

## FESTSCHRIFT FOR PROFESSOR LUZIUS WILDHABER

### THE AUSTRALIAN DEBT TO THE EUROPEAN COURT OF HUMAN RIGHTS\*

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#### FORMIDABLE PRESIDENTS

It was my privilege to know Judge Rolv Ryssdal, President of the European Court of Human Rights before the election of Professor Luzius Wildhaber. I met him in a series of conferences organised by the Commonwealth Secretariat concerned with the growing influence of international human rights jurisprudence on municipal law of common law countries. The conferences in which we participated built on the Bangalore Principles<sup>1</sup>. With his authentic career as a judge in Norway, his survival as a member of the Resistance in Norway during the Second World War, his trail-blazing work as President of the Strasbourg Court

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\*\* Justice of the High Court of Australia. One-time President of the International Commission of Jurists; former Special Representative of the UN Secretary-General for Human Rights in Cambodia; Laureate of the UNESCO Prize for Human Rights Education; Member of the UNAIDS Global Panel on HIV/AIDS and Human Rights.

<sup>1</sup> (1988) 62 *Australian Law Journal* 531.

and his commanding presence, Rolv Ryssdal was respected throughout the world. This included in the normally sceptical common law world with its general preference for domestic law over international or regional law and for pragmatic solutions over conceptual ones, together with its scepticism of the natural law tradition of continental Europe and its preference for common law rules and procedures.

When Rolv Ryssdal died in February 1998, it seemed impossible that the European Court of Human Rights would be blessed with a successor of equal ability. In the principal Australian law journal, paid tribute to Judge Ryssdal's achievements<sup>2</sup>. Yet happily for the Court, for its participating States and for humanity, the election of Professor Wildhaber provided another gifted leader for the world-wide development of human rights jurisprudence. He had a different style but an equally commanding intelligence.

Over nearly a decade, I have had the good fortune to attend with Luzius Wildhaber the annual conferences held at the Yale Law School on global constitutionalism. In the company of senior justices of the Supreme Court of the United States, the Supreme Court of Canada, the Lord Chief Justice of England, the President of the Supreme Court of Israel, the Chief Justice of India, a Justice of the Supreme Court of

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<sup>2</sup> (1998) 72 *Australian Law Journal* 480.

Japan and other distinguished participants, Luzius Wildhaber stood out. He made a profound impression.

One of the ways he does this, as his friends know, is by telling the stories of the cases decided by the European Court and by explaining the principles for which they stand. He is a master story teller: simple in exposition, succinct in elaboration and always devoted to principle<sup>3</sup>. This is the best way to teach human rights jurisprudence. It is the way to spread the ideas of the European Court of Human Rights. In such a short time, it has grown to be a court of profound global significance.

Although Australia is not a party to the statute of the European Court of Human Rights, during the presidencies of Rolv Ryssdal and Luzius Wildhaber, the decisions of the Court, and the reasoning of its judges, have begun to have a profound impact in my country. It is the purpose of this contribution to the *Festschrift* for Professor Wildhaber, on his laying down of his high responsibilities as President of the Court, to illustrate, by reference to Australian case law, the spread of the European Court's jurisprudence to the antipodes. I offer this tribute to the marvellous leadership of two profoundly significant lawyers of international repute. Specifically, in this book, I offer it as a tribute to my

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<sup>3</sup> L Wildhaber, "The Coordination of the Protection of Fundamental Rights in Europe" in *Schweizerisches Recht* (Band 124 (2005) II 44).

friend Luzius Wildhaber and his shining intelligence and high dedication to principles of justice, equality and human rights for all.

### **THE AUSTRALIAN DEBT**

As the world's largest and busiest human rights court, with jurisdiction extending over some eight hundred million people<sup>4</sup>, the European Court of Human Rights is at the centre of the most influential international human rights judicial dialogue now existing. Since its establishment, the European Court of Human Rights has made a considerable contribution to the understanding of human rights both in Europe and around the world.

The decisions of the Court have not only led to specific outcomes in individual cases. They have also contributed, at a broader level, to the general development of a global human rights framework. As Professor Villiger has noted:

“In its huge body of case law, the Strasbourg Court has given shape and meaning to human rights ... The Strasbourg Court is renowned for its carefully reasoned judgments that do justice to the individual case while providing governments, public authorities, and domestic

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<sup>4</sup> G Ress, “The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order” (2005) 40 *Texas International Law Journal* 359, at 363; M. E. Villiger, “The European Court of Human Rights” (2001) 91 *American Society of International Law Proceedings* 79, at 79.

courts with the backcloth for legislation, government acts, and court decisions in virtually every area of human rights.”<sup>5</sup>

The contribution made to countries outside Europe is well illustrated by examining the references which Australian judges have made to the decisions of the European Court of Human Rights over recent years. Such references have a particular significance in a country such as Australia, where fundamental human rights are not expressly protected by a constitutional or enacted Bill of Rights and where there are few express rights guaranteed by the national constitution. In such an environment, it is only natural that Australian lawyers, citizens and others should look towards human rights developments in other parts of the world as an important intellectual and practical influence. Australians like myself, committed to the strengthening of human rights law, can draw strength from the advances made in the decisions of the European Court of Human Rights. Decisions of the Strasbourg Court have proved a powerful resource for those seeking to further the recognition and protection of basic human rights and fundamental freedoms within the Australian legal system. This legacy is certain to continue and to grow in the 21st century.

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<sup>5</sup> M. E. Villiger, “The European Court of Human Rights” (2001) 91 *American Society of International Law Proceedings* 79, at 80.

### **AN EARLY EXAMPLE**

One of the earliest significant references to the jurisprudence of the European Court of Human Rights occurred in the 1978 decision of the High Court of Australia in *Dugan v Mirror Newspapers Ltd*<sup>6</sup>. At issue was whether Darcy Dugan, a prisoner serving a commuted death sentence, could sue the Sydney *Daily Mirror* newspaper for defamation. The *Daily Mirror* argued that Dugan had no civil right to sue. It was submitted that the ancient English law of attainder and corruption of the blood had been absorbed into Australian law when Great Britain acquired sovereignty over the Australian continent in 1788. This had stripped Dugan of his civil rights because of his status as a convicted capital felon. In a majority decision, the High Court of Australia upheld this argument. It accepted that the law of attainder had been received from English law. It was therefore part of Australian law, at least until it was overridden by a valid law enacted by an Australian Parliament.

The lone dissenter in the High Court of Australia was Justice Lionel Murphy. In his decision Justice Murphy referred to international materials and opinions. He concluded that the civil death doctrine violated “universally accepted standards of human rights<sup>7</sup>.” Specific reference was made by him to the decision of the European Court of

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<sup>6</sup> *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583.

<sup>7</sup> *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, per Murphy J at 607.

Human Rights in *Golder v United Kingdom*<sup>8</sup>. That decision had concerned the interpretation of Article 6 of the *European Convention on Human Rights and Fundamental Freedoms* (“the *European Convention*”). Justice Murphy cited with approval the Strasbourg Court’s acknowledgement that:

“In civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts ... The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognised’ fundamental principles of law: the same is true of the principle of international law which forbids the denial of justice. Article 6(1) must be read in the light of these principles.”<sup>9</sup>

After considering the “overwhelming weight of evidence against the doctrine” of attainder of blood and removal of access to the courts to assert ordinary civil rights Justice Murphy ultimately concluded that it “does not accord with modern standards in Australia”. He found that attainder and corruption of the blood should not be recognised as part of the existing Australian common law.<sup>10</sup> But his was a lone voice.

The reference in *Dugan v Mirror Newspapers Ltd* is characteristic of the way in which the High Court of Australia has come to make use of

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<sup>8</sup> *Golder v United Kingdom* (1975) E.H.R.R. 524 at 527.

<sup>9</sup> *Ibid*, at 533.

<sup>10</sup> *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, per Murphy J at 608.

the jurisprudence developed by the European Court of Human Rights in more recent times. An examination of decisions referring to the jurisprudence of the European Court of Human Rights illustrates the progressive way that such materials have been cited by an increasing number of Australian judges to support attempts to develop and strengthen the protection of human rights and freedoms in Australia by reference to basic legal principles expounded in the decisions of the European Court. Such attempts have not always reflected the opinion of the majority of judges on the High Court of Australia. *Dugan v Mirror Newspapers Ltd* was an early example of this fact. But, gradually, the power of the exposition and the persuasion of the reasoning have encouraged Australian judges, and therefore Australian advocates, to look to Strasbourg and to invoke its holdings.

### **DEVELOPING THE RIGHT TO FREEDOM OF EXPRESSION**

One of the most important human rights developments in Australian law over the past twenty years has been the recognition of a type of implied constitutional right to freedom of political communication. This implied "right" was initially explained by the High Court in *Australian Capital Television Pty Ltd v Commonwealth*<sup>11</sup>. In that case Chief Justice Mason acknowledged that the fundamental importance of freedom of political communication in modern systems of representative

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<sup>11</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

government had been recognised by overseas courts in various jurisdictions<sup>12</sup>. He specifically referred, amongst other courts, to the European Court of Human Rights, and to its pronouncements of the importance of the basic right of generally free political expression in cases such as *Handyside v United Kingdom*<sup>13</sup>, *The Sunday Times Case*<sup>14</sup> and *Lingens v Austria*<sup>15</sup>.

The influence of the *European Convention*, and of the European Court of Human Rights expounding it, on the development of the implied constitutional right to freedom of political communication in Australia may be seen in several of the leading Australian cases in this area<sup>16</sup>. In Australia, the implied "right" has been held to derive textually as an implication arising from sections 7 and 24 of the Australian Constitution. The requirement that parliamentary representatives be "directly chosen by the people", as stated in the Australian Constitution, has been

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<sup>12</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, per Mason CJ at 140.

<sup>13</sup> *Handyside v United Kingdom* (1976) 1 E.H.R.R. 737, at 754.

<sup>14</sup> *The Sunday Times Case (The Sunday Times v United Kingdom)* (1979) 2 E.H.R.R. 245.

<sup>15</sup> *Lingens v Austria* (1986) 8 E.H.R.R. 407, at 418.

<sup>16</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, per Mason CJ at 140, Brennan J at 157-159; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, per Mason CJ at 29, Brennan J at 47; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, per Mason CJ, Toohey and Gaudron JJ at 130; *Leask v Commonwealth* (1996) 187 CLR 579, per Brennan CJ at 593-595, Dawson J at 606, Toohey J at 615.

interpreted as carrying a necessary requirement that the constitutionally mandated choice must be an informed one and that it should not be limited by impermissible restrictions on access to relevant political information. To emphasise the essential importance of free public discussion in sustaining a modern representative democracy, Justice FG Brennan, in *Nationwide News Pty Ltd v Wills*, referred to decisions of the European Court of Human Rights in *The Observer and The Guardian v United Kingdom*<sup>17</sup>. He said<sup>18</sup>:

“... it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments.”

In the High Court of Australia, it was accepted that this implied constitutional right to freedom of political communication was not an Australian equivalent to Article 10 of the *European Convention*. Article 10 expressly creates a general right to freedom of speech. The European Court of Human Rights has taken a broad approach in interpreting that provision<sup>19</sup>. This contrasts with the implied and more limited and particular, character of the guarantee upheld under

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<sup>17</sup> *The Observer and The Guardian v United Kingdom* (1991) 14 E.H.R.R. 153, at 178.

<sup>18</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, per Brennan J at 47.

<sup>19</sup> As seen in decisions such as *Lingens v Austria* (1986) 8 E.H.R.R. 407 and *Case of Oberschlick v Austria*, Series A, No. 204, 23 May 1991.

Australian law. The interpretation of the latter is limited by the terms and structure of the Australian Constitution. Its operation has been confined to political communications necessary to ensure the efficacy of democratic parliamentary government. There are thus considerable differences between the scope of the protected rights to freedom of speech recognised in Europe and Australia.

In *Theophanous v The Herald & Weekly Times Ltd*, these differences led Justice Brennan to suggest that the assistance to be gained from the 'Article 10 cases', in determining the scope and application of the Australian freedom of political communication, was extremely limited<sup>20</sup>. On the other hand, in the same case, Chief Justice Mason and Justices Toohey and Gaudron recognised that, whilst the Australian guarantee was not the precise equivalent of the *European Convention* broad guarantee provided under either Article 10 or under the First Amendment of the United States Constitution<sup>21</sup>:

“... that circumstance is not a reason for concluding that the United States and European approaches are irrelevant or inappropriate to our situation.”

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<sup>20</sup> *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, per Brennan J at 162-163.

<sup>21</sup> *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, per Mason CJ, Toohey and Gaudron JJ at 130.

## **PROPORTIONALITY IN AUSTRALIAN CONSTITUTIONAL LAW**

The Australian “freedom of speech” cases have also been central to the development of the constitutional concept of proportionality and its application in Australian law. In this, the influence of the European Court of Human Rights is directly evident.

The concept of proportionality has its origins in European, specifically German, constitutional law. This foundation was noted by Justice Gummow in the High Court of Australia, writing in *Minister for Resources v Dover Fisheries Pty Ltd*<sup>22</sup>:

“The concept of ‘reasonable proportionality’ as a criterion for assessment of validity in constitutional and administrative law appears to have entered the stream of the common law from Europe and, in particular, from the jurisprudence of the Court of Justice of the European Communities and the European Court of Human Rights.”

The concept of proportionality essentially affords lawyers a formula for balancing competing principles and ensuring that measures adopted by governments are reasonably proportionate and harmonious to achieving the legitimate purpose for which such measures are introduced. The European Court of Human Rights has employed the concept in cases such as *Handyside v United Kingdom*<sup>23</sup> and the

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<sup>22</sup> *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 116 ALR 54, per Gummow J at 64.

<sup>23</sup> *Handyside v United Kingdom* (1976) 1 E.H.R.R. 737.

*Sunday Times Case*<sup>24</sup>. It has done so to determine whether breaches of the *European Convention* had been proved. To decide whether the restriction of a right guaranteed under the *European Convention* is valid, the European Court of Human Rights has considered whether the restriction is "proportionate" to a legitimate aim that is being pursued.

In Australia, the proportionality test was chiefly derived from the jurisprudence of the European Court of Justice and the European Court of Human Rights<sup>25</sup>. The relationship between the Australian and European concepts of proportionality has been expressly acknowledged by Justice Selway, a brilliant judge of the Federal Court of Australia who died recently<sup>26</sup>:

“... [T]here are considerable differences between the test as applied in European law and the test applied in Australia, although the application of the proportionality test in Australia in respect of guarantees, immunities and limitations upon power does bear a striking similarity with the use of the test in European law.”

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<sup>24</sup> *The Sunday Times Case (The Sunday Times v United Kingdom)* (1979) 2 E.H.R.R. 245.

<sup>25</sup> *Leask v Commonwealth* (1996) 187 CLR 579, per Toohey J at 615; *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 116 ALR 54, per Gummow J at 64; Sir Anthony Mason, “Trends in Constitutional Interpretation” (1995) 18 *University of New South Wales Law Journal* 237, at 246; J. Kirk, “Constitutional Guarantees, Characterisation and the Concept of Proportionality” (1997) 21 *Melbourne University Law Review* 1, at 2; T. H. Jones, “Legal Protection for Fundamental Rights and Freedoms” (1994) 22 *Federal Law Review* 57, at 77.

<sup>26</sup> B Selway, “The Rise and Rise of the Reasonable Proportionality Test in Public Law” (1996) 7 *Public Law Review* 212, at 212.

Justice Selway dated the first development of a reasonable proportionality test in Australia to cases in the 1930s. However, he noted that it was not until the 1980s that the notion was explicitly discussed and its constitutional significance recognised.<sup>27</sup> Since that time<sup>28</sup>:

“... in Australia the proportionality doctrine has taken root and, indeed, extended its reach into the heartland of federal constitutional law.”

The proportionality test has become part of the central test applied by the High Court of Australia for determining the validity of an alleged violation of an express or implied constitutional freedom or guarantee. The concept has been employed in this manner in cases considering, for example, the express guarantee of freedom of interstate trade under section 92 of the Australian Constitution<sup>29</sup>, the express prohibition on legislative discrimination against the residents of other States under section 117 of the Australian Constitution<sup>30</sup>, and the implied

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<sup>27</sup> B Selway, “The Rise and Rise of the Reasonable Proportionality Test in Public Law” (1996) 7 *Public Law Review* 212, at 213-214.

<sup>28</sup> *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 116 ALR 54, per Gummow J at 64.

<sup>29</sup> *Castlemaine Tooheys Ltd v State of South Australia* (1990) 169 CLR 436, per Mason CJ, Brennan, Deane, Dawson and Toohey JJ at 473; *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

<sup>30</sup> *Street v Queensland Bar Association* (1989) 168 CLR 461, per Brennan J at 510-512, per Gaudron J at 570-574.

constitutional protection of freedom of political communication just mentioned<sup>31</sup>.

The use of the concept of proportionality in this way, being a test of legitimate restrictions upon guaranteed human rights, essentially mirrors the application of the proportionality concept by the European Court of Human Rights in cases such as *Handyside v United Kingdom*<sup>32</sup> and the *Sunday Times Case*<sup>33</sup>. This point was made by Chief Justice Brennan in *Leask v Commonwealth*<sup>34</sup>.

The precise scope of the concept of proportionality within Australian constitutional law, particularly in terms of its use as a test of characterisation, has been the subject of considerable debate amongst Australian judges and lawyers<sup>35</sup>. The use of proportionality as a test for

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<sup>31</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1997) 177 CLR 106, per Mason CJ at 142-144, Brennan at 157-160; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, per Brennan J at 150-152, Deane J at 178-179; *Cunliffe v Commonwealth* (1994) 182 CLR 272, per Mason CJ at 300, Brennan J at 323-326, per Deane J at 339-340, Gaudron J at 387-388; *Leask v Commonwealth* (1996) 187 CLR 579, per Brennan CJ at 593-595, Dawson J at 606, Toohey J at 614-616; *Mulholland v Australian Electoral Commission* (2005) 220 CLR 181 at 266-268 [247]-[268].

<sup>32</sup> *Handyside v United Kingdom* (1976) 1 E.H.R.R. 737.

<sup>33</sup> *The Sunday Times Case (The Sunday Times v United Kingdom)* (1979) 2 E.H.R.R. 245.

<sup>34</sup> (1996) 187 CLR 579, per Brennan CJ at 594.

<sup>35</sup> For an examination of the history and developments relating to this topic see: J. Kirk, "Constitutional Guarantees, Characterisation and the Concept of Proportionality" (1997) 21 *Melbourne University Law*

the legitimacy of alleged violations of constitutional freedoms, immunities and guarantees – a use which mirrors the application of the concept by the European Court of Human Rights – is, however, now well established. In developing the concept in this manner, the Australian courts have expressly drawn upon the jurisprudence of the European Court of Human Rights. This process is bound to continue in the coming years.

A related concept that is derived from the European Court of Human Rights is that of the “margin of appreciation”. In cases such as *The Observer and The Guardian v United Kingdom*<sup>36</sup>, the European Court of Human Rights recognised that, when applying the proportionality test, it should allow a “margin of appreciation” to the lawmakers of a participating State in their decisions about the means that would be used to achieve a particular purpose that falls within a constitutional power but also which has the effect of inhibiting, to some degree, a constitutional guarantee or freedom. The “margin of appreciation” has been called a<sup>37</sup>:

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*Review 1*; B. Selway, “The Rise and Rise of the Reasonable Proportionality Test in Public Law” (1996) 7 *Public Law Review* 212; H. P. Lee, “Proportionality in Australian Adjudication”, contained in G. Lindell (ed.) *Future Directions in Australian Constitutional Law* (1994), at 126-149.

<sup>36</sup> *The Observer and the Guardian v United Kingdom* (1991) 14 E.H.R.R. 153, at 178.

<sup>37</sup> J. Kirk, “Constitutional Guarantees, Characterisation and the Concept of Proportionality” (1997) 21 *Melbourne University Law Review* 1, at 56.

“foundational aspect of the jurisprudence of the Court of Human Rights.”

In cases such as *Leask v Commonwealth*<sup>38</sup>, *Cunliffe v Commonwealth*<sup>39</sup> and *Australian Capital Television Pty Ltd v Commonwealth*<sup>40</sup> Chief Justice Brennan drew directly from the European Court of Human Rights in suggesting that the concept of a parliamentary “margin of appreciation” was applicable to Australia. Whilst this concept remains a “controversial importation” into Australian constitutional law<sup>41</sup> the influence of the European Court of Human Rights is apparent in discussions about its application in Australia. The difficulties of the concept, as it seems to me, is that it is vague in purpose, unclear in expression and liable to allow departure from basic norms on grounds which the phrase insufficiently and imprecisely explains. On a continent as diverse as Europe, this may be inescapable. In a continental country with relatively few basic internal differences, such as Australia, the notion seems less attractive.

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<sup>38</sup> *Leask v Commonwealth* (1996) 187 CLR 579, per Brennan CJ at 595

<sup>39</sup> *Cunliffe v Commonwealth* (1994) 182 CLR 272, per Brennan J at 325.

<sup>40</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, per Brennan J at 159.

<sup>41</sup> *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [204] of my own reasons.

## **THE RIGHT TO A FAIR TRIAL**

The European Court of Human Rights has also influenced developments in Australian criminal procedure, most notably in cases considering the content of the right to a fair trial. The Australian Constitution does not contain an expressly guaranteed right to a fair trial, in a form equivalent to the general guarantee provided by Article 6 of the *European Convention*. Indeed, the only express constitutional protection is afforded under section 80 of the Australian Constitution. This guarantees the right to trial by jury for all indictable federal offences. Section 80, however, has been given a narrow interpretation by the High Court.<sup>42</sup> Remarkably, it has been held that if a criminal charge is not tried on indictment (a formal document initiating the trial process) s 80 of the Constitution has no application and its guarantee of jury trial is bypassed.

There has been some judicial support for the concept of an implied constitutional right to a fair trial arising from the structure and contents of Chapter III of the Australian Constitution dealing with the judicature and the vesting of the judicial power of the Commonwealth in the courts<sup>43</sup>. The existence of a broad implied constitutional right to a

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<sup>42</sup> *R v Archdall and Roskrige; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *Kingswell v The Queen* (1985) 159 CLR 264; *R v Cheng* (2000) 203 CLR 248.

<sup>43</sup> *Dietrich v The Queen* (1992) 177 CLR 292, per Deane J at 326, Gaudron J at 362;

fair trial, however, has not yet been accepted by a majority of the High Court of Australia<sup>44</sup>. The content, scope and nature of any implied rights in Chapter III of the Constitution remains a subject of considerable legal debate.

Despite the lack of an express constitutional guarantee of fair trial or due process, or an Australian equivalent to Article 6 of the *European Convention*, the right of an accused to have a fair trial according to law has been recognised as a fundamental element of Australian criminal law<sup>45</sup>. The precise elements of such a right have not been exhaustively listed. In each case where an infraction is pleaded, it ultimately falls to the courts to develop, express and apply this concept. Justice Brennan has referred to this continual process of elaboration as being<sup>46</sup>:

“... the onward march to the unattainable end of perfect justice.”

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<sup>44</sup> See, however, *Ebner v Official Trustee* (2001) 205 CLR 337 at 363 [82] per Gaudron J; 373 [116]-[117] of my own reasons.

<sup>45</sup> *Dietrich v The Queen* (1992) 177 CLR 292, per Mason CJ and McHugh J at 299-300; *McKinney v The Queen* (1991) 171 CLR 468, at 478; *Jago v District Court (NSW)* (1989) 169 CLR 23, per Mason CJ at 29, Deane J at 56, Toohey J at 72, Gaudron J at 75; A. Mason, “Fair Trial” (1995) 19 *Criminal Law Journal* 7; K.P. Duggan, “Reform of the criminal law with fair trial as the guiding star” (1995) 19 *Criminal Law Journal* 258; J. J. Spigelman, “The truth can cost too much: The principle of a fair trial” (2004) 78 *Australian Law Journal* 29, at 30.

<sup>46</sup> *Jago v District Court (NSW)* (1989) 168 CLR 23, per Brennan J at 54.

But at least the march is generally in a forward direction. In Australia, it is not a retreat.

There are obvious differences between Australian and European law in relation to the application of the right to a fair trial, particularly in terms of the context within which this guarantee must be considered. As a result, there are limits to the direct application within Australia of the decisions of the European Court of Human Rights concerning Article 6 of the *European Convention*. Nevertheless, reference has been made on many occasions to the general approach by the European Court and to the development of specific elements of the right to a fair trial as explained by the Strasbourg Court.

One clear example of the influence may be seen in *Dietrich v The Queen*<sup>47</sup>. That case concerned the extent of an indigent accused's right to legal representation in a serious criminal trial. The High Court of Australia, by majority, allowed Mr Dietrich's appeal. It held that the right to a fair trial could be violated where an indigent person, accused of a serious crime, was not able to secure legal representation through no fault of his or her own. A notable aspect of this decision was the Court's willingness to consider international developments in this area. Specific consideration was given to decisions of the European Court of Human Rights. In their joint reasons in *Dietrich*, Chief Justice Mason and

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<sup>47</sup> *Dietrich v The Queen* (1992) 177 CLR 292.

Justice McHugh expressly noted the approach of the European Court of Human Rights in cases such as *Monnell and Morris v United Kingdom*<sup>48</sup> and *Granger v United Kingdom*<sup>49</sup>. They stated that<sup>50</sup>:

“... the European Court of Human Rights has approached the almost identical provision in the E.C.H.R. [Article 6(3)(c)] by emphasising the importance of the particular facts of the case to any interpretation of the phrase “when the interests of justice so require”. As will become clear, that approach is similar to the approach which, in our opinion, the Australian common law must now take.”

A more recent example of this willingness is the decision of the High Court of Australia in *Mallard v The Queen*<sup>51</sup>. As part of a broad examination of the duty of disclosure imposed upon the prosecution in criminal cases, the approaches adopted in various jurisdictions, including in the European Court of Human Rights, were outlined, considered and applied<sup>52</sup>.

Many signs therefore point to Australian judges continuing to refer to decisions of the European Court of Human Rights to assist in the

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<sup>48</sup> *Monnell and Morris v United Kingdom* (1987) 10 E.H.R.R. 205, at 225.

<sup>49</sup> *Granger v United Kingdom* (1990) 12 E.H.R.R. 469, at [480]-[482].

<sup>50</sup> *Dietrich v The Queen* (1992) 177 CLR 292, per Mason CJ and McHugh J at 307.

<sup>51</sup> *Mallard v The Queen* (2006) 80 ALJR 160.

<sup>52</sup> *Mallard v The Queen* (2006) 80 ALJR 160, my own reasons at [68]-[80].

development of the concept of what is meant by a fair trial in contemporary Australian conditions. Those decisions help to render the elements of this right more precise. This continuing influence was acknowledged by Justice Duggan of the Supreme Court of South Australia, who said that:

“It is to be expected that the future content of a “fair trial” in Australia will be influenced at least to some extent by international conventions, the views of the European Court and the reactions to those views by the English courts.”<sup>53</sup>

### **APPLYING INTERNATIONAL STANDARDS IN MIGRATION LAW**

The approach taken by the European Court of Human Rights in protecting the fundamental rights of migrants, and particularly refugees, has also directly influenced the approach adopted in a number of Australian decisions in the context of migration law. This has most notably occurred in the context of considering the approach taken by the European Court of Human Rights to the *Refugees Convention*; a treaty to which Australia is a signatory.

The policy of mandatory detention of alien arrivals in Australia where they have no entry visas, has been a controversial political issue, particularly in recent years. In considering various legal issues relating

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<sup>53</sup> K.P. Duggan, “Reform of the Criminal Law with Fair Trial as the Guiding Star” (1995) 19 *Criminal Law Journal* 258, at 271.

to questions of detention, Australian courts have repeatedly referred to decisions of the European Court of Human Rights concerning Article 5(1) of the *European Convention*, being the right to liberty and security of the person. In cases such as *Chahal v United Kingdom*<sup>54</sup> and *Amuur v France*<sup>55</sup>, the European Court of Human Rights has taken a broad approach to this guarantee. Article 5(1) has been held not only to require that no individual be deprived of their liberty unless this is done according to law but also that the law itself, and its application in the individual case, must not be arbitrary.

In *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri*<sup>56</sup> the Full Court of the Federal Court of Australia, an intermediate court of appeal below the High Court of Australia, concluded that cases in the European Court provided support for the view that a similarly broad interpretation applied in relation to Article 9(1) of the *International Covenant on Civil and Political Rights*. This, in turn, was held to affect the interpretation of section 196 of the *Migration Act 1958* relating to mandatory detention of aliens. The Full Court of the Federal Court concluded that the *Migration Act* should be read, as far as its language

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<sup>54</sup> *Chahal v United Kingdom* (1996) 23 E.H.R.R. 413.

<sup>55</sup> *Amuur v France* (1996) 22 E.H.R.R. 533.

<sup>56</sup> *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 126 FCR 54; (2003) 197 ALR 241.

permitted, in conformity with Australia's international obligations under the *International Covenant on Civil and Political Rights*<sup>57</sup>.

In relation to the specific issue of indefinite detention the conclusions reached in *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri*<sup>58</sup> were effectively rejected by a majority of the High Court of Australia in the subsequent decisions of the High court in *Al-Kateb v Godwin*<sup>59</sup> and *Minister for Immigration and Multicultural Affairs v Al Khafaji*<sup>60</sup>. In *Al-Kateb*, a 4:3 decision of the Court, the legality of the indefinite detention of two unlawful non-citizen stateless persons under the *Migration Act 1958* (Cth), in circumstances where they were likely to be detained for the indefinite future, was upheld as within the Act and constitutionally valid. Three of the seven Justices (including myself) dissented. The decision in *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri*<sup>61</sup> still remains significant, as

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<sup>57</sup> Australia is a party to the *International Covenant on Civil and Political Rights*, having ratified the *ICCPR* on 13 August 1980. It is also a party to the First Optional Protocol, permitting individual communications on alleged breaches. It has been held that these ratifications inevitably bring the *ICCPR* into having an influence over Australia's domestic law: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 per Brennan J.

<sup>58</sup> *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 126 FCR 54; (2003) 197 ALR 241.

<sup>59</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>60</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664.

<sup>61</sup> *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 126 FCR 54; (2003) 197 ALR 241.

an illustration of an Australian court examining the decisions of an international human rights court and using those decisions in an attempt to strengthen human rights protection within Australia by interpreting Australian legislation in conformity with such decisions.

Australian judges have also looked to the approach of the European Court of Human Rights when considering the obligation of a State to safeguard and protect applicants in the context of the *Refugees Convention*. In cases such as *Minister for Immigration & Multicultural Affairs v Respondents S152/2003*<sup>62</sup>, *Applicants M160/2003 v Minister for Immigration & Multicultural & Indigenous Affairs*<sup>63</sup> and *VRAW v Minister for Immigration & Multicultural & Indigenous Affairs*<sup>64</sup> reference has been made to the standard applied by the European Court of Human Rights in *Osman v United Kingdom*<sup>65</sup>. Whilst the approach adopted in that case has not been viewed as providing Australian courts with a definitive guide to what 'international standards' might be, it has been treated as identifying some of the issues that are likely to be relevant to this area of international law which Australian judges should consider.

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<sup>62</sup> *Minister for Immigration & Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487, per Gleeson CJ, Hayne and Heydon JJ at 495.

<sup>63</sup> *Applicants M160/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 219 ALR 140, per Finkelstein J at 151.

<sup>64</sup> *VRAW v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1133, per Finkelstein J at [18].

<sup>65</sup> *Osman v United Kingdom* (1998) 29 E.H.R.R. 245.

## **THE IMPACT OF HUMAN RIGHTS IN FAMILY LAW**

The cases collectively referred to as the “*Re Kevin* decisions”<sup>66</sup> are another example that illustrate the international character of human rights jurisprudence today and the positive contribution that has been made to such understandings in Australia by the decisions of the European Court of Human Rights.

The issue in the “*Re Kevin* decisions” was whether a marriage between a woman and a post-operative female to male transsexual person was valid under the statutory and constitutional provisions for “marriage” under Australian law. In granting a declaration of the validity of the marriage Justice Chisholm of the Family Court of Australia, at first instance, conducted a comprehensive review of the legal position in other countries with respect to the recognition of a transsexual person’s acquired gender and any subsequent marriage. This included a review of relevant decisions of the European Court of Human Rights. In relation to the decisions of the European Court of Human Rights, discussed in his decision, Justice Chisholm concluded<sup>67</sup>:

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<sup>66</sup> *Attorney-General (Cth) v “Kevin and Jennifer”* (2003) 172 FLR 300; *Kevin v Attorney-General (Cth)* (2001) 165 FLR 404.

<sup>67</sup> *Kevin v Attorney-General (Cth)* (2001) 165 FLR 404, per Chisholm J at 449-450.

“These decisions are not directly relevant to the present case. ... Nevertheless, the cases provide useful glimpses of developments and trends in thinking in Europe. There is a great deal of common ground among the various international human rights instruments. Overall, I think that these decisions indicate that failure to recognise the sex of post operative transsexuals raises serious issues of human rights, such that the question arises whether the failure can be permitted on the basis of the margin of appreciation allowed to States under the Convention. It is clear that a decision in favour of the applicants would be more in accord with international thinking on human rights than a refusal of the application.”

In affirming the decision of Justice Chisholm, on appeal, the Full Court of the Family Court of Australia also provided a detailed examination of relevant international case-law, referring extensively to the approach taken by the European Court of Human Rights on analogous questions. The Full Court stated that it agreed generally with the submission of the Australian Human Rights and Equal Opportunity Commission that Australian courts “should and do give weight to the views of specialist international courts and bodies such as ... the European Court of Human Rights.”<sup>68</sup> Whilst it was acknowledged that the decisions of the European Court of Human Rights would not be determinative, because they are not binding as a matter of law on Australian courts, they were held to be “helpful” in considering the principal issues that were before the Court<sup>69</sup>. There was no hesitation in examining them and giving them weight in reaching the decision. This

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<sup>68</sup> *Attorney-General v “Kevin and Jennifer”* (2003) 172 FLR 300, per Nicholson CJ, Ellis and Brown JJ at 349.

<sup>69</sup> *Attorney-General v “Kevin and Jennifer”* (2003) 172 FLR 300, per Nicholson CJ, Ellis and Brown at 354.

alone is an important advance in Australia on the position that obtained a decade earlier.

The Full Family Court recognised that differences between the legal fundamentals in Europe and Australia would necessarily limit the relevance of decisions of the European Court of Human Rights. In regard to this, that court stated<sup>70</sup>:

“We appreciate that these are decisions by a Court as to the interpretation of a Convention to which Australia is not a party and must be read with this in mind. Nevertheless, as Johnson J pointed out in *Bellinger*, it provides a startling confirmation of the degree of international isolation that this country would adopt if [the contrary position] is found to represent the law.”

No attempt was made by the Australian Government to appeal against the *Re Kevin* decision to the High Court. In the end, the Government, which had strongly contested the transsexual's marriage right, accepted the Family Court's decision. Such cases also highlight the fact that the exchange of ideas and knowledge about legal developments between Australian courts and the European Court of Human Rights is not all in the one direction. The decision of Justice Chisholm in *Kevin v Attorney-General (Cth)*<sup>71</sup> has been cited with approval by the Grand Chamber of the European Court of Human Rights

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<sup>70</sup> *Attorney-General v “Kevin and Jennifer”* (2003) 172 FLR 300, per Nicholson CJ, Ellis and Brown JJ at 353.

<sup>71</sup> *Kevin v Attorney-General* (2001) 165 FLR 404.

in *I v United Kingdom*<sup>72</sup> and *Christine Goodwin v United Kingdom*<sup>73</sup>. In these decisions, the European Court of Human Rights found that the legal status, and treatment, of transsexual people in the United Kingdom had resulted in violations of articles 8, 12, 13 and 14 of the *European Convention*. The United Kingdom Parliament subsequently enacted the *Gender Recognition Act 2004* (UK) in response to these decisions. Rachael Wallbank, who appeared as counsel in the “*Re Kevin*” decisions, has expressed the view that<sup>74</sup>:

“The legal nexus between the *Gender Recognition Act 2004* and the *Re Kevin* decisions really highlights the international interdependence of reform efforts in respect of the human rights of people with transsexualism.”

### **FURTHER EXAMPLES OF THE INFLUENCE**

There are many other examples of decisions by the European Court of Human Rights being cited in Australian decisions, and of the approach adopted by the European Court of Human Rights in a particular area, being considered by Australian judges with a view to informing themselves on the development of Australian law. Some examples of the range of references that have been made to decisions

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<sup>72</sup> *I v United Kingdom* (2003) 36 E.H.R.R. 53.

<sup>73</sup> *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18.

<sup>74</sup> R. Wallbank, “*Re Kevin* in Perspective” (2004) 9 *Deakin Law Review* 461, at 480.

of the European Court of Human Rights by judges of the High Court of Australia in recent years include:

- In *Grollo v Palmer*<sup>75</sup> the High Court noted that other countries had taken the same view about the desirability of judicial supervision of warrants to authorise the secret surveillance of suspects in criminal cases. The Court cited the decision of the European Court of Human Rights in *Klass v Federal Republic of Germany*<sup>76</sup> as an illustration highlighting the human rights considerations that inform this view<sup>77</sup>.
- In *Applicant A v Minister for Immigration and Ethnic Affairs*<sup>78</sup>, Justice McHugh accepted as correct the approach of Justice Zekia in the European Court of Human Rights in *Golder v United Kingdom*<sup>79</sup> in interpreting Article 31 of the *Vienna Convention on the Law of Treaties*, stating that it is the approach that “should be followed in this country”.

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<sup>75</sup> (1995) 184 CLR 348.

<sup>76</sup> *Klass v Federal Republic of Germany* (1978) 2 E.H.R.R. 214, at 235.

<sup>77</sup> *Grollo v Palmer* (1995) 184 CLR 348, per Brennan CJ, Deane, Dawson and Toohey JJ at 367-368.

<sup>78</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, per McHugh J at 253-254.

<sup>79</sup> *Golder v United Kingdom* (1975) 1 E.H.R.R. 524.

- The relatively strict approach adopted by the European Court of Human Rights towards questions of apparent and actual judicial bias and the requirements of judicial impartiality and judicial independence has been referred to in decisions of the High Court such as *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka*<sup>80</sup> and *Johnson v Johnson*<sup>81</sup>. In those decisions, the approaches taken by the European Court of Human Rights have reinforced the principles recognised in Australian law.
- In *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*<sup>82</sup>, my dissenting reasons referred, with approval, to the approach of the European Court of Human Rights to the interpretation of Article 9 of the *European Convention* in decisions such as *Kokkinakis v Greece*<sup>83</sup> and *Metropolitan Church of Bessarabia v Moldova*<sup>84</sup>. This was expressed in the context of considering the right to religious freedom in terms of the *Refugees Convention* and its application in Australia.

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<sup>80</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 152 in my own reasons.

<sup>81</sup> *Johnson v Johnson* (2000) 201 CLR 488, my own reasons at 501-502.

<sup>82</sup> *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1142; (2005) 216 ALR 1, at [121]-[123] in my own reasons.

<sup>83</sup> *Kokkinakis v Greece* (1993) 17 E.H.R.R. 397, at 418.

<sup>84</sup> *Metropolitan Church of Bessarabia v Moldova* (2002) 35 E.H.R.R. 13, at [118].

As I have shown, judicial references of this kind are not confined to the High Court of Australia. References to the European Court of Human Rights may also be found in many decisions of other Australian courts. Recent examples have included:

- The Full Court of the Federal Court of Australia referring to the decision in *Handyside v United Kingdom*<sup>85</sup> to illustrate the general principle that freedom of expression protects not only inoffensive speech but also extends to the protection of speech that offends, shocks or disturbs<sup>86</sup>.
- In *The Queen v Astill* a central issue for the New South Wales Court of Criminal Appeal was the reception of hearsay evidence in a manslaughter trial. The importance, in terms of procedural fairness, of the opportunity to cross-examine a witness was discussed by reference to *Unterpertinger v Austria*,<sup>87</sup>. This was a case in which the European Court of Human Rights held the conviction to be in violation of Article 6 of the *European Convention*<sup>88</sup>.

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<sup>85</sup> *Handyside v United Kingdom* (1976) 1 E.H.R.R. 737.

<sup>86</sup> *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105; (2004) 204 ALR 761, per French, Lee and Carr JJ at [69].

<sup>87</sup> *Unterpertinger v Austria* (1986) 13 E.H.R.R. 175.

<sup>88</sup> *R v Astill* (1992) 63 A Crim R 148, at 157 in my reasons in the New South Wales Court of Appeal.

- Article 3 of the *European Convention* and related decisions of the European Court of Human Rights were considered in *Smith v The Queen*, together with other international materials, in an examination of the prohibition against cruel and unusual punishments and the prohibition of excessive fines as universal human rights<sup>89</sup>.
- In *Australian Meat Industry Employees' Union v Belandra Pty Ltd*<sup>90</sup> Justice North, in the Federal Court of Australia considered, in some detail, the approach taken by the European Court of Human Rights to the interpretation of Article 11 of the *European Convention*. This was done in the context of interpreting the Australian federal *Workplace Relations Act 1996* (Cth) and, more specifically, the meaning of provisions designed to protect workers against discrimination on the basis of trade union membership.
- The decision of *Soering v United Kingdom*<sup>91</sup> was considered by Justice North in *McCrea v Minister for Customs & Justice*<sup>92</sup>. That case concerned the power of the Minister for Customs and Justice to

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<sup>89</sup> *Smith v The Queen* (1991) 25 NSWLR 1, at 14 and 15 in my own reasons in the New South Wales Court of Appeal.

<sup>90</sup> *Australian Meat Industry Employees' Union v Belandra Pty Ltd* [2003] FCA 910, per North J at [192] – [197], [217].

<sup>91</sup> *Soering v United Kingdom* (1989) 11 E.H.R.R. 429.

<sup>92</sup> *McCrea v Minister for Customs & Justice* [2004] FCA 1273.

surrender the applicant to Singapore in circumstances where he was charged with criminal offences punishable in Singapore by the death penalty. Although Justice North ultimately concluded that such comparative jurisprudence was of little assistance in determining the central question of the construction of section 22(3)(c) of the *Extradition Act 1988* (Cth), he did conclude that such materials were relevant in so far as they were indicative of a recent international trend of opposition to imposition of the death penalty.

### **AN ERA OF HUMAN RIGHTS**

The use of international materials in the development of Australian law is still a matter of debate and controversy in some circles<sup>93</sup>. In particular, the idea that the Australian Constitution should be read consistently with the rules of international law has been described as “heretical”<sup>94</sup>. I do not accept that view. But it is one held in some legal quarters in Australia, including by judges of the highest standing.

Of course, there are considerations that limit the application of unincorporated international law by domestic judges. The primary fidelity of a domestic judge is normally to the national Constitution.

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<sup>93</sup> The opposing viewpoints in this debate were expressed in *Al-Kateb v Godwin* (2004) 219 CLR 562, per McHugh J at 589-595; my own reasons at 622-630.

<sup>94</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, per McHugh J at 589.

Consistent with this obligation, such a judge cannot give priority to international law that has not been made part of the domestic legal system over and above the clear requirements of their national law<sup>95</sup>. It is possible, however, to respect this limitation whilst simultaneously acknowledging the important role that can be played by international materials. The decisions of bodies such as the European Court of Human Rights can enhance judicial thinking by exposing judges to the way that other experienced lawyers have approached similar issues. Shutting ourselves off from the experiences and knowledge of others only serves to restrict us in the continued pursuit of justice. Efforts to isolate individual countries, such as Australia and the United States of America from the persuasive force of international law are “doomed to fail”<sup>96</sup>.

The jurisprudence of the European Court of Human Rights has had a very important impact within Australia. This is reflected most clearly in the references made by Australian courts to decisions of the Court. References to such decisions have been increasing in recent years. This is a trend that seems likely to continue and expand.

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<sup>95</sup> *Minister for Immigration & Multicultural & Indigenous Affairs v B* (2004) 219 CLR 365, per Kirby J at 425.

<sup>96</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 629, in my own reasons. See MD Kirby, "International Law - the Impact on National Constitutions" (The Seventh Annual Grotius Lecture) 21 *American University International Law Review* 327.

The influence of the European Court of Human Rights is not defined exclusively by the number of references found in Australian case law. It has also had a more intangible, and possibly more enduring, effect through the way that the European Court has guided and influenced our thinking about human rights. As Sir Anthony Mason pointed out in relation to international law and legal institutions:

“The influence of international legal developments travels far beyond the incorporation of rules of international law and convention provisions into Australian domestic law. The emphasis given by international law and legal scholars to the protection of fundamental rights, the elimination of racial discrimination, the protection of the environment and the rights of the child, have changed the way in which judges, lawyers and legal scholars think about these subjects.”<sup>97</sup>

This influence will also continue, and indeed grow, in the future. This is because Australia, like other modern nations and economies, has become increasingly international in its outlook. As well, the Australian people are becoming more aware of the importance of human rights issues and jurisprudence. The effective protection of human rights has become a subject of considerable interest and debate in Australia. That debate now includes the need for a national Bill of Rights and for State human rights statutes<sup>98</sup>. These are just two contemporary debates.

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<sup>97</sup> Sir Anthony Mason, “Cross Currents: Internationalism, National Identity & Law”, Paper presented to the 50<sup>th</sup> Anniversary Conference of the Australasian Law Teachers’ Association (1995), at 5.

<sup>98</sup> G Williams, *The Case for an Australian Bill of Rights* (UNSW, 2004).

Undoubtedly, there is a growing national human rights dialogue in Australia. Unfortunately, the increased prominence of human rights discussions is partly the result of the heightened challenges that we face in protecting human rights in the present century.

In this environment, the role of the European Court of Human Rights is more significant and essential than ever. Reasoned, serious, balanced decisions are a powerful weapon against injustice and arbitrary or ill-conceived deprivation of fundamental rights. The Strasbourg Court will no doubt continue to influence and guide the development of human rights law in Australia, as it has done in many non-signatory countries. The European Court of Human Rights is undoubtedly:

“... a court for the modern age. It continues to give intellectual leadership where wisdom and proportionality matter most.”<sup>99</sup>

I pay an Antipodean tribute to the two great Presidents of the Strasbourg Court whom I have known; and especially to Luzius Wildhaber at this time as he lays down the heavy responsibilities he has borne in helping to build such a formidable, respected and useful body of transnational

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<sup>99</sup> M D Kirby, “Terrorism and the Democratic Response: A Tribute to the European Court of Human Rights”, Robert Schuman Lecture, 11 November 2004. See (2005) 28 UNSWLJ 221.

law of great potency, including in Australia, on the opposite side of the world.

**FESTSCHRIFT FOR PROFESSOR LUZIUS WILDHABER**

**THE AUSTRALIAN DEBT TO THE EUROPEAN COURT OF HUMAN  
RIGHTS**