71]). It went on to discuss the United Kingdom legislation, the *Foreign State Immunities Act* 1978 (UK) and to recommend the adoption of its approach.

73 In *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611, the Court of Appeal of England and Wales concluded that the concept of "governmental or sovereign" activity, within the meaning of the English equivalent of s 9 of our *Immunities Act,* should be given a broad scope extending to the performance of police functions as "essentially a part of governmental activity" (at 669). In a striking manifestation of the significance of the principle of reciprocity in international relations, the applicant for the immunity in that case was the Commissioner of the Australian Federal Police.

74 Their Honours continued at 669:

> "The protection afforded by the Act of 1978 to states would be undermined if employees, officers (or as one authority puts it 'functionaries') could be sued as individuals for matters of state conduct in respect of which the state they were serving had immunity. Section 14(1) must be read as affording to individual employees or officers of a foreign state protection under the same cloak as protects the state itself."

75 The reasoning of the Court of Appeal in *Propend Finance* was approved by the House of Lords in *Jones v Ministry of Interior of Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270 where, by reference to this and other authorities, Lord Bingham said at [10]:

> "The foreign State's right to immunity cannot be circumvented by suing its servants or agents."

76 His Lordship went on to say:

> "[30] … A State can only act through servants and agents; their official acts are the acts of the State; and the State's immunity in respect of them is fundamental to the principle of State immunity."

77 Numerous similar quotations could be gathered. In my opinion, this proposition is so obvious that it is not surprising that the drafter of the *Immunities Act* did not find it necessary to make any express reference to individuals in, relevantly, s 3(3)(c). The various entities listed in that section – "executive

government", "department", "organ"- act through individual officers. The appellant's submissions in this regard should be rejected.

78 The appellant relied on the recent decision of the Supreme Court of the United States in *Samantar v Yousuf* 130 S.Ct 2278 (2010) which established that the equivalent legislation in the United States was not intended to apply to individuals and that the position of individuals was governed by the common law. The constitutional and legislative position is so different in Australia, that I do not find that decision of significant assistance for the purposes of interpreting the Australian legislation.

79 The alternative and primary submission – that former officers are not entitled to immunity – is primarily based on the fact that s 9 is expressed in the present tense, ie, "*is* immune" and the immunity applies with respect to the jurisdiction of a court "in a proceeding". The present tense is used in the definition of foreign state in s 3(1) in terms of "a country that is … an independent foreign State". The appellant also submitted that the present tense appears in s 3(3). However, the only verb in that subsection is "includes" which refers to other provisions of the Act and takes the matter no further.

80 The use of the present tense in s 9, which the appellant contends provides textual foundation for its interpretation, is explicable in other ways. The question of immunity only arises with respect to proceedings that have been instituted. Such a proceeding could involve other parties. Section 9 would make little sense if it used the past tense.

81 The Attorney invokes s 40 (1)(c) as textual support for the interpretation for which he contends. That section, as I have discussed, authorises the Minister to certify both that "a specified person *is*" and that s/he "was at a specified time" either "the head of, or the government or part of the government of a foreign State". Indeed, this section goes further to authorise such certification in the case of "a former foreign State".

82 It is not clear to me how one takes civil proceedings against a former sovereign state. Nor indeed how one takes proceedings against a former "part of the government". In each case, the only proceedings which I can envisage are proceedings against individuals who formerly held office in the state or governmental entity that has ceased to exist.

83 Section 40(1)(c) is concerned with persons who are "specified" in the certificate. This paragraph picks up, in the case of an individual, the introductory words of both s 3(3)(b) and (c). It probably also, inferentially, picks up the inclusory final clause of s 3(3)(c).

84 A further textual indication is found in s 36(1) which, as I have noted, extends the *Diplomatic Privileges and Immunities Act* to a person "who is *for the time being* … the head of a foreign State" (emphasis added). Where Parliament intended to confine the operation of the *Immunities Act* to the period of occupancy of an office, it said so expressly.

85 Having regard only to the text, in my opinion, the use of the present tense in s 9 is a significantly weaker, if any, textual indicator than the two matters to which I have referred, particularly s 40(1)(c).

86 The provision of a conclusory certificate by the Minister for Foreign Affairs under s 40 is a central feature of the legislative regime, intended to apply when an issue of immunity arises in legal proceedings. The express statement that such a certificate can identify "a specified time" is, in my opinion, a strong indication that s 9, the principal operative provision of the legislative scheme, is not intended to have effect with respect to the time of institution of proceedings. Of course the time specified could be the date of the proceedings, but if that were envisaged it would have been easy to say so. The specification of the time is left at large so that it can refer to the conduct sought to be impugned.

87 Mr Gleeson SC submitted that United States case law had identified two possible purposes of state immunity. First, that the objective of such immunity is to respect comity by way of avoiding foreign states being exposed to the inconvenience of proceedings. Secondly, to avoid the chilling effect on future conduct by a foreign state or its manifestation. He submitted that the former was the objective and, accordingly, a person or entity who or which was no longer a manifestation of the foreign state could be joined in proceedings without inconveniencing the state itself.

88 The judgment of the Supreme Court of the United States relied on by Mr Gleeson SC is *Dole Food Company v Patrickson* 123 S.Ct 1655; 538 US 468, where the Court said at 1663:

> "Foreign Sovereign immunity … is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns."

89 The judgment referred at this point to an earlier judgment of the Court in *Verlinden BV v Central Bank of Nigeria* 461 US 480; 103 S.Ct 1962. However, I can find nothing in that case to support the proposition in *Dole Food.*

90 In my opinion, the purposes of the *Immunities Act* cannot be confined to "inconvenience" or, indeed, to "chilling effect". The reduction of the purpose of state immunity to this glib duality should not be accepted for purposes of determining the scope and purpose of the *Immunities Act.*

91 In Anglo-Australian law the purpose of state immunity has always been expressed on a higher plane than either "inconvenience" or "chilling effect". Perhaps the most commonly cited statement in this context is that of Lord Atkin in *Compania Naviera Vascongado v Steamship "Christina"* [1938] AC 485 ("*the Christina*") at 490 where his Lordship said:

> " …[T]he courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings …"

This formulation has often been applied.

92 However, Lord Atkin's observations must not be treated as if they were "graven on tables of stone" or as a "statutory definition". (See *United States of America v Dollfus Mieg Et Cie SA and Bank of England* [1952] AC 582 at 615 and 621 per Lords Radcliffe and Tucker respectively.)

93 An influential statement of the common law position is the following passage from *The SS Christina*, where Lord MacMillan said at 498:

> "When the doctrine of the immunity of the person and property of foreign sovereigns from the jurisdiction of the Courts of this country was first formulated and accepted it was a concession to the dignity, equality and independence of foreign sovereigns which the comity of nations enjoined."

94 References to the "dignity" of a sovereign state appear frequently in subsequent authority. (See, eg, *United States of America and Republic of France v Dollfus Mieg* supra per Lord Tucker at 621; *Juan Ysmael v Government of the Republic of Indonesian* [1955] AC 72 at 86; *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 per Viscount Simonds at 395 and at 417 per Lord Denning.)

95 In *The Christina* supra, Lord Wright identified a range of purposes for the doctrine of state immunity at 502-503. (See also the consideration of a number of different considerations under the heading "The Rationale for the Immunity" in Hazel Fox QC *The Law of State Immunity* (2nd ed, 2008) Oxford University Press at pp 45-61.)

96 Furthermore, in *Playa Larga v I Congreso del Partido* [1983] 1 AC 244 ("*I Congreso del Partido*"), the case in which the House of Lords adopted the "restrictive theory" of State immunity, Lord Wilberforce said at 262:

> "It is necessary to start from first principle. The basis upon which one state is considered to be immune from a territorial jurisdiction of the courts of another state is that of 'par in parem' which effectively means that the sovereign or governmental act of one state are not matters upon which the courts are other states will adjudicate."

97 His Lordship stated that one of the bases of the "restrictive theory", with respect to commercial transactions, was:

> "To require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions."

98 He went on to distinguish between a "private act" and a "sovereign or public act". His Lordship went on to note that it may not always be easy to decide how to categorise particular conduct entered into on behalf of a state. As he put it at 264:

> "The activities of states cannot always be compartmentalised into trading or governmental activities; and what is one to make of a case where a state has, and in the relevant circumstances, clearly displayed, both a commercial interest and a sovereign or governmental

> interest? … This difficulty is inherent in the nature of the 'restrictive' doctrine introducing as it does an exception, based upon a certain state of facts, to a plain rule."

99 The ALRC Report, which rejected the vagueness of terminology such as "private" and "public", also identified a range of purposes for the doctrine of state immunity. It discussed the following in a Chapter entitled "Underlying Principles of Foreign State Immunity":

> Respect for the independence of other States.
>
> Reciprocity.
>
> Avoidance of conflict in international relations.
>
> The requirements of international law.

100 Under the first heading of "Respect for Independence", the authors noted at [37]:

> "The original justification for immunity, and one which still carries weight in relation to acknowledged areas within the authority of other States, is the notion of the sovereign equality of states. In the absence of special factors one does not exercise jurisdiction over equals: *par in parem non habet jurisdictionem."*

101 After discussing the application of the principle of equality the authors concluded at [37]:

> " … in cases involving, for example, the exercise of administrative or political power by the foreign state, especially within its own territory, the principle has much more weight."

102 With respect to the heading of "Reciprocity" they noted that at [38]:

> "Like other arguments in this field, the argument of reciprocity does not lead to any single or simple solution, nor does it avoid the need to balance conflicting considerations. But it does draw attention to the possible consequences of excessive claims. … it is suggested that reciprocity is not as such a satisfactory rule to adopt …"

103 With respect to the heading "Avoidance of Conflict", the authors stated that the exercise of jurisdiction against foreign states: "can raise serious difficulties" and noted that that may be particularly the case for relations with countries which continue to assert an absolute right to immunity, such as the People's Republic of China (see [39]).

104 With respect to the heading "Requirements of international law", the authors noted that international law does impose some restraint on exercises of jurisdiction, but that there is no general agreement on the extent of those restrictions. The authors said at [40]:

> "[The] distinction (upon which both the international and common law of state immunity are said to rest) between 'sovereign', 'public' or 'governmental' acts and 'private', 'commercial' or 'private-law' acts is far from clear or easy to apply. Indeed it has often been said to be an incoherent or unworkable distinction. As we have seen, there is no consensus in international

> law or practice as to exactly where the line is to be drawn. The better view is that the apparently categorical distinction between *acta iure imperii* and *acta iure gestionis* is a reflection of a number of different international law principles and requirements which can be regarded as underlying the notion of restrictive immunity."

The authors went on to identify a number of such principles.

105 At the end of its discussion of "Underlying Principles" the ALRC Report stated:

> "[45] Conclusions
>
> There can be no questions of eliminating entirely the immunity of foreign states and their organs from the jurisdiction of Australian courts. At the same time there are good reasons for restricting that immunity within proper limits. The difficulty is that international law, while allowing such a restriction, does not itself prescribe the criteria to be applied, at least in any specific or detailed way. It is therefore necessary to examine in more detail how the distinction is to be drawn between immune and non-immune transactions to assist both in assessing the adequacy of the common law and in formulating (if necessary or desirable) a legislative alternative."

106 In my opinion, the full range of purposes of the *Immunities Act* cannot be served if the legislation has effect only as at the date of the institution of proceedings. The date of the proceedings is, in my opinion, irrelevant in the context of those purposes.

107 Far from being concerned merely with the "inconvenience" of the foreign state or any kind of "chilling effect" upon conduct in the future, the legislative scheme is primarily concerned to serve purposes arising from the nature of a state as the principal actor in international relations, in its character as such and, through reciprocity, thereby serving the interests of Australia as such a state. Whenever conduct undertaken by or on behalf of a foreign state within its territory is sought to be impugned, these fundamental characteristics of the system of relations amongst sovereign states are brought into question. The purposes of the *Immunities Act* are not served if an individual can be sued with respect to conduct conducted in the name and/or on behalf of the state after the person has ceased to hold the office in which that conduct was undertaken.

108 For purposes of determining this issue, I find considerable assistance from the observations of Diplock LJ, with respect to the purpose of diplomatic immunity, as extended by statute to officers of international organisations, in *Zoernsch v Waldock* [1964] 1 WLR 675 in which he said at 691-692:

> "The immunity of an envoy from suit or legal process arises from the duties owed by states to one another in international law. In respect of acts done by an envoy in his private capacity the purpose of his immunity from suit or legal process is so that he may perform his duties to his government without harassment while 'en poste'. The immunity is from legal process, not from liability, and its purpose is fulfilled when he has ceased to be 'en poste' and has had a reasonable time to wind up his affairs in the country to which he is accredited. The English cases show that in English law an envoy's immunity from suit and legal process in respect of acts done in his private capacity endures only so long as he is 'en poste' and for a sufficient time thereafter to enable him to wind up his affairs: *Magdalena Steam Navigation Co v Martin* (1859) 2 E & E 494; *Musurus Bey v Gadban* [1894] 2 QB 352; 10 TLR 493. But quite different considerations, however, apply to acts done by him in his official capacity. Such acts are done on behalf of his government. His government being a foreign sovereign

> government, under principles of English law which are so well known that I refrain from citing authority, is immune from the jurisdiction of the English courts. The propriety of its acts cannot be examined in a municipal court unless it consents to waive its immunity. A foreign sovereign government, apart from personal sovereigns, can act only through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be 'en poste' at the date of the suit.
>
> Even if there were no previous authority on the subject, I should have no hesitation in holding that an envoy's immunity from suit and legal process in respect of acts done in his official capacity was permanent, unless waived by his government, and did not cease with his ceasing to be 'en poste'. But I think, that there is already authority for this proposition in *Rahimtoola v Nizam of Hyderabad* [1958] AC 379."

109 In the *Nizam of Hyderabad* case, a claim was made against the *former* High Commissioner for Pakistan personally for money had and received. He established that he had received the money in England in his official capacity as High Commissioner. In those circumstances it was held, in accordance with the principles that I have stated, that an English court had no jurisdiction to entertain the claim.

110 The reasoning in *Nizam of Hyderabad*, as explained by Lord Diplock in *Zoernsch v Waldock,* is applicable to the present proceedings. A *former* officer of a sovereign state was entitled to the immunity with respect to his status at the time of the relevant conduct, not his status at the time of the institution of proceedings.

111 As Lord Browne-Wilkinson said in *R v Bow Street Magistrate; Ex parte Pinochet (No 3)* [2000] 1 AC 147 at 202, after referring to the immunity of a former ambassador:

> "In my judgment at common law a former head of state enjoys similar immunities, ratione materiae once he ceases to be head of state. He too loses immunity, ratione personae, on ceasing to be head of state. … He can be sued on his private obligations. … As ex head of state he cannot be sued in respect of acts performed whilst head of state in his public capacity: *Hatch v Baez* (1876) 7 Hun 596. Thus at common law the position of the former ambassador and the former head of state appears to me to be much the same: both enjoy immunity for acts done in performance of their respective functions whilst in office."

(See also, to similar effect, at 265 per Lord Hutton; 268 per Lord Millett and 281 per Lord Phillips but c/f *Jones v Ministry of Interior of Saudi Arabia* [2004] EWCA Civ 1394; [2005] 2 WLR 808 at [128]-[129] per Lord Phillips.)

112 This also represents, in my opinion, the common law of Australia. The *Immunities Act*, specifically s 9 in combination with s 3(3), did not change the common law with respect to the scope of the persons whose conduct fell within the immunity of the state. Nothing in the ALRC Report suggests any change was intended to the common law in this respect.

113 For the reasons I have outlined above, the *Immunities Act* does apply to former officers. This ground of appeal should be rejected.

The Third Ground

114 The final ground of appeal is:

> "The Court erred in concluding that the first, second and third defendants were entitled to immunity under s 9 of the Act because no such immunity exists in respect of civil claims arising out of acts of torture."

115 This ground raises matters which were agitated to some extent before Latham J with respect to the second and third respondents. The appellant contends that the immunity does not apply to acts of torture.

116 Written and oral submissions in this Court on ground 3 proceeded as if the case concerned only torture. That is not so. The Amended Statement of Claim alleges a case of trespass involving the intentional infliction of damage. The particulars identify causes of action in false imprisonment, wrongful arrest, assault and battery as well as torture.

117 Clause 6 of the Statement of Claim identified the causes of action alleged as follows:

> "6 The injuries for which an award of damages is sought by the plaintiff were caused by the defendants and their servants and agents:
>
> (i) wrongful arrest;
>
> (ii) assaults and batteries;
>
> (iii) torture;
>
> (iv) total restraint; and
>
> (v) false imprisonment of the plaintiff."

118 The pleading goes on to state that each arrest, assault and detention "was without lawful excuse". It further states that "each act of torture cannot be justified". Particulars were given of trespass with respect to five separate periods of time: 31 December 1999 to 1 January 2000, 26 to 29 January 2000, 4 to 11 February 2000, 5 March to 4 November 2000 and 13 January 2001. They include allegations of torture only with respect to the periods 26 to January 2000 and 4 to 11 February 2000.

119 It is clear that the third ground of appeal cannot apply to many of the allegations contained in the Amended Statement of Claim. No attempt was made in this Court to support the allegations of wrongful arrest, assault and false imprisonment on the basis of this ground of appeal.

120 The appellant's written submissions in this Court were not signed or settled by Mr Gleeson SC. Those submissions contended that international law confers universal jurisdiction on the Australian

courts to hear and determine a civil claim of torture. This was said to arise by the direct application of international law because a rule recognised as *jus cogens* is a peremptory, non-derogable norm of international law of a superior status to other rules of international law. In oral submissions and in supplementary written submissions, Mr Gleeson SC abandoned the contention that this Court had any such universal civil jurisdiction.

121 There is a considerable body of authority denying the existence of such jurisdiction, despite the recognition of the prohibition of torture as *jus cogens.* (See *Al-Adsani v United Kingdom* (2002) 34 EHRR 111 and *Kalogeropoulou v Greece and Germany,* Judgment on Admissibility 12 December 2002 (ECHR) (Europe); *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675 (Canada); *Jones v Ministry of Interior of Saudi Arabia* [2006] UKHL 26 (United Kingdom); *Fang v Jiang* [2007] NZAR 420 (New Zealand).) The only exception is Italy, against which Germany has instituted proceedings in the International Court of Justice in this regard. (Jurisdictional Immunities of the State (*Germany v Italy)* General List No 143, ICJ; See also A Binanchi, *Ferrini v Federal Republic of Germany* (2005) 99 *Am J Int'l* 242.)

122 Mr Gleeson SC's submissions were directed to the interpretation of s 9, culminating in the proposition that, in the case of torture, s 9 does not apply because the words "foreign State" in that section do not extend to encompass conduct by or on behalf of the State which amounts to torture. Alternatively, the words "in his or her public capacity", s 3(3)(b), together with the implicit equivalent application of the entities identified in s 3(3)(c), should be interpreted so as not to extend to acts of torture.

123 The steps by which Mr Gleeson SC supported the above conclusion were set out by him as follows:

(i) A statute should where possible be interpreted consistently with international law.

(ii) International law recognises certain peremptory norms described as *jus cogens* which no State is free to depart from.

(iii) Those norms include torture and have included torture at all times material to this case.

(iv) In the criminal context there is now a species of universal criminal jurisdiction in torture cases as a reflection of *jus cogens*.

(v) International law does not recognise acts which are *jus cogens* to be acts done in a public or official capacity.

124 Accordingly, it is no part of the public capacity of the executive government or of the head of state to torture the citizens of that state and the words "foreign State" in s 9, as further defined in s 3, do not extend to such conduct.

125 Where, as here, an Australian statute applies to circumstances to which international law also applies,

an Australian court must apply the local statute in accordance with its terms, even if doing so may conflict with a principle of international law. The court applies all principles of statutory interpretation, including the principle that, where permissible, the court will seek to give effect to Australia's international obligations, including rules of customary international law. (*Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309 at 363; *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 74-77, 79, 81; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168 at 203-204, 211-212, 224; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 303-305; *Kartinyeri v The Commonwealth (Hindmarsh Island Bridge Act Case)* [1998] HCA 22; (1998) 195 CLR 337 at [97].)

126 This principle affects the interpretative tasks that arise in the course of statutory interpretation, including:

> Deciding the meaning of ambiguous or obscure words.
>
> Deciding whether to read down general words.
>
> Deciding whether a definition does not apply on the basis of a strained construction.
>
> Considering whether to depart from the natural and ordinary meaning of words by adopting a strained construction.
>
> Giving qualificatory words an ambulatory operation.
>
> Drawing implications from the text.
>
> Reading words into a statute by filling gaps.

127 I have discussed those processes on other occasions. See, eg, *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681 and the authorities discussed in J J Spigelman, *Statutory Interpretation and Human Rights: The McPherson Lecture Series* Vol 3 (2008) Queensland University Press, esp at pp 47, 117-143.

128 There must, however, be some ambiguity, in the broad sense of the term, in the legislative scheme which permits the court to interpret the legislation consistently with customary international law or Australian treaty obligations. (See, eg, *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.)

129 As Mason CJ and Deane J, with whom Gaudron J agreed, said in *Teoh* supra at 287-288:

> "In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If

> the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations."

130 Section 9 of the *Immunities Act* commences with the words "Except as provided by or under this Act …". The Act goes on to identify a number of specific exceptions. In my opinion, the words "except as provided by or under this Act" do not allow for any exception based upon international law, even if that law is of the character for which the appellant contends.

131 Lord Bingham's analysis in *Jones v Ministry of Interior* supra, is precisely in point. Section 1(1) of the *State Immunity Act* 1978 (UK) provides:

> "A state is immune from the jurisdiction of the courts in the United Kingdom except as provided in the following provisions of this Part of the Act."

132 Sections 2-11 of the UK Act identify proceedings from which a state is not immune. They are the equivalent of ss 10-20 of the *Immunities Act.* In my opinion, s 1(1) of the UK Act is indistinguishable from s 9 of the *Immunities Act.*

133 Lord Bingham's analysis is applicable to the Australian legislation. He said at [13]:

> " … On a straightforward application of the 1978 Act, it would follow that the Kingdom's claim to immunity for itself and its servants or agents should succeed, since this is not one of those exceptional cases, specified in Part 1 of the 1978 Act, in which a state is not immune, and therefore the general rule of immunity prevails. It is not suggested that the Act is in any relevant respect ambiguous or obscure: it is, as Ward LJ observed in *Al-Adsani v Government of Kuwait (No 2)* (1996) 107 ILR 536, 549, 'as plain as plain can be'. In the ordinary way, the duty of the English court is therefore to apply the plain terms of the domestic statute. …"

134 The only reason why the House or Lords felt it necessary to go beyond this interpretation is because of the impact of the *Human Rights Act* 1988 (UK). This is not necessary in Australia.

135 I note that the Supreme Court of the United States reached the same conclusion with respect to a similarly worded provision in *Samantar v Yousuf* supra at 7. So did the Ontario Court of Appeal in *Bouzari* supra at [42]. (The Supreme Court of Canada refused leave to appeal.)

136 In my opinion, there is nothing ambiguous, even in the broad sense of that term, about the words: "Except as provided by or under this Act" in s 9. By enacting Part II of the *Immunities Act,* Parliament intended to remove the uncertainty in the state of both international law and the common law by creating, in s 9, an absolute immunity and providing, in subsequent sections, for a precise and complete list of exceptions. It would, in my opinion, undermine this objective to introduce a limitation of the kind for which the appellant contends upon the natural and ordinary meaning of the words "Except as provided by or under this Act" in s 9 or the words "in his or public capacity", with reference to the head of state, in s 3(3)(b) and the equivalent limitation which may be implicit in the

references to the various manifestations of executive government in s 3(3)(c).

137 I find the introductory words in s 9 – "Except as provided by or under this Act" – intractable. For this reason alone, this ground of appeal should be rejected. The position is like that described by Mason CJ, Wilson and Dawson JJ, in *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 519:

> "[W]e are concerned with an Act which purports to cover the field … and we do not think there is any room for international law to make up any deficiency, whether the result of inadvertence or not, which may appear in the law."

138 Section 9 is not, in my opinion, ambiguous or obscure, within the meaning of s 15AB(1)(b)(i) of the *Acts Interpretation Act* 1901 (Cth). It is not necessary to have regard to extrinsic material pursuant to that section. Nevertheless, as the parties emphasised the significance of the ALRC Report, which proposed legislation in the precise form of the *Immunities Act,* it is appropriate to refer to that report in order to identify its purpose in the sense of the mischief to which the Act was directed. (See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.) The Report confirms that the meaning of s 9 is its natural and ordinary meaning, within s 15AB(1)(a).

139 At the time that the ALRC Report was presented and acted upon by the Commonwealth Parliament, there was no clarity in the principles of international law which determined what kinds of official conduct were entitled to immunity. As Lord Denning put it in *Nizam of Hyderabad* supra at 417-418, in a judgment which was disapproved by other Law Lords in that case, but which has subsequently been very influential:

> "Search as you will among the accepted sources of international law and you will search in vain for any set of propositions. There is no agreed principle except this: that each State ought to have proper respect for the dignity and independence of other States. Beyond that principle there is no common ground. It is left to each State to apply the principle in its own way, and each has applied it differently. Some have adopted a rule of absolute immunity which, if character which logical extreme, is in danger of becoming an instrument of injustice. Others have adopted a rule of immunity for public acts not for private acts, which has turned out to be a most elusive test. All admit exceptions. There is no uniform practice. There is no uniform rule. …"

140 The ALRC Report emphasised at pp xv-xvi that the common law had developed considerably in recent times. The Report went on to outline in some detail the nature of that recent development and the issues that had arisen because of it. It specifically noted the enactment of legislation in a number of common law jurisdictions in the light of these developments. (See at [16].)

141 The general nature of the development at common law was described (at [9]-[11]) as the substitution of the traditional "absolute immunity" approach by a "restrictive immunity" approach. The latter reflected the development of exceptions to state immunity which had arisen primarily because of the expansion of governmental conduct beyond traditional roles into commercial and trading activities. (For the progression of the UK case law see the analysis by Lord Cross of Chelsea in *The Philippine Admiral v Wallem Shipping* [1977] AC 373 esp at 391-393 and 397-399 and the analysis by Lord Denning in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529 at 552-557. See also *I*

Congreso del Partido supra per Lord Wilberforce at 261-267. The parallel development of United States law is set out in *Verlinden* supra at 48.)

142 The principal problem with the emergence of restrictive immunity was the degree of uncertainty that existed with respect to the kind of conduct that would be found to be exempt from immunity under the restrictive approach. As the ALRC Report put it:

> "[62] … The present law is uncertain in a number of respects. It proceeds upon a distinction between governmental and private or commercial which is inadequate to deal with the full range of issues upon which it is proper that local plaintiffs should be able to bring foreign states before Australian courts. In the interests of avoiding possible future foreign relations problems Australia should articulate to foreign states more precise rules governing their liability to the jurisdiction of Australian courts."

143 In its analysis of the current state of the law, the ALRC Report referred to matters of uncertainty in the context of determining whether or not to recommend legislation, as distinct from leaving the matter to the common law. For example, the Report said:

> "None of the Australian cases is recent, and none of them is accordingly helpful in assessing the present Australian law. At least one can say that the Australian courts would be likely to follow a common law position established by English courts …"(at [17])
>
> With respect to the English common law: "Because the focus is on the dichotomy between commercial and governmental transactions, the distinction gives no guidance, and neither does the case law, as to when non-commercial torts committed by the foreign state will be immune." (at [18])
>
> "The question of execution against foreign state property (other than trading ships) has not been carefully considered in any of the recent English cases." (at [19])
>
> "Apart from a basic distinction between immune and non-immune conduct or transactions, the most vexed question in foreign state immunity has been what entities apart from the state, head of state and central government should be entitled to the shield of foreign state immunity. This is not an area in which executive significance are available to resolve doing all this … No precise test has emerged as to when immunity is available." And in referring to a particular statement: "… such a test does not lend itself to precise application." (at [20])
>
> With respect to the method of waiving immunity: "It is not clear that a modern Australian court would follow these decisions, but until they are overruled, the position remains uncertain and unsatisfactory." (at [21])
>
> The Report also discussed the difficulties of service of process. (at [30])

144 The ALRC summarised the position as follows:

> "[34] As this survey indicates, the English courts have been seeking to develop the common law in line with what they perceive as developments in international law and practice. This process has been most marked in relation to the area of substantive immunity from jurisdiction, although even there it is by no means complete. It may be that a similar process will occur in those jurisdictions, such as Australia, where the common law still regulates the subject, in relation to matters such as waiver and submission, and execution. However, until this does happen considerable uncertainty will remain and is increased by the fact that in the most important common law jurisdictions the matter is now regulated by statute. Rapid clarification of the issues which remain unsettled at common law is, therefore, not to be expected."

145 The ALRC Report went on to recommend a particular approach in the legislation which it proposed and which has become the *Immunities Act*. It rejected an approach identifying territorial sovereignty as the starting point and also considered certain other suggestions. It said:

> "[63] … The basic principle could be stated as one of absolute immunity with enumerated exceptions for which immunity will not be available."

146 The ALRC Report concluded:

> "[65] … Accordingly the proposed Australian legislation should provide that a foreign state is immune except as provided in the legislation. The exceptions should be designed so as to reflect not a single governmental/commercial dichotomy but rather the full range of considerations outlined in Chapter 3."

147 The uncertainty identified by the ALRC, and by numerous other commentators at the time, was resolved in both the United Kingdom and Australia by legislation adopting a general statement of immunity subject to a detailed list of exceptions. (Sections 10-20 of the *Immunities Act.*)

148 The reference to "absolute immunity" in the extract from [63] of the ALRC Report is a reference to s 9. This was the approach which the ALRC recommended and which has been adopted.

149 The provision of a higher degree of certainty in this area of the law was a principal objective of the legislation as enacted. The means by which this was done, as indicated above, was to enact the traditional form of absolute immunity, subject to clearly stated exceptions. Section 9 should be so interpreted. Accordingly, the introductory words of s 9 affirmed the traditional position at common law – being absolute immunity – subject to the adoption of restrictive immunity in the respects, and only in the respects, set out in the Act itself. Certainty would be undermined by inviting disputation about the legitimacy or otherwise of official conduct. Similarly, certainty would be undermined if the legislative regime could have an ambulatory operation, in order to accord with subsequent developments in international law.

150 An argument of the character now advanced was rejected by the House of Lords in *I Congreso del Partido* supra, which was decided under the common law, rather than under the then recent *State Immunity Act* 1978 (UK). Lord Wilberforce said at 272:

> "It was argued by the respondents that even if the Republic of Cuba might appear to be entitled to plead the state immunity, it should be denied that right on various grounds: that its acts were contrary to international law or, to good faith, or were discriminatory, or penal. From the view which your Lordships take these argument do not arise, but I would wish to express my agreement with the judge and with Waller LJ as to their invalidity. The whole purpose of the doctrine of state immunity is to prevent such issues being canvassed in the courts of one state as to the acts of another."

151 In the Court of Appeal Lord Justice Waller agreed with what the first instance judge had said in this regard. (See *I Congreso del Partido* [1980] 1 Lloyd's Law Reports 23 at 36.) The trial judge was Justice Robert Goff (later Lord Goff of Chieveley). Justice Goff said in *I Congreso del Partido* [1977] 1 Lloyd's Law Reports 536 at 556:

> " … the acceptance until so recently in this country of the absolute doctrine of sovereign immunity has hitherto precluded ventilation of matters of this kind in the English courts … The submission appears to run contrary to the whole principle of sovereign immunity; the sovereign is immune from process precisely because the domestic court will not adjudicate upon his actions."

152 I agree with Lord Wilberforce that an important "purpose of the doctrine of State immunity", both at common law and as enacted by the *Immunities Act,* is to "prevent … issues" such as whether a foreign State was in breach of its obligations under international law "being canvassed in the courts" of the forum. That is what s 9 affirmed to be law applicable in Australia. In this respect also, the *Immunities* Act did not change the common law.

153 The *Immunities* Act established a definitive statement of the immunity, and a comprehensive statement of exceptions, to be applied by Australian courts. In my opinion, it is not possible to infer an additional exception from international law, either directly or by means of narrowly construing the text of the *Immunities Act.*

154 It is not possible to read down the words "foreign State" in s 9, as defined in s 3(3), in the manner for which the appellant contends.

155 Mr Gleeson SC's argument, set out at [123] above, fails at the first proposition. It is not possible to interpret s 9 of the *Immunities Act* consistently with what he contends international law requires. The third ground of appeal should be rejected.

Conclusion

156 I note the fourth respondent did not seek an order for costs. The orders I propose are:

1 Leave to appeal granted.

2 Appeal dismissed.

157 **ALLSOP P**: I have had the great advantage of reading the Chief Justice's reasons in draft. I agree with

the orders proposed by His Honour. Subject to the following comments (with one exception, by way of addition rather than qualification) I agree with the Chief Justice's reasoning in support of those orders.

158 The process of statutory interpretation of the *Foreign States Immunities Act 1985* (Cth) (the "Act") must, of course, be undertaken in its context. That context includes not only the fabric of international law against which the Act was passed, but also the valuable Australian Law Reform Commission Report (ALRC Report 24 on Foreign State Immunity). What is plain from the text of the Act in its context is that the extent of the immunity of foreign States and of any exception thereto was to be determined by reference to the words of the Act. The clear words of s 9 of the Act reflect that intended control.

159 The subject matter of the Act lies at the heart of the foreign relations of Australia as a nation that are the legislative concern of the Commonwealth. It is unnecessary to repeat the expressions of this character in the cases, many of which are referred to by the Chief Justice. The clearly expressed intention of the Parliament to prevent litigation against foreign States, except as provided by the Act, is to be recognised against the importance of that subject matter. Litigation of a criminal character can ultimately be controlled by the powers and capacities of the Attorney-General and the prosecuting authorities. Civil litigation, if within the jurisdiction of the courts, is a matter between the litigants to be resolved by the courts. The courts (whether exercising federal or State jurisdiction) have a constitutional duty as the third and equal branch of government in the relevant polity to resolve and quell such disputes. Interference with that task by the other branches of government, or either of them, would raise Constitutional issues. Thus, to the extent that Parliament is permitted to legislate as to the existence or not of immunity from jurisdiction in respect of a subject matter of such central importance to the external relations of the nation, the words of s 9 ("Except as otherwise provided by or under this Act") assume governing importance.

160 It is unnecessary for these additional comments to refer at any length to the place and influence of international law in the construction and interpretation of domestic statutes. It suffices to say that the task at hand is the ascertainment of the meaning of the domestic statute, which, of course, may or may not be affected by the content or meaning of a norm of international law or an international instrument.

161 Here, the Act is not to be interpreted as an instrument of plasticity, including or not including immunity depending on the development of international law. It is an Act, set against the background of lack of clarity at the time in the underlying principles of foreign state immunity, which sought, by its terms, to lay down, as a matter of legislative expression, the extent and restrictions on the immunity. See in particular, the ALRC Report at [34] and [62].

162 I would prefer not to base my views of the primacy of the place of s 9 of the Act on the presence or absence of ambiguity in its terms. Section 9 is to be read in its context. Doing so, its terms retain their apparent clarity and their meaning is confirmed.

163 Mr Gleeson SC put two submissions on ground 3 of the appeal, as alternative, but related arguments. The first was that the words "foreign State" in s 9 do not extend to encompass conduct by or on behalf of the State which amounts to torture because torture is not done exercising sovereign authority. The second was that the words "in his or her public capacity" in s 3(3)(b) and the implicit similar content of s 3(3)(c) should be interpreted as not to extend to acts of torture.

164 I agree with the Chief Justice that the introductory words of s 9 do not permit any general exception based on torture being contrary to a rule of *jus cogens* under international law: see, in particular, [136] of the Chief Justice's reasons.

165 Mr Gleeson SC submitted that should his primary submission of the exception to s 9 based on torture being contrary to a rule of *jus cogens* fail, his "softer" proposition was as to the text of s 3(3)(b) and (c) being construed as not to extend to acts of torture because they are acts which infringe a peremptory norm of general international law from which no derogation is permitted: a rule of *jus cogens,* and therefore are acts which cannot be seen to be done in a public capacity. This submission can be met by the reasoning of the Chief Justice. I would wish to add the following.

166 The concept of "official capacity" for the purposes of the *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* done at New York on 10 December 1984 (the "Torture Convention") and its relationship with sovereign immunity lay at the heart of the disagreement between the Court of Appeal and the House of Lords in *Jones v Ministry of Interior of Saudi Arabia* [2005] QB 699 (Court of Appeal) and [2007] 1 AC 270 (House of Lords). Neither decision, of course, is binding. Nevertheless, given the degree of similarity between the relevant parts of the *State Immunity Act 1978* (UK) and the Act and the partly international character of the subject matter with which both statutes are concerned, significant weight should be given to the unanimous views of the members of the House of Lords as to the perceived error in the reasoning of the judgments in the Court of Appeal. I say this intending not the slightest disrespect to the lucid and erudite judgments of Mance LJ (as his Lordship then was) and Lord Phillips of Worth Matravers.

167 I also, however, and once again with the greatest respect, agree with the analyses of Lord Bingham of Cornhill and Lord Hoffmann as to the interrelationship between the Torture Convention (and the need for acts of torture to be "in an official capacity") and the rules of immunity *ratione materiae*. Their Lordships' reasoning is apposite to the relationship between the Torture Convention (and the need for acts to be done in an "official capacity") and the words of s 3(3)(b) ("public capacity") and any like content implicit in s 3(3)(c).

168 The point is not a bare textual or logical construction. The official capacity required in Article 1 rule 1 of the Torture Convention is a central attribute of the wrong. It is more than the identification of the author of the wrong and the context in which he or she must be acting: cf Mance LJ in *Jones* [2005] QB at 742 [71]. It is the lending of the force and weight of the State to the violence and inhumanity described in the Article. It is a characteristic of the conduct that warrants the denunciation by the treaty and the community of nations and by the treatment of the rule as a *jus cogens*. One cannot strip away

or ignore a necessary characteristic of torture, being one that, in part, informs its moral and legal reprehensibility, in order to have it fall outside the words of a statute dealing with immunity in order to deprive the act of immunity because of its reprehensible status with that characteristic.

169 With respect, an analysis that seeks to say torture is not a public act or not an official act or not an exercise of sovereign authority conflates the characterisation of the official's act as "public" or "official" with questions of its moral illegitimacy. Torture (defined by Article 1 of the Torture Convention as acts inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity) is not to be regarded as a morally legitimate official act or exercise of public power. To the contrary, it is recognised by the Torture Convention and international law as sufficiently morally reprehensible as to warrant the application of criminal law under the laws of State Parties and under a universal criminal jurisdiction as a crime against humanity. It is a gross abuse of public power. This does not deny that it is carried out in an official or public capacity. It makes such acts as carried out in an official capacity subject to criminal prosecution. As Lord Hoffmann said in *Jones* [2007] 1 AC at 302 [81] the reason that General Pinochet did not enjoy immunity *ratione materiae* from public prosecution was not because he had not acted in an official capacity, it was because international law had removed the immunity for him.

170 To find that the perpetrators of such acts in an official or public capacity are able to be rendered liable under the civil law of a State for the consequences of their acts one must have recourse to the relevant law of that State governing foreign state immunity. In Australia, that is the Act. One does not conclude that they are so liable by reading out of their acts an attribute of the character of those acts – the official capacity under which the acts were done, being the capacity that assisted in giving the acts their character for the operation of the Torture Convention.

171 The international community views torture as morally illegitimate and a criminal abuse of State power, that is the exercise of power through acts of officials or others in an official capacity. The terms of the Act, however, are concerned with the capacity in which the act is done, not with its moral illegitimacy.

172 If the Commonwealth Parliament wishes to remove the immunity of foreign States for civil liability for torture such as by legislating in accordance with Article 14 of the Torture Convention, it must amend the Act.

173 I agree with the Chief Justice that in the light of the proper construction of the Act, the questions whether a universal civil jurisdiction regarding torture exists and how it would be justiciable in Australia were the Act to be construed differently need not be discussed. None of the kinds of considerations referred to in *Kuru v New South Wales* [2008] HCA 26; 236 CLR 1 and like authorities concerning an intermediate court dealing with all issues before it are apposite. Not the least reason for this conclusion is that the expression of a view about such issues may play a part in the development of international law principles: see J G Starke *Introduction to International Law* (7th Ed, 1972) at 39 - 42. That would be inappropriate if, as here, the expression of a view is irrelevant to the disposition of

the appeal. The controversy between the parties is able to be quelled by application of a law of the Parliament properly construed. There the matter should rest.

174 **McCLELLAN CJ at CL:** I agree with Spigelman CJ.

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LAST UPDATED:
5 October 2010