[NOT FOR PUBLICATION OR CITATION WITHOUT PERMISSION]

18 October 2016

Australian Academy of Law

"The Increasing Internationalisation of Australian Law"

By Justin Gleeson SC

Solicitor-General of the Commonwealth

Introduction

The topic I have chosen for this evening is the "Increasing Internationalisation of Australia Law".[1] My thoughts are stimulated by the insightful observations of Justice Stephen Breyer of the U.S. Supreme Court in his 2015 book entitled *The Court and the World, American Law and the New Global Realities*. I will seek to adapt these observations to the

[1] I am indebted to counsel assisting Megan Caristo for substantial assistance in the preparation of this speech.

Australian context.

According to Justice Breyer, the docket of the U.S. Supreme Court is filled increasingly with what he calls "foreign" cases: cases calling on the Court to consider activities of the U.S. executive carried out offshore (as with Guantanamo Bay), of foreign commerce, of foreign threats to national security, and so on. As a result, the smooth operation of U.S. law has increasingly come to depend on its capacity to work in harmony with the laws of foreign nations and international law more generally.

Justice Breyer identifies four specific drivers for the increasing internationalisation of U.S. law. The *first* is threats to U.S. national security, which have forced U.S. courts to consider issues such whether the constitutional protections afforded to persons within U.S. borders extend to citizens or non-citizens beyond those borders, and how far the Constitution allows the President and Congress to limit civil liberties in the face of threats to the safety of American citizens and non-citizens.

The *second* key driver is the need to interpret U.S. statutes in an increasingly interconnected world. The emphasis has shifted "from the mere avoidance of direct conflict toward enabling analogous foreign and domestic statutes to work harmoniously together".[2]

The *third* key driver has been the increase in international agreements including not just treaties but also executive agreements with other nations, executive orders authorising formal or informal arrangements between government agencies and their foreign counterparts, agreements between regulators, such as anti-trust enforcers or bank

[2] See Stephen Breyer, *The Court and the World, American Law and the New Global Realities* (Alfred A Knopf, 2015), see especially 92.

regulators with their foreign counterparts and so on. Where once agreements were confined mainly to war, peace, trade and territories, today they span matters once considered local in character, such as social and political rights, private commercial contracts and even family life. They are frequently multi-national and may create new organizations. Justice Breyer argues that the Court's interpretation of international agreements has had to adapt to these changes by striving to find interpretations that harmonize the laws and practices of the parties to an agreement and workable solutions that demonstrate that the law can offer a means for addressing emerging problems.[3]

The *fourth* key driver has been U.S. judges themselves who increasingly confer with foreign judges and find that they have more in common than they used to. U.S. judges and foreign judges are faced increasingly with similar problems; they perform similar judicial tasks of interpreting treaties and agreements that protect individual human rights and regulate international commerce; and they have a similar desire to ensure that the law can offer an effective solution to the problems that face our increasingly turbulent world.[4]

My core question tonight is how far do we see these or parallel drivers working to effect the internationalisation of Australian law? I would identify 8 key drivers in the Australian context.

Australia – the historical context – Federation.

The *first* driver to note, in the Australian context, is that that there are particular features of our federal Constitution, as adopted in 1900, that have always opened Australian law to overseas influences. At Federation, the Framers quite self-consciously built into our

[3] Ibid see especially 167-168.
[4] Ibid see especially 249-251.

written Constitution a mix of British and American conceptions.

From Britain, the Framers drew on notions of responsible and representative government. They are most clearly evident in the requirements in ss 7 and 24 that Senators and members of the House of Representatives be "directly chosen by the people" and in s 64 which requires that "no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or member of the House of Representatives".

From the United States, the Framers consciously adopted much of the structure of the Constitution, its model of federalism, its concept of the separation of powers and some of its individual provisions. Section 75(v) of the Constitution, for example, giving the High Court an entrenched constitutional grant of jurisdiction to review the legality of actions of the Executive, represented the Framers' response to the decision of the U.S. Supreme Court in *Marbury v Madison*.[5] Similarly, the list of powers allocated to the Commonwealth Parliament in s 51 was based largely around a core list identified from the U.S. experience as necessary for the central government in a Federation. It was supplemented by a few additions largely suggested by U.S. experience or doubts: banking and insurance and a uniform marriage power.

Early High Court decisions show that the Justices and counsel had a close familiarity with U.S., Canadian and international law sources, as well of course of U.K. authority. The High Court's decision in 1908 in *Potter v Minehan*[6] is now best remembered for the statement of Justice O'Connor that has become the origin of the principle of legality.

---

[5] See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), ¶ 313. "Upon any Question, Howsoever Arising", ¶ 325. "In which a Writ of Mandamus or Prohibition, or an Injunction, is Sought Against an Officer of the Commonwealth."

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

A re-reading of this case reveals something more fundamental about the method of the early High Court. The question before the High Court was whether the power over immigration in s 51(xxvii) allowed the Commonwealth Parliament to pass a law treating a person as an "immigrant"—and thus exposed to the dictation test—when that person had been born and lived with his mother in Victoria, and at the age of five years had been taken by his Chinese father to China where he had remained for 26 years. The Court surveyed the principles of what we would now call both public and private international law, authorities on the U.S. Constitution as well U.K. authorities in reaching the conclusion that, absent evidence that the person had positively abandoned his connection with Australia, he remained a member of the Australian community and could not be treated as an immigrant.

Judicial fashions have waxed and waned over the 115 years since Federation but at various points in that history, and particularly in the last 10 years or so, it has been evident that the High Court is very attuned to rethinking the implications of the blend of unwritten British and written American Constitutionalism that found its way into our Constitution. Let me give some examples.

First, cases on executive power such as *Pape*, *Williams (No 1)* and *Williams (No 2)*[7], turned very much on seeing the executive power of the Commonwealth embodied in s 61 as sourced in the British Crown but significantly adapted to, and limited by, notions of Federalism and the role of the Senate drawn from the U.S. constitution.

Secondly, the High Court has long accepted the relevance of U.S. jurisprudence on Art 1, s 8, which gives Congress the power to impose taxes as long as they are "uniform

[7] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, *Williams v The Commonwealth* (2012) 248 CLR 156, *Williams v The Commonwealth (No 2*) (2014) 252 CLR 416.

throughout the United States", to s 51(ii) of our Constitution, which empowers Parliament to make laws with respect to taxation but so as not to discriminate between States.[8] This was given particular focus in 2013 in *Fortescue*.[9] The Chief Justice in particular drew on the U.S. jurisprudence as "appropriate sources of comparative Constitutional law" in construing s 51(ii) because a similar federal principle underpinned each of Art 1, s 8 and s 51(ii).[10] This assisted the conclusion that a taxation law will not discriminate if its operation is general throughout the Commonwealth even if it may not operate uniformly owing to different circumstances existing in different States.

Thirdly, in 2013, the High Court in the *ACT Same-Sex Marriage Case*[11] rejected the ACT's argument that its same-sex marriage law was "consistent" within s 109 with the *Marriage Act 1961* (Cth) (**Marriage Act**). The Court—in determining the scope of the *Marriage Act*, and of the underlying Constitutional power in s 51(xxi)—placed reliance upon the Convention Debates in which Australia's Framers recognized that there was a substantial public interest in giving the Commonwealth Parliament the legislative ability to enact a uniform scheme with respect to marriage. This was particularly so in light of the unsatisfactory U.S. experience prior to 1900 in which the absence of such a federal power had necessitated resort to complex rules of private international law to determine whether a marriage solemnised in one State was valid in another, or whether a marriage terminated in one State had likewise ended in another.[12]

It is important, however, not to overstate the influence of U.S. law. While the Framers consciously adopted the structure of the U.S. Constitution and some of its provisions, they

---

8 See *Deputy Federal Commissioner of Taxation (NSW) v Brown* (1958) 100 CLR 32 at 39 (Dixon CJ).
9 *Fortescue Metal Groups v The Commonwealth* (2013) 250 CLR 548.
10 Ibid at [25]-[26].
11 *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.
12 Ibid at [7].

also consciously rejected other of its provisions, most notably the Bill of Rights. The strong individual rights flavour of the Bill of Rights often means that principles developed in U.S. cases cannot directly be transplanted to Australia. Nevertheless, U.S. case law can offer ways of understanding a concept or provide useful points of comparison for developing an argument. In 2015 in *McCloy*[13], which concerned the validity of certain NSW election donation laws in light of the implied freedom of political communication, much of the parties' argument, and the reasoning of a number of Justices, referred to U.S. Supreme Court decisions on the U.S. First Amendment, even if the precise outcomes in the U.S. cases were not directly translated into the result here.[14]

To round out this first point, while some American constitutional jurisprudence, particularly in the originalist tradition, goes back to the British roots pre-1789,[15] the lived experience of the U.S. Constitution, over more than 200 years, in the face of unfolding legal challenges and repeated amendments to the Constitution, provides the primary guide to its interpretation. With Australia, we have two proud legal traditions, British and American, primarily as developed at 1900 but with an eye to later developments, that help inform our living Constitution today.

In summary, the first contrast I would draw with Justice Breyer's thesis is that it is not just a heavy recent High Court diet of "foreign cases" that drives our constitutional law to be international; the very origins and underpinnings of our federal compact have always invited it to be so.

---

13 *McCloy v NSW* (2015) 89 ALJR 857.

14 Ibid, for example, [36]-[42] (French CJ, Kiefel, Bell and Keane JJ) and [181] (Gageler J).

15 See, Norman Dorsen, "The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer", 3 *International Journal of Constitutional Law* 519 (2005).

Australia – the significance of key twentieth century developments – treaty making and implementation

At the time of Federation, Australia was not an independent player on the world stage. No express treaty making power was inserted into the Constitution. At 1901, it was considered that the Imperial Crown would retain the constitutional right to make treaties that would be binding on all parts of the Empire including Australia. Australia was envisaged as bearing only limited traits of sovereignty, as a Colonial legislature within the Empire.

As the century developed, Australia took on an increasingly independent international role. This was formally recognised in events such as the Imperial Conferences of 1926 and 1930, as well as the passage and adoption of the Statute of Westminster. As the new nation came to assume full legal personality on the international plane, the High Court came to recognise that s 61 enables the Australian Executive to enter treaties in all areas affecting the nation,[16] and later still that s 51(xxix) gives the Commonwealth Parliament a pervasive power to turn those treaties into domestic statute, necessarily trumping any State laws otherwise in force.[17]

The period immediately post World War II was very significant, with Australia closely involved in the foundation of the United Nations, its various organisations and Tribunals, and the making of key international agreements. Australia was forging what James Crawford has described as a "foreign policy distinct from that of the United Kingdom"

[16] *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643-644 (Latham CJ).

[17] See, for example, *Victoria v Commonwealth* (1996) 187 CLR 416; *Western Australia v Commonwealth* (1995) 183 CLR 373.

with a "liberal internationalism".[18] Some of the most significant international institutions were established and the most enduring agreements were signed. The International Monetary Fund and the International Bank for Reconstruction and Development (or World Bank) were founded in 1944.[19] Remarkable Australians including Dr Herbert Vere Evatt, Sir Kenneth Bailey and Sir Paul Hasluck, were instrumental at the 1945 San Francisco conference at which the *Charter of the United Nations* and the *Statute of the International Court of Justice* (**ICJ**) were signed.

This leads me to the *second* key driver, which is perhaps the key twentieth century development in the further internationalisation of Australian law, and one which does closely parallel Justice Breyer's analysis of the U.S. experience. The driver is the ever progressive expansion in the number, range and form of treaties or agreements entered by the Commonwealth executive on behalf of the nation. It is estimated that Australia is now party to over 2000 treaties.[20]

A key challenge posed by these treaties and agreements is that Australian courts are increasingly called upon to interpret domestic statutes implementing international obligations. This in turn requires our Courts to blend domestic principles of statutory interpretation with the somewhat more expansive principles in the Vienna Convention on the Law of Treaties.[21] The Vienna Convention requires that consideration be given to the context of a treaty, which includes "any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty" as well as "any

---

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

[19] *Articles of Agreement*, signed in Bretton Woods, 1944.

[20] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 3rd Ed, 2013) 1.

[21] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty".[22] It also requires that the following three matters be considered: first, "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions"; second, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" and third "any relevant rules of international law applicable in the relations between the parties".[23]

Most of us at law school never studied the Vienna Convention, even though Australia acceded to it in 1974. Further, it is hard to find an Australian law school curriculum which encourages students to study in a holistic way the range of treaties Australia has entered. Perhaps a change in curriculum is needed. Increasingly treaties and their implementing statutes are the very stuff of much domestic legal practice.

Three recent High Court cases – spanning the areas of human rights, taxation law and child abduction – illustrate the challenges Australian Courts and lawyers now face in interpreting and applying treaties as part of an exercise of domestic statutory construction but with regard to the methods of the Vienna Convention.

The first case, from 2013, is *Maloney v The Queen*.[24] There, the High Court considered a challenge to Queensland laws that restricted the amount of alcohol a person could possess on Palm Island, which is inhabited almost entirely by indigenous people. The appellant argued that the laws were inconsistent with the *Racial Discrimination Act 1975* (Cth) (**RDA**), which implements Australia's obligations under the *International Convention on*

[22] Ibid Article 31(2).
[23] Ibid Art 31(2).
[24] (2013) 252 CLR 168.

the Elimination of All Forms of Racial Discrimination (**CERD**).[25] In particular, the appellant argued that the laws were inconsistent with the guarantee of equality of rights regardless of race in s 10 of the RDA and that the laws were not saved by s 8 of the RDA as "special measures" to address inequality. Sections 8 and 10 expressly refer to, and pick up the language of, the CERD. Accordingly, it was necessary for all parties and judges to closely analyse the rights that CERD protects as well as what the CERD understood to be special measure.

In six separate judgments, a majority of the High Court held that the Queensland laws engaged s 10 but that the laws were special measures saved by s 8 of the RDA. In doing so, there was a dispute amongst the Justices, which remains currently unresolved on the Court, as to how far the Court can look at materials post-dating both the entry of CERD and the passing of the RDA. Undoubtedly they would be relevant under a conventional Vienna Convention exercise; but can materials which post-date the passing of a domestic statute inform its interpretation? Justice Gageler took the broadest view on this question, and Justice Hayne the narrowest.[26] In the U.S., Justice Breyer would regard such materials as highly persuasive, whereas former Justice Scalia would have regarded them as a distraction.

The second recent example, from 2015, is *Macoun v Commissioner of Taxation.*[27] In that case, the High Court unanimously held that a former officer of part of the World Bank was not entitled to an exemption from taxation in respect of monthly pension payments he had received. The case concerned the construction of the *International Organisations*

[25] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 ATS 211 (entered into force 4 January 1969).
[26] Above n 30 at 199 (Hayne J) and 292-293 (Gageler J).
[27] (2015) 90 ALJR 93

(Privileges and Immunities) Act 1963 (Cth) (**IOPI Act**) and the *Specialised Agencies (Privileges and Immunities) Regulations 1986* (Cth) (**the Specialised Agency Regulations**), which confer upon a person who holds an office in an international organisation an exemption from taxation on salaries and emoluments received from the organisation. It was apparent from the legislative history and context that the IOPI Act and the Specialised Agency Regulations sought to implement very important Conventions on immunities implemented by the United Nations in 1946 and 1947.[28] The Court considered the underlying Conventions in some detail, and was significantly assisted by the preparatory works in interpreting them. It also examined the subsequent state practice to determine whether it required the Conventions to be given a different interpretation to that available on the text.[29]

Before leaving this second key driver, I should briefly note a related phenomenon. Increasingly our Courts are called upon to interpret domestic statutes which implement international obligations sourced in custom rather than treaty. In such a case the domestic interpretative exercise may extend to a full blown public international law enquiry into the scope of the underlying customary obligation, either by directly making findings on state practice or by having regard to persuasive rulings from international courts or tribunals on that question.

For example, in 2015 in *Firebird v Nauru*,[30] the High Court was called upon to rule on a number of questions concerning the interaction of the *Foreign Judgments Act 1991* (Cth)

---

[28] *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 (entered into force 17 September 1949); *Convention on the Privileges and Immunities of the Specialized Agencies*, opened for signature 21 November 1947, 33 UNTS (entered into force 9 May 1986).

[29] Above n 33 at [75], [80]-[81].

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

(**FJA**) and earlier *Foreign States Immunities Act 1985* (Cth) (**FSIA**). The FSIA implements Australia's obligations under the restrictive theory of foreign state immunity which is part of customary international law. The Court had to decide whether an application to register a foreign judgment under the FJA attracted the prima facie immunity under the FSIA; if it did whether the "commercial transactions" exception to immunity under the FSIA could be available; whether the FSIA permitted ex parte registration of foreign judgment under the FJA; and the scope of the separate immunity from execution against assets in the jurisdiction in the FSIA. Each of the three separate judgments made extensive use of decisions of the International Court of Justice[31], and the highest Courts of the UK, USA and Canada[32], on the underlying issues of customary international law, which in turn informed the domestic statute.

The end result was that a default judgment obtained out of the Tokyo District Court by a creditor on a bond transaction guaranteed by the Republic of Nauru attracted prima facie immunity under FSIA, but could be registered here by reason of the commercial transactions exception, and on an ex parte basis. However there was a separate immunity from execution under the FSIA against the cash reserves which Nauru held in Australian bank accounts because the purposes for which the accounts were in use were not commercial but instead for the ordinary aspects of the governmental functions of Nauru.

Sheer increase in international commerce

The *third* key driver of the internationalisation of Australian law has been Australia's ever increasing involvement in international trade and commerce. The same driver is present in the U.S. and in nations all around the world. With increased international trade and

[31] At [48], [79], [99] (French CJ and Kiefel J), [133]-[134] (Gageler J).
[32] At [46] (French CJ and Kiefel J), [133] (Gageler J), [223]-[224], [228] (Nettle and Gordon JJ).

commerce comes an increased need to regulate that trade and commerce and resolve related disputes. That has necessarily led to an increase in international arbitral awards and foreign judgments, which have sought to be enforced in Australia.

The important Australian legislation in this context is the FJA to which I have referred and the *International Arbitration Act 1974* (Cth) (**IAA**).

The FJA has been the subject of a number of significant recent cases, including *PT Bayan*[33] where the High Court dismissed a challenge to an assets-freezing order made by the Supreme Court of Western Australia in relation to what was at that stage the mere possibility of a future judgment being given by the High Court of Singapore and a future application for registration under the FJA in Western Australia. The case had no connection with Australia other than the party being sued in Singapore had assets here.

The IAA gives effect to Australia's international obligations under the 1958 New York Convention and gives the 'force of law' in Australia to the UNCITRAL Model Law.[34] The Model Law provides for the 'recognition' and 'enforcement' of awards made in an international commercial arbitration, including the enforcement of an award by a 'competent court' (Art 35). Enforcement of an arbitral award may be refused only on limited grounds, such as the independence of the arbitrator, the fairness of the arbitral process or that the award is contrary to public policy (Art 36).

In 2013, the High Court in *TCL Air Conditioner*[35] established that there was no constitutional difficulty under Ch III in the IAA implementing the Model Law, thus

---

33 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 89 ALJR 975.
34 UNCITRAL Model Law on International Commercial Arbitration (1985).
35 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533.

leaving the Federal Court no ability to exercise what might otherwise have been a common law jurisdiction to refuse to enforce an arbitral award on the ground of error of law appearing on the face of the award.

A further stage of the *TCL* saga took place in the Full Court of the Federal Court where TCL argued that the Federal Court should refuse to recognise or enforce the arbitral award under Art 36 of the Model Law because the award was contrary to Australian public policy.[36] The Court reviewed, and relied on, the extensive international jurisprudence on the public policy exception in Arts 34 and 36 of the Model Law (as well as Art V of the *New York Convention*) in concluding that its international context meant that the exception is "limited to the fundamental principles of justice and morality of the state".[37] The Court emphasized that:

> It is of the first importance to attempt to create or maintain, as far as the language employed by Parliament in the IAA permits, *a degree of international harmony and concordance of approach* to international commercial arbitration. (Emphasis added).[38]

Challenges to the recognition or enforcement of foreign arbitral awards and judgments in Australian courts are only likely to increase. In ruling on challenges based on public policy, our Courts will have to reflect on which policies of the Australian law are so fundamental or profound as to trump presumptively binding foreign awards or judgments. There is a necessary tension in the very existence of a public policy exemption: on the one hand, public policy can safeguard against potentially dangerous or outrageous results and

[36] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361.
[37] Ibid at [64].
[38] Ibid at [75].

therefore protect the integrity and legitimacy of arbitration or foreign judicial processes. On the other hand, the exception may undercut the efficiency and finality of arbitration or foreign judicial proceedings insofar as it encourages re-litigation by a losing party.[39] Australian courts will pay close regard to how foreign courts interpret this public policy exception.

The work of the Hague Conference on Private International Law should also be noted here. The *Convention on Choice of Court Agreements*[40] is now in force and is attracting more State party signatories. Australia is also a strong mover in the Hague Conferences' Judgments Project which seeks the creation of a worldwide treaty to better facilitate the recognition and enforcement of civil and commercial judgments.

The attitudes of judges (and counsel)

A *fourth* key driver of the internationalisation of Australian law lies in the attitudes of the Judges. Although the enthusiasm in Australia of intermediate and ultimate appellate courts for deriving assistance from foreign and international legal materials waxed and waned in the twentieth century, the last ten years or so has seen a resurgent judicial interest in drawing upon foreign, comparative, and public international sources where they can assist in the proper disposition of the dispute at hand. As I noted already, Justice Breyer observes a similar trend occurring in the U.S., as American jurists and foreign jurists find that they have more in common that they once did.

It is notable also that many judges have post-graduate qualifications from overseas universities and are proficient in languages other than English. On our current High

[39] Above n 2 at 186.

[40] *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, [2016] ATNIA 7 (entered into force 1 October 2015).

Court, for example, Justice Kiefel specialised in comparative studies at Cambridge, is fluent in German and has a keen interest in German constitutional law; Justice Gageler is a graduate of Harvard Law School with a keen interest in U.S. Constitutional Law and Justices Keane and Nettle are graduates of Oxford University.

I would include in this driver not just the judges. As more and more of our practitioners have completed their post-graduate studies in the Northern Hemisphere, and the younger generation is dextrous in using digital technology to access and deploy foreign and international materials, there is an ever ready willingness to think of each legal problem in the widest of possible terms.

For present purposes, I wish to give only one example, albeit a controversial one. In *McCloy* which I mentioned earlier, four Justices held that the *Lange/Coleman* principle now calls for a more precise statement of the second limb of the test, one which requires analysis through the prism of the four stages of European proportionality. That rather large step was in no way compelled by the reasoning in *Lange* or *Coleman*, let alone by a textual reading of ss 7, 24, 64 or 128 of the Constitution untutored. It was an interpretive choice informed by knowledge and respect for a foreign legal tradition. Two Justices, Gageler J and Gordon J, wrote powerful reasons indicating that the validity of the laws under challenge in *McCloy* could be decided applying the traditional *Lange/Coleman* formulation, and that the case was not the right vehicle to decide whether to take the major step of the injection of European proportionality into our Constitution.

Increasing exposure of the Commonwealth's actions to international dispute

resolution

A *fifth* key driver, only briefly noted by Justice Breyer in the U.S. context, is that the Commonwealth Executive has increasingly consented to jurisdiction over Australia before international courts or tribunals. In some cases, that results in a pure public international law claim, seemingly divorced from Australian law. In this category we might observe that the consents by each of Australia and Japan to the jurisdiction of the ICJ enabled Australia in 2013 to bring proceedings successfully against Japan for contraventions of the *International Whaling Convention for the Regulation of Whaling*.[41]

Or again, under the 1982 *United Nations Convention on the Law of the Sea* (**UNCLOS**) Australia has in 2016 been brought before a process of "compulsory conciliation" by Timor-Leste for a dispute concerning "the delimitation of the exclusive economic zone and continental shelf between Timor-Leste and Australia including the establishment of the permanent maritime boundaries between the two states". In late August this year, in a hearing in The Hague before a five member Commission, Australia argued that provisions of UNCLOS and the *Treaty on Certain Maritime Arrangements in the Timor Sea*[42] between Australia and Timor-Leste excluded the jurisdiction of Commission to hear the dispute. In mid–September the Commission unanimously rejected Australia's arguments and has until September next year to provide its report on the dispute.[43] The Commission's decision, however, will not be binding on Australia because as a conciliation, it is not binding on the parties.

---

41 See *Whaling in the Antarctic (Australia v Japan; New Zealand intervening) (Judgment*) [2014] ICJ Rep 226.

42 Treaty on Certain Maritime Arrangements in the Timor Sea, opened for signature 12 January 2006, [2007] ATS 12 (entered into force 23 February 2007).

43 *A Conciliation Commission Constituted Under Annex V to the 1982 United Convention on the Law of the Sea*, (*Timor-Leste v Australia*) (*Decision on Australia's Objection to Competence*) (Permanent Court of Arbitration, 19 September 2016).

However, significantly for present purposes, such consents to jurisdiction may have a wider reach whereby actions done by the Commonwealth Parliament or Executive are exposed to overlapping dispute resolution under both domestic and international law. A single legal problem may call for the lawyers to deploy multiple systems of law to resolve it, systems that may produce different outcomes to the same overall problem.

For example, in 2013 the Commonwealth acted under domestic national security law to seize documents and data following a raid in Canberra of the offices of a former legal representative of Timor-Leste. While that action might have been challenged in the Australian courts on administrative law grounds, Timor-Leste preferred to rely upon Australia's consent to ICJ jurisdiction to obtain provisional measures against Australia.[44] The matter was later settled before a final hearing. The case illustrates that the Commonwealth Executive, when assessing the validity of its conduct in advance, will in some cases have to consider both domestic law and international law, and the possibility of being sued domestically and internationally. A problem which once could be viewed as merely local has become both local and international.

When Australia becomes a party to a treaty, it may also be agreeing to complaint mechanisms under that treaty. For example, individuals now have direct access to complaint mechanisms under many human rights treaties, whereby they can, after domestic avenues have been exhausted, bring a case to an international human rights body.[45] The determinations of such bodies may not be directly binding on Australia, but

---

[44] See *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia) (Order)* (International Court of Justice, 11 June 2015).

[45] For example, under: the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); the *Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2518 UNTS; *Convention against Torture and Other Cruel, Inhuman or Degrading*

can and do lead to changes in domestic law or executive action.[46]

Particular consideration should be given to consents by the Commonwealth Executive to international dispute resolution in the form of Investor-State Dispute Settlement (**ISDS**). This increasingly exposes the conduct of the Commonwealth Parliament or Executive to scrutiny on the international stage.

ISDS has allowed a matter that has been litigated to finality in our High Court, being the dispute over the constitutionality of the *Tobacco Plain Packaging Act 2011* (Cth) (**Tobacco Plain Packaging Act**),[47] to be re-litigated through a different legal prism in an international arbitration seeking the opposite result.[48]

There have been three key disputes in regards to the Plain Packaging Act: two resolved, one ongoing. The first dispute concerned the constitutionality of the Plain Packaging Act in light of s 51(xxxi) of the Constitution. In 2012, a six-one majority of the High Court rejected a challenge brought by tobacco companies on the ground that the Plain Packaging Act acquired their intellectual property without the provision of just terms. The majority concluded that, although there may have been a *deprivation* of the intellectual property rights of the tobacco companies, there was no *acquisition* of those rights by the Commonwealth, which was necessary to engage s 51(xxxi).

Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 112, Art 22; and CERD, Art 14.

46 For example, following the decision of the Human Rights Committee (**HRC**) in *Toonan v Australia (Human Rights Committee Communication No 488/1992)*, that Tasmanian legislation criminalizing homosexuality were in breach of Australia's obligations under the ICCPR, the Commonwealth Parliament passed the *Human Rights (Sexual Conduct) Act 1994* (Cth). Pursuant to that Act, sexual conduct between consenting adults in private was declared not to be subject to arbitrary interference with privacy, within the meaning of Art 17 of the ICCPR (on which the HRC's decision was based). Before a Court case could be brought invalidating the relevant Tasmanian criminal law (under s 109 of the Constitution), the Tasmanian legislature repealed the provision criminalizing homosexuality: *Criminal Code Amendment Act 1997* (Tas).

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

48 See also Robert French AC, 'Investor-state dispute settlement - A cut above the Courts?', (Speech delivered at the Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014).

The second dispute concerning the Australian Plain Packaging Act involved one of the plaintiff tobacco companies in the High Court case, namely Philip Morris. PM Asia sued Australia under the 1993 *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments*[49] (**Australia-Hong Kong BIT**). The dispute was the first investor-state dispute brought against Australia and was heard by a tribunal under the auspices of the Permanent Court of Arbitration. In December 2015, the Tribunal ruled that the reliance by PM Asia on the Australia-Hong Kong BIT constituted an abuse of right that disqualified it from pursuing its claims in the arbitration.[50] After a close examination of the factual record, including a hearing in Singapore that involved the cross-examination of lay witnesses and the expert testimony, the Tribunal found that PM Asia had engaged in a corporate restructure to gain the protection of the Australia-Hong Kong BIT at a time when there was a reasonable prospect that a measure that may give rise to a treaty claim would materialise, rendering its claim inadmissible.

The ruling by the Tribunal meant the arbitration did not proceed to the merits stage. Had the arbitration proceeded then PM Asia would have argued that, under the international law concept of expropriation, a *deprivation* without an *acquisition* is sufficient to constitute an expropriation. The arbitration would then have concerned whether Australia could justify the deprivation as a legitimate public health measure, and whether the Australia-Hong Kong BIT implicitly excluded such measures from the concept of expropriation.

---

[49] Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments, signed 15 September 1993, 1748 UNTS 385 (entered into force 15 October 1993).

[50] PCA Case 2012-12 (Philip Morris Asia Pty Ltd v Australia) (Award of Jurisdiction and Admissibility) (Permanent Court of Arbitration, 17 December 2015).

The third dispute concerning the Australian Plain Packaging Act is before the World Trade Organisation (**WTO**) in which Australia is a respondent in proceedings bought by five countries who argue that the Tobacco Plain Packaging Act (and related laws) are inconsistent with Australia's obligations under articles in the *Agreement on Trade-Related Aspects of Intellectual Property Rights*,[51] the *Agreement on Technical Barriers to Trade*[52] and the GATT. In 2014 the chair of the panel determining those disputes informed the Dispute Settlement Body that the panel expects to issue its final report to the parties in the second half of this year.

These trends are likely to continue with the increase in Free Trade and Business Investments Agreements entered by Australia. Australia has signed over 20 Bilateral Investment Treaties (**BIT**) since 1988 when it signed a BIT with China,[53] and currently has 10 Free Trade Agreements (**FTAs**) in force.[54] Many of these contain clauses permitting investors of one State to take the opposing State to arbitration, under ISDS.

The Commonwealth exposing States and Territories to international law claims

A *sixth* key driver of the internationalisation of Australian law has been the Commonwealth Executive entering international agreements that constrain action at State and Territory as well as Commonwealth level. The promises that the Commonwealth Executive makes on the international plane bind Australia in respect to the conduct of all

---

51 *Agreement on Trade-Related Aspects of Intellectual Property Rights,* opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995)

52 *Agreement on Technical Barriers to Trade*, opened for signature 15 April 1994, 1868 UNTS 120 (entered into force 1 January 1995).

53 *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, signed 11 July 1998, 1988 ATS 14 (entered into force 11 July 1988).

54 Australia has 10 FTAs currently in force with New Zealand, Singapore, Thailand, US, Chile, the Association of South East Asian Nations (ASEAN) (with New Zealand), Malaysia, Korea, Japan and China.

organs of government in Australia. Equally, those promises expose the Commonwealth to claims of breach in respect to the actions of all organs of government within the Federation. These matters are not merely theoretical and are illustrated by two cases, one in 1994 and one more recently.

In the second case, actions by NSW may result in claims being brought against the Commonwealth, who may in turn seek compensation for those claims (perhaps unsuccessfully) against NSW. That possibility arises because last year, the High Court rejected a constitutional challenge brought by NuCoal Resources and others to legislation passed by the NSW Parliament cancelling some of their mining licenses in light of adverse findings made by the Independent Commission Against Corruption. Since then, NuCoal has indicated publicly that it has foreign investors who may seek to have claims brought under the Australia/US Free Trade Agreement. Those claims would be against the Commonwealth if brought. The Commonwealth, if it were found liable, would be required to pay damages for the actions of NSW. Such a claim is an example of the way in which international law tends to aggregate the constituent elements of a federation; that is, on the international stage, Australia is treated as a single entity and not as a federation of States. If the Commonwealth were liable to pay damages then one could well imagine that it may seek to recover those costs from NSW. In response, NSW might seek to argue that it was the Executive of the Commonwealth and not of NSW that entered the Australia/US Free Trade Agreement.

International law claims repackaged domestically

The last two drivers see actions at various levels of Government in Australia, which in the past would have been exposed solely to domestic law challenge, now being opened up to a second level of challenge before international panels. The reverse is also increasingly true, and forms the *seventh* driver. Increasingly there are litigants whose real complaint is that Australia has breached international obligations, especially in the human rights area, but who finding that Australia has consented to no international dispute resolution mechanism, or no binding one, creatively re-package their claims as domestic law claims.

For example, in April 2016, the UN Human Rights Committee ruled that Australia's detention of five persons was arbitrary and contrary to Art 9(1) of the ICCPR.[55] The five persons had been determined to be refugees but had been refused visas to in light of adverse security assessments by ASIO. They were not given the reasons for the adverse assessments. Among other conclusions, the UN Human Rights Committee held that under the ICCPR prism the refugees ought to have been informed of the specific risks attributed to each of them and had been deprived of legal safeguards allowing them to challenge effectively the grounds for indefinite detention. This gave the five persons the satisfaction of a ruling, but with no binding force against Australia.

The same basic problem of detention on the basis of secret evidence is now being pursued domestically, in an attempt to secure a binding result. There are a variety of challenges currently before the Full Court of the Federal Court and the High Court, in which persons who have been refused visas or who have had visas cancelled on the basis of information they have not seen are challenging provisions of the Migration Act that allow the Minister

[55] Human Rights Committee, 116th sess, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2233/2013, UN Doc CCPR/C/116/D/2233/2013 (18 April 2016) (FJ et al v Australia).

to refuse or cancel a visa in reliance on information that is "protected" from production to a court. The plaintiffs argue that the provisions are invalid because they impermissibly impair the ability of a Ch III court to supervise the exercise of the Minister's power contrary to s 75(v) of the Constitution. How, they ask, can a person bring an action under s 75(v) unless they know why a decision was made as it was? And how can a court review the legality of a decision if it does not have access to the information on which the decision was based?

The use of domestic courts to achieve what cannot be achieved internationally or through ordinary Parliamentary processes, especially in the space of human rights, is a trend that Justice Breyer also recognises in the U.S. The Alien Tort Statute, for example, gives U.S. courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". Reflecting on the range of cases that have been brought under the Alien Tort Statute, Justice Breyer notes they raise a series of questions: how are courts to apply the basic standard "in violation of the law of nations"? "When does a murder, an arrest, detention, suppression of protestors, low pay, or environmental harm qualify as a violation of international law?"[56] Are courts, indeed American courts, the right institutions to decide when a corporation or an individual has violated "the law of nations"?[57]

Similar questions might be asked of Australia Courts: how should the High Court determine whether the Executive has acted inconsistently with international law? Does it have the institutional capacity to do so? What can counsel appearing before it do to assist the High Court to resolve such disputes?

---

[56] Above n 2 at 11.
[57] Above n 2 at 146-147.

Renvoi from international for foreign law to domestic law

The *eighth* and final driver of the internationalisation of Australian law for tonight's purposes is one that receives little attention from Justice Breyer. As a nation such as Australia, or its citizens or businesses, increasingly find themselves drawn into foreign or international dispute resolution, the body of law governing the claim may invite *a renvoi* to Australian domestic law to resolve part or all of the claim. This may require expert evidence on the content of Australian domestic law to be presented within the foreign or international claim and/or offer a role for Australian counsel as part of the legal team in that claim. Two recent examples immediately come to mind.

Just last week the Swiss Federal Court dismissed an appeal by current and former Essendon players against a decision of the Court of Arbitration for Sport (**CAS**) when it determined an appeal de novo by the World Anti-Doping Authority from the Australian Football League Anti-Doping Tribunal (**AFL Tribunal**) and held that the players had breached the AFL Anti-Doping Code.

CAS is a body based in Switzerland, existing by reason of international agreements. A central issue for the Swiss Court was whether the scope of jurisdiction of CAS was determined solely by construing the constitutive international documents of CAS, or whether its jurisdiction was curtailed by the Australian domestic law instruments governing the first instance tribunal, the AFL Tribunal. If there was *a renvoi* to Australian law, what sort of appeal did Australian law permit or require from the AFL Tribunal to CAS?

Accordingly, submissions or expert opinion from Australian lawyers, including one from

me as Solicitor-General and several from former judges of the High Court and Federal Court, were made to the Swiss Federal Court concerning the interaction of the AFL Anti-Doping Code, the AFL Player Rules, the Code of Sport-Related Arbitration of the Court of Arbitration for Sport, the the *Australian Sports Anti-Doping Authority Act 2006* (Cth) and so on.

The significant differences of opinion in those submissions illustrate one of the difficulties whenever there is a need within one dispute resolution system to make findings on the content of the law of another judicial system.

Similar difficulties arose in the ISDS tobacco arbitration with PM Asia mentioned earlier. There, to gain the protection of the Hong-Kong Australia Bilateral Investment Treaty, PM Asia's investment in Australia had to be "admitted" subject to Australia's laws and investment policies. That created *a renvoi* to Australian law being the *Foreign Acquisitions and Takeovers Act 1975* (Cth), which required foreign companies to notify the Australian Treasurer about certain investments they intended to make in Australia. The Australian Treasurer could then decide whether to allow or block such investment. Prior to making its investment, PM Asia advised the Treasurer that the relevant investment was being made to affect a straightforward corporate restructure and on that basis the investment was allowed. In the subsequent arbitral proceedings, Australia argued that PM Asia had misled the Treasurer. It had told a half truth, in that the true purpose of the investment was to gain the protection of the investment treaty to challenge the plain packaging of tobacco measure. Australia submitted that as a matter of domestic law the Treasurer's decision was infected by jurisdictional error and so invalid. Expert evidence was given from PM Asia by ex-High Court Justice the Hon Ian Callinan QC and from

Australia by the ex-Federal Court Justice the Hon Roger Gyles QC. Ultimately Australia did not persuade the Tribunal, consisting of a German, a Swiss and a Canadian arbitrator, that there was jurisdictional error arising under Australian law.

Conclusions

The matters that I have discussed invite a need for a fundamental rethinking in legal training and practices in this country and I make *five* suggestions.

First, lawyers will have to become more comparative and internationally-law minded in their practices, not only becoming familiar with non-domestic legal norms, but more particularly with the international legal texts which inform domestic (statutory) obligations. They will need to make themselves familiar and versatile with the range of material about international organisations, obligations and treaties, which are increasingly coming to feature, indeed dominate, many disputes and many transactions.

Second, lawyers will have to consider how best to present foreign sources and international materials to domestic courts. What sources might most assist Courts? How should they be presented? Should foreign experts be called to give evidence? How should disputes among experts be resolved? In the reverse situation, how should Australian lawyers best present evidence about Australian law to foreign or international tribunals?

Third, lawyers will have to consider competing sets of legal norms and how and where they might be resolved. The cases I have discussed tonight illustrate that one core legal problem—for example, whether one country can lawfully seize documents for a national security purpose from the local premises of a person who may act for a foreign State, or whether one country can lawfully impose local health or environmental requirements on

foreign companies—may in fact be governed by two or more sets of legal norms, and potentially resolved differently in different forums.

Fourth, lawyers will have to anticipate how international laws, foreign laws and treaties might arise in the future. Lawyers acting for a commercial client who may be negotiating a transaction for performance in a foreign country should, for example, consider the availability of ISDS protection in a treaty between Australia and that country or the most favourable forum and seat for the resolution of a potential dispute.

Fifth, universities and professional bodies need to develop courses to assist lawyers to meet these challenges. The courses do not need to make foreign law experts out of participants. Rather, they need to teach participants about how best to engage with international and foreign materials and how best to marshal, and listen to, the "many voices" that Justice Breyer calls on U.S. Courts to engage with and which Australian courts are increasingly engaging with.

I thank the Academy for the opportunity to speak on these important matters tonight.