

Legal Practice in a Global Neighbourhood

Sir Ninian Stephen Lecture

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Introduction

For many law students immersed in the task of learning about Australian law, the sphere of international law and international commercial practice may seem remote from their day-to-day concerns. The object of this lecture, in honour of Sir Ninian Stephen, is to point to the ways in which Australian law and legal practice are increasingly affected by our global legal environment. I have chosen this topic because of Sir Ninian Stephen's outstanding record not only as a justice of the High Court and Governor-General of Australia, but also as an Australian internationalist. Let me begin by talking about some High Court decisions which are focused on international human rights questions but which have wider significance for this topic.

Some concrete cases

The first decision is one in which Sir Ninian took part in 1982. The case was *Koowarta v Bjelke-Petersen*.¹ In the 1970s, John Koowarta was an Aboriginal man living at Aurukun in Queensland. He was a member of the Winychanam Group of Aboriginal people. He and his community wanted to acquire a pastoral lease in Queensland to graze cattle. He approached a Commonwealth body, the Aboriginal Land Fund Commission, for finance to help with the purchase of the Archer River Pastoral Holding. The Commission agreed to provide the money and in February 1976 entered into a contract to acquire the pastoral lease. Under the *Land Act 1962* (Qld), however, the transfer required the approval of the Minister for Lands. That approval was refused. The stated reason for the refusal was:

The Queensland Government does not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation.

¹ (1982) 153 CLR 168.

It was, on any view, a decision based on race.

Koowarta commenced proceedings against the then Premier of Queensland, Mr Bjelke-Petersen and other ministers for damages under the *Racial Discrimination Act 1975* (Cth) ('RDA'). He relied upon s 9 of the RDA, which makes it unlawful to do 'any act involving a distinction, exclusion, restriction or preference based on race ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'.² The Premier and his ministers filed a defence asserting that s 9 and other relevant provisions were invalid. Queensland also brought a separate action seeking a declaration that the RDA was invalid. Both cases were argued in the High Court in March 1982. I had the privilege of appearing as one of two junior counsel to the then Commonwealth Solicitor General, Sir Maurice Byers QC. The other junior counsel for the Commonwealth was Mr R I Hanger, a barrister from Queensland.

The Commonwealth contended that the RDA was a valid exercise of the power of the Commonwealth Parliament to make laws with respect to external affairs. That power is conferred under s 51(xxix) of the Constitution. Queensland argued that racial discrimination was a matter of purely domestic concern. The Commonwealth responded that the RDA had been passed to give effect to Australia's international obligations under the Convention for the Elimination of All Forms of Racial Discrimination ('CERD'). On that basis the Act was said to be a law with respect to external affairs. The Commonwealth also argued that the prohibition against racial discrimination had become a customary rule of international law on account of its widespread repetition in international instruments and national laws.

On 11 May 1982 the High Court held, by a majority of four to three, that the impugned provisions of the RDA were valid. The decision was significant in more than one way. It established that the powers of the Commonwealth Parliament to make laws with respect to external affairs could extend to a matter of international concern in respect of which Australia had undertaken treaty obligations even if that matter was not otherwise the subject of the law-making powers of the Commonwealth Parliament. It had the practical consequence that the RDA survived to become an important aspect of Australia's domestic

² *Racial Discrimination Act 1975* (Cth), s 9.

human rights architecture. It is, of course, at the centre of recent debates about the tension between prohibitions on racial vilification on the one hand, and freedom of speech on the other. Of equal, if not greater national importance, was the underpinning provided by the RDA for the protection of native title rights and interests which were recognised ten years after *Koowarta* in *Mabo v Queensland (No 2)*.³

The *Mabo* litigation began in 1982, the same year that *Koowarta* was decided. Eddie Mabo and others commenced proceedings in the High Court for the recognition of customary native title on Murray Island in the Torres Strait. That island, like many others in the Torres Strait, is part of the State of Queensland. Queensland attempted a pre-emptive strike against the possible recognition of native title by enacting a law entitled '*The Queensland Coast Islands Declaratory Act 1985 (Qld)*'. That Act was designed to have the effect of extinguishing native title, if it existed, on the islands of the Torres Strait.

The High Court, in a judgment delivered in 1988, held that the Queensland law was invalid, pursuant to s 109 of the Constitution, because it was inconsistent with the RDA. The decision is generally known as *Mabo (No 1)*.⁴ It built on the foundations of *Koowarta*. It had the practical consequence that no State law in force after the enactment of the RDA could validly extinguish or acquire native title rights and interests in a way that differed from the acquisition or extinguishment of non-Indigenous property rights. The significance of the decision depended ultimately on the High Court holding that customary native title could be recognised at common law. The Court so decided in *Mabo (No 2)*⁵ in 1992.

The decision in *Mabo (No 1)* was founded upon the RDA which gave effect to Australia's international obligations under CERD. The decision in *Mabo (No 2)* also had an international dimension because of its reliance upon international standards in the development of the common law of Australia, with respect to native title. In Sir Gerard Brennan's leading judgment he rejected the concept of terra nullius, that is, the idea that lands occupied by Indigenous people could be treated as belonging to no one. In so doing he spoke of the effect of international law on the development of the common law. He said:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law,

³ (1992) 175 CLR 1.

⁴ *Mabo v Queensland* (1988) 166 CLR 186.

⁵ (1992) 175 CLR 1.

especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.⁶

Sir Gerard Brennan spoke to similar effect in another sphere, that of the criminal law, in *Dietrich v The Queen*.⁷ That case concerned the right of an accused person to a fair trial and the power of courts to stay proceedings where the accused person is unrepresented and where such representation is essential to a fair trial. It was a case in which an accused person facing a serious criminal charge had been refused legal aid for representation at trial. Sir Gerard Brennan, in his judgment, referred to Art 14 of the International Covenant on Civil and Political Rights ('ICCPR') which includes the right to have legal assistance in any cases where the interests of justice so require. Quoting what he had written in *Mabo (No 2)*, he said:

Although this provision of the Covenant is not part of our municipal law, it is a legitimate influence on the development of the common law.⁸

Chief Justice Mason and McHugh J in the same case, referred to international instruments defining the attributes of a fair trial.⁹

Dietrich was a case about the operation of the criminal law. That sphere of practice can bring in international law in a variety of ways. Two other recent decisions of the High Court illustrate the point. One was the *Maloney v The Queen*¹⁰ judgment, which was delivered on 19 June 2013. An Aboriginal woman living in the Palm Island community was prosecuted for breach of a Queensland law which imposed restrictions on the possession of alcohol in the community. The question was whether the law under which she was prosecuted was invalid for inconsistency with the RDA. That required consideration of whether the restrictions on the use of alcohol in the indigenous community discriminated against indigenous people in their enjoyment of rights protected by CERD, and if so, whether the law was a special measure permitted within the meaning of Art 1(4) CERD. The case required the Court to interpret provisions of the CERD which had been incorporated into the

⁶ (1992) 175 CLR 1, 42 (Mason CJ and McHugh J agreeing at 15).

⁷ (1992) 177 CLR 292.

⁸ Ibid 321, see footnote 10.

⁹ Ibid 300.

¹⁰ (2013) 87 ALJR 755.

terms of the RDA. In the event the Court held that the restrictions did constitute a special measure and were valid.

The 2011 decision of the High Court in *Momcilovic v The Queen*¹¹ also arose out of a criminal prosecution. It involved the Charter of Human Rights and Responsibilities of Victoria, and the interpretation of a State drugs law which reversed the onus of proof for possession of drugs if drugs were found in a place where the accused was residing. The presumption of innocence as a human right is recognised in the Charter of Human Rights and Responsibilities of Victoria. The Charter requires Victorian State laws to be interpreted, so far as possible, consistently with the rights declared in it including the presumption of innocence. That presumption is to be found in many international instruments, including the ICCPR and the European Convention on Human Rights. There are many decisions of foreign and international courts concerning its interpretation. Some of those were relevant to the way in which its application was interpreted for the purposes of the Victorian law. The argument in the case was that the reverse onus provision should be interpreted as merely reversing an evidential onus rather than the persuasive onus of proof. In the end the argument was rejected but Ms Momcilovic succeeded on another ground based on the interpretation of the State drug legislation.

Another high profile area of Australian domestic law which is affected by international law is the vexed area of immigration, especially as it affects asylum seekers coming to Australia without lawful visas. In a unanimous judgment in 2010 dealing with off-shore processing of asylum seekers, the High Court observed that:

read as a whole, the *Migration Act* contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol. ... the *Migration Act* proceeds, in important respects, from the assumption that Australia has protection obligations to individuals. Consistent with that assumption, the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.¹²

That context, of course, affects the interpretation of provisions of the Act.

¹¹ (2011) 245 CLR 1.

¹² *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, 339 [27].

Those cases, *Koowarta*, *Mabo (No 1)*, *Mabo (No 2)*, *Dietrich*, *Maloney*, *Momcilovic* and the migration case, are examples of the interaction of what might broadly be called international human rights laws with Australia's domestic law, constitutional, statutory and common law. Such interactions, however, are found in many areas of the law. There are important aspects of commercial law, insolvency and taxation law, intellectual property law, family law and environmental and heritage law to name just a few, which give effect to Australia's international obligations. The global legal environment, however, encompasses wider issues than those. International trade and commerce globally and in our region are conducted within a framework of international conventions, investment treaties, free trade agreements, model laws regulating international transactions and standardised transactional documents and practices, not all of which can be expressed in terms of legal rules. Many of them affect how Australians do business and some may have implications for national sovereignty.

Sir Ninian Stephen's international perspective

Before turning to a more general consideration of the ways in which international law and Australia's domestic law interact, it is appropriate to say a few words about Sir Ninian Stephen in whose honour this lecture is named.

Sir Ninian Stephen served Australia's national judicial system as one of its leading jurists. His judicial service in Australia encompassed two years on the Supreme Court of Victoria followed by ten years as a Justice of the High Court of Australia from 1972 to 1982. In 1982 he was appointed as Governor-General, an office which he held until 1987. Instead of then retiring to write his memoirs, Sir Ninian in 1989 became the first Australian Ambassador for the Environment, an office which he occupied for three years. In 1991 he became chairman of the Second Strand of the Northern Ireland peace talks. He served as a judge of the International Tribunals for the former Yugoslavia and for Rwanda and as an ad hoc judge of the International Court of Justice. He advised the South African government in the period following apartheid. He worked for the International Labour Organisation investigating labour conditions in Burma and in 1998 led an expert group investigating the possible trial of leaders of the Khmer Rouge in Cambodia. He was a true Australian internationalist.

Sir Ninian Stephen's international perspective was reflected in his judgment in *Koowarta*. Speaking about the external affairs power, he recognised the place of Australia as a member of the global community of nations and said of our country:

Even a nation occupying an entire island continent cannot be 'an Island entire of itself'...¹³

He saw a connection between the internal state of Australian society and Australia's place as a member of the external global community. He pointed to the difficulty of identifying subject matters which could be said to be purely domestic and not of international concern. That was, of course, relevant to the constitutional question of Commonwealth power to make laws with respect to external affairs where those laws concerned purely domestic matters not within any other head of Commonwealth power. He said:

this does no more than reflect the increasing awareness of the nations of the world that the state of society in other countries is very relevant to the state of their own society. Thus areas of what are of purely domestic concern are steadily contracting and those of international concern are ever expanding.¹⁴

What he said there in the context of the *Koowarta* judgment is reflected in the nature of legal practice today and the effects upon it of the global environment regardless of whether the lawyer works in a large transnational firm or a small domestic practice.

Globalisation and international law, trade and commerce

The phenomenon of globalisation affects legal practice as it does so many other areas of our daily lives. A report recently published by the Australian Government Office for Learning and Teaching on Internationalising the Australian Law Curriculum for Enhanced Global Legal Education and Practice tells the reader what is now apparent to all in the legal profession:

¹³ (1982) 153 CLR 168, 211.

¹⁴ Ibid 217.

Globalisation has seen a shift in the market place with the growth of 'global law' firms, an increase in international trade in legal services and legal practice operating in a 'borderless environment'.¹⁵

Some years ago former Chief Justice Spigelman of New South Wales referred to the importance of a global perspective on commercial matters and expressed some regret that:

there are still areas of the law which remain inward looking and parochial. From time to time there emerge particular reforms that indicate a global outlook but they occur on an ad hoc basis in particular categories of reference.¹⁶

Barriers to the development of an awareness of the international legal environment have also been discussed by former Federal Court Justice Paul Finn who has focused particularly on the international dimension of the field of contract law in which he has particular expertise. He said, and I agree:

This international dimension is becoming of increasing importance as international commercial law falls increasingly under the influence of internationally accepted general principles and trade practices and usages, particularly in the context of international commercial arbitration.¹⁷

It is helpful, in light of those observations, to take a broader view of the ways in which international law relates to Australian domestic law generally. First of all it is necessary to say something about how international law differs from Australian domestic law.

Is international law, truly law?

There has long been philosophical debate about whether international law is properly described as 'law'. One of the founding fathers of this branch of study, Hugo Grotius, said in 1625:

¹⁵ Australian Government Office of Learning and Teaching, *Internationalising the Australian Law Curriculum for Enhanced Global Legal Education and Practice* (2012) 22.

¹⁶ James Spigelman, 'Corporate Governance in International Business Law' (Speech delivered at Book Launch, University of Sydney, 18 June 2009).

¹⁷ Paul Finn, 'Internationalisation or Isolation: The Australian Cul de Sac? The Case of Contract Law' in Mary Elizabeth Hiscock and William van Caenegem (eds), *The Internationalisation of Law: Legislating, Decision Making, Practice and Education* (Edward Elgar Publishing, 2010) 145, 145–46.

there is no lack of men who view this branch of law with contempt as having no reality outside of an empty name.¹⁸

Four centuries after Grotius, international law still attracts debate about whether it is properly called law. It is sometimes treated as little more than an emergent property of the co-incident self-interest of collections of States.¹⁹ A leading international law scholar, Hersch Lauterpacht said in 1960 that international law is 'immature' in character and imprecise and uncertain in its rules. It doesn't have a legislature or an executive or a judiciary with compulsory jurisdiction.²⁰ Those features persist today despite the immense amount of development in the content, diversity and complexity of international law and its institutions. On the other hand, Professor Gillian Triggs, now President of the Human Rights Commission, made the point that international law can be regarded as law because States and non-State actors treat it as obligatory in their international relations:

A feature of all organised legal communities is that commands properly issued will be obeyed. It has remained true that most States abide by the rules of international law almost all the time.²¹

Her contention about the extent to which international law works in practice must be acknowledged. If it did not, as she says, 'no mail would go from State to State, no currency or commercial transaction would take place'.²²

The sources of international law

International law and domestic law differ in the character of their sources. Domestic law is derived from and legitimated by the constitutional machinery of law-making.²³ There is no global constitutional machine which acts as a formal source of international law.²⁴

¹⁸ Hugo Grotius, 'The Law of War and Peace' (FW Kelsey trans, Carnegie Classics, 1925), xliii, 9 [trans of *De Jure Belli ac Pacis* (first published 1646)].

¹⁹ Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005) 3.

²⁰ Lauterpacht, (ed) *International Law — Being the Collected Papers of Hersch Lauterpacht* (Cambridge University Press, 1970) 31–33.

²¹ Gillian Triggs, *International Law: Contemporary Principles and Practice* (LexisNexis Butterworths, 2006) 4.

²² Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990) 20, quoted in Triggs above n 21, 4.

²³ Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 3.

²⁴ Ibid.

There are many institutions, including regional bodies, involved in interpreting and applying international law generally and in making and interpreting treaties and conventions across a wide variety of subject areas. The rise of international commercial arbitration also coincides with the development of a global jurisprudence affecting commercial transactions.

There is a basic set of recognised sources which appear to be largely common ground. They are to be found in Article 38 of the Statute of the International Court of Justice ('ICJ'). They are the primary sources of law upon which the ICJ acts. Article 38(1) provides:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilised nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 38 assumes the existence of a body of international law to be applied by the ICJ. Although it is not in terms an exhaustive statement, it has been treated as such so far as it relates to the ICJ.²⁵

Assuming international law is properly called law and that obligations under international law, treaties or conventions are binding, the question arises — how are they applied in national legal systems and particularly in the Australian legal system?

Theories of interaction between international law and municipal law

Historically, debates about the interaction between international and domestic law were carried on between two schools of thought designated 'Monists' and 'Dualists'. The Monists regard international and domestic law as part of a single idea of law which binds individuals, albeit in international law their conduct is attributed to States. Dualists, on the other hand, maintain that the sources and content of international law and domestic law differ so greatly that the former can never become part of the latter unless so made by the legislative power of the State.²⁶ Australia's approach to international law is dualist. Neither

²⁵ Georg Schwarzenberger, *International Law* (Steven and Sons, 3rd ed, 1957) vol 1, 26.

²⁶ See generally Lauterpacht, above n 20, 216–17.

rules of international law nor obligations entered into by the executive government in treaties and conventions have binding operation in domestic law unless transformed into that domestic law that is done primarily by statutory enactment. Rules of what is called customary international law may be adopted by judicial decision as part of the common law.

Australian jurisprudence does not exclude the application of rules of customary international law and of unincorporated treaty obligations to the interpretation of domestic statutes. Nor does it exclude the influence of international law in the development of the common law. Six propositions going to the extent and limits of dualism in Australia were set out by Gummow J in 1992 in *Minister for Foreign Affairs and Trade v Magno*.²⁷ In substance, they were as follows:

1. It is for Parliament not the Executive to make or alter domestic law. Legislation is necessary to render international obligations enforceable in the courts.
2. Mere legislative approval of treaties or other obligations assumed by the Executive does not render the treaties or obligations binding on individuals within Australia nor does it create justiciable rights for individuals.²⁸
3. Absent parliamentary incorporation by legislation of a convention which has been ratified by Australia, the terms of the convention may still be used in interpreting domestic legislation. The underlying principle is that parliament should be presumed as intending to legislate in accordance with, and not in conflict with, international law.
4. In some cases a statute may adopt the language of a convention in anticipation of Australian ratification. The provisions of the convention may be used to assist resolution of an ambiguity in the interpretation of the statute but not so as to displace its plain words.
5. Administrative decision-makers may have regard, in exercising discretions under international law, to international obligations or agreements which have not been incorporated into the domestic law.

²⁷ (1992) 112 ALR 529, 534–35.

²⁸ An example is to be found in s 5 of the *Charter of the United Nations Act 1945* (Cth) which says that the Charter is 'approved'. This does not make it binding on individuals in Australia.

6. There may be cases in which an expression used in a domestic statute is given the meaning it bears in a particular convention.

One issue which has been considered in the High Court is whether international law should influence the interpretation of the Australian Constitution.

An example of dualism — international law and the interpretation of the Constitution

The Australian Constitution is part of an Act of the United Kingdom Parliament. The powers it creates are distributed among the elements of the Australian federation and between the different branches of the Commonwealth government.

The relationship between rules of international law and the scope of the legislative powers conferred upon the Commonwealth Parliament by the Constitution was considered in *Polites v The Commonwealth*.²⁹ That case concerned s 13A of the *National Security Act 1939-1943* (Cth) which provided for compulsory military service and raised the issue of whether it extended to aliens living in Australia. It was argued that the Act and the constitutional power to make laws with respect to defence should be interpreted in accordance with a rule of customary international law that restricted the right of nations to conscript aliens within their borders. That was a rule of international law which predated the enactment of the Constitution by the United Kingdom Parliament.

The Court rejected the proposition that the law-making powers of the Commonwealth were limited by rules of international law. The grant of power to the Parliament was plenary. Sir Owen Dixon said:

Within the matters placed under its authority, the power of the Parliament was intended to be supreme and to construe it down by reference to the presumption is to apply to the establishment of legislative power a rule for the construction of legislation passed in its exercise. It is nothing to the point that the Constitution derives its force from an Imperial enactment. It is none the less a constitution.³⁰

In so saying however, he accepted that international law could influence the way in which Acts of Parliament are interpreted. He said:

²⁹ (1945) 70 CLR 60.

³⁰ Ibid 78.

unless a contrary intention appear, general words occurring in a statute are to be read subject to the established rules of international law ...³¹

International law and the interpretation of statutes

As was pointed out in *Polites* rules of international law may inform the interpretation of statutes. Rules of international law and international obligations assumed by Australia may also interact with other common law rules affecting statutory interpretation. One of those common law rules is the principle of legality. In essence it requires that unless the Parliament has used clear language an Act of Parliament should not be interpreted so as to adversely affect fundamental rights and freedoms at common law. The principle was described by Gleeson CJ as:

not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.³²

Freedom of expression is one such fundamental freedom recognised by the common law.³³ Another is personal liberty.³⁴ Another is the accusatorial nature of the criminal process and the presumption of innocence.³⁵ Another is the right to own property and a presumption against its acquisition without compensation.³⁶ It does not take a great stretch of the imagination to see overlaps between those fundamental rights and freedoms long recognised by the common law, and some of the fundamental rights and freedoms which are the subject of the Universal Declaration of Human Rights and subsequent international conventions to which Australia is a party. It is arguable that some of the civil and political rights protected by those conventions have become part of international customary law which itself may be incorporated in or inform the development of the common law. If such rights and freedoms become part of the common law, they may be relied upon in the interpretation of statutes using the principle of legality. Whether that incorporation may effectively extend

³¹ Ibid 77.

³² *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309, 329.

³³ *Evans v New South Wales* (2008) 168 FCR 576, 595–96 and cases cited therein.

³⁴ *Minister for Immigration v Haneef* (2007) 163 FCR 414, 442–44 and cases cited therein.

³⁵ *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082.

³⁶ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304.

or just strengthen pre-existing recognition of rights and freedoms under common law may be debatable.

Beyond the effects of international law upon statutory interpretation is the still controversial area of its impact upon the exercise of official power conferred by Acts of Parliament. This was the question raised in *Minister of State for Immigration and Ethnic Affairs v Teoh*.³⁷ There, a majority of the High Court held that ratification of a treaty could give rise to a general legitimate expectation that administrative decision-makers would act in accordance with the terms of the treaty. The international obligations did not therefore give rise to mandatory relevant considerations nor to a substantive right to the exercise of the discretion in accordance with international law. Rather, they informed the application of procedural fairness in the decision-making process. That application was called into question in *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*.³⁸ Beyond drawing attention to the issue, I do not propose to comment further on it.

International trade law

International law, treaties and conventions have a big part to play in trade and commerce in which Australia is involved. There are many bodies such as the World Trade Organisation, the International Labour Organisation, the World Bank, the World Intellectual Property Organisation, the United Nations Conference on Trade and Development, the Asian Pacific Economic Co-operation and many others which shape the content and processes of international trade law and have their effects on domestic legal systems.

One organisation that tries to harmonise the legal rules affecting international trade is the International Institute for the Unification of Private Law ('UNIDROIT') based in Rome. UNIDROIT was set up originally in 1926 as an organ of the League of Nations and re-established in 1940 pursuant to a multi-lateral agreement known as the UNIDROIT Statute. There are 63 member countries, of which Australia is one. Amongst its membership from our region are China, India, Indonesia, Japan and Korea. The United Kingdom, the United States and Canada are also members. The function of UNIDROIT is to study needs and methods for modernising, harmonising, and coordinating private, and in particular, commercial law as between States and to formulate uniform laws, instruments, principles and

³⁷ (1995) 183 CLR 273.

³⁸ (2003) 214 CLR 1.

rules to achieve those objectives. Its work has given rise to many important international instruments including Conventions relating to uniform laws for the international sale of goods, international wills, financial leasing, factoring, franchise disclosure and international securities. Of particular importance are its published Principles of International Commercial Contracts, in the preparation and revisions of which, former Australian Federal Court Justice and distinguished legal academic, Paul Finn, has had a continuing involvement. Put simply, the Principles are, as he has described them:

In the nature of default rules which can readily be incorporated into the terms of a domestic contract made in this country.³⁹

They have had a significant impact on contract law globally. They are widely accessible in many languages including Chinese, Arabic, Korean and Japanese, and are taught in all major law faculties in civil law and common law jurisdictions.

There is also an important international industry in the arbitration of disputes arising out of international commercial transactions. Legal service providers in global markets find themselves involved in negotiating and structuring transactions which must operate across a number of jurisdictions. Many such transactions use dispute resolution mechanisms which apply internationally accepted rules and/or attract the application of uniform and model laws derived from multilateral and international law-making bodies.

By the *International Arbitration Act 1974* (Cth), Australia has given the force of law in Australia to the model law on international commercial arbitration which was adopted by the United Nations Commission on International Trade Law ('UNCITRAL'). Under the Act, awards made under arbitrations of disputes arising under international commercial transactions can be enforced in the Federal Court and Supreme Courts of Australia. Last year the High Court upheld the constitutional validity of those provisions.⁴⁰ It rejected an argument that the exercise of the conferring of enforcement jurisdiction on the Federal Court was incompatible with its institutional integrity as a Court exercising the judicial power of the Commonwealth.

³⁹ Paul Finn, 'The UNIDROIT Principles: An Australia Perspective' (Speech delivered at the UNIDROIT Principles of International Commercial Contracts: What Do They Mean For Australia?, CLE Seminar, Sydney, 25 June 2008) 8.

⁴⁰ *TCL Air Conditioner (Zhong Shan) Co Ltd v Judges of the Federal Court of Australia* (2013) 87 ALJR 410.

In all of these developments in global trade and commerce in which Australian citizens, corporations and governments can be involved as well as the legal profession, the future role of the Australian judicial system might be thought to be at some risk of becoming marginal. That is a concern which extends beyond institutional status. It is a concern about the authority and visibility of the rule of law in commercial disputes involving international actors which, although able to be classed as private disputes governed by contract, may yield outcomes of great importance to the Australian community. When disputes of that kind are heard by courts and decided in the exercise of judicial power, they are decided by publicly appointed judges exercising powers conferred on them by public law and not by private agreement. Each decision made by a Court in public, even though determining a dispute between private parties, is an affirmation in a public way of the rule of law at work.

That having been said, there is no gainsaying the force of some observations on the topic by the former Chief Justice of New South Wales, the Hon JJ Spigelman AC, published in 2010.⁴¹ The Chief Justice pointed to the distinctive burden that national legal systems may impose upon international trade, commerce and investment, including uncertainty about the ability to enforce legal rights, additional layers of complexity, costs of enforcement and risks arising from unfamiliarity with foreign legal processes. A singular achievement of the international commercial arbitration system was 'the reduction of these transaction costs.'⁴² Those sentiments were effectively reaffirmed in 2012 in India by the present Chief Justice of New South Wales who told audiences in Mumbai and New Delhi that Australia had embraced the arbitration option as a first class resolution mechanism.⁴³

There is another species of international arbitration which raises greater concerns. This arises out of what are called Investor-State Dispute Settlement processes under which private investors can take national governments to arbitration where legislative changes or even judicial decisions have affected their investments. These processes are often provided for in bilateral investment treaties and free trade agreements. Australia is a party to 21 bilateral investment treaties and currently seven free trade agreements. We are presently

⁴¹ James Spigelman, 'Preface' in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) v–iii.

⁴² Ibid vi.

⁴³ Tom Bathurst, 'The Australian Arbitration Option' (Speech delivered to the Australian Centre for International Commercial Arbitration Forum, Mumbai and New Delhi, 27 and 29 February 2012).

negotiating a further seven free trade agreements including the Trans-Pacific Partnership Agreement.

It is not unusual for claimants in Investor-State arbitral processes to challenge the decisions of domestic courts by characterising those decisions as breaches of the treaty obligations of the respondent State.⁴⁴ A leading example involves Canada. In a notice of arbitration filed on 12 September 2013 under the North American Free Trade Agreement ('NAFTA'), the pharmaceutical company Eli Lilly complained of Canadian judicial decisions which held that its patents for two drugs known as Strattera and Zyprexa were invalid for want of utility. The first drug is used to treat ADHD and the second to treat schizophrenia and related psychotic disorders. Eli Lilly alleged in its notice of arbitration that:

the judiciary in Canada has created a new doctrine to assess whether an invention meets the condition of being 'useful' or 'capable of industrial application'.⁴⁵

The doctrine is said by Eli Lilly to be inconsistent with the utility standards embodied in Ch 17 of NAFTA and 'significantly out of step with the law of utility in Canada's NAFTA partners'.⁴⁶

Eli Lilly is demanding from Canada damages estimated in an amount of not less than \$500 million together with recovery of any payment it or its enterprises was required to make arising from the improvident loss of its patents and its inability to enforce them.⁴⁷

Of contemporary interest, a different concern about domestic court processes may be ventilated in the ISDS arbitration initiated by Al Jazeera Media Network against Egypt pursuant to a bilateral investment treaty concluded between Egypt and Qatar in 1999. Al Jazeera claims \$150 million compensation based on breach of that agreement by Egypt related to the harassment and imprisonment of its journalists working in that country.

⁴⁴ United Nations Conference on Trade and Development, *Recent Developments in Investor-State Dispute Settlement (ISDS)* (April 2014)

⁴⁵ http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf.

⁴⁶ Richard Dearden et al, *Eli Lilly and Company v Government of Canada: Notice of Arbitration* (12 September 2013) Investment treaty Arbitration, [9]

⁴⁷ <http://italaw.com/sites/default/files./case-documents/italaw1582.pdf>.

⁴⁶ Ibid.

⁴⁷ Ibid [85(a)].

A member of the Philip Morris tobacco group is presently challenging Australia's tobacco plain packaging legislation in arbitral proceedings under a bilateral investment treaty between Hong Kong and Australia. A Philip Morris company incorporated in Hong Kong has become the holding company of Philip Morris in Australia and claims that the law has adversely affected its investments in Australia. That is on the basis that the plain packaging legislation prevents it from using its trademarks and associated intellectual property rights on cigarettes and cigarette packaging. The High Court rejected a constitutional challenge to the legislation holding that it did not amount to acquisition of the tobacco company's intellectual property.⁴⁸ It seems at least possible that the argument to be advanced in the arbitral tribunal under the Australia-Hong Kong Bilateral Investment Treaty might be inconsistent with that conclusion.

Conclusion

There are many dimensions to the ways in which international law and the global legal environment interact with Australia's law and legal practice. These are matters of which the law graduate today should be aware, whether they are headed for international law firms, suburban practices or working as in-house lawyers in the private or public sector. Lawyers who are sensitive to those dimensions of their practice and work mean an Australian society more sensitive to matters and better able to engage with its global legal environment.

⁴⁸ *JT International SA v Commonwealth* (2012) 250 CLR 1.