IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S100 of 2015

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

ANDREW JOHN MACOUN
Appellant

and

COMMISSIONER OF TAXATION
Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication

1. The appellant certifies that these submissions are in a form suitable for publication on the internet.

Part II: Issues presented by the appeal

2. The appeal raises the following issues:

   a. Whether pension payments received by the appellant from a Specialized Agency (in his case, being the International Bank for Reconstruction and Development (**IBRD**), being "emoluments" to which the appellant became entitled while holding office in the IBRD, were exempt from taxation in the income years in which the payments were received by virtue of the privilege conferred by Item 2 of Part I of the Fourth Schedule to the *International Organisations (Privileges and Immunities) Act* 1963 (Cth) (**IOPI Act**) together with s 6(1)(d)(i) of the IOPI Act and reg 8 of the *Specialized Agencies (Privileges and Immunities) Regulations* 1986 (Cth) (**Specialized Agencies Regulations 1986**).

   b. Whether the Full Court erred in its construction of the abovementioned legislative provisions and regulations by clearly failing to prefer in the interpretation of those provisions, the interpretation that would best achieve the purpose and object of the IOPI Act, as required by s 15AA of the *Acts Interpretation Act* 1901 (Cth) (together with s 13(1) of the *Legislative Instruments Act* 2003 (Cth)). In this regard, whether the Full Court should have preferred in substance the interpretation adopted by the Administrative Appeals Tribunal from which the appeal was brought.

   c. Whether the Full Court erred in seriously failing to apply the principles of statutory interpretation enunciated by the High Court (in particular, *Lacey v*

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Attorney General (Qld) (2011) 242 CLR 573 at 592-593 [42]-[46], *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at [45], *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523 at [47]).

d. Whether from August 1957 until 1986, s 23(y) of the *Income Tax Assessment Act* 1936 (Cth) in its several forms exempted from tax, the salaries and emoluments (including pension payments) of officials (inter alia) of the IBRD derived from sources outside Australia by a resident of Australia appointed for services with the IBRD outside Australia.

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e. Whether Australia is in breach of its obligations under Article VI, Section 19(b) of the Convention on the Privileges and Immunities of the Specialized Agencies to which Australia acceded.

Part III: Judiciary Act 1903 (Cth), s 78B

3. The appellant has considered whether this appeal involves "a matter arising under the Constitution or involving its interpretation". It does not. Accordingly, s 78B notices are not required.

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Part IV: Reports of reasons for judgment

4. The reasons of the Full Court of the Federal Court of Australia ("**FC**") are reported at: (2014) 227 FCR 265. The reasons of the Administrative Appeals Tribunal ("**AAT**") are reported at: (2014) 63 AAR 200 and also at 2014 ATC 10-354.

Part V: Relevant facts

5. The facts were not in dispute and were referred to in the reasons of the AAT (The
30 Hon. Brian Tamberlin Q.C., Deputy President)[1] at AAT[1]-[10], [17]-[18], [32]-[37] and of the Full Court (per Edmonds and Nicholas JJ)[2] at FC[5]-[8]. The essential facts are as follows.

6. The appellant is a civil engineer and is 66 years old (AAT[1]). In 1992, the appellant received a fixed 2-year appointment as a sanitary engineer to the staff of the IBRD, which formed part of the World Bank Group (at AAT[2]-[3]). Under this appointment he became entitled at his "option" to participate in the World Bank Group Staff's Retirement Plan (**SRP**) and he duly exercised this option and made contributions voluntarily out of his salary during the course of his fixed appointment
40 (AAT[4]). On 23 September 1993, the appellant received a "regular" appointment as a sanitary engineer with the IBRD and a condition of his employment was that participation in the SRP was "mandatory" (at AAT[5]-[7]).

7. The SRP was a contributory defined benefit plan under which participants in regular employment and under 62 years, as was the appellant, were required to make contributions of 7% of their "pensionable gross salaries" and the Bank contributed such amounts as were sufficient and necessary to fund the cost of liabilities that

[1] (2014) 63 AAR 200; 2014 ATC 10-354; [2014] AATA 155
[2] (2014) 227 FCR 265; [2014] FCAFC 162

exceeded those funded by participants (at AAT[9]). Over the whole period of his employment by IRBD, the appellant contributed a total of US$200,842 to the SRP (at AAT[10]). The benefits were not directly linked to the accumulated value of contributions made to the plan and benefits could be payable under it as a monthly retirement pension for life (at AAT[9]). The normal retirement age under the plan was at age 62 years but the appellant retired earlier at age 60 years and received an early retirement pension that was less than the normal pension (at AAT[9]).

The Tribunal's findings

8. The Tribunal found that the pension payments were in the nature of an "emolument" because they could be described as a profit or gain arising from an office or employment or as a "compensation for services" by way of remuneration (AAT[32])[3].

9. The Tribunal also found that after the appellant received the letter of 23 September 1993 from the World Bank, he accepted that participation in the SRP was mandatory and that his employment and remuneration were subject to the SRP (at AAT[33]). The benefits and payments under the plan came comfortably within the description of "remuneration" and the relevant entitlement of the appellant to the remuneration arose during his term of employment and it did not matter that some of his remuneration was to be paid after termination (at AAT[33]). It was "common ground" that, for example, salary earned before but paid or received after termination would continue to be exempt as retaining that characterisation after termination (at AAT[33]). The appellant's entitlement to the pension payments, and therefore the payments themselves, were impressed with the character of payments arising from employment (at AAT[34]). They were a part of the remuneration entitlement that crystallised during the course of the appellant's employment (at AAT[34]). The entitlement did not cease on termination of his employment but continued and has been paid and is being received by the appellant (at AAT[34]). The fact of employment and the rendering of services during his term of employment was the factor which gave the appellant the right to payment (at AAT[36]).

10. The Tribunal concluded that the pension payments paid to the appellant were exempt from tax on the basis that they were "emoluments" within the meaning of the Fourth Schedule to the IOPI Act and that the "immunity" in respect of "emoluments" in Part I of the [Fourth] Schedule *continues in force and effect after the termination of the Applicant's employment and after performance of the services in respect of which the pension entitlement was granted during the period of his service or office* (emphasis added) (at AAT[59]). The Tribunal rejected the argument of the respondent that the exemption from tax on "emoluments" received from the organisation ceases to apply after active employment, holding that no such dichotomy or inference could be inferred from the legislation (at AAT[39]-[45]).

11. The Tribunal made orders that the decision under review be set aside and substituted a decision that the pension the appellant received from the World Bank in the 2009

[3] See also: *Nette v Howarth* (1935) 53 CLR 55 at 60.8 (per Rich J), 62.6 (per Starke J), 65.3 (per Dixon J as his Honour then was) and 67.5 (per Evatt & McTiernan JJ); *Brumby v Milner* [1976] 1 WLR 1096 at 1098H (per Lord Wilberforce)

and 2010 income years did not form part of his assessable income and was exempt from Australian income tax (at AAT[60]).

The decision of the Full Court

12. The Full Court allowed the respondent's appeal and made orders setting aside the decision of the Tribunal and ordered that the decision under review be affirmed. In relation to the issue of competency of the appeal, the plurality considered that only questions 1 and 2 of the five questions raised by the respondent's notice of appeal were on "questions of law" (at FC[29]-[38]). Their Honours also considered that the reasoning of the Tribunal was flawed in two main respects:

    a. The Tribunal had adopted a "bottom up" approach to the construction of the IOPI Act by reference to the terms of a relevant delegated regulation (the Specialized Agencies Regulations 1986) rather than a "top down" approach (at FC[39]-[40]); and

    b. The Tribunal's consideration of "entitlement" to the pension payments arising during the course of employment was "totally irrelevant" and the only relevant consideration was "receipt" during the course of employment: Item 2 of Part I of the Fourth Schedule to the IOPI Act (at FC[41]).

13. Their Honours stated that the Second Reading Speech in relation to the bill that introduced the IOPI Act indicated that the privileges "may not" have been intended to provide a breadth of protection from the fiscal laws of member states implied by the Appellant's submissions (at FC[43]). Their Honours considered that there was a "clear dichotomy" established by s 6(1)(d) of the IOPI Act between privileges and immunities which apply to a person who holds office, and the immunities which apply to a person who has ceased to hold office and the clear language of s 6(1)(d) provided a more secure basis from which to infer the relevant legislative purpose (at FC[42]-[43]). Their Honours also considered that reg 8(1) of the Specialized Agencies Regulations 1986 confined the persons on whom the privileges specified in Part I of the Fourth Schedule to the IOPI Act were to be conferred, to persons holding office in a Specialized Agency. On the basis that the Appellant did not hold office in the IBRD in the years of income in question, the privilege conferred by Item 2 of that Schedule to the IOPI Act was not available to him in respect of his pension payments, even if they continued to be "emoluments" to which he became entitled while holding office in the IBRD (at FC[44]).

14. In a separate judgment, Perram J observed that the IOPI Act had implemented the *Convention on the Privileges and Immunities of the Specialized Agencies* (that entered into force 2 December 1948) (at FC[47]). His Honour considered that the Convention, properly construed, required Australia *not* to impose income tax on the Appellant's pension (at FC[48] and [58]). However notwithstanding this, for the reasons given by Edmonds and Nicholas JJ, Perram J considered that the meaning of the Fourth Schedule to the IOPI Act and the Specialized Agencies Regulations 1986 were sufficiently clear that he did not feel he could permissibly read them in a way that complied with Australia's clear obligations as a matter of public international law (at FC[49] and see also FC[59]).

Part VI: Argument

The errors complained of in the decision of the Full Court

15. The appeal raises a fundamental question of law concerning the proper construction of and preferred interpretation to be given to critical provisions of the IOPI Act[4] and the Specialized Agencies Regulations 1986[5] that, together with the *Income Tax Assessment Act* 1997 (Cth) (**ITAA97**)[6], relevantly confer upon a person who holds an office in an "international organisation"[7] an exemption from taxation in Australia on "*salaries and emoluments received from the organisation*".

16. The Full Court erred below in failing to have regard to all of the relevant principles of construction of statutes that have been laid down by common law and statutes which are now known to the courts as designed to give the relevant words the meaning that the legislature "*is taken to have intended them to have*" (see *Lee v NSW Crime Commission* (2013) 251 CLR 196 at 225-226 [45] per French CJ and cases there cited).

17. In 2011[8], s 15AA of the *Acts Interpretation Act* 1901 (Cth) was repealed and the following provision substituted:

> ***"15AA Interpretation best achieving Act's purpose or object***
> *In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation."*

18. Section 15AA requires a purposive construction of Commonwealth Statutes and for preference to be given to that interpretation that will "best achieve" the purpose or object of the Act in question. In *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 at 592.7-593.4 [45]-[46] (which case considered a similar provision in the *Acts Interpretation Act* 1991 (Qld) – s 14(1)), the plurality, assuming that there was no intention to displace common law rules outside that legislative provision's sphere of operation, stated that "*the interpretations from which the selection which it mandates is to be made must be those which comply with the requirements of those rules, none of which is antagonistic to purposive construction*".

19. In *Lacey (supra* at [44]) the plurality also explained that the application of the rules of interpretation:

> *"... will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It*

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[4] Sub-section 6(1)(d)(i) and Item 2 of Part I of the Fourth Schedule to the IOPI Act
[5] Reg 8 of the Specialized Agencies Regulations 1986
[6] Section 6-20 of the ITAA97
[7] In the present case, see reg 3 and the Schedule (Item 6) to the Specialized Agencies Regulations 1986 which provide that the IBRD is an "international organisation" to which the IOPI Act applies
[8] *Acts Interpretation Amendment Act* 2011 (Cth) – see clause 23

resides in its text and structure, albeit it may be identified by reference to the common law and statutory rules of construction".

20. In *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523 at 539, [47] (footnotes omitted) the plurality referred to the importance of commencing with consideration of the statutory text and that context and purpose were also important:

> *"As French CJ, Hayne, Crennan, Bell and Gageler JJ said in Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (43): "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text". Context and purpose are also important. In Certain Lloyd's Underwriters v Cross (44) French CJ and Hayne J said:*
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> > *"The context and purpose of a provision are important to its proper construction because, as the plurality said in Project Blue Sky Inc v Australian Broadcasting Authority (45) '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of* ***all*** *the provisions of the statute' ... That is, statutory construction requires deciding what is the legal meaning of the relevant provision 'by reference to the language of the instrument viewed as a whole' (46), and 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'(47)." (emphasis of French CJ and Hayne J)."*

21. In addition to s 15AA, other principles of statutory construction were not considered by the majority of the Full Court such as the principle that "a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law": *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207; [2015] HCA 1 at [8] (per French CJ) and at [383]-[390] (per Gageler J) and *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 and Another* (2006) 231 CLR 1 at 14-16 [34] (per Gummow ACJ, Callinan, Heydon And Crennan JJ).

The applicable legislation relied upon - the statutory text

22. The relevant starting point in the process of construction is the text of the IOPI Act that relevantly comprises s 6(1)(d) and Part I and Part II of the Fourth Schedule. The particular provision must be considered as part of the whole Act as described in s 13 *Acts Interpretation Act* 1901 (Cth).[9]

23. Section 6(1)(d), by reference to Parts I and II of the Fourth Schedule, divides the privileges and immunities to be conferred by regulation on a person who holds an office in an international organisation such as the IBRD (other than "high office") and those that can be conferred on a person who has ceased to hold office.

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[9] As amended by the *Acts Interpretation Amendment Act* 2011 (Cth) that substituted s 13 – see clause 22

24. Section 6(d)(i) permits the regulations to "confer" upon a person who holds such an office in an international organisation to which the IOPI Act applies any or all of the privileges and immunities in Part I of the Fourth Schedule. One of those immunities is Item 2 of Part I being "*Exemption from taxation on salaries and emoluments received from the organisation*".

25. The use of the word "confer" in s 6(1)(d) is important. It means to "grant" or "bestow"[10] or "present". What is granted or in effect "given" to the officer is obviously intended to be of benefit to him or her. It supports the view that these provisions are to be interpreted beneficially and in a manner that will fulfil the purpose of the official receiving the benefit if the language used in the text so permits. Consistent with this notion that something in the discretion of the grantor is being granted or given is the word "has" in reg 8(1) of the Specialized Agencies Regulations 1986 i.e.... "has the privileges and immunities specified in Part I of the Fourth Schedule to the Act". To give these provisions the narrow construction adopted by the Full Court is quite inconsistent with their purpose. Having granted or given the exemption in Item 2, to narrow it to receipt during office, when a pension payment of its very nature cannot be so received, in the absence of clear words to that effect, is to defeat that object.

26. Here the Appellant relies on the immunity in Item 2 of Part I. There are no express words confining the benefit of the immunity to the period of office. There is no dispute in the present case that the *grant* of the immunity is to a person who holds an office in a Specialized Agency that is an international organisation. However, once holding such an office and being granted the immunity, the officer thereafter "has" it (as reg. 8(1) states) and the benefit of the immunity is engaged in respect of all "salary and emoluments received" by the officer from the international organisation.

27. Reg 8(2) of the Specialized Agencies Regulations 1986 excluded from the privileges and immunities conferred on officers, the right to export furniture and effects free of duty (Item 7 of Part I). Item 7 however remains within the text for the purposes of construing the Schedule in the IOPI Act. It is a clear instance of an immunity, the benefit of which is to be taken after termination of the functions of office.

28. The relevant words used in the heading of Part I of the Fourth Schedule and in Item 2 thereof are "Privileges and Immunities of Officer...of International Organisation" and "exemption from taxation on salaries and emoluments received from the organisation". The heading of reg 8 of the Specialized Agencies Regulations 1986 also refers to "Privileges and Immunities of Officers...of Specialized Agencies". The immunity thus attaches to a person (the officer) in the first place and then to all of the salaries and emoluments that are subsequently received from the relevant international organisation.

29. The word "received" is used in Item 2 of Part I. It has special connotation in taxation law in that it represents the time at which an officer would be otherwise assessable in relation to salary or emoluments. Under s 6-5 of the ITAA97 (and previously s 25(1) of the *Income Tax Assessment Act* 1936 (Cth) (**ITAA36**), a salary and wage taxpayer

[10] The Australian Concise Oxford Dictionary, 2004, Oxford University Press: definition of "confer": "1 *tr* (often foll. by *on, upon*) grant or bestow (a title, degree, favour, etc.)"

(such as the Appellant) would be regarded as having "derived" ordinary income at the time it is received[11] or is deemed to have been received (i.e. as soon as it is applied or dealt with in any way on the person's behalf or as he/she directs – s 6-5(4) ITAA97 and previously s 19 of the ITAA36). However, by virtue of s 6-20(1) of the ITAA97, an amount of ordinary income will be "exempt income" if it is made exempt from income tax by a provision of the ITAA97 or "another Commonwealth law" (such as the IOPI Act).

30. The Full Court has in effect read into Item 2 of Part I words to the effect *"provided the receipt of salary or emoluments occurs during the term of office"*. Simply stated, there is no apparent reason not to give the words their ordinary meaning. In question here are pension payments received by the Appellant from the IBRD. Such payments are appropriately defined as "emoluments". According to the Macquarie Dictionary, *"emoluments"* are *"profits arising from an office or compensation for services"*[12]. The Tribunal found the pension payments were *"emoluments"* (AAT[32]) and it was a finding of fact binding on the Full Court. In any event, it was accepted by all members of the Full Court (FC [34], [44] per plurality and [52],[58] per Perram J).

31. The right to receive the pension payments crystallised when the Appellant ceased to hold office. From that moment only, could the Appellant have become entitled to receive any pension payment and to take the benefit of the immunity under Item 2. As a matter of logic and reasonableness it is hardly likely that Parliament would have intended to deny such "emoluments" the benefit of that immunity.

32. Salary would ordinarily be received during the period of office. The immunity in Item 2 would then apply. Circumstances can be envisaged, where salary is unpaid at the time of retirement and the officer would clearly be entitled to receive it from the organisation after retirement. However it must follow from the Full Court's decision, that the officer would be disentitled to the immunity from tax when so received. Likewise, if a lump sum withdrawal of a benefit or a lump sum commutation of a benefit or, perhaps, overtime payments were paid after retirement. The officer would not be entitled to the immunity under the Full Court's decision.

33. These anomalies arising from the Full Court's interpretation of the text were not addressed by the Full Court. Nor was Item 7 (see above). In the absence of contrary words it is surely unlikely the Full Court's "dichotomy"[13] would have best achieved the object and purpose of an Act designed to confer privileges and immunities on officers of organisations such as the IBRD.

34. The interpretation of "salary and emoluments *received* from the international organisation" in Item 2 attracts a broader notion. Salary and emoluments emanate from a fund that has been built up by the international organisation from contributions by member States of that organisation. As explained below under "Context", it is relevant to take into account the reason for the immunity in Item 2 and the justification for it as outlined at length in the Second Reading Speech. In

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[11] *FC of T v Firstenberg*: (1976) 27 FLR 34 at 57; (1976) 76 ATC 4141 at 4154 (per McInerney J); Case 29 1 TBRD 88; 1 CTBR (NS) 225 Case 57; Case B53 2 TBRD 223; 2 CTBR (NS) 125 Case 27

[12] The Shorter Oxford Dictionary provides a similar definition: "*a profit or gain arising from office or employment, reward, remuneration*": Clarendon Press, Oxford, 1993

[13] FC[43] per plurality

short, it is stated that certain exemptions from the fiscal laws of members states are justified on the ground that no one member State should obtain financial advantages by imposing charges on assets contributed by States which are members of an international organisation[14]. In the appellant's case, the SRP was provided by the IBRD as an integral part of his total compensation and benefits package for services to be rendered by him and after salaries was the most valuable element of the package and was funded by both employee and IBRD contributions[15].

35. The Full Court referred to a "clear dichotomy" established by s 6(1)(d) of the IOPI Act between privileges and immunities which apply to a person who holds office and the immunities which apply to a person who has ceased to hold office. Part II deals with immunity from suit explicitly conferred on a former officer. It is an identical immunity to that in Parts II of the Second, Third and Fifth Schedules of the IOPI Act. The use of "Part I" and "Part II" in the Fourth Schedule was questioned in the debate on the Act by Mr Snedden MHR. Sir Garfield Barwick in reply supplied an answer[16]. It is apparent therefore that, so far as Parliament was concerned, there was no intention to narrow the interpretation of these provisions by the adoption of what was a purely mechanical step by the draftsman of a distinction which had relevance to Schedule 2 but not any real relevance in subsequent Schedules as the Respondent would suggest. Apart from this explanation, it could be said that explicit words were used in Part II to make it clear that the similar immunity in Part I, Item 1 was intended to relate to suits and other legal process that were initiated "during the period the person was in office". If Part II had not been enacted, an issue could have arisen as to whether the Item 1 immunity extended beyond the period of office (i.e. to suits or legal process *initiated* after termination) or possibly causes of action claimed to have come into existence only after the officer's employment had ceased (eg Perram J at FC [52], line 24).

36. The presence of an immunity from suit in identical terms in Part I, item 1 and Part II provides no basis, it is submitted, to support the suggested "dichotomy" adopted by the Full Court. The presence of Part II of the Fourth Schedule does not permit an inference to be drawn that:

    a. Item 2 of Part I of the Fourth Schedule does not apply to emoluments received by an officer after termination of office even though such emoluments were received by the officer holding an office, from the relevant international organisation; nor

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[14] Second Reading Speech, 8 May 1963 per Sir Garfield Barwick at AB-XX (p2)

[15] World Bank Group Staff Retirement Plan Handbook, AB-XX, at page 9, Section 1 - Introduction

[16] Section 15AB(2)(h) of the *Acts Interpretation Act* 1901 (Cth), Official Hansard for the House of Representatives, No 34, 1963, Tuesday, 20 August 1963 at page 284 (first column) per query raised by Mr Snedden and (second column) per Sir Garfield Barwick's reply:

"...Mr Deputy Speaker, may I respond briefly to something just said by the honorable member for Bruce (Mr. Snedden). First of all, in a minor key, he called attention to the immunity provided for in Part II. of the Fourth Schedule, which is exactly the same and is expressed in the same language as the first immunity in Part I. of the same schedule. This form contained in the Fourth Schedule is dictated rather by the course the draftsman took in the earlier schedules.

***Mr Snedden** – If I may interrupt, let me say that I appreciate that. I was merely asking for an explanation of Part II. of the Fourth Schedule.*

***Sir GARFIELD BARWICK** - It begins with the Second Schedule. What is in Part II. of the Second Schedule is of much less circumstance than what is in Part I. of that schedule, because the privileges and immunities in Part I. are not limited to official acts, whereas those in Part II. are, because that part contains the words "in respect of acts and things done in his capacity as such an officer". The wording of Part II. of the Second Schedule is carried down into the subsequent schedules in the same form".*

b. that Item 7 of Part I could not apply to export furniture and effects free of duties for an officer when leaving Australia on the termination of functions or his/her office (as this would be clearly contrary to the plain terms of Item 7).

37. The Full Court attacked what they called a "bottom up" approach on the part of the Tribunal (FC[40]). It is submitted that there was no substance in this because the two provisions, that is, s 6(1)(d)(i) of the IOPI Act and reg 8 are completely consistent in their language.

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38. The Full Court was also bound to accept that the word "emoluments" included pension payments because they were rewards for services rendered and the ordinary meaning of the word was a question of fact which the Full Court could not upset. It is submitted that in those circumstances it is essential to consider the question of "entitlement" contrary to the view (FC[41]) the Full Court expressed. The consequence was that their judgment failed to consider the importance of the word "emoluments" including pension payments which could only be received after an officer ceased to hold office. Their failure to do this was not only contrary to a proper consideration of the text but blocked the path to discovering the meaning
20 which best achieved the object and purpose of the Act and the requirements of s 15AA (never referred to).

An analysis of the rationale of the legislation - Context

39. The consideration of the text does not end the process of construction in which a court must engage. Even clear words may not bear the meaning the legislature is *taken to have intended them to have*[17]. The whole Act in its context, including extrinsic material, requires consideration.

30 40. In this case the relevant context includes the text of the Convention on the Privileges and Immunities of the Specialized Agencies (the **Specialized Agencies Convention)** and the principles applicable to consistency between conventions to which Australia is a party and domestic law and a consideration of the apparent disconformity between the interpretation of the Convention's provisions as adopted and confirmed by Perram J and that adopted in the Court's "dichotomy"[18].

41. In this wider context, a relevant starting point is the Second Reading Speech introducing the IOPI Act (see AB-XX at pp 24-28). Sir Garfield Barwick indicated:

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a. The bill in clause 6 when read in conjunction with the schedules, proposes that the Parliament should lay down very clearly the upper limits of the privileges and immunities which might be conferred by the regulations upon international organisations connected in the capacities described.
b. It is essential that an international organisation should have a status that protects it against control or interference by any government. Certain

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[17] *Lee v NSW Crime Commission* (2013) 251 CLR 196 (supra) at 225-226[45] and cases there cited

[18] Tribunal at AAT[57], Full Court-Perram J at FC[48], FC[54]-[55]). *Minister for Immigration and Multicultural Affairs v QAAH of 2004* (2006) 231 CLR 1 at 14-16 [34]; Spanish cases (unrep): *Serafin and Yolanda* (478/2001, 17/1/03, Sup.Court Andalusia); *Enrique* (1227/2003, 28/3/07, Sup. Court Barcelona); *Arroyo* (736/2000, 12/3/03, Sup. Court Madrid)

exemptions from fiscal laws of member states are justified on the ground that no one state should obtain financial advantages by imposing charges on assets contributed by the states which are members of an international organisation.

c. Australia is a party to the Convention on the Privileges and Immunities of the Specialized Agencies. It needs to be strongly emphasised that they are conferred by member states not for the personal benefit of any individuals but solely in the interests of the organisation to enable it to perform its function - the philosophy is one of *functional necessity* - necessary, that is, if the organisation is to function effectively.

42. It is submitted that a reading of the Speech will indicate the Parliament had no intention other than to allow privileges and immunities to be conferred on organisations or officers, such as the IBRD and the appellant, to the full extent of the words used by the Specialized Agencies Convention to describe them but within the maximum limits set by the IOPI Act and in order to ensure the organisations could function effectively. That *"legislative purpose casts light on the sense in which the words in the statute are to be read"*[19].

43. The tax exemption is part of that *"functional necessity"*. It enables staff of high calibre to be attracted to take up office in an international organisation involving the abandonment of other careers, the disruption of family life, living in remote locations away from familiar surroundings, all of which are involved[20]. It is also justified so that member states do not obtain financial advantages by taxing assets/funds contributed by other member States that are members of the international organisation and that fund the payment of salaries and other emoluments such as pensions.

44. Nothing in the historical legislative context indicates there was intended to be a "clear dichotomy" in s 6(1)(d) of the IOPI Act between the privileges and immunities applying to a person who holds office and the immunities applying to an officer who has ceased to hold office in the case of an immunity such as that in item 2 of Part I. As Perram J explained at FC[47], the IOPI Act implemented in Australia the Specialized Agencies Convention that entered into force on 2 December 1948[21]. This was clearly the object and purpose of the IOPI Act but to do so under the control of Parliament by describing "the upper limits" of the privileges and immunities that could be conferred. Those "upper limits" when analysed follow closely those as described in Article VI Section 19(b) of the Specialized Agencies Convention. This article provided that officials of the specialized agencies shall:

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[19] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 31 [4] per French CJ

[20] It is noted in this regard that one of the conditions of the Appellant's employment in his letter of offer of 23 September 1993 (AB-XX at XX) was that the World Bank had a "reassignment policy" under which the Appellant would be expected to accept future reassignment, including a tour of duty at a field office overseas, and whilst personal preferences would be considered, a final decision would be made "in the interests of The World Bank"

[21] Australia acceded to the Convention in 1962 – see introductory words to SR 1962, No.105 (Cth) and [1962] ATS 13 (first footnote beneath Section 43)

> *"(b) Enjoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by specialized agencies and on the same conditions as enjoyed by officials of the United Nations"*[22].

45. Relevantly, Article V, Section 18 of the *Convention on the Privileges and Immunities of the United Nations* (**the United Nations Convention**) that entered into force on 17 September 1946 provided that:

> *"Officials of the United Nations shall ...*
> *(b) Be exempt from taxation on the salaries and emoluments paid to them by the United Nations".*

46. Neither of the abovementioned provisions in these Conventions contained any equivalent of Part I and Part II nor sought to restrict the benefit of exemption from tax on salaries and emoluments paid to officials *only* during the actual period of office. It is also to be noted that the words "enjoy" and "enjoyed" were used in Article VI Section 19(b) being words of gift or grant as was the word "confer" used in s 6(d)(i) the IOPI Act (i.e. "confer") and "has" in reg 8(1) of the Specialized Agencies Regulations 1986.

47. As already stated (supra at [35]), Sir Garfield during the Second Reading debate indicated that the adoption of Parts I and II of the Fourth Schedule to the IOPI Act was purely part of the draftsman's mechanism adopted from Second Schedule. If it had a purpose such as the Respondent seems to give it, Sir Garfield surely would have said so. This is consistent with the following statement in the Second Reading Speech:

> *"The schedules to the principal bill describe the privileges and immunities which may be conferred by the regulations, as well as tie classes of persons upon whom privileges and immunities may be conferred. The provisions of the schedules follow very closely those of the international conventions on the subject to which I have just referred."* (emphasis added)

48. An issue concerning an official's continuing immunity from suit was raised in one of the *travaux preparatoires*[23] to the Specialized Agencies Convention itself. In the Final Report of Sub-Committee 1 of the Sixth Committee on the "Co-ordination of the Privileges and Immunities of the United Nations and Specialized Agencies" dated 15 November 1947[24], the Sub-Committee had said in connection with Article VI Section 19(a) of the Specialized Agencies Convention dealing with immunity from suit that it was agreed that, to fulfil its purpose, it was necessary that the immunity should continue after officials had ceased to be officials and also for paragraph (b).

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[22] Refer Article V Section 18 of the Convention on the Privileges and Immunities of the United Nations- in force on17 September 1946 – *"Officials of the United Nations shall ... (b) Be exempt from taxation on the salaries and emoluments paid to them by the United Nations"*.

[23] Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969); *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54; (2006) 231 CLR 52; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 14-16 [34]

[24] United Nations General Assembly: Sixth Committee – Co-ordination of the Privileges and Immunities of the United Nations and of the Specialized Agencies – Final Report of Sub-Committee 1 of the Sixth Committee: Rapporteur: Mr WE Beckett (United Kingdom) – pages 8-9, paragraph [22]. The Specialized Agencies Convention was approved by the General Assembly only six days later on 21 November 1947

49. It appears therefore that it was positively contemplated in the context of that Convention that Section 19(a) dealing with immunity from suit and paragraph (b) relating to exemption from taxation would both continue after officials had ceased to be officials and such an interpretation followed from the wording of the section as a whole and was required if the provisions were to receive their proper effect[25].

50. Nothing in the Second Reading Speech or the parliamentary debate signifies there was ever intended to be a significant *change* in the exemption relating to salaries and emoluments so it would *only* apply in relation to salary and emoluments received prior to termination of office. To the contrary, the Second Reading Speech indicated that Parliament did not intend to depart from the substance of the Conventions and "*the provisions of the Schedules of the IOPI Act followed very closely those of the international conventions.*" Therefore, before a Court would conclude otherwise, it would need to find express words restricting the exemption to only salary and emoluments received *during the period of office.*

The relevant legislative history

51. The IBRD was formed on 27 December 1945, following the United Nations Monetary and Financial Conference, 1-22 July 1944 in Bretton Woods.[26] The final act of the Conference was to agree the instruments for the establishment of the IBRD and the International Monetary Fund. Governments were not bound until its legislature approved as Australia did and, as a result, the articles of agreement entered into force in Australia on 5 August 1947[27].

52. Importantly, Article VII section 9(b) of the articles of agreement for the IBRD stated the following:

> *"(b) No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to executive directors, alternates, officials or employees of the Bank who are not local citizens, local subjects, or other local nationals."*

53. Section 10 of the IBRD agreement provided that each member stated was required to take the necessary action in its own territories for the purpose of making effective in its own law, the principles in Article VII.

54. On 3 June 1947, the ITAA36 was amended to introduce s 23(x) and s 23(y) that applied to the year ended 30 June 1946 and subsequent years. Section 23(x) was

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[25] The learned author of "*The Legal Status- Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations*"[25] further explains that the immunity from suit in the case of official acts is granted *ratione materiae* and not *ratione personae* – that is, it is an immunity that is not attached to the "person" of international officials, but instead depends on the "intrinsic nature of the acts" performed by them. The learned author notes at page 113.4, that few of the instruments of international organisations state explicitly that immunity from suit in respect of official acts shall subsist after the termination of activities. However he states that "it is to be assumed that even in the absence of a specific reference, such immunity is expected to exist after the officials cease to be officials, because it is granted *rationae materiae* and not *ratione personae*". The author also made reference at page 106.9 to the abovementioned report of Sub-Committee 1 of the Sixth Committee.

[26] See Articles of Agreement for the International Monetary Fund and the International Bank for Reconstruction and Development, United Nations Monetary and Financial Conference, Bretton Woods, N.H, 1-22 July 1944

[27] [1947] ATS 15 and also by virtue of the enactment of the *International Monetary Agreements Act* 1947 (No 5 of 1947) which received Royal assent on 2 April 1947. This Act approved, inter alia, Australia becoming a member of the IBRD (s 4) and included the articles of agreement that govern the IBRD in the Second Schedule to the Act.

added in order to exempt from tax "*the income of any prescribed organization of which Australia and one or more other countries are members*". Section 23(y) did the same in relation to:

> *"the official salary and emoluments of an official of an organization the income of which is exempt under the last preceding paragraph, where that salary is, or those emoluments are, derived from sources-*
>
> *(i) in Australia by a non-resident; or*
>
> *(ii) out of Australia by a resident who is appointed for service with that organization outside Australia".*

55. In the explanatory memorandum, the Treasurer (the Right Hon. JB Chifley) indicated that s 23(y) would grant exemption in respect of the official salary and emoluments of certain officials of any international organisation which was exempted under the proposed new section 23(x) but that the view taken by the Commonwealth Government was that Commonwealth tax should be imposed on the remuneration derived in Australia by those officials who are resident of Australia but might be granted, however, in respect of the official remuneration of overseas officials who come to Australia and that justification might be found for granting exemption in respect of the official remuneration derived outside Australia by Australian residents appointed for ex-Australian service by the United Nations[28].

56. In 1948, the Commonwealth Government enacted the *International Organizations (Privileges and Immunities) Act* 1948 (Cth) (**IOPI Act 1948**) which gave approval to Australia's accession to the United Nations Convention (s 3) and provided that the Governor General could make regulations, prescribing all matters necessary for:

    a. giving effect to the provisions of the [United Nations] Convention; and

    b. giving effect, in relation to any international organization, to the provisions of any convention on the privileges and immunities of that international organization to which Australia has acceded (s 5).

    The Act was assented to on 17 December 1948 and commenced on 14 January 1949.[29]

57. By Act 48 of 1950, the name of the ITAA36 was changed to the "*Income Tax and Social Services Contribution Assessment Act* 1936-1950" and there was substituted a new s 23(y) as follows:

> *"(y) the official salary and emoluments of an official of a prescribed organization of which Australia and one or more other countries are members, to the prescribed extent and subject to the prescribed conditions".*

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[28] See further explanatory note (per Mr JB Chifley)

[29] In 1960, some very minor amendments were made to the IOPI Act 1948 by the *International Organizations (Privileges and Immunities) Act* 1960 (**IOPI Act 1960**) which added s 5(c) enabling regulations to be made, inter alia, to confer on an international organization of which Australia or the Government of the Commonwealth was a member, "juridical personality" and "legal capacity".

58. The explanatory memorandum (issued by the Treasurer, the Right Hon. AW Fadden) indicated that the reason for the change to s 23(y) was so that the consideration of exemption of an international organization's income (under s 23(x)) could be considered independently of the exemption of the remuneration of its officials (under s 23(y)). The Act was assented to on 14 December 1950.

59. On the same date, reg 4AB under the *Income Tax and Social Services Contribution Assessment Act* 1936-1950 (Statutory Rules 1950, No 101) was amended for the purpose of adding a number of different international organisations as "prescribed organizations" including the IBRD. However due to the introduction of new reg 4AC only four international organisations were "prescribed" at that time for the purposes of s 23(y) and did not include the IBRD.

60. On 7 August 1957, the abovementioned reg 4AB and reg 4AC were repealed and replaced by new reg 4AB (Statutory Rules 1957, No 39). Sub-reg 4AB(1) provided in paragraph (e) that the IBRD was a "prescribed organization" for the purposes of s 23(x). By sub-reg 4AB(2)(c), an income tax exemption for salary and emoluments was now extended to officials of the IBRD but was limited in the following way:

> *(2) For the purposes of paragraph (y) of section 23 of the Act, the organizations specified in the last preceding sub-regulation are prescribed, and the official salary and emoluments of an official of an organization specified in that sub-regulation are, in accordance with that paragraph, exempt from income tax and social services contribution-*
>
> *(a) ...*
>
> *(b...; and*
>
> *(c) in the case of an official of an organization specified in paragraph (d), (e), (f), (g) or (j) of the last preceding sub-regulation, being an official who is a resident of Australia and who is appointed for service out of Australia with that organization – to the extent that the official salary and emoluments are for services rendered out of Australia."*[30]

61. On 23 December 1962, regulations were made under the IOPI Act 1948-1960 (Statutory Rules 1962, No 105, **the 1962 regulations**). The preamble to those regulations indicated that Australia had acceded to the Specialized Agencies Convention and had, "*subject to certain specified considerations, undertaken to apply to the Specialized Agencies specified in the regulations, the provisions of the Convention.*" The IBRD was specified in regulation 2 as one of the relevant Specialized Agencies. However, importantly, sub-reg. 4(1) and sub-reg. 4(3) provided as follows:

> *"4(1) Each Specialized Agency and each person in relation to whom the Convention applies has, in Australia, the privileges and immunities*

[30] In 1962, there were some minor amendments to the Income Tax and Social Services Contribution Regulations (Statutory Rules 1962 No 112). Sub-reg. 4AB(2) pertaining to s 23(y) was entirely omitted and replaced. However, relevantly paragraph (c) of the new sub reg. 4AB(2) continued to exempt from income tax the official salary and emoluments of an official of the IBRD who was a resident of Australia to the extent the official salary and emoluments were for services rendered outside Australia.

applicable under the Convention (other than those referred to in the Convention) to that specialized agency or that person, as the case may be.
(2)...
(3) Where any Act, other than the International Organizations (Privileges and Immunities) Act 1948-1960 or regulations made under any Act including regulations made under that last-mentioned Act makes provision in relation to privileges and immunities of a Specialized Agency or a person in relation to whom the Convention applies, sub-regulation 1 of this regulation does not confer any privileges or immunities in relation to matters arising under that first-mentioned Act or under those Regulations as the case may be".

62. In other words, from 23 December 1962, due to sub-reg. 4(3), the statutory rules made under the IOPI Act 1948-1960 did not confer any privileges and immunities in relation to income tax and social service contributions in relation to the IBRD or its officials because s 23(y) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1950 and reg. 4AB of the *Income Tax and Social Services Contribution Assessment Regulations* had *already* made provision for such privileges and immunities. In respect of other privileges and immunities conferred by the Specialized Agencies Convention, sub-reg 4(1) would have applied.

63. The IOPI Act 1963, being the Act in question in the present proceedings, was enacted on 18 October 1963 and commenced on 15 November 1963. Sub-section (2)(1) repealed both the IOPI Act 1948 and the IOPI Act 1960[31]. However ss 2(2) *preserved* regulations made under those Acts and such regulations continued in force (unless and until repealed by regulations made under the IOPI Act 1963). Therefore, the statutory rules of 23 December 1962 (No 105) above continued and sub reg 4(3) preserved the operation of both s 23(y) and reg 4AB in relation to privileges and immunities from income tax in the case of the IBRD's officials.

64. Section 23(y) was thus in the following form as at 15 December 1963 (being the date that the IOPI Act 1963 commenced):

"(y) the official salary and emoluments of an official of a prescribed organization of which Australia and one or more other countries are members, to the prescribed extent subject to the prescribed conditions"[32].

65. Further sub-reg 4AB(1) specified the IBRD in paragraph (e) as a "prescribed organization" and sub-reg 4AB(2)(c) was relevantly in the following form:

"(2) For the purposes of paragraph (y) of section 23 of the Act, the organizations specified in the last preceding sub-regulation and the International Finance Corporation are prescribed, and the official salary and emoluments of an official of such an organization or the International Finance Corporation are, in accordance with that paragraph, exempt from income tax and social services contribution-...

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[31] See earlier footnote 29

[32] Section 23(y) was inserted by *Income Tax and Social Services Contribution Assessment Act 1950* (Act 48 of 1950). There was a further amendment to s 23(y) made by *Income Tax and Social Services Contribution Assessment Act (No 3)* 1956 (Act 101 of 1956) to remove the word "and" last occurring.

(a)...
(b)...
(c) in the case of an official (other than one referred to in paragraph (a) of this sub-regulation) who is a resident of Australia, to the extent that his official salary and emoluments are for services rendered out of Australia, and, if the official is not an Australian citizen and came to Australia solely for the purposes of performing his official duties, to the extent, also that his official salary and emoluments are for services rendered in Australia."

66. Section 23(y) and sub-reg 4AB(2), it is submitted, in terms treated "emoluments" which included pension payments as exempt from tax when the official was an Australian resident where those emoluments were for services rendered outside Australia. To this extent it was consistent with the exemption provided for by Article V, Section 18(b) of the United Nations Convention (or Article VI, Section 19(b) of the Specialized Agencies Convention). In other respects, it was not.

67. On 17 April 1986, the Specialized Agencies Regulations 1986 were made under the IOPI Act (Statutory Rules 67, 1986). The making of these regulations by virtue of s 2(3) of the IOPI Act[34] meant that the 1962 regulations made under the IOPI Act 1948 (No. 105) ceased to have effect. Section 2(3) of the IOPI Act provided:

> *"(3) Where regulations are made under this Act conferring privileges and immunities upon an international organization to which this Act applies or upon a person, any regulations continued in force by sub-section (2) that also confer privileges and immunities upon that organization or person cease to have effect in relation to that organization or person".*

68. Thus, the "legislative scheme" in place at the time the IOPI Act was enacted and, importantly, immediately prior to the time that the Specialized Agencies Regulations 1986 were made, was that a specific exemption from income tax was provided under s 23(y) and reg. 4AB which was in force by reason of reg. 4(3) of the 1962 regulations. That legislative scheme did *not* confine the income tax exemption for the salary and emoluments of an official of a "prescribed organization" such as the IBRD to only salary and emoluments received during the term of office.

69. On 9 May 1986, Australia acceded without any reservation to the Specialized Agencies Convention. This was explained by the Minister for Foreign Affairs, the Hon. Bill Hayden at the time[35]. It is clear from the terms of s 23(y) and sub-reg 4AB(2)(c) that there was no intention for the Specialized Agencies Regulations 1986 made in April 1986 to reduce the exemption from tax for an official to emoluments received whilst an officer but rather an intention to extend the exemption to cover what the Specialized Agencies Convention provided in Article VI, Section 19(b)[36].

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[34] as amended in minor respects by the *International Organizations (Privileges and Immunities) Amendment Act* 1982 (Cth) (No. 4 of 1982)
[35] Statement by Minister for Foreign Affairs on 9 May 1986, (1984-1987) 11 Australian Year Book of International Law 522 at 533-535
[36] See explanatory note accompanying the Specialized Agencies Regulations 1986 that contains no mention to or the suggestion of any reduction in the exemption given to officers.

70. At the time that s 23(y) was omitted in 1988, the relevant explanatory memorandum observed that s 23(y) was now "*redundant*" as a result of the income tax exemption conferred by regulations made under the IOPI Act 1963 following upon Australia's accession to the [Specialized Agencies] Convention. Indeed it had been redundant since 24 April 1986.

71. It is noted that Australia had in fact deposited instruments of acceptance to the Specialized Agencies Convention in November 1962[38] but with several reservations that were queried or objected to by the agencies and the instruments were not formally accepted for deposit. There was then a later deposit of instruments (but without reservation) on 9 May 1986[39].

72. The more limited reservations previously contained in s 23(y) and reg 4AB were thereafter no longer maintained.

73. None of the above matters in relation to the relevant legislative history and legislative scheme at the time of the enactment of the IOPI Act or the Specialized Agencies Regulations 1986 were considered by the Full Court in its preferred interpretation of the relevant provisions, despite submissions being made by the Appellant about these matters. They are clearly matters that ought to be taken into account in selecting the interpretation of the provisions in question that best achieves the purpose and object of the IOPI Act (s 15AA *Acts Interpretation Act* 1901 (Cth)). They establish that there was no intention on the part of Parliament to do other than extend the privileges and immunities to the fullest as provided by the Convention and that the introduction of Parts I and II were never intended to restrict the tax exemption in Item 2 to the period of office of officials such as the appellant.

Australia would be in breach of the Specialized Agencies Convention if the respondent's argument was accepted

74. Perram J held that Australia was in breach of its obligation under the Specialized Agencies Convention not to levy income tax on the appellant.

75. In the course of a well reasoned judgement on the issue, his Honour, having referred to the relevant principles, considered the interpretation of Article V, Section 18 of the comparable Convention relating to the United Nations brought into play by Article VI, Section 19 of the Specialized Agencies Convention and considered how it had been applied in other domestic Courts which had formed a similar view to his.

76. His Honour had noted, there is no reason why the word "emolument" would not include a pension payment and it was particularly so where, as in the appellant's case "*the official has diverted a contribution from salary towards the pension*".

77. The appellant submits that the judgement of Perram J in relation to the Convention was clearly correct and was in accordance with the relevant principles he enunciated (see FC[53] and the text and cases there cited).

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[38] 1962 ATS 13

[39] Minister for Foreign Affairs on 9 May 1986, Australian Year Book of International Law at 533-535, No 13, see page 12. The instruments deposited where Australia could under Section 39 of the Specialized Agencies Convention could have a special agreement with a body such as WHO to tax its resident officials who rendered services in Australia.

78. The consequence of this being so is of considerable importance to the proper interpretation of the text in s 6(1)(d) of the IOPI Act and reg 8. It is submitted that neither Perram J nor the Full Court gave any consideration to the consequence of Australia being in breach of the Convention. In the absence of clear words, as already submitted and having regard to the submissions already made, the appellant submits that not only was the plurality in error in finding a "dichotomy" but also in the light of the meaning of the word "emoluments" and other relevant facts, failing to consider whether Australia's breach was a strong reason for giving the text a beneficial and purposive meaning designed to implement the Convention (and one that the language could clearly bear). The relevant facts included that the appellant's participation in the SRP was mandatory as a condition of his employment[40] and his contributions to the SRP were *deducted from his salary* on a regular basis (emphasis added)[41]. The appellant contributed a total of US$200,842 to the SRP[42]. The World Bank stated in the staff handbook that "*The Bank provides the SRP as an integral part of the total compensation and benefits package offered to staff. After salaries it is the most valuable element of that package*".[43]

The effect of principles of construction relevant to the application of established rules of international law

79. The plurality also failed to consider the principle that "*every Statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with established rules of international law*"[44] (cf Perram J at FC[48] and the learned Deputy President at AAT[56]-[58]). In *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 and Another* (2006) 231 CLR 1 at 14-16 [34] the plurality said:

> "*...by reason of s 15AB(2)(d) of the Acts Interpretation Act, the Convention may be considered for the purposes described in s 15AB(1). Further Australian Courts will endeavour to adopt a construction of the Act and the regulations, if that construction is available, which conforms to the Convention....*"

80. Again there was a failure by the plurality to consider the application of this principle in relation to Australia's obligations under the Convention which was clearly a part of the established rules of international law and practice and was an example of the comity of nations in upholding the functional capacity of these agencies and their officers. When those principles are applied here as Perram J did and the plurality failed to do, it should have led both the plurality and Perram J to from the view that the interpretation they were adopting was in conflict with those principles.

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[40] AAT[7], AB-XX at XX
[41] AAT[7], ABXX at XX
[42] AAT[10], AB-XX at XX
[43] ABXX at XX
[44] *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207; [2015] HCA 1 at [8] (per French CJ) and at [383]-[390] (per Gageler J) and *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 and Another* (2006) 231 CLR 1 at 14-16 [34] (per Gummow ACJ, Callinan, Heydon And Crennan JJ). See also *Minister for Immigration and Border Protection v WZAPN WZARV v Minister for Immigration and Border Protection* [2015] HCA (17 June 2015) at [53], [61]-[69] (per plurality) and at [91]-[92] per Gageler J

Part VII: Applicable legislation and regulations at the relevant time

81. The relevant legislative provisions and applicable regulations as in force in the relevant years of income are attached as Annexure A. These provisions are also presently in force, materially unchanged. A full copy of all of the relevant legislative provisions and applicable regulations (including historical provisions/regulations and extrinsic material) and relevant Conventions will be provided to the Court.

Part VIII: Precise form of orders sought by the appellant

82. The appeal be allowed with costs.

10 83. The orders made by the Full Court of the Federal Court of Australia on 4 December 2014 be set aside and, in lieu thereof, it be ordered that the appeal to the Full Court of the Federal Court of Australia be dismissed and that the Respondent pay the Appellant's costs of that appeal.

Part IX: Estimate of oral argument

84. The appellant estimates that 2&3/4 hours would be required for presentation of its oral argument (including reply).

20 Dated: 19 June 2015

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ANNEXURE A

PART VI: APPLICABLE STATUTES AND REGULATIONS

***International Organisations (Privileges and Immunities) Act 1963* (Cth)**

(These provisions are still in force, in the form below, at the date of making the submissions as they were at the relevant dates being 30 June 2009 and 30 June 2010)

Section 6

6 Privileges and immunities of certain international organisations and persons connected therewith

(1) Subject to this section, the regulations may, either without restriction or to the extent or subject to the conditions prescribed by the regulations:

(a) confer upon an international organisation to which this Act applies:

(i) juridical personality and such legal capacities as are necessary for the exercise of the powers and the performance of the functions of the organisation; and

(ii) all or any of the privileges and immunities specified in the First Schedule;

(b) confer:

(i) upon a person who holds, or is performing the duties of, an office prescribed by the regulations to be a high office in an international organisation to which this Act applies all or any of the privileges and immunities specified in Part I of the Second Schedule; and

(ii) upon a person who has ceased to hold, or perform the duties of, such an office the immunities specified in Part II of the Second Schedule;

(c) confer:

(i) upon a person who is accredited to, or is in attendance at an international conference convened by, an international organisation to which this Act applies as a representative of:

(A) a country other than Australia;

(B) another international organisation to which this Act applies; or

(C) an overseas organisation to which this Act applies;

all or any of the privileges and immunities specified in Part I of the Third Schedule; and

(ii) upon a person who has ceased to be accredited to such an organisation, or has attended such a conference, as such a representative the immunities specified in Part II of the Third Schedule;

(d) confer:

(i) upon a person who holds an office in an international organisation to which this Act applies (not being an office prescribed by the regulations to be a high office) all or any of the privileges and immunities specified in Part I of the Fourth Schedule; and

(ii) upon a person who has ceased to hold such an office the immunities specified in Part II of the Fourth Schedule; and

(e) confer:

(i) upon a person who is serving on a committee, or is participating in the work, of an international organisation to which this Act applies or is performing, whether alone or jointly with other persons, a mission on behalf of such an organisation all or any of the privileges and immunities specified in Part I of the Fifth Schedule; and

(ii) upon a person who has served on such a committee or participated in such work or has performed such a mission the immunities specified in Part II of the Fifth Schedule.

(2) Regulations made for the purposes of this section may be of general application or may relate to:

(a) particular international organisations to which this Act applies;

(b) particular offices or classes of offices;

(c) particular conferences, committees or missions or classes of conferences, committees or missions; or

(d) representatives of particular countries, of particular international organisations to which this Act applies or of particular overseas organisations to which this Act applies.

(3) Where by the regulations any privileges or immunities are conferred upon a person who is accredited to, or is in attendance at an international conference convened by, an international organisation to which this Act applies as a representative of:

(a) a country other than Australia;

(b) another international organisation to which this Act applies; or

(c) an overseas organisation to which this Act applies;

that person is entitled to the same privileges and immunities while travelling to a place for the purpose of presenting his or her credentials or of attending the conference or while returning from a place after ceasing to be so accredited or after attending the conference.

(4) Where by the regulations any privileges or immunities are conferred upon a person who is serving on a committee, or participating in the work, of an international organisation to which this Act applies or is performing, whether alone or jointly with other persons, a mission on behalf of such an organisation, that person is entitled to the same privileges and immunities while travelling to a place for the purpose of serving on the committee or participating in that work or performing the mission or while returning from a place after serving on the committee or participating in that work or performing the mission.

(5) Subject to subsection (6), where by the regulations or by subsection (3) any privileges or immunities are conferred upon a person who is, or has been, a person accredited to, or in attendance at an international conference convened by, an international organisation to which this Act applies as a representative of:

(a) a country other than Australia;

(b) another international organisation to which this Act applies; or

(c) an overseas organisation to which this Act applies;

a person who is, or has been during any period, a member of the official staff of the first-mentioned person is entitled, in respect of that period, to the same privileges and immunities.

(6) A person who is, or has been, a representative of:

(a) a country other than Australia;

(b) another international organisation to which this Act applies; or

(c) an overseas organisation to which this Act applies;

or a member of the official staff of such a representative during the period when he or she is or was an Australian citizen is not entitled under this section or the regulations to any privileges or immunities in respect of that period, except in respect of acts and things done in his or her capacity as such a representative or member.

Fourth Schedule

Part I

Privileges and Immunities of Officer (other than High Officer) of International Organisation

1. Immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer.

2. Exemption from taxation on salaries and emoluments received from the organisation.

3. Exemption (including exemption of a spouse and any dependent relatives) from the application of laws relating to immigration and the registration of aliens.

4. Exemption from the obligation to perform national service.

5. Exemption from currency or exchange restrictions to such extent as is accorded to an official, of comparable rank, forming part of a diplomatic mission.

6. The like repatriation facilities (including repatriation facilities for a spouse and any dependent relatives) in time of international crisis as are accorded to a diplomatic agent.

7. The right to import furniture and effects free of duties when first taking up a post in Australia and to export furniture and effects free of duties when leaving Australia on the termination of his functions.

Part II

Immunities of Former Officer (other than High Officer) of International Organisation

Immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer.

Specialized Agencies (Privileges and Immunities) Regulations 1986 **(Cth)**

(These provisions are still in force, in the form below, at the date of making the submissions as they were at the relevant dates being 30 June 2009 and 30 June 2010)

8 Privileges and immunities of officers (other than high officers) of Specialized Agencies

(1) Subject to subregulation (2), a person who holds an office in a Specialized Agency, other than a person who holds, or is performing the duties of, an office specified in Column 3 of an item in the Schedule, has the privileges and immunities specified in Part I of the Fourth Schedule to the Act.

(2) A person to whom subregulation (1) applies does not have the right to export furniture and effects free of duties when leaving Australia on the termination of his or her functions in relation to a Specialized Agency.

(3) A person who has ceased to hold an office in a Specialized Agency, other than an office specified in Column 3 of an item in the Schedule, has the immunities specified in Part II of the Fourth Schedule to the Act.

Acts Interpretation Act 1901 **(Cth)**

(These provisions are still in force, in the form below, at the date of making the submissions as they were at the relevant dates being the date of the Federal Court decision - 4 December 2014)

Section 13

13 Material that is part of an Act

(1) All material from and including the first section of an Act to the end of:
   (a) if there are no Schedules to the Act—the last section of the Act; or
   (b) if there are one or more Schedules to the Act—the last Schedule to the Act;
   is part of the Act.

(2) The following are also part of an Act:
   (a) the long title of the Act;
   (b) any Preamble to the Act;
   (c) the enacting words for the Act;
   (d) any heading to a Chapter, Part, Division or Subdivision appearing before the first section of the Act.

Section 15AA

15AA Interpretation best achieving Act's purpose or object

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

***Legislative Instruments Act 2003* (Cth)**

(These provisions are still in force, in the form below, at the date of making the submissions as they were at the relevant dates being the date of the Federal Court decision - 4 December 2014)

13 Construction of legislative instruments

(1) If enabling legislation confers on a rule-maker the power to make a legislative instrument, then, unless the contrary intention appears:

(a) the *Acts Interpretation Act 1901* applies to any legislative instrument so made as if it were an Act and as if each provision of the legislative instrument were a section of an Act; and

(b) expressions used in any legislative instrument so made have the same meaning as in the enabling legislation as in force from time to time; and

(c) any legislative instrument so made is to be read and construed subject to the enabling legislation as in force from time to time, and so as not to exceed the power of the rule-maker.

(2) If any legislative instrument would, but for this subsection, be construed as being in excess of the rule-maker's power, it is to be taken to be a valid instrument to the extent to which it is not in excess of that power.

(3) If enabling legislation confers on a rule-maker the power to make a legislative instrument:

(a) specifying, declaring or prescribing a matter; or

(b) doing anything in relation to a matter;

then, in exercising the power, the rule-maker may identify the matter by referring to a class or classes of matters.

(4) For the purposes of subsection (3), ***matter*** includes thing, person and animal.

Note: This section has a parallel, in relation to instruments that are not legislative instruments, in subsection 33(3AB) and section 46 of the *Acts Interpretation Act 1901*.