

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S100 of 2015

BETWEEN:

ANDREW JOHN MACOUN

Appellant

AND

COMMISSIONER OF TAXATION

Respondent



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Respondent's Submissions

Filed on behalf of the respondent, the
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PART I: PUBLICATION

1. The respondent (**Commissioner**) certifies that this submission is in a form suitable for publication on the internet.

PART II: ISSUES

2. The appeal and proposed notice of contention raise three questions, which should be answered as follows:

- a. (**The Appeal**) Whether s 6 and the Fourth Schedule of the *International Organisations (Privileges and Immunities Act) 1963* (Cth) (**IOPI Act**) and regulation 8 of the *Specialized Agencies (Privileges and Immunities) Regulations 1986* (Cth) (**SAPI Regulations**), properly construed, confer a taxation exemption in respect of the periodical pension payments that were received by the appellant from the International Bank for Reconstruction and Development (**IBRD**) at a time when he had ceased to hold office in that organization? **No**.
- b. (**Notice of Contention Ground 1**) Whether the reasoning and conclusion of the Full Federal Court (**FFC**) can be additionally supported by regarding the periodical pension payments as retirement benefits that fall outside the composite phrase “salaries or emoluments received from the organisation” as it is placed as item 2 of Part I of the Fourth Schedule to the IOPI Act? **Yes**.
- c. (**Notice of Contention Ground 2**) Whether the *Convention on the Privileges and Immunities of the Specialized Agencies* [1988] ATS 41 (**Agencies Convention**), properly construed in accordance with principles under the *Vienna Convention on the Law of Treaties* [1974] ATS 2 (**VCLT**), requires Australia not to tax the appellant’s pension? **No**.

PART III: SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

3. The Commissioner certifies that he has considered whether a notice should be given under s 78B of the Judiciary Act 1903 (Cth) and that no notice needs to be given. (In particular, it is considered that the Court can receive the additional materials the parties seek to rely upon on the international law issues without raising a question under s 73 of the Constitution – see [54]-[55] below).

PART IV: RELEVANT FACTS

4. Save for inconsequential errors, the facts set out in the appellant’s submissions (**AS**) are not contested. However, certain additional matters in relation to the Staff Retirement Plan (**SRP**) of the IBRD, pursuant to which the appellant received the pension payments in issue, should be noted.
5. Participants in the SRP¹ were defined to mean every person employed by the IBRD on a Regular appointment (Appeal Book (**AB**) _). The SRP included provisions relating to the eligibility of participants to receive retirement pensions and disability pensions and the conditions for the payment of death benefits to participants’ family members (AB _). Participants in the SRP who retired between the ages of 55 and 62, as the appellant did, became eligible to receive monthly pension payments from the date of their retirement, calculated in accordance with formulae in the SRP (AB _). Payment of the regular pension in such circumstances was subject to, amongst other things, the participant electing to advance

¹ The references that follow to the SRP are to the version effective as at 1 July 1997 at AB _ . Materially similar provisions are found in the version dated 5 October 1989 at AB _ .

the effective date of the pension.² Retirement pensions under the SRP were calculated on the basis of participants' "highest average gross salary" rather than on the basis of their net salaries³. That is, on the assumption that SRP pensions were generally subject to national income tax, participants' net-of-tax salaries were grossed up by substantial amounts for the purpose of calculating the pension benefits payable to them.⁴

- 10 6. The appellant originally lodged returns for the income years ended 30 June 2009 and 30 June 2010 (the **relevant income years**) that included amounts referable to the pension payments he received in those years from the World Bank Group. He subsequently amended those returns to exclude the pension payments, which led the Commissioner to issue amended assessments for the relevant income years. The Commissioner disallowed objections made by the appellant to the inclusion of the pension payments in his assessable income (**Objection Decision**) (AB _) and the appellant applied successfully to the Administrative Appeals Tribunal (**AAT**) for review of the Objection Decision.

PART V: APPLICABLE PROVISIONS

- 20 7. In addition to the provisions in Annexure A to AS, the following statutory and treaty provisions are directly relevant: s 10 of the IOPI Act; regulation 10 of the SAPI Regulations; s 27H of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**); Article VI of the Agencies Convention; and Article V of the *General Convention on the Privileges and Immunities of the United Nations* [1949] ATS 3 (**UN Convention**). The historical statutory material is included in **Folder A** which is to accompany these submissions.

PARTS VI and VII: ARGUMENT ON APPEAL AND NOTICE OF CONTENTION

Summary of Commissioner's Submissions

- 30 8. The Commissioner, in summary, submits as follows:
- a. The text, structure and purpose of the IOPI Act supports the conclusion of the FFC that the distinction between the privileges and immunities that may be conferred on a person who *holds* an office, on the one hand, and the immunities that may be conferred on a person who has *ceased* to hold an office, on the other, is fundamental to the construction of the IOPI Act and SAPI Regulations. Attention must be given to the time at which any privilege or immunity is claimed to arise and to the performance of the "office" with which it is connected. Regardless of whether a pension payment can be properly regarded as an "emolument", the determinative factor is that the pension payment is not *received from the organisation* during the officer's period of employment with the organisation: see below at [13]-[16].
 - b. In additional support for the FFC's reasoning and conclusion, the pension payments should be characterised as retirement benefits which fall outside the composite phrase "salaries or emoluments received from the organisation" as it is placed as item 2 of Part I of the Fourth Schedule to the IOPI Act. Specifically, a pension is a payment for a period in which service is *no longer* being rendered: the entitlement only arises *after* the person has left the office; and when the pension is then paid, it is received in the capacity of a former officer, rather than a present officer: see below at [17]-[34].
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² SRP Article 3.2, AB _.

³ SRP Articles 1.1(j), 1.1(l), 3.1(b), 3.2(c), AB _; see also AAT [46]-[47]).

⁴ The gross up amount was calculated in accordance with a sliding scale; for a participant with an annual net salary of \$80,000 or more, the gross salary was "(Net Salary x 1.86) minus \$22,400": AB _.

- c. Contrary to the obiter finding of Perram J below, the construction offered above is *consistent* with Australia's international obligations. The Agencies Convention, properly interpreted by reference to the ordinary meaning of its text, in the light of its context and the Convention's object and purpose, does not require States parties to confer an exemption from taxation on pensions paid by the Specialized Agencies. The practice of States parties does not alter that construction, as it does not disclose a universal approach to the issue amongst members. The preparatory works of the UN Convention, which underpins the Agencies Convention, disclose a positive intention *not* to confer an exemption from taxation on retirement benefits: see below at [54]-[80].

10 The key difference between the decisions below

9. The five grounds set out in the Notice of Appeal in substance urge that the construction which the AAT placed upon the relevant statutory provisions was correct in law and should not have been overturned by the FFC. It is important then to identify precisely the error which the FFC found in the construction adopted by the AAT.

10. The AAT reasoned:

- a. The periodical pension payments are in the nature of "emoluments" within the relevant statutory provisions because they can be described as a profit or gain arising from an office or employment or as "compensation for services" by way of remuneration: AAT [32].
- b. The appellant's entitlement to the emolument arose or crystallised during his term of employment: AAT [33] and [34].
- c. The fact that the pension payments were received after the employment had ceased does not alter their characterisation or take them outside the statutory provisions: AAT [38].
- d. The construction exercise is not advanced by observing the distinction between the "Privileges and Immunities of Officer[s]" in Part I of the Fourth Schedule to the IOPI Act and the "Immunities of Former Officer[s]" in Part II of that Schedule; or by observing that the relevant exemption from taxation is found only in Part I. Parts I and II of the Fourth Schedule are distinct provisions and should be read as such. The exemption from taxation in Part I extends to all emoluments to which an entitlement arises while the person holds office irrespective of whether they are paid after the office ceases and irrespective of the fact that there is no exemption from taxation accorded in Part II to former officers: AAT [41]-[45].
- e. The above construction receives support from the Second Reading Speech in respect of the IOPI Act and from the decisions of certain Spanish Tribunals: AAT [50]-[58].

11. The primary error which the FFC found in the decision of the AAT was that it failed to pay sufficient attention to two related matters:

- a. The Fourth Schedule to the IOPI Act, which is in turn engaged by s 6(1)(d) of the IOPI Act and regulation 8(1) of the SAPI Regulations, draws a "clear dichotomy" between the "Privileges and Immunities of [an] Officer" of a relevant international organisation in Part I and the "Immunities of [a] Former Officer" in Part II. Regulations made under the IOPI Act cannot confer any of the privileges specified in Part I upon a person who does not currently hold office in the IBRD. This includes the "exemption from taxation on salaries and emoluments received from the organisation", which is included in Part I of the Fourth Schedule, but which is not replicated in Part II: FFC [43]-[44];

b. The wording of the exemption has quite deliberately targeted salaries and emoluments *received from the organisation*. The use of the language *received from the organisation*, in the context of an exemption which is included in Part I, and not replicated in Part II, means that the determinative consideration is receipt during the course of employment, rather than entitlement arising during the course of employment, as appealed to the AAT: FFC at [39]-[41].

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12. The FFC concluded (at [44]) that the pension payments fell outside the exemption because they were received as a matter of fact at a time when the appellant had ceased to hold the relevant office, “even if such payments continued to be ‘emoluments’ to which he became entitled while holding office in the IBRD”. In expressing the conclusion this way, the FFC was not endorsing the correctness of the AAT’s finding that the payments were or continued to be emoluments to which he became entitled while holding office in the IBRD;⁵ it was simply observing that, whatever view was taken on that question, it did not affect the ultimate point of construction.

The AAT erred and the FFC was correct to so find

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13. The Commissioner contends that the FFC was correct to find error in the reasoning of the AAT. In carrying out the construction exercise, weight, indeed significant weight, needs to be given to:

- a. the careful and express distinction in s 6(1)(d) of the IOPI Act between a person who holds an office and a person who has ceased to hold an office in an international organisation to which the Act applies;
- b. the distinction between the privileges and immunities available to be conferred by regulation made under s 6(1)(d) on current officers, being those in Part I of the Fourth Schedule, and the immunity available to be conferred on former officers, being that in Part II of the Fourth Schedule;
- c. the deliberate decision to include the taxation exemption in the former case but not the latter case; and
- d. the adoption of the language “received from the organisation” in the definition of the exemption.

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14. The AAT was in error not to give significant attention to these matters. Its process of reasoning – which starts with the concept of emolument in item 2 of Part I of the Fourth Schedule; gives it its broadest possible meaning of any “gain”; and then introduces a causal connection that the emolument be one “*arising from an office or employment*” or which “*crystallise[s]* during the course of ... employment” – is a significant departure from the language of *receipt* adopted within the item; the item’s placement within Part I of the Fourth Schedule; and its non-replication in Part II.

15. That is, both text and structure favour the FFC’s conclusion. As does purpose, which will be addressed further below at [28]-[34].

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16. The appellant’s contention that there are “no express words confining the benefit of the immunity [from taxation] to the period of office” ignores the force of the matters just set out.⁶ The statutory scheme operates in such a way that the grant of the exemption in the Fourth

⁵ Cf AS [30], [38].

⁶ Cf AS [26], [28], [36].

Schedule to the IOPI Act, pursuant to the SAPI Regulations, depends on the *status* of the grantee as an office holder or former office holder *as and when* the relevant amount is received. The words said by the appellant (AS [30]) to be impermissibly read in by the FFC are no more than the correct construction of the very language that appears in the legislation. To the contrary, the notion of “entitlement”, which the appellant entreats the Court to consider (AS [38]), finds no basis in the statutory text.

Construing item 2 as a composite expression (Notice of Contention Ground 1)

- 10 17. The reasoning and conclusion of the FFC receives additional support if the meaning of the term “emolument”, within the composite expression “salaries and emoluments received from the organisation” as located in Part I of the Fourth Schedule, is given direct attention and if, in doing so, questions of characterisation, capacity and statutory purpose are addressed more explicitly.

Text and Context

- 20 18. A convenient way to understand the exemption from taxation in item 2 of Part I of the Fourth Schedule to the IOPI Act is to view it as attaching to the composite expression “salaries and emoluments received from the organisation”. It would be erroneous to construe that phrase, as the appellant appears to contend in places, simply by combining the dictionary meanings of its component parts.⁷ Equally it would be erroneous to give a meaning to any part of the phrase without attention to the role that the phrase has in the operation of the statutory scheme established by s 6(1)(d) of the IOPI Act and the SAPI Regulations.⁸

- 30 19. It is important to observe the following in relation to the exemption in item 2:
- a. Item 2 articulates an exemption from taxation that *may* be conferred, by regulations made under s 6(1)(d), upon a “person who holds an office in an international organisation”. Contrary to the appellant’s submissions, there is no basis for inferring a beneficial purpose in favour of the *official* from the use of the word “confer” in s 6(1)(d) in circumstances where: (i) that provision expressly enables regulations to confer the exemption “either without restriction *or to the extent or subject to the conditions prescribed by the regulations*”;⁹ and (ii) as the appellant elsewhere correctly acknowledges, the privileges and immunities are conferred to enable the *organisation* to function effectively, not for the personal benefit of any individual.¹⁰
 - b. The item is placed alongside other exemptions in Part I of the Fourth Schedule which appertain to the period in which a person holds office, such as an exemption from the obligation to perform national service and an exemption from currency or exchange restrictions. In this respect, item 7 of Part I, upon which the appellant seeks to place heavy reliance, is not an “instance of immunity the benefit of which is to be taken after termination of office”.¹¹ To the contrary, the legislation, by the language it deploys, has clearly delineated between circumstances where a person *terminates their functions in*

⁷ Cf AS [30]; see *XYZ v The Commonwealth* (2006) 227 CLR 532 at 543-544 [19] per Gleeson CJ; at 592-593 [176] per Callinan and Heydon JJ; *Alphapharm Pty Ltd v H Lundbeck A-S* (2014) 89 ALJR 1 at 14 [61] per Crennan, Bell and Gageler JJ.

⁸ Cf AS [26], [28].

⁹ Cf AS [25].

¹⁰ Cf AS [41(c)].

¹¹ Cf AS [27], [33], [36(b)].

Australia and those where a person *ceases to hold office* in an international organisation. The two events may, but need not, coincide. The fact that item 7 confers a privilege where a person terminates their functions in Australia does not lead to an inference that it, or any other privilege or immunity within Part I of the Fourth Schedule, is available in the period after a person ceases to hold office.

- 10 c. Item 2 identifies specifically the types of payments that are to be the subject of the exemption. It does not (one may assume deliberately) include a range of other payments which have some connection with the fact that an office has at some prior time been held. The fact that the item is drafted *not* to include retirement benefits, pension payments or termination payments must be given weight in the construction exercise. The item does not embrace the broader list of payments one finds in other Commonwealth statutes, including in the taxation context.¹²
- d. Further, the item should be interpreted as giving both the word “salaries” and the word “emoluments” work to do;¹³ if emolument is read in the broadest possible sense of any gain arising from office, it would impermissibly swallow up the notion of salaries.¹⁴
- 20 20. The legislative scheme has thus been framed such that whether or not regulations may be made under s 6(1)(d) of the IOPI Act conferring the tax exemption in item 2 of Part I of the Fourth Schedule upon a particular kind of receipt depends upon the relationship and connection between that benefit, the officer receiving it, the performance of their duties and the holding of office. Force and effect has to be given to these legislative choices. Questions of characterisation and capacity thus arise.

Characterisation and capacity

21. A characterisation exercise is therefore necessary. The payments which an international organisation may make to persons who hold, or cease to hold, office can be of a variety of characters:
- 30 a. At one end, salary can be seen fairly simply as payments which are made, usually on a periodic basis, as the *quid pro quo* for the officer actually serving in the office. They are the payments for the rendering of service and are expressly covered by item 2 of Part I of the Fourth Schedule. Equally, the term could have been “wages” without altering the result.¹⁵
- b. The concept of an “emolument” is apt to capture a broader, albeit not unlimited, range of additional benefits received by the official from the organisation for the performance of office. In *Nette v Howarth*, Dixon J understood the term (in the context of the *Bankruptcy Act*) to have a narrower meaning than a “mere gain, profit or advantage” and to relate to “revenue, whether casual or constant, arising from an office, station, or

¹² Compare, for example, the provision of the *Bankruptcy Act 1924* (Cth) at issue in *Nette v Howarth* (1935) 53 CLR 55 and *Federal Commissioner of Taxation v Official Receiver* (1956) 95 CLR 300, which referred to a person being in receipt of “pay, pension, salary, emoluments, profits, wages, earnings, or income”.

¹³ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] per McHugh, Gummow, Kirby and Hayne JJ; *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 62 [7] per Gleeson CJ and Callinan J.

¹⁴ A point made in a taxation context in relation to “allowances” in *Mutual Acceptance Company Limited v Federal Commissioner of Taxation* (1944) 69 CLR 389 at 397 per Latham CJ.

¹⁵ In *Mutual Acceptance*, Latham CJ described wages, in the ordinary sense, as that which is paid to an employee *as such*; ie, in respect of an incident of service: at 396-398.

situation”.¹⁶ Justice Rich referred to “emoluments” as “the advantages in money or money’s-worth which flow from occupation of an office or the like”.¹⁷ Placed in the context of the “Privileges and Immunities of [an] Officer”, as opposed to a person who has ceased to hold office, the phrase “emoluments received from the organisation” connotes that range of additional benefits received as part of the quid pro quo for the occupation of the office and the rendering of service that go beyond merely “salary”. Like salary, emoluments must be received *in the capacity* of a current office holder.

- 10 c. Beyond the case of salaries and emoluments so received, there could be a range of other benefits which have some form of connection, close or distant, with the fact that office has been held, but which are not benefits given in exchange for the service provided by the office holder as such or received in that capacity. One example is a termination payment. Such a payment may be a discretionary one made because of, and in recognition of, the cessation of the office; or it may be made by reason of a contractual or statutory entitlement which had governed the office from the outset. The form a termination payment takes may affect whether or not it is apt to be described as an “emolument” within item 2 of Part I of the Fourth Schedule; it is not readily apparent that any or all termination payments would be so characterised.
- 20 d. The position is clear, however, when one moves to retirement benefits in general or periodic pension payments in particular. The very character of a retirement benefit, or a periodical pension payment, is that it is a benefit received by the person at a time when he or she no longer holds the office, is no longer providing the service pursuant to the office and no longer has the entitlements to remuneration which existed when that service was being rendered. It is not a payment for service; it is not payment for cessation of service; it is a payment for the period which “follow[s] service” and in which service is no longer being rendered.¹⁸ Whether or not a pension payment could, in general parlance or in other statutory contexts, be regarded as an emolument, it cannot be so regarded for the purposes of item 2 of Part I of the Fourth Schedule to the IOPI Act;¹⁹ the connection required between the holding of office, performance of duties of office and the receipt of the payment is simply lacking.
- 30 e. As with a termination payment, the retirement benefit or periodic pension payment may be discretionary or may be contractual/statutory. In the latter case, in one sense it can be said that while the service is on foot the person knows that they have rights which may prove valuable at a future date and for a future period when the service has ceased. In this loose sense, one may be able to speak of a form of present “entitlement”. But what is critical is that the person does not have an unconditional and absolute entitlement to call for the pension until the person has taken the step of leaving office; and when the pension is then paid, it is received in the capacity of a former officer, rather than a present officer.²⁰

¹⁶ (1935) 53 CLR 55 at 65; see also *Federal Commissioner of Taxation v Official Receiver* (1956) 95 CLR 300 at 314 per Williams J.

¹⁷ (1935) 53 CLR 55 at 60 per Rich J.

¹⁸ See *Nette v Howarth* (1935) 53 CLR 55 at 65 per Dixon J. This proposition is true in general and on the particular scheme in issue here: See SRP Articles 2.3, 3.1 and 3.2, AB _.

¹⁹ Cf, in a very different context, *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 710 per McTiernan J.

²⁰ Cf AS [38].

- f. A similar characterisation exercise would be carried out with other benefits; death benefits or total and permanent disability benefits, including those payable under the SRP,²¹ would, like retirement benefits, be most probably regarded as insufficiently connected with the current holding of office to attract the exemption.
22. Returning then to the AAT decision, the FFC was correct to find error in an approach which involved the AAT construing an emolument as any profit or gain arising from an office or employment or as compensation for services by way of remuneration (AAT [32]); asking whether the relevant entitlement to the pension arose or crystallised during the term of the appellant's employment; and concluding that it did (AAT [33]-[34]).
- 10 23. *First*, the AAT's interpretation of "emoluments", which is again contended for by the appellant, renders the express reference to salaries in item 2 otiose. The text of the composite phrase thus warrants a narrower construction of emoluments than "[any] profits arising from an office" or "compensation for services".²² On that overly broad meaning, every "salary" is also an "emolument". The appropriate narrower meaning is that identified at [21(b)] above.
24. *Second*, a focus on *when* entitlements to a pension "arise" or "crystallise", as a basis for examining whether they are emoluments, ignores the source requirement for the exemption which has been squarely stated in item 2 – namely, that the relevant thing be "received" from the organisation as a privilege of a current office holder – and substitutes for it a different requirement.
- 20 25. *Third*, in any event, the appellant may have had contractual rights during his period of employment which might mature into a future retirement pension (or, for that matter, to a future disability pension, if he were to suffer injury or illness, or a future death benefit payable to his spouse, if he were to die), but his entitlement to the retirement pension could not be said to be "crystallised" or be unconditional and complete while ever he remained in employment.²³ The SRP made clear that an essential step before the appellant could call for the pension was that his regular appointment with the IBRD be terminated for any cause other than death or disability;²⁴ and that he has reached a certain age or elect to advance the effective date of the pension. The pension would then be received as a benefit in circumstances where he was no longer holding office, rendering service or entitled to the remuneration for performance of the office. Indeed, had the appellant, after ceasing office and taking up the pension, resumed his office within the IBRD, his pension would have ceased under the terms of the SRP.²⁵ This highlights that a critical aspect of the character of the SRP retirement pension is its being a payment for the period in which a participant has *ceased* to hold the office.
- 30 26. Thus the AAT erred in law in holding that the appellant's entitlement to the pension payments was "a part of the remuneration entitlement which crystallised during the course of the [appellant's] employment" (AAT [34]). There was no unconditional or absolute entitlement to a pension while he held office. It was only on ceasing to hold office, attaining a relevant age, and remaining alive, that his right crystallised. The extent of the right then depended on

²¹ SRP, Articles 3.4 and 4.1, AB _.

²² Cf AS [30]; AAT [32].

²³ See AS [31].

²⁴ See SRP Articles 2.3, 3.1 and 3.2, AB _; World Bank Group Staff Retirement Plan Handbook (**Handbook**), section 4.4, AB _.

²⁵ SRP, Article 8.1, AB _; Handbook, section 2.6, AB _.

the further period in which he remained alive. And of course, what is sought to be brought to tax are the pension payments *as received*, not some anterior contingent right to a future pension that arose during the course of employment.

27. Further, this is not some finding of fact by the AAT which, even if erroneous, is immune from review in an appeal on a question of law. The primary facts are not in dispute; the question whether they admit of no other conclusion than that the pension payments fall outside item 2 is one of law.²⁶

Statutory purpose

- 10 28. The construction proffered above not only matches the text but also the identifiable purpose of the IOPI Act. One key purpose, as evident from the text and confirmed in the relevant Second Reading Speech, was to:²⁷

[I]ay down very clearly the *upper limits*, so to speak, of the privileges and immunities which *might* be conferred by the regulations and persons connected with those organizations *in the capacities described*. (Emphasis added.)

29. The statutory purpose claimed by the appellant – that the IOPI Act intended to “extend the privileges and immunities to the fullest” (AS [73]) – does not accord with this more restrained expression of the object of the Act.
- 20 30. Next, a critical reason given in the Second Reading Speech for enabling the conferral of privileges and immunities on international organisations and persons connected with those organisations was to assist *those organisations* in the “performance of [their] functions”.²⁸ The inclusion of a facility in the IOPI Act (s 10) and SAPI Regulations (reg 10) for an agency to *waive* any privileges or immunities to which a current or former office holder is otherwise entitled makes clear that the conferral of privileges and immunities on officers under the legislative scheme is done in furtherance of the performance by the relevant agency of *its* functions. The official may be a beneficiary, but only so far as necessary for the *organisation* to perform its functions.
- 30 31. That object is advanced if the privileges and immunities in the Fourth Schedule to the IOPI Act generally, and the privilege in item 2 of Part I of that Schedule in particular, are construed so as to apply only where the necessary relationship exists between the subject of the privilege and the actual holding of the office pursuant to which the work of the international organisation is performed.
32. The primary interest protected by the exemption from taxation (as confirmed by international materials referred to below – see at [67]) is that the organisation will receive the service of the officeholder, who will remain *independent* by reason of not having to submit during the holding of office to the taxation jurisdiction of any Convention State (whether the State of his or her nationality or residence, or a State in which he or she is located while working for the organisation). Once office ceases, and wherever the former officeholder chooses to reside thereafter, that interest of the organisation disappears.

²⁶ *Mutual Acceptance* at 399 per Rich J; cf AS [30] and FFC at [34]-[35], which unhelpfully divorces “emolument” from the composite phrase in which it appears, thereby diminishing the nature of the question of law.

²⁷ Second Reading Speech for the *International Organizations (Privileges and Immunities) Bill 1962*, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 May 1963, p 1; Senate, *Parliamentary Debates* (Hansard), 21 August 1963, p 1.

²⁸ *Ibid*, p 2.

33. By contrast, an exemption for pensions of *former* officers from national taxation is not necessary for the effective *functioning* of international organisations.²⁹ The appellant's submission (AS [43]) that a tax exemption of that nature is part of the principle of "functional necessity" is wholly at odds with the references in the Second Reading Speech to the privileges being intended to extend to "persons *engaged* in the work of such institutions";³⁰ and with the further evidence that the IBRD itself *functions* on the basis that the retirement pensions it pays its staff may be subject to tax and are grossed up accordingly.³¹ (States may choose to go further, in their discretion; thus, pursuant to s 27H of the ITAA 1936, Australia does not tax that component of foreign pensions that are representative of a recipient's contributions to the pension fund.)

34. The appellant places reliance on a part of the Second Reading Speech that referred to a 1945 International Labour Organization (ILO) document identifying three purposes for these types of privileges and immunities.³² The second is that:

certain exemptions from the 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 States which are members of an international organisation. (Emphasis added.)

Not too much can be taken from this. "*Certain*" suggests the exemptions had limits;³³ the question is: what are they? The statement may have been more directed to the privileges and immunities of the organisation itself: see IOPI Act, First Schedule. In any event, across long and discursive debates in both Houses, in which a number of members expressed doubt about the wisdom of enacting the law, there was no express statement, by any member, that the intended effect of the law, if regulations were made to its full reach, was to exempt payments received by former officials of organisations.³⁴

Accidents of timing?

35. It is convenient then to deal with one possible objection to the FFC's approach, raised on the special leave application and at AS [32]. If the question posed by the exemption is totally answered by an enquiry into whether the date of actual receipt of the alleged salary or emolument was before or after the date in which the official ceased to hold office, how would this accommodate the case of a payment (unlike a pension) which is undoubtedly a salary or emolument, but which, for whatever reason, is received just after the office ceases? Is it really intended that the exemption would be unavailable in such a case?

36. There are two answers. The first is to recall that the privileges and immunities granted to officials are conferred "in the interests of the specialized agencies and not for personal benefit

²⁹ Cf AS [41]-[43].

³⁰ Second Reading Speech for the *International Organizations (Privileges and Immunities) Bill 1962*, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 May 1963, p 2; Senate, *Parliamentary Debates* (Hansard), 21 August 1963, p 2.

³¹ SRP, Article 1 (definition of "gross salary" and "highest average gross salary"), Schedule A, Article 3.1, Article 3.2, AB _; Handbook, section 3.1, AB _. See also AB _, referring to the appellant's entitlement to a tax allowance if he was liable to pay national income taxes on his World Bank remuneration.

³² AS [34], [42].

³³ See FFC [43].

³⁴ Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 August 1963, pp 278-285; Senate, *Parliamentary Debates* (Hansard), 12 September 1963, pp 517-551.

of the individuals themselves”: Section 22 of the Agencies Convention. It always lies in the hands of the international organisation to order its own affairs to ensure that any payment of salaries or emoluments to the officer referable to the actual conduct of the office is received by the officer while he or she continues to hold office, even if the officer has ceased to perform their usual duties. If this answer is accepted, no qualification to or elaboration of the reasoning of the FFC is required.

- 10 37. However, if it is necessary to go further, one can accommodate this situation without significant departure from the core of the approach of the FFC by construing “salaries and emoluments” within Part I of Schedule 4 as the Commissioner contends under ground 1 of the Notice of Contention (see above at [21]). Thus, it may be that where a payment properly bears the character of a salary or emolument (as a payment for the service rendered during office) *and* it is one to which the official has accrued an unconditional and absolute entitlement during the currency of his or her office, then the exemption is available *even if* the payment is made in fact after the date the office ceases. On that approach, the focus is on whether the payment is sufficiently connected to the holding of the office and the performance of the duties of the office so as to be characterised as a salary or emolument received from the organisation in the capacity of a present officer within item 2, properly construed. Adopting such an approach would not disturb the FFC’s conclusion in the case of a periodic pension because, as seen above, it is received in the capacity of a former, not a present, officer holder.

20 **International law issues (Notice of Contention Ground 2)**

38. The notice of appeal does not in terms raise any argument about the scope of Australia’s international obligations or how such obligations may bear on the statute, yet the appellant now seeks to traverse this territory.
39. Edmonds and Nicholas JJ found it unnecessary to go into this matter in the FFC. Perram J did and concluded (obiter) that the construction propounded by the Commissioner would place Australia in breach of its international obligations, but was nevertheless the construction clearly mandated by the text of the domestic statute.
- 30 40. The international law issues were dealt with in an incomplete fashion in the FFC, and likewise earlier in the AAT. The appellant did not, before the AAT or the FFC, put the full argument which Perram J adopted. He simply referred to certain Spanish decisions to indicate that there was “some reasoned guidance” for the construction he was advancing of the Australian statute (AAT [56]). For the Commissioner’s part, the approach taken below was essentially that the IOPI Act and SAPI Regulations were clear, so it was unnecessary to delve too far into the international law issues.
- 40 41. As the matter is now before this Court, it is considered appropriate to supplement the material and arguments put below so that the Court has full assistance on the international law questions. They might arise in one of two related ways. First, a proper understanding of the Agencies Convention may be relevant because the IOPI Act and the SAPI Regulations implement Australia’s obligations under it; this is apparent from the legislative history and the context of the IOPI Act. Secondly, as a general point of construction, the Court should seek to interpret the IOPI Act in a manner that accords with Australia’s international obligations if such a construction is open.³⁵ Notice of Contention ground 2 formalises the issue so it is

³⁵ *Minister for Immigration and Border Protection v WZAPN* (2015) 89 ALJR 639 at 649 [53] per French CJ, Kiefel, Bell and Keane JJ; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 15 [34].

properly before the Court.

Legislative history (see Folder A)

42. A brief further excursion into the legislative history is instructive in understanding the relevance of the international law to the privileges and immunities intended to be conferred by the IOPI Act.
43. The genesis of the IOPI Act was the *International Organizations (Privileges and Immunities) Act 1948 (Cth) (1948 Act)*. The original purpose of that Act (and the regulations made under it) was to confer privileges and immunities on UN officials in accordance with the UN Convention. In 1961, the regulations under the 1948 Act were expanded to confer juridical personality and legal capacity on other international organisations, including the IBRD.³⁶
44. In 1962, Australia sought to accede to the Agencies Convention. At the same time the *International Organizations (Privileges and Immunities of Specialized Agencies) Regulations 1962 (Cth) (1962 Regulations)* were made, apparently in contemplation of Australia's accession to the treaty. Australia's accession to the Agencies Convention was not ultimately accepted by the UN, due to reservations that were attached with the accession notification.³⁷ But the 1962 Regulations were made nonetheless.
45. Regulation 4(1) of the 1962 Regulations conferred on each Specialized Agency and each person to whom the Agencies Convention applied the privileges and immunities applicable to that Agency or person under the Agencies Convention. The Agencies Convention was attached as a schedule to the 1962 Regulations. The privileges and immunities in the Agencies Convention were thus given force of law in Australia through the 1962 Regulations. However, regulation 4(3) of the 1962 Regulations provided that those regulations did not apply if any other Act or regulation "makes provision in relation to privileges and immunities of a Specialized Agency or a person in relation to whom the Convention applies".
46. As at 1962, s 23(y) of the ITAA 1936 *did* so provide in relation to the IBRD and its officers, in the following terms:³⁸
23. The following income shall be exempt from income tax:
- ...
- (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..
47. From 13 December 1962, regulation 4AB(2)(c) of the *Income Tax and Social Services Contribution Regulations 1936 (Cth) (ITAA 1936 Regulations)* prescribed the IBRD as an organisation to which s 23(y) applied and exempted from income tax the official salary and emoluments of an official of the IBRD who is a resident of Australia only "to the extent that

³⁶ *International Organizations (Privileges and Immunities) Regulations 1961 No 64 (Cth)*.

³⁷ See Australia's instrument of accession (and reservation) to Agencies Convention dated 15 November 1962; cf AS fn 21.

³⁸ Subsection 23(y), enacted in 1947, originally exempted from income tax the official salary and emoluments of an official of a prescribed organisation "where that salary is, or those emoluments are, derived from sources- (i) in Australia by a non-resident; or out of Australia by a resident who is appointed for service with that organization outside Australia." Amendments were subsequently made to the provision in 1948 and 1950: see *Income Tax Assessment Act 1947 No 11 (Cth)*, s 5(d); *Income Tax Assessment Act 1948 No 44 (Cth)*, s 4; *Income Tax and Social Services Contribution Assessment Act 1950 No 48 (Cth)*, s 6(b).

his official salary and emoluments are for services rendered out of Australia".³⁹ On the Commissioner's contention, the scheme in place pursuant to s 23(y) of the ITAA 1936, like the scheme that is currently in force, was thus focused upon the connection between the relevant salary or emoluments, the status of the relevant official, and the services rendered in the capacity as an official.⁴⁰ Payments for *past* service, such as pension payments, were not exempt: they were not payments *for services rendered*, let alone such for services rendered out of Australia.⁴¹

- 10 48. By reason of the operation of s 23(y) of the ITAA 1936, regulation 4AB of the ITAA 1936 Regulations and regulation 4(3) of the 1962 Regulations, the 1962 Regulations did not independently operate to confer a tax exemption on IBRD officials.
49. In 1963, the IOPI Act was enacted. It repealed the 1948 Act, but by s 2(2) continued in force any regulations that had been made under the 1948 Act and which were still in force at the time of the enactment of the IOPI Act.
50. The IOPI Act as enacted erected the structure of Schedules providing for categories of privileges and immunities that could be conferred on persons, including officers and former officers of international organisations, by regulation. However, regulations were not immediately made using that structure; instead, the 1962 Regulations, s 23(y) of the ITAA 1936 and regulation 4AB of the ITAA 1936 Regulations initially continued in force.
- 20 51. It was not until 1986 that the 1962 Regulations were repealed⁴² and new regulations adhering to the structure of the IOPI Act, being the SAPI Regulations, were made. Shortly after the making of the SAPI Regulations, Australia again deposited an instrument of accession to the Agencies Convention, which this time was accepted, leading to Australia's accession to that treaty on 9 May 1986.⁴³
- 30 52. The significance of that accession was that Australia's international obligations could no longer be satisfied by continued adherence to the scheme which had been in force since 1962: if payments were properly characterised as salaries or emoluments of a person holding relevant office (ie payments for the rendering of that service), they should be exempt from tax even if the person was an Australian resident rendering the service in Australia. However, on the Commissioner's contention, payments for former service remained outside both the reach of the Agencies Convention and the Australian domestic law.
53. Accordingly, Subsection 23(y) of the ITAA 1936 and clause 4AB of the ITAA 1936 Regulations were subsequently repealed in 1988.⁴⁴ Since that time, the provisions of the IOPI Act and SAPI Regulations have been the only relevant source of any privileges or immunities conferred on officers or former officers of the IBRD.⁴⁵ Wherever the service is rendered, the

³⁹ *Statutory Rules 1962 No 112* (Cth), regulation 1.

⁴⁰ Cf AS [68]-[69].

⁴¹ Cf AS [66].

⁴² *International Organizations (Privileges and Immunities of Specialized Agencies) Regulations (Repeal) 1986 No 64* (Cth).

⁴³ Cf AS fn 21.

⁴⁴ *Taxation Laws Amendment Act (No 2) 1988 No 78* (Cth), s 10(a); *Income Tax Regulations Amendment 1988 No 196* (Cth).

⁴⁵ It is noted that the *International Monetary Agreements Act 1963 No 53* (Cth) and *International Monetary Agreements Act 1968 No 130* (Cth) removed the facility that previously existed under s 11 of the *International*

salaries and emoluments received from the organisation for that service are exempt from taxation. Neither the IOPI Act nor the SAPI Regulations have been amended in any material or presently relevant respect since their enactment.

Construction of the Agencies Convention

54. The interpretation of a treaty is a question of law rather than fact.⁴⁶ The “ordinary canons of statutory construction” apply when construing a domestic statute that incorporates a treaty.⁴⁷ Those “ordinary canons” include that the Court should apply the VCLT when construing international treaties.⁴⁸ The materials now put to the Court by the parties (proposed to be included as **Folder B**), in particular, the *travaux préparatoires* and material showing State practice, are of the kind referred to by the VCLT and are relied upon to discern the proper interpretation of the Agencies Convention and the IOPI Act. The material is put before the Court on the basis that in an appeal under s 73 of the Constitution, it remains open for the Court to receive material relevant to the understanding of the context in which the statute was enacted, even if the material was not before the Court below.⁴⁹ In *Maloney*, for example, the Court considered certain materials put before the Court, which were said to assist in the interpretation of the *Convention on the Elimination of Racial Discrimination*.⁵⁰
55. In this case, each of the *travaux*, in existence prior to the enactment of the IOPI Act, and the State practice subsequent thereto, assists in understanding the text of the Agencies Convention. They do not re-write the text or take the asserted meaning beyond the limits of the text.⁵¹ Rather, they support the plain meaning as submitted by the Commissioner. They assist the Court in the conventional construction process.

VCLT construction exercise

56. Under the VCLT, the process of construction begins with a good faith consideration of the ordinary meaning of the terms of the treaty in their context and in the light of the treaty’s object and purpose (Art 31(1)). In addition, any subsequent agreement between the parties regarding the interpretation of a treaty or the application of its provisions, and any subsequent practice of the parties in the application of the treaty (which establishes a common agreement regarding its interpretation) shall be taken into account (Art 31(3)(b)). Further, it is possible to have recourse to the preparatory work of the treaty and the circumstances of its conclusion, as supplementary means of interpretation, to confirm the meaning of the text or to assist in determining that meaning when it is ambiguous, obscure, or the ordinary meaning would lead to a manifestly absurd or unreasonable result (Art 32).

Monetary Agreements Act 1947 (Cth) to make regulations granting privileges and immunities to IBRD officials or employees.

⁴⁶ *ACCC v PT Garuda Indonesia (No 9)* (2013) 212 FCR 406 at 417 [48]; *Li v Zhou* (2014) 87 NSWLR 20 at 29 [30]-[31].

⁴⁷ *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213 at 238 [65].

⁴⁸ *Maloney v R* (2013) 252 CLR 168 (*Maloney*) at 180-181 [14] (French CJ) and 255-256 [235] (Bell J); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230, 240, 251-253, 277; *Povey v Qantas Airways Limited* (2005) 223 CLR 189 at 202 [24]; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 545 [8].

⁴⁹ *Newcastle City Council v GIO General Limited* (1997) 191 CLR 85 at 102, fn 26. *Thomas v Mowbray* (2007) 233 CLR 307 at [614]-[635] per Heydon J.

⁵⁰ See at 198 [61] (Hayne J); at 180-181 [14]-[15] (French CJ); at 221-222 [134] (Crennan J); at 235 [175] (Kiefel J); at 255-256 [235] (Bell J); and at 292 [326]-[327] (Gageler J).

⁵¹ Cf *Maloney* at 185 [23] (French CJ).

57. It follows that the VCLT is the primary prism through which to decide the content of international law in the present case (that is, to interpret the content of the obligation contained in s 19(b) of the Agencies Convention); one gets to the decisions of foreign or international courts or tribunals only to the extent they might bear on subsequent agreement or practice as part of the full VCLT exercise or otherwise have persuasive force.
58. Thus, although the three Spanish decisions discussed by Perram J (at FFC [54]-[57]) are not irrelevant, the proper starting point, rather than Art 38(1)(d) of the ICJ Statute, is the ordinary meaning of the text of s 19(b), to be considered in light of its context and the object and purpose of the Agencies Convention, taking due account of any relevant State practice, and as then supplemented by reference to preparatory works.
59. Contrary to Perram J's obiter conclusion, the VCLT analysis does *not* support a finding that Australia is *required* to confer an exemption from taxation on former officials of specialised agencies in respect to their retirement benefits.⁵² Rather, a proper interpretation of the Agencies Convention permits States parties to distinguish between officers and former officers; State practice does not show a sufficiently uniform approach by States parties to the taxation of agency pensions to warrant any conclusion that they may not be taxed; and the *travaux* positively suggest that pensions *may* be taxed. It follows that the Commissioner's construction of the IOPI Act and the Regulations does not place Australia in breach of its international obligations; indeed, the Agencies Convention contemplates that IBRD pensions may be taxed; and as a correct reflex of the international law position the IBRD itself arranges its pension plan on the basis that they are likely to be.⁵³

Ordinary meaning of the text

60. Sections 19-20 of the Agencies Convention set out a range of privileges and immunities conferred on "officials of the specialized agencies". The relevant "officials" are defined in section 18. Under that section, organisations are to specify to governments of States Parties categories of officials and, "from time to time", are to make known to those governments the names of the persons in the various categories. Relevantly, section 19(b) provides that such designated officials shall "[e]njoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the specialized agencies and on the same conditions as are enjoyed by officials of the United Nations". The section thereby invokes the relevant taxation exemption conferred under the UN Convention.
61. Section 18(b) of the UN Convention confers on "officials" of the UN an exemption from taxation on the salaries and emoluments paid to them by the United Nations. Section 17 defines "officials" as those persons falling within categories specified by the UN to States parties, whose names will, from time to time, be made known to the UN.
62. The ordinary meaning of the word "official" suggests a *present* status. Dictionary definitions include as "officials" those who hold or are invested with a public office, or who have official duties.⁵⁴ The context of the text, under which the relevant categories of officials and their names have to be *designated*, supports that reading. The categories refer to classes of current, operating officials, as would the lists of names made known to governments of members. Once a person leaves the service of the relevant organisation, their name would be removed

⁵² Cf AS [76]-[78].

⁵³ Cf AS [80].

⁵⁴ Black's Law Dictionary, Oxford English Dictionary.

from the relevant list. This reflects a connection between the particular privileges and immunities conferred under the treaties and the designation of a person as a *current* official.⁵⁵

- 10 63. That conclusion provides a basis for the further step that when the Agencies Convention attached the privilege to the “*salaries and emoluments paid to [officials] by the specialized agencies*” it meant to refer to the remuneration associated with the actual performance of the office (salaries, or *les traitements*) and beyond that to those supplementary elements of remuneration that may be granted in addition to the official’s salary in the strict sense, again for the performance of the office (emoluments, or *émoluments*). Thus the language of the treaties accords with the approach that a direct temporal connection is needed between a “salary or emolument received from an organisation” and the holding of an office before an exemption from taxation for that emolument may be granted under the IOPI Act.⁵⁶

Object and purpose of the Agencies Convention

- 20 64. That interpretation accords with the object and purpose of the Agencies Convention. The preamble to the Agencies Convention refers to the “unification as far as possible of the privileges and immunities enjoyed by the United Nations and by the various specialized agencies”. The second paragraph of the preamble to the UN Convention reads “[w]hereas... officials of the Organization shall ... enjoy such privileges and immunities *as are necessary for the independent exercise of their functions* in connection with the Organization” (emphasis added).⁵⁷
- 30 65. All but one of the privileges and immunities conferred under s 19 of the Agencies Convention on officials of specialized agencies further the independent exercise of the functions of those officials only for the period in which they hold office. So, for example, the immunity from immigration restrictions (s 19(c)), the privilege relating to exchange facilities (s 19(d)) and the exemption from national service (s 20) all assist in the unimpeded carrying out by the official of the organisation’s functions. But these only do so during the period of tenure of the official; once the person has ceased to be an official, such privileges and immunities do not advance the exercise of the organisation’s functions and need no longer be conferred.
66. The exception in s 19 of the Agencies Convention is the immunity from suit in s 19(a), which is reflected in the IOPI Act. Organisational functionality requires that such immunity continue post-office, because it attaches to *official acts*, which may not come before a Court until after the official ceases work for the organisation. The timing of the claim against the official lies in the hands of the third party claimant, not the official or the organisation. Yet the threat of a future suit, after a person leaves office, has the capacity to affect the independent exercise of the functions of a current official *while in office*. Hence, as the IOPI Act and Regulations recognise, immunity from suit in connection with official acts advances the object of the Agencies Convention if the immunity endures after the official leaves office.
- 40 67. The same cannot be said, however, of the exemption from taxation conferred under the Agencies Convention.⁵⁸ The interference of national taxation authorities with the affairs of sitting officials of international organisations has the patent capacity to affect the independent exercise of their functions. For example, to the extent that officials are required to prepare tax

⁵⁵ Cf AS [46].

⁵⁶ Cf AS [47].

⁵⁷ See also, *Charter of the United Nations* [1945] ATS-CD 1, Article 105.

⁵⁸ Cf AS [48]-[49].

returns, engage with revenue authorities or dispute assessments while in office and face court cases, the independent performance of their official functions may be hindered. However, once a person has left the office of the organisation, the imperative for the exemption from tax, in terms of the exercise of the official's functions, dissipates.

68. The statutory purpose asserted by the appellant in respect of the IOPI Act finds no foundation in the international law framework.⁵⁹ There is no basis in the text of the UN Convention or Agencies Convention to conclude that the purpose of the tax exemptions therein is to offer higher overall net packages so as to attract permanent staff to international organisations. The treaties are instead concerned primarily with the independent exercise of official functions by existing staff.

State practice and international jurisprudence

69. The practice of States parties to the UN Convention and Agencies Convention indicates that, contrary to the assumption of Perram J, there is no uniform approach to the taxation of pensions. Some States do seek to tax the pensions of officials of the UN and specialized agencies, whereas others do not.

70. In 1985, the Secretariat of the International Law Commission (ILC) conducted a review of the "major features of the practice followed since 1966 by the United Nations, the specialized agencies and IAEA [the International Atomic Energy Agency] in respect of their status, privileges and immunities".⁶⁰ The ILC concluded that there had been no uniform interpretation of the terms "salaries and emoluments" as they appear in Section 19(b) of the Agencies Convention.⁶¹ The ILC noted, for example, that the ILO considered that the terms include anything of financial value derived from ILO, *with the exception of pension benefits*, whereas the Food and Agriculture Organisation interpreted "salaries and emoluments" as including base salary and allowances, plus overtime bonuses and separation payments.⁶² Neither of these approaches would catch pension payments. The ILC further noted that the question whether a pension paid to a former employee or their beneficiary is an "emolument" had arisen at the IBRD. The ILC report stated:⁶³

IBRD experience provides no comprehensive answer. It is understood that in Austria such pensions are exempt from taxation because they are deemed to fall within the meaning of "salaries and emoluments". The view in the Netherlands is that such pensions are not exempt from taxation and a 1977 Supreme Court decision held that a pension paid by the United Nations Joint Staff Pension Fund to a former official of the International Court of Justice resident in the Netherlands was not exempt from income tax. The Netherlands authorities have also held that the pension of a widow of a deceased IBRD staff member was not exempt from taxation. In the United States, pensions are not considered as a part of the salaries and emoluments referred to in Article VII, section 9(b) of the IBRD Articles of Agreements, even in the case of non-nationals who intend to remain in the United States and receive their pensions there.

71. The ILC's opinion is borne out by a number of instances of States parties to the UN

⁵⁹ Cf AS [43].

⁶⁰ "Relations between States and international organizations (second part of the topic). The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat", UN Doc A/CN.4/L.383 and Add.1-3 at p 151.

⁶¹ Ibid at p 201, [152].

⁶² Ibid at [152] and [153].

⁶³ Ibid at [155].

Convention and Agencies Convention taxing pensions paid to former officials of international organisations. These States include the United Kingdom,⁶⁴ Belgium⁶⁵ and Ireland.⁶⁶

72. The meaning of the UN Convention and Agencies Convention may be illuminated by consideration of the views of the courts of other countries in respect of those Conventions.⁶⁷ However, decisions of national courts also reveal no consensus on the issue at hand.

73. The Spanish decisions referred to by Perram J, which interpret s 18 of the UN Convention as exempting the pension of UN officials from income tax,⁶⁸ do not provide a complete or even representative picture of the approach taken by national courts or tribunals to date. (In addition, just on their face, they display little engagement with the full VCLT exercise, including the *travaux* cited below, and seem to be partly influenced by provisions of domestic Spanish tax law).

74. For the fuller picture, *first*, in 1980 the Australian Taxation Board of Review held:⁶⁹

Although the word “emolument” in some contexts may comprehend a pension payable after employment has ceased, the [UN Convention] and the legislation and subordinate legislation, so also the regulations and rules of the United Nations Joint Staff Pension Fund all tend to the construction that an emolument relates to a monetary benefit payable to one who is presently serving the United Nations ... and conversely that a pension relates to a monetary payment to that person (or his widow or dependent) after his contributory service has been brought to an end by death, disability or other qualifying retirement.

75. *Second*, in 2003, the Administrative Court of Appeal in Paris considered Article 22(b) of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Headquarters Agreement between France and UNESCO, being a provision based upon s 18 of the UN Convention, which provided that “[o]fficials governed by the provisions of the Staff

⁶⁴ See Her Majesty’s Revenue & Customs, *RE2417 – Employees of International Organisations: Treatment of Pensions* (last updated 23 June 2014) <<http://www.hmrc.gov.uk/manuals/remanual/RE2417.htm>>.

⁶⁵ In response to a Parliamentary question in 2004, the Belgian Minister for Finance stated that the tax exemption provided for under Section 19(b) of the Agencies Convention applies only to officials in active service, and that pensions provided by organisations to former officials are subject to tax: Belgian Parliamentary Question no. 198 5 January 2004, M.P. Viseur (Minister for Finance), session 2003-2004, no. 019. See also Kingdom of Belgium, Foreign Affairs, Foreign Trade and Development Cooperation website, *Services, Protocol, Privileges and Immunities, International Organisations*, <http://diplomatie.belgium.be/en/services/Protocol/privileges_immunities/international_organisations/algemene_ri chtlijnen/>.

⁶⁶ Ireland, as dualist State, has implemented its obligations under the UN Convention and the Specialized Agencies Convention via the *Diplomatic Relations and Immunities Act 1967 (DRI Act)*. Under section 9 of the DRI Act, a person to which the UN Convention applies shall have and enjoy exemptions, immunities and privileges to such extent as are provided for in each case by the Convention. A Tax Briefing dated December 1996 prepared by the Customer Service Unit, Office of the Chief Inspector of Taxes, stated (at p 15) that “The relief from Irish tax ... applies to serving officials of the United Nations and to serving officials of a specialised agency of the United Nations. The provisions of the [DRI Act] do not relieve from the charge to Irish tax, pensions payable by the UN (or by a specialised agency o[f] the UN) to Irish resident individuals”.

⁶⁷ *Minister for Immigration and Border Protection v WZAPN* (2015) 89 ALJR 639 at 650 [61] per French CJ, Kiefel, Bell and Keane JJ.

⁶⁸ See *Serafin and Yolanda* (unreported, appeal number 478/2001, judgment dated 17 January 2003); *Enrique* (unreported, appeal number 1227/2003, decision 326/2007, judgment dated 28 March 2007); *Bruno* (unreported, appeal number 736/2000, decision 351/2003, judgment dated 12 March 2003).

⁶⁹ *Case M90* (1980) 80 ATC 648 at [17].

Regulations of the Organization ... [s]hall be exempt from all direct taxation on salaries and emoluments paid to them by the Organization". The Court held that the tax exemption on salaries and emoluments accorded under article 22 did *not* extend to pensions, and that retired UNESCO officials were unable to benefit from the exemption.⁷⁰

- 10 76. *Third*, in *Question of the Tax Regime Governing Pensions Paid to Retired UNESCO Officials Residing in France*⁷¹, an Arbitration Tribunal hearing a dispute between France and UNESCO held, for the purposes of the UNESCO Headquarters Agreement, that the ordinary meaning of the words "salaries and emoluments" did *not* include the notion of a retirement pension.⁷² The Tribunal also found that the word official "did not include officials who are no longer in active service"⁷³ because "the position of the official and that of the retiree (or former official) are so different as to be incompatible".⁷⁴ Relevantly, in this connection, the Tribunal referred to s 18 of the UN Convention, upon which article 22(b) of the Headquarters Agreement was modelled, as conferring on States parties to that Convention "freedom ... to decide what provision they wish to make regarding exemption of retirement pensions from taxation".⁷⁵ The Tribunal noted that the parties did not dispute "the fact that [s 18] does not exempt retirement pensions".⁷⁶
- 20 77. *Fourthly*, in a similar vein, a 2009 decision of the Netherlands Supreme Court, *X v State Secretary for Finance*⁷⁷, concluded that the retirement pension paid by the UN Joint Staff Pension Fund to a former registrar of the ICJ was not exempt from Dutch tax by reason of Article 32(8) of the ICJ Statute. That article conferred a taxation exemption on the "salaries, allowances, and compensation" of certain officers of the ICJ and was not expressed to cover "emoluments". However, in interpreting the ICJ Statute, the judgment drew upon the history of the UN Convention, and noted that "clearly, it was considered [by the drafters of the UN Convention] that pensions were not covered by the words 'salaries and emoluments'".⁷⁸
- 30 78. The Commissioner submits that, in light of the above, Justice Perram's conclusion that it is "not seriously contestable" that the pensions of UN officials cannot be taxed, is wrong.⁷⁹ The State practice and international jurisprudence support the different conclusion that the Agencies Convention contemplates that member States may elect to tax pensions that are paid by international organisations, or, at the very least, that there is no uniform acceptance that they may not.

⁷⁰ *Decision of the Administrative Appeals Court of Paris decision, 2nd Chamber, 7 November 2003, 01PA04215.*

⁷¹ 14 January 2003, *United Nations Juridical Yearbook* (2001), p 421 at 433-434. The arbitrators were Mr Kéba Mbaye, a former judge and Vice-President of the ICJ; Mr. Nicolas Valticos, a former judge of the European Court of Human Rights and ad hoc judge of the ICJ; and Mr. Jean-Pierre Quéneudec, Emeritus Professor of Law at the Université Panthéon-Sorbonne.

⁷² *Ibid*, pp 432-433.

⁷³ *Ibid*, pp 431, 434.

⁷⁴ *Ibid*, pp 432.

⁷⁵ *Ibid*, pp 433-434.

⁷⁶ *Ibid*, p 434.

⁷⁷ Supreme Court, 16 January 2009, LJN No. BF7264, BNB (2009), No. 113 in *Netherlands Yearbook of International Law 2010* (2010), p 394ff.

⁷⁸ *Ibid* at p 400 [3.3.5].

⁷⁹ Cf AS [77].

Supplementary means of interpretation – preparatory works

79. Last but not least, resort may be had to Art 32 of the VCLT, and the preparatory works of the treaty, to confirm what is submitted to be the ordinary meaning of the text, as set out above. *First*, the preparatory works for the Agencies Convention show that whatever view was taken as to whether the tax exemption would continue after an official left office,⁸⁰ the governing intent of s 19 was to “make whatever system is in force in respect of officials of the United Nations [under the UN Convention] automatically applicable to officials of the Specialized Agencies [under the Agencies Convention]”.⁸¹ That makes it relevant to consider, *secondly*, the preparatory works of the UN Convention, which in turn confirm that it was *not* intended for s 18(b) thereof to create any taxation exemption in respect of pensions paid to former UN officials. The records of the negotiations indicate that the drafters of the UN Convention contemplated the possibility of exempting pensions from taxation under that treaty, *but deliberately decided against that approach*.⁸²

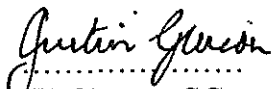
The Sub-Committee on privileges and immunities examined another proposal submitted by the Advisory Group of Experts on administrative and budgetary matters, made with a view to exempting all members of the staff of the Organization from taxation on retirement benefits and exempting their beneficiaries from taxation on death benefits, either in the form of a lump sum or benefits paid by the Organizations to widows and orphans. The Sub-Committee decided, without prejudice to this question being taken up and considered separately at a later stage, that a provision to this effect should not be included in the general Convention.

80. Again, this shows that Justice Perram’s conclusion was in error. The UN Convention and Agencies Convention were not intended to confer an exemption from taxation with respect to pensions. Although some States might take a different approach, the Conventions do not require that they do so. The construction of the IOPI Act found below *does*, therefore, accord with Australia’s international obligations under the Agencies Convention. That construction should be upheld for this reason in addition to the arguments above regarding the plain language and purpose of the IOPI Act.

PART VIII: LENGTH OF ORAL ARGUMENT

81. It is estimated that 2 ¼ hours will be required for the presentation of the oral argument of the Commissioner.

Dated: 10 July 2015


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Solicitor-General of the
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⁸⁰ A matter on which the IOPI Act takes a clear position.

⁸¹ United Nations General Assembly – Sixth Committee – Coordination 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), Document A/C.6/191 at pp 8-9; cf AS [48].

⁸² United Nations – Privileges and Immunities of the United Nations – Report of the Sixth Committee to the General Assembly, Rapporteur: Mr WE Beckett (United Kingdom), Document A/43/Rev.1, 1 January 1946 at pp 643-644.

ANNEXURE A

PART V – APPLICABLE STATUTORY PROVISIONS

As noted in the Commissioner's submissions, it is also proposed that a joint bundle of historical legislation be filed with the Court.

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

(Reprint for 4 July 2008 to 28 June 2013)

Section 10 – Waiver

10 The regulations may make provision for or in relation to the waiver of any privileges or immunities to which an international organisation or a person is entitled by virtue of this Act or the regulations.

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

(Current reprint)

Regulation 10 – Waiver of privileges and immunities

(1) A Specialized Agency may waive any privileges and immunities to which:

- (a) the Specialized Agency;
- (b) a person who holds or has ceased to hold an office in the Specialized Agency;
- 20 (c) a person who is serving, or has served, on a committee of the Specialized Agency;
or
- (d) a person who is performing, or has performed, whether alone or jointly with other persons, a mission on behalf of the Agency,

is entitled by virtue of the Act or these Regulations.

(2) The government of a country referred to in regulation 7 may waive any privileges and immunities to which a person upon whom privileges and immunities are conferred by that regulation is entitled by virtue of the Act or these Regulations.

Income Tax Assessment Act 1936 (Cth)

(Reprint for 26 May 2008)

Section 27H

Assessable income to include annuities and superannuation pensions

(1) Subject to Division 54 of the *Income Tax Assessment Act 1997*, the assessable income of a taxpayer of a year of income shall include:

- 10
- (a) the amount of any annuity derived by the taxpayer during the year of income excluding, in the case of an annuity that has been purchased, any amount that, in accordance with the succeeding provisions of this section, is the deductible amount in relation to the annuity in relation to the year of income; and
 - (b) the amount of any payment made to the taxpayer during the year of income as a supplement to an annuity, whether the payment is made voluntarily, by agreement or by compulsion of law and whether or not the payment is one of a series of recurrent payments.

Note: Division 54 of the *Income Tax Assessment Act 1997* provides a tax exemption for certain payments under structured settlements and structured orders.

(2) Subject to subsections (3) and (3A), the deductible amount in relation to an annuity derived by a taxpayer during a year of income is the amount (if any) ascertained in accordance with the formula $\frac{A(B - C)}{D}$, where:

20 *A* is the relevant share in relation to the annuity in relation to the taxpayer in relation to the year of income.

B is the amount of the undeducted purchase price of the annuity.

C is:

- (a) if there is a residual capital value in relation to the annuity and that residual capital value is specified in the agreement by virtue of which the annuity is payable or is capable of being ascertained from the terms of that agreement at the time when the annuity is first derived—that residual capital value; or
- (b) in any other case—nil; and

D is the relevant number in relation to the annuity.

30 (3) Subject to subsection (3A), where the Commissioner is of the opinion that the deductible amount ascertained in accordance with subsection (2) is inappropriate having regard to:

- (a) the terms and conditions applying to the annuity; and

(b) such other matters as the Commissioner considers relevant;

the deductible amount in relation to the annuity derived by the taxpayer during the year of income is so much of the annuity as, in the opinion of the Commissioner, represents the undeducted purchase price having regard to:

(c) the terms and conditions applying to the annuity;

(d) any certificate or certificates of an actuary or actuaries stating the extent to which, in the opinion of the actuary or actuaries, the amount of the annuity derived by the taxpayer during the year of income represents the undeducted purchase price; and

(e) such other matters as the Commissioner considers relevant.

10 (3A) For the purposes of this section, where the annuity derived by a taxpayer during a year of income is part of an annuity of which a part has been commuted in the year of income or a preceding year of income, the deductible amount ascertained under subsection (2) or (3) shall be reduced by such amount as, in the opinion of the Commissioner, is appropriate having regard to:

(c) any deductible amount ascertained under this section in relation to the annuity in relation to a preceding year of income; and

(d) such other matters as the Commissioner considers relevant.

(4) In this section:

actuary means a Fellow or Accredited Member of the Institute of Actuaries of Australia.

20 *agreement* means any agreement, arrangement or understanding whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings.

annuity means an annuity, a pension paid from a foreign superannuation fund (within the meaning of the *Income Tax Assessment Act 1997*) or a pension paid from a scheme mentioned in paragraph 290-5(c) of that Act, but does not include:

(a) an annuity that is a qualifying security for the purposes of Division 16E; or

(b) a superannuation income stream (within the meaning of the *Income Tax Assessment Act 1997*).

30 *life expectation factor*, in relation to a person in relation to an annuity, means the number of years in the complete expectation of life of the person as ascertained by reference to the prescribed Life Tables at the time at the beginning of the period to which the first payment of the annuity relates.

purchase price means:

- (a) in relation to a pension—the sum of:
 - (i) contributions made by any person to a foreign superannuation fund to obtain the pension; and
 - (ii) so much as the Commissioner considers reasonable of contributions made by any person to a foreign superannuation fund to obtain superannuation benefits including the pension; and
- (b) in relation to an annuity other than a pension—the sum of:
 - (i) payments made solely to purchase the annuity; and
 - (ii) so much as the Commissioner considers reasonable of payments made to purchase the annuity and to obtain other benefits.

10

relevant number, in relation to an annuity in relation to a year of income, means:

- (a) where the annuity is payable for a term of years certain—the number of years in the term;
- (b) where the annuity is payable during the lifetime of a person and not thereafter—the life expectation factor of the person; and
- (c) in any other case—the number that the Commissioner considers appropriate having regard to the number of years in the total period during which the annuity will be, or may reasonably be expected to be, payable.

20

relevant share, in relation to an annuity derived by a taxpayer during a year of income, means:

- (a) in a case where the annuity derived by the taxpayer is a share of an annuity (which annuity is in this paragraph referred to as the ***total annuity***) payable to the taxpayer and another person or other persons—the fraction ascertained by dividing the number of whole dollars in the amount of the annuity derived by the taxpayer during the year of income by the number of whole dollars in the amount of the total annuity derived during the year of income by the taxpayer and the other person or persons; or
- (b) in any other case—the number 1.

30

residual capital value, in relation to an annuity, means the capital amount payable on the termination of the annuity.

undeducted purchase price, in relation to an annuity, has the meaning given by section 27A immediately before the commencement of Schedule 1 to the *Superannuation Legislation Amendment (Simplification) Act 2007*.

- (5) In the definition of *purchase price* in subsection (4):
- (a) a reference to contributions made by any person to a foreign superannuation fund to obtain a pension does not include a reference to contributions made to a foreign superannuation fund by an employer, or by another person under an agreement to which the employer is a party, for the purpose of providing superannuation benefits for, or for dependants of, an employee of the employer; and
 - (b) a reference to payments made to purchase, or solely to purchase, an annuity (other than a pension) does not include a reference to payments made by an employer, or by another person under an agreement to which the employer is a party, to purchase, or solely to purchase, the annuity for, or for dependants of, an employee of the employer.
- 10 (6) For the purposes of subsection (5), in determining whether a person is an employer of another person, treat the holding of an office by the other person as employment of that person.

Convention on the Privileges and Immunities of the Specialized Agencies [1988] ATS 41

Article VI

Officials

20 Section 18

Each specialized agency will specify the categories of officials to which the provisions of this article and of article VIII shall apply. It shall communicate them to the Governments of all States parties to this Convention in respect of that agency and to the Secretary-General of the United Nations. The names of the officials included in these categories shall from time to time be made known to the above-mentioned Governments.

Section 19

Officials of the specialized agencies shall:

- (a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;
- 30 (b) Enjoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the specialized agencies and on the same conditions as are enjoyed by officials of the United Nations;

- (c) Be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;
- (d) Be accorded the same privileges in respect of exchange facilities as are accorded to officials of comparable rank of diplomatic missions;
- (e) Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crises as officials of comparable rank of diplomatic missions;
- (f) Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

10 Section 20

The officials of the specialized agencies shall be exempt from national service obligations, provided that, in relation to the States of which they are nationals, such exemption shall be confined to officials of the specialized agencies whose names have, by reason of their duties, been placed upon a list compiled by the executive head of the specialized agency and approved by the State concerned.

Should other officials of specialized agencies be called up for national service, the State concerned shall, at the request of the specialized agency concerned, grant such temporary deferments in the call-up of such officials as may be necessary to avoid interruption in the continuation of essential work.

20 Section 21

In addition to the immunities and privileges specified in sections 19 and 20, the executive head of each specialized agency, including any official acting on his behalf during his absence from duty, shall be accorded in respect of himself, his spouse and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

Section 22

- 30 Privileges and immunities are granted to officials in the interests of the specialized agencies only and not for personal benefit of the individuals themselves. Each specialized agency shall have the right and the duty to waive the immunity of any official in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the specialized agency.

Section 23

Each specialized agency shall co-operate at all times with the appropriate authorities of member States to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuses in connexion with the privileges, immunities and facilities mentioned in this article.

General Convention on the Privileges and Immunities of the United Nations [1949] ATS 3

Article V

10 Officials

Section 17

The Secretary-General will specify the categories of officials to which the provisions of this article and article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.

Section 18

Officials of the United Nations shall:

- 20
- (a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;
 - (b) be exempt from taxation on the salaries and emoluments paid to them by the United Nations;
 - (c) be immune from national service obligations;
 - (d) be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;
 - (e) be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned;
 - (f) be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys;
- 30
- (g) have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

Section 19

In addition to the immunities and privileges specified in section 18, the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

Section 20

10 Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

Section 21

The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this article.