Federal Court of Australia

Re Minister of Foreign Affairs and Trade; the Commissioner of the Australian Federal Police and the Commonwealth of Australia v Geraldo ⇦ Magno ⇨ and Ines Almeida [1992] FCA 566 (26 November 1992)

FEDERAL COURT OF AUSTRALIA

Re: MINISTER FOR FOREIGN AFFAIRS AND TRADE; THE COMMISSIONER OF THE AUSTRALIAN
FEDERAL POLICE and THE COMMONWEALTH OF AUSTRALIA
And: GERALDO ⇦ **MAGNO** ⇨ and INES ALMEIDA
No. V G154 of 1992
FED No. 864
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Statutory Interpretation - Public International Law - Human Rights - Delegated Legislation
[1992] FCA 566; (1992) 37 FCR 298
[1992] FCA 566; (1992) 112 ALR 529
(1992) 28 ALD 119 (extract)

COURT

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION
Gummow(1), French(2) and Einfeld(3) JJ.

CATCHWORDS

Statutory Interpretation - Regulation making power - whether Diplomatic Privileges and Immunities (Amendment) Regulations SR no. 7 of 1992 within the power conferred by Diplomatic Privileges and Immunities Act 1967 ("the 1967 Act"), s. 15 - whether regulations reasonably proportionate to enabling purpose of parent legislation - need for close scrutiny of regulations - meaning of "necessary or convenient" for giving effect to statute - interpretation of international treaties as apply in Australia - Vienna Convention on the Law of Treaties - effect of human rights on statutory interpretation

Public International Law - Vienna Convention on Diplomatic Relations - special status of premises of diplomatic missions - effect of declaration by s. 7 of 1967 Act that certain articles of the Convention have the force of law in Australia - purposes of Convention and Australian legislation -

recognized international practice

Human Rights - freedom of speech or expression - freedom of assembly - constitutional position - parliamentary intent on domestic applicability and enforceability of international human rights norms - human rights and statutory interpretation

Delegated Legislation - Regulations - "necessary or convenient" - reasonable proportionality to the enabling purpose of the parent legislation

HEARING

SYDNEY
26:11:1992

Counsel and solicitors for the appellents: Dr C.N. Jessup and

Mr R Kendall instructed
by the Australian
Government Solicitor

Counsel and solicitors for respondents: Mr K.H. Bell instructed
by Bernard Collaery

ORDER

THE COURT ORDERS THAT:
(1) The appeal be allowed. (2) Order 1 made by Olney J on 16 April 1992 be set aside and in place

of Order 1 order that the Court answers in the affirmative the
question: -
"Was the making of the Diplomatic Privileges and
Immunities Regulations (Amendment) being Statutory
Rule 1992, No. 7, authorized by and within the power
conferred by Section 15 of the Diplomatic Privileges
and Immunities Act, 1967?"
(3) Any party seeking a costs order do so by written submissions filed
in the New South Wales District Registry within 7 days.

DECISION

GUMMOW J: This appeal was heard in Melbourne. It is brought, by leave, from orders of a Judge of this Court (Olney J) upon the trial of a separate issue concerning the validity of the Diplomatic Privileges and Immunities (Amendment) Regulations, SR No. 7 of 1992 ("SR No. 7"). His Honour answered in the negative the question whether the making of SR No. 7 was authorised by and within the power conferred by s. 15 of the Diplomatic Privileges and Immunities Act 1967 ("the Act"). The case is reported, (1992) 35 FCR 235.

2. The following facts were taken by Olney J as appearing to be common cause. But it should be emphasised at the outset that we are concerned only with the separate issue before Olney J, one of validity. It is no part of the function of the Court on this appeal to enter upon what may be disputatious factual matters. The issue is whether particular delegated legislation is valid, not whether, if valid, it would apply to particular facts if they were found.

3. On 17 November 1991 and thereafter groups of protesters conducted a demonstration outside the Embassy of the Republic of Indonesia, in Darwin Avenue, Yarralumla, in the Australian Capital Territory. On 18 November, two persons, one of whom was the first respondent, placed a number of

white crosses, each measuring about 500mm in height, on the grass verge next to the footpath outside the Embassy. The first respondent is a former resident of East Timor. One of his cousins had been killed on 12 November 1991 at a violent incident in Dili in East Timor in which force had been used by the Indonesian military.

4. In addition to the placing of the crosses on the grass verge other objects were placed by other persons on public land close to the Embassy. They were a demountable hut and a flagpole with associated flags and banners. These were later removed to a new position diagonally across the road and some 50 metres from the perimeter of the Embassy.

5. The second respondent spoke for a group describing themselves as the East Timorese Community. The second respondent would not agree to move the crosses.

6. On 15 January 1992 the Governor-General made SR No. 7. This came into force upon notification in the Gazette on 16 January 1992. On or about 26 January 1992 officers of the Australian Federal Police removed the crosses from outside the Embassy. They are now in the custody of the solicitor for the respondents. The second appellant holds office as Commissioner of Police under appointment by the Governor-General, pursuant to s. 17 of the Australian Federal Police Act 1979.

7. By application filed in this Court on 20 January 1992 the respondents sought certain injunctive relief and a declaration that SR No. 7 was invalid and of no effect. On 7 February 1992, Ryan J ordered the question of the validity of SR No. 7 be decided separately and before the trial of any other question. Olney J decided that question favourably to the present respondents and it is from his Honour's decision that the present appeal is brought.

8. The source of the regulation making power is to be found in s. 15 of the Act. It states:-

> "15 The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act."

Section 7 of the Act states that certain provisions of the Convention "have the force of law" in Australia.

9. Sub-s. 4(1) defines the term "Convention" as meaning the Vienna Convention on Diplomatic Relations a copy of the English text of which is set out in the Schedule to the statute. The Convention was done at Vienna on 18 April 1961. The preamble to it affirms that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the Convention. Article 22 states:-

> "22 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of mission.
> 2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
> 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

Article 1(a) assigns to the phrase "head of mission" the meaning of the person charged by the sending State with the duty of acting in that capacity. Article 1(i) provides that the "premises of the mission" are:-

> "the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission."

Article 29 states: -

> "29 The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

The phrase "diplomatic agent" means the head of the mission or a member of the diplomatic staff of the mission: Article 1(e). See Duff v The Queen [1979] FCA 83; (1979) 39 FLR 315 at 352-6.

10. In her commentary on the Convention, entitled "Diplomatic Law", 1976, pages 78-97, Eileen Denza discusses Article 22. She says (at 78):-

> "The special status of diplomatic premises in modern international law has two aspects - firstly, that no official of the receiving State may perform in the premises or in relation to them any act of sovereignty, and secondly, that a particularly high duty of protection is owed in respect of them by the receiving State. Paragraphs (1) and (3) of this Article formulate the first and paragraph (2) the second aspect."

In B. Sen, "A Diplomat's Handbook of International Law and Practice" 3rd Revised Ed., pp 111-112, the author, formerly legal adviser to the Indian Ministry of External Affairs says:-

> "The term "inviolability" in respect of premises implies that the receiving state is obliged to prevent its officials and agents from entering or performing any official acts within the premises. It is also under a special duty to take all appropriate steps to protect the premises from being entered into or damaged by any private persons and to prevent any disturbance or breach of peace in front of the premises. The government of the receiving state is thus under a duty to adopt special measures over and above those it takes to discharge its general duty ensuring order. Inviolability attaches to all premises irrespective of whether leased or rented by the government of the home state. The premises are deemed to include all buildings, appurtenances, garden and the carpark. The rule of inviolability of the premises of the mission as well as the residence of the envoy has been universally recognised in practice of the states. It has now been embodied in the Vienna Convention 1961. A need for such form of immunity can best be expressed in the words of Vattell:-
> "The independence of the Ambassador would be very imperfect and his security very precarious if the house in which he lives were not to enjoy a perfect immunity and be inaccessible to the ordinary offices of justice. The Ambassador might be molested under a thousand pretexts, his

> secrets might be discovered by searching his papers, and his person exposed to insults. Thus all the reasons which establish his independence and inviolability concern likewise in securing the freedom of his house." (Vattell, Le Droit des Gens, Vol IV, Ch 9.)"

11. In Wright v McQualter (1970) 17 FLR 305 at 321, Kerr J considered the meaning of the phrase in Article 22(2) "impairment of its dignity" and said:-

> "If there were in the last analysis no more in this case than a quiet peaceful gathering on the lawn (in front of the premises of the United States Embassy) of persons shouting slogans and carrying placards of the kind in question here, with no risk of intrusion or damage to the premises, I would have some doubt whether there was any basis for believing that such action in such a place could reasonably amount to impairing the dignity of the mission, which is, after all, a political body. As such, it must presumably accommodate itself to the existence of strong disagreement with some of the policies of its government and to the direct and forceful verbal expressions of such disapproval. I appreciate that something may turn on the closeness of those concerned to the premises and on the extravagance or insulting nature of the language used, but, for myself, I would like to keep this whole subject open until, if ever, it arises for decision."

See also the discussion by O'Connor J in Boos v Barry [1988] USSC 44; 485 US 312 at 323 (1988).

12. The relationship between an instrument embodying an international obligation of Australia and a municipal statute dealing with that subject matter presents various issues to Australian courts. It is necessary to distinguish between some of these issues before turning to the contentions argued on this appeal. (It is unnecessary to consider the significance in municipal law of customary international law or any role international law may have in resolving uncertainty in municipal non-statute law).

13. First, there is the basic proposition that if the international obligation involves enforcement in the courts which is not already authorized by municipal law, legislation is needed to make the necessary changes in the law or equip the Executive with the necessary means to execute the obligation; it is for the Parliament and not the Executive to make or alter municipal law: New South Wales v The Commonwealth [1975] HCA 58; (1975) 135 CLR 337 at 450-451, Simsek v McPhee (1982) 148 CLR 636 at 641-2, Koowarta v Bjelke-Petersen [1982] HCA 27; (1982) 153 CLR 168 at 192-3, 211-12, 224-5, 253, Kioa v West [1985] HCA 81; (1985) 159 CLR 550 at 570-1, Dietrich v The Queen (High Court, 13 November 1992, pp 8, 66 of the Print).

14. Secondly, not all legislative approval of treaties or other obligations entered into by the Executive renders the treaty binding upon individuals within Australia as part of the law of the Commonwealth, or creates justiciable rights for individuals. An example is s. 3 of Charter of the United Nations Act 1945. This simply states that the Charter is "approved", something insufficient to render the Charter binding on individuals in Australia: Bradley v The Commonwealth [1973] HCA 34; (1973) 128 CLR 557 at 582, Koowarta supra at 224. See also Dietrich v The Queen supra pp 66-67. The legislation with which this appeal is concerned is not within this class, because s. 7 states that certain provisions of the Convention "have the force of law" in Australia.

15. Thirdly, the Parliament may make no attempt to incorporate expressly into domestic law the terms of a convention which has been ratified by Australia. Nevertheless, the terms of the convention may be resorted to in order to help resolve an ambiguity in domestic primary or subordinate legislation: Infabrics Ltd v Jaytex Ltd (1982) AC 1 at 16; Regina v Home Secretary: Ex parte Brind [1991] UKHL 4; (1991) 1 AC 696 at 747-8, 749-50, 760; Dietrich v The Queen supra pp 9-10, 55. This is on the footing that, prima facie the Parliament should be taken as intending to legislate in conformity and not in conflict with international law: Zachariassen v The Commonwealth [1917] HCA 77; (1917) 24 CLR 166 at 181; Polites v The Commonwealth [1945] HCA 3; (1945) 70 CLR 60 at 68-9, 77, 80-81. The present is not a case in this category.

16. (I should note that whilst in some English decisions, notably Derbyshire County Council v Times Newspapers Ltd (1992) 3 All ER 65 at 77-8, 93-4, provisions such as Article 10 of the European Convention on Human Rights have been treated as if they were no more than British international obligations in the ordinary sense, the significant effect in Britain of decisions of the European Court of Human Rights upon judgments given at the domestic stage of the same litigation invites inquiry as to whether, in substance, the Convention now is a part of the British constitutional and juridical structure).

17. Fourthly, in some cases, notwithstanding the absence in the statute of any reference to a particular international obligation, it may be evident that the statute adopted the nomenclature of a convention in anticipation of subsequent Australian ratification. If so, where the language of the statute is ambiguous it is permissible to refer to the provisions of the convention to assist resolution of an ambiguity, but not to displace the plain words of the statute: D and R Henderson (Mfg) Pty Ltd v Collector of Customs for the State of New South Wales (1974) 48 ALJR 132 at 135, per Mason J, affd. 49 ALJR 335; Barry R Liggins Pty Ltd v Comptroller-General of Customs (1991) 31 FCR 112 at 120. The 1967 Act is not such a statute.

18. Fifthly, difficult questions of administrative law and of judicial review arise where, whilst the international obligation or agreement in question is not in terms imported into municipal law and the municipal law is not ambiguous, nevertheless, upon the proper construction of the municipal law, regard may be had by a decision-maker exercising a discretion under that law to international agreement or obligation. If that agreement or obligation is misconstrued by the decision-maker, is there reviewable error of law? Or is the "error" to be classified as factual in nature? If the latter is correct, the scope for judicial review will be narrowed. The question is unresolved; see Heshmati v Minister for Immigration, Local Government and Ethnic Affairs [1991] FCA 387; (1991) 31 FCR 123 at 133, Curragh Queensland Mining Limited v Daniel [1992] FCA 44; (1992) 34 FCR 212. Here, the terms of the Convention enter directly into the issues presented by the case, not merely as a relevant matter for a decision-maker to have regard to in exercising a statutory discretion.

19. Finally, in other cases, an expression used in a law made by the Parliament may have given to it expressly in that law the meaning it bears in a particular convention. The provisions of the Migration Act 1958 concerning refugee status as they stood at the time of Minister for Immigration and Ethnic Affairs v Mayer [1985] HCA 70; (1987) 157 CLR 290, and Chan v Minister for Immigration and Ethnic Affairs [1989] HCA 62; (1989) 169 CLR 379, provide an example. The present is not such a case.

20. In cases falling within this last category, where the treaty or other international obligation is "referred to" within the meaning of sub-s. 15AB(2)(d) of the Acts Interpretation Act 1901 ("the Interpretation Act"), consideration may be given to it not only to determine provisions which are ambiguous or obscure, but for the wider purposes spelled out in sub-s. 15AB(1). It may be sufficient to attract to s. 15AB that the agreement, whilst "not referred to" in the statute itself, was referred to in the Second Reading Speech: ICI Australia Operations Pty Ltd v Fraser [1992] FCA 120; (1992) 106 ALR 257 at 262-3. In the present case, the convention is not merely referred to in the municipal law. It is directly drawn into the statute.

21. As I have indicated, sub-s. 7(1) of the Act the Parliament took the course of stating that certain provisions of the Convention "have the force of law" in this country, subject to certain specified adjustments. These are spelled out in sub-s. 7(2). Other examples of legislation in this form are found in the Civil Aviation (Carriers' Liability) Act 1959, ss. 11, 21, 25A, and the Income Tax (International Agreements) Act 1953, ss. 5-11R. See also the British legislation considered in James Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd (1978) AC 141, and Fothergill v Monarch Airlindes Ltd [1980] UKHL 6; (1981) AC 251.

22. In construing such provisions, (i) it is to be remembered that the terms used are not those drafted by Parliamentary Counsel, but are the result of negotiations between a number of contracting state parties with various legal systems and methods of legislative drafting, (ii) if the text or one of the texts is not in English, a question may arise as to the extent to which the municipal court takes judicial notice of the foreign language which has been used for what is now part of the municipal law, and (iii) the applicable rules of interpretation are those recognised by customary international law, as codified by the Vienna Convention on the Law of Treaties; see Zoeller v Federal Public of Germany (1989) 23 FCR 282 at 290-2, Thiel v Commissioner of Taxation of the Commonwealth of Australia [1990] HCA 37; (1990) 171 CLR 338 at 356-7, Littrell v United States of America (1992) 3 All ER 218 at 221. In the present case, it was not suggested that these considerations gave rise to any particular difficulty in construction of the Act.

23. The regulation making power in s. 15 of the Act permits, inter alia the making of regulations "necessary or convenient" to be prescribed for carrying out or giving effect to s. 7. This has, with some modifications, lifted up, inter alia, Article 22 of the Convention and given it the "force of law" in this country.

24. I should now set out, so far as relevant, the text of s. 7 of the 1967 Act:-

> "7(1) Subject to this section, the provisions of Articles 1, 22 to 24 (inclusive) and 27 to 40 (inclusive) of the Convention have the force of law in Australia and in every external Territory.
> (2) For the purposes of those provisions as so having the force of law:-
> (a) a reference in those provisions to the receiving State shall be so read as a reference to Australia, and where the context so permits, as including a reference to every State of the Commonwealth and every Territory;
> (b) a reference in those provisions to a national of the receiving State shall be read as a reference to an Australian citizen:
> (c) a reference in paragraph 1 of Article 22 to agents of the receiving State shall be read as including a reference to members and special members of the Australian Federal Police, members of the police force of a State or a Territory and persons exercising a power of entry to premises;
> (d) a waiver by the head of the mission of an overseas country, or by a person for the time being performing the functions of the head of the mission of an overseas country, shall be deemed to be a waiver by that overseas country;
> (e). . .
> (f) . . .

> (g) . . .
> (h) . . .
> (3) Nothing in sub-s. (1) effects the application of any law of the Commonwealth or of a Territory relating to quarantine, or prohibiting or restricting the importation into, or the exportation from, Australia or that Territory, as the case may be, of any animals, plants or goods, but this sub-section does not prejudice the immunity from suit or from any civil or criminal process that a person has by virtue of sub-s. (1).
> (4) . . .
> (5) For the purposes of Section 38 of the Judiciary Act 1903, a matter arising under the Convention and having the force of law by virtue of this section shall be deemed not to be a matter arising directly under a treaty."

The effect of sub-s. 7(5) is to qualify what would otherwise be the exclusive original jurisdiction of the High Court of Australia in "matters arising directly under any treaty".

25. I turn to the submissions of counsel.

26. Counsel for the respondents contended that the effect of s. 7, as regards Articles 22 and 29, is that there is a law of the Commonwealth that the Commonwealth and every State and Territory is under a special duty to take all appropriate steps to protect mission premises and to prevent any attack upon the person, freedom or dignity of the heads of missions or members of the diplomatic staff. He submitted that (i) this obligation created by the Parliament, was imposed upon the executive government, and (ii) it was to be discharged by the execution of that body of common law and existing statute law, the infringement of which might endanger mission premises, the heads of mission or diplomatic staff.

27. All of this may be conceded. But counsel then submitted that the effect of s. 7 went no further and 2. 7 did not permit or authorise the making of additional laws designed to implement the obligations it creates. That proposition should not be accepted. The taking of "all appropriate steps" may involve not only steps to execute or enforce existing municipal law. Appropriate steps may include the imposition and enactment of further legal obligations upon the Australian community. Section 7 must be read with s. 15. It may be necessary or convenient to give effect to s. 7 by the making of regulations. That is what has taken place.

28. Regulations were made under the 1967 Act in 1989 by the Diplomatic Privileges and Immunities Regulation, (SR No. 287 of 1989). It was those regulations which were amended by SR No. 7. Two new definitions of "prescribed land or premises" and "prescribed object" were inserted. The first was defined as meaning land or premises belonging to the Commonwealth or a State or Territory "to which the public has access". The second was defined as meaning

> "an object or structure that is on prescribed land or premises or within 100 metres of the premises of a mission or of the residence of the head, or other diplomatic agent, of a mission."

(The term "mission" is defined in sub-s. 4(1) of the 1967 Act as meaning "a diplomatic mission").

29. New regulations 5A and 5B were inserted by SR No. 7. It is necessary to set these out in full.

> "5A (1) The Minister may certify, in the form set out in the Schedule, that in his or her opinion removal of a prescribed object described in the certificate from the prescribed land

or premises described in the certificate would be an appropriate step within the meaning of Article 22 or 29 of the Convention.
(2) In deciding whether to issue a certificate, the matters to which the Minister is to have regard include:
(a) the nature of the prescribed object;
(b) the proximity of the object to the premises of the mission or to the residence of the head, or another diplomatic agent, of a mission;
(c) the period for which the object has been on the prescribed land or premises.
(3) A certificate takes effect when the certificate is issued, unless a later time or day is specified in the certificate.
(4) A certificate has effect for a period of 30 days from the day when the certificate was issued.
(5) Sub-reg. (4) does not prevent the issue of further certificates in respect of matters stated in the certificate.
(6) The Minister is to cause a copy of a certificate to be laid before each House of the Parliament within 15 sitting days of that House after the day when the certificate is issued."

(The disallowance provisions of Part XII of the Interpretation Act therefore apply to such a certificate.)

5B (1) In this regulation:
"prescribed officer" means:
(a) a member of special member of the Australian Federal Police; or
(b) a member of the police force of a State or Territory; or
(c) a member of the Australian Protective Service.
(2) A prescribed officer, with such assistance as the officer reasonably believes is necessary and with such force as is necessary and reasonable, may remove a prescribed object described in a certificate from prescribed land or premises described in the certificate.
(3) A prescribed officer must not remove a prescribed object from prescribed land or premises before giving a reasonable opportunity to a person:
(a) who is apparently in control of the object; or
(b) who placed the object on the land or premises;
to remove the object from the land or premises and take it to a location:
(c) where it may lawfully be placed; and
(d) that is more than 100 metres from the premises of the mission referred to in the certificate or the residence of the head, or another diplomatic agent, of the mission.
(4) When a prescribed officer removes a prescribed object from prescribed land or premises, the officer may retain the object for a period of 7 days from the day when the object

> is removed from the land or premises.
> (5) At the end of the 7 days, the prescribed officer must take reasonable steps to return the prescribed object to a person referred to para. (3)(a)or (b) or (if that person is not entitled to posses it) the owner, unless;
> (a) proceedings in respect of which the object may afford evidence (including an appeal to a court in relation to those proceedings) were begun before the end of the 7 days and have not been completed; or
> (b) the officer is otherwise authorised by law or an order of a court of the Commonwealth or of a State or Territory to retain, destroy or dispose of the object."

30. On 16 January 1992, the day on which SR No. 7 came into force, the first respondent ("the Minister") signed a certificate upon which officers of the Australian Federal Police acted when, on or about 26 January 1992, they removed the crosses from outside the Indonesian Embassy. The certificate was stated to have effect from 3.30pm on 16 January 1992; see Reg. 5A(3). The Minister certified that in his opinion the removal of the crosses, being "prescribed objects", from "prescribed land or premises", being "the prescribed land located within 50 metres of the boundary of the premises of the Indonesian Embassy prescribed below, and in proximity to the premises of the Indonesian Embassy situated at 8 Darwin Avenue, Yarralumla in the Australian Capital Territory", would be "an appropriate step within the meaning of Article 22 or 29 or the Convention". The Minister stated in the certificate that the reasons for the issue of it were that the presence of the prescribed objects on that land or those premises could lead to:-

> "the impairment of the dignity, or the disturbance of the peace, of the mission or of the head, or other diplomatic agent of, the mission."

31. The primary judge held that the regulations introduced by SR No. 7 were neither necessary nor convenient for giving effect to the 1967 Act. Rather, in his Honour's view, they were clearly inconsistent with the 1967 Act. Accordingly the regulations were not a valid exercise of the power conferred by s. 15. In particular, his Honour held that the regulations purported to do something which the Parliament has neither done itself nor delegated to the regulation making authority.

32. The primary attack upon the validity of the regulations before Olney J, as before us, was based upon the consequences of the inclusion in Reg. 5A(1) of the phrase "The Minister may certify . . . that in his or her opinion . . .". The provisions as to certification are vital to the regime established by SR No. 7. It is the existence of the certificate which is the source of the authorization of prescribed officers to use force to remove "prescribed objects" and to engage in acts which might otherwise be wrongful. I accept that if the certificate provisions are invalid then the remainder of SR No. 7 cannot survive without them.

33. The crucial passage in his Honour's reasoning is as follows (35 FCR at 245):-

> "The nature and purpose of s. 7 of the Act is to give the Convention the force of law in Australia. Nothing in the Act indicates that the provisions of Articles 22 or 29 are to have a meaning in Australian law other than the meaning which the words used in the Articles convey. A regulation which enables the meaning of the words of the Convention to be either expanded or contracted is not a regulation "not inconsistent with (the Act)" and will therefore fall outside of the power conferred by s. 15. The real effect of reg. 5A is to permit the Minister to decide

> that an object constitutes a threat to the peace, or an impairment of the dignity, of a mission and further that the removal of the object will be an appropriate step to prevent such threat or impairment. He does this simply by forming an opinion that the removal of a particular prescribed object or class of prescribed objects would be an appropriate step under Article 22 or Article 29 and certify it to that effect.
> The regulation making power clearly does not extend to authorising regulations to be made defining the meaning of terms used in the Act. Nor does it contemplate that regulations may authorise the Minister, or indeed any other person or authority, to be the arbiter of what constitutes a threat to the peace, or the impairment of the dignity, of a mission or of what steps are appropriate to prevent any disturbance of the peace of a mission or impairment of its dignity. To achieve either of those ends very specific powers will be required in the Act itself."

34. I should add that the Regulations have since been twice amended since making of SR No. 7. The first amendment was by SR No. 41 of 1992 which were made 10 February 1992 and notified in the Gazette on the next day. The next amendment was by SR No. 118 of 1992, made 23 April 1992 and notified in the Gazette on 28 April 1992. The present proceeding is concerned with the legality of what was done under the law as it stood when the crosses were removed on 26 January 1992, that is to say before either of these amendments was made.

35. However, it should be noted that SR 41 omits from Reg. 5A(1) the phrases "in his or her opinion" and "within the meaning of"; the latter phrase has substituted for it "to give effect to". It also inserts a definition of "certificate", so as to identify a certificate referred to in sub-reg. 5A(1). Further, SR 118 omits sub-reg. 5A(1) and substitutes a provision:-

> "Where the presence of a prescribed object on prescribed land or premises impairs, or (if it were to take place or continue) would impair the dignity of a mission or the residence of the head, or another diplomatic agent, of a mission, and the removal of the object would be an appropriate step to prevent the impairment, or continuation of the impairment, the Minister may certify to that effect."

36. The starting point for any consideration of the validity of SR No. 7 must be to determine the true nature and purpose of the regulation making power in s. 15: The State of South Australia v Tanner [1989] HCA 3; (1989) 166 CLR 161 at 164. I have set out the text of s. 15 earlier in these reasons.

37. A power such as that conferred by s. 15 does not authorise the making of regulations which vary or depart from the positive provisions of the statute itself or which go outside the field of operation which the statute marks out for itself. Such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them or to depart from or vary the plan which the legislature has adopted to attain its ends: Shannahan v Scott [1957] HCA 4; (1957) 96 CLR 245 at 250.

38. In the present case the regulation making power is expressly limited to regulations "not inconsistent with this Act". The matters which may be prescribed are those required or permitted by the Act to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the 1967 Act. The evident purpose of s. 15 of the Act is not to authorise the Governor-General to make regulations which empower a third party, such as the Minister, to give to any of the relevant Articles in the Convention a wider operation than follows from the force of law given them by s. 7; cf Turner v Owen [1990] FCA 358; (1990) 26 FCR 366 at 388-389.

39. The question then is whether SR No. 7 is the result of an exercise of the regulation making power which is not contemplated or authorised by s. 7.

40. The certification by a Minister provided for in reg. 5A would not be necessary or convenient for carrying out or giving effect to the 1967 Act if directed to what would not be an appropriate step within the meaning of Article 22 or 29 of the Convention thus of s. 7 of the Act. Thus, in my view, the phrase "in his or her opinion" has to be read accordingly.

41. Counsel for the appellants, in approaching this issue, sought to have the Court give particular weight to "the reasonably formed views of the Minister with respect to matters of degree and judgment within the special knowledge of his Department." He relied, in particular, upon Richardson v The Forestry Commission [1988] HCA 10; (1988) 164 CLR 261 at 293-296, per Mason C.J., Brennan J. But this is to misapply what their Honours said. The relevant constitutional fact, in assessing the validity of the Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987, was a somewhat special one. The external affairs power authorises the 1967 Act, which discharges an undoubted treaty obligation. Richardson establishes that the external affairs power goes further and extends to support a law to ensure the discharge of a treaty obligation which is "reasonably apprehended" by the Parliament to exist. The relevant constitutional fact was whether, in enacting the statute under challenge, the Parliament had made a "legislative judgment" for which there was a reasonable basis. If that legislative judgment could not have been reasonably supported, the statute would have been invalid.

42. Accordingly, in Richardson there is no support for the proposition that the regulation making authority conferred by s. 15 of the Act is properly exercised by committing to the opinion of a third party the necessity of convenience of particular steps in carrying out or giving effect to s. 7.

43. On his part, counsel for the respondents, submitted that SR No. 7 permitted action to be taken in respect of some activity or thing which in the opinion of the Minister was a disturbance or impairment within the meaning of Article 22, whether or not this actually was so. That, he submitted, was contrary to "the scope and object and the plan of the Act".

44. Whether or not the removal of a prescribed object would be an "appropriate step" within the meaning of the relevant articles of the Convention is a question of law, or of mixed law and fact, because those articles have, by s. 7 of the Act, been given the force of law in this country. Regulation 5A thus itself postulates an objective legal criterion. The decision to issue the certificate may not be reviewable under the Administrative Divisions (Judicial Review) Act 1977, because the certificate affects legal rights and duties at large and changes the law. The decision may not be of an administrative character within the meaning of s. 3: Queensland Medical Laboratory v Blewett [1988] FCA 423; (1988) 84 ALR 615 at 633-637. It is unnecessary to decide if this is so. That is because the question would still be justiciable, whether under s. 75(v) of the Constitution by way of injunction, prerogative writ and, perhaps, declaration, or in this Court under s. 39B of the Judiciary Act 1903 and s. 21 of the Federal Court of Australia Act 1976; see Richardson supra at 292-3; Miller v TCN Channel Nine Proprietary Limited [1986] HCA 60; (1989) 161 CLR 556 at 614.

45. Regulation 5A should not be read as authorising the Minister to form an opinion which errs in law and therefore does not carry out or give effect to s. 7 of the Act. As I have indicated, the Regulation should be construed as authorising the formation of an opinion which is consistent with the Act. So construed the Regulation is valid. Accordingly, there is no occasion to apply para. 46(1)(b) of the Interpretation Act so as to confine SR No. 7 to an operation within the regulation making power.

46. However, as French J points out in his reasons for judgment, the holding that SR No. 7 is valid (the issue on this appeal) does not enter upon the question of whether in a particular case the Minister acted ultra vires the SR No. 7 and the Act. No such issue is before us.

47. Counsel for the respondents submitted, as an independent ground, that because there was no definition of "certificate" in SR No. 7, and because that term was used in Reg. 5B without express linkage to Reg. 5A, the regulations were so uncertain as to be unintelligible and ultra vires. However, the defined expression "prescribed object" appears in both regulations as that which is described in what must be the one certificate. In this way there is a textual linking of Reg. 5B to Reg. 5A. There is no uncertainty or unintelligibility.

48. The appeal should be allowed. Order 1 made by Olney J on 16 April 1992 should be set aside. In place of order 1 the Court should answer in the affirmative the question there set out. Any party seeking a costs order should do so by written submissions filed in the New South Wales District Registry within 7 days.

FRENCH J. Geraldo **Magno** is of East Timorese extraction. On 18 November 1991 he placed 124 white wooden crosses about 500mm high on a grass verge next to a footpath outside the Indonesian Embassy at 8 Darwin Avenue, Yarralumla in the Australian Capital Territory. The crosses were placed as a symbolic protest against the killing of a number of East Timorese people by members of the Indonesian Military Forces, which was said to have occurred at the Santa Cruz Cemetery in Dili, East Timor, on 12 November 1991. Also placed on public land close to the Embassy at this time were a flagpole with associated flags and banners and a demountable hut, at one time described as the East Timorese Embassy but later described as the East Timorese Information Centre. Representatives of a Canberra based East Timor support group and a Sydney based East Timorese community, along with representatives of the ACT Trades and Labour Council, maintained a presence outside the Embassy from 17 November 1991. The hut and flagpole were put in place by the Trades and Labour Council and the Canberra based East Timor support group. By agreement with the Minister for Foreign Affairs and Trade they were subsequently moved to a position about 50 metres from the perimeter of the Embassy premises. Ines Almeida, who acts as a spokesperson for the Sydney based East Timorese community would not agree to move the crosses.

2. On 15 January 1992 regulations known as the Diplomatic Privileges and Immunities Regulations (Amendment) (1992) (SR 1992 No.7) came into force and on the same day the Minister for Foreign Affairs and Trade signed a certificate under the Regulations certifying his opinion that the removal of the crosses would be an appropriate step within the meaning of Article 22 or 29 of the Vienna Convention on Diplomatic Relations. The stated reason for the issue of the certificate was that the presence of the crosses could lead to "the impairment of the dignity, or the disturbance of the peace, of the mission or of the head, or other diplomatic agents of, the mission". On 26 January 1992, officers of the Australian Federal Police removed the crosses from outside the Embassy. They subsequently passed into the custody of solicitors acting for **Magno** and Almeida.

3. Upon an urgent ex parte application made by **Magno** and Almeida on 17 January 1992, Olney J. granted temporary injunctive relief restraining the Minister, the Commissioner of the Australian Federal Police and the Commonwealth of Australia from removing the crosses until 23 January 1992 or further order. On 20 January 1992, **Magno** and Almeida filed an application in this Court naming those persons as respondents. By that application they sought declarations that the Diplomatic Privileges and Immunities Regulations (Amendment) 1992 and the Minister's certificate were invalid. They also claimed an injunction restraining each of the respondents from acting upon or giving effect to the certificate or removing the crosses. A further declaration of the invalidity of the certificate was sought upon grounds of breach of the rules of natural justice, failure to take account of relevant considerations, taking into account irrelevant considerations, unreasonableness and excess of power. On 23 January 1992, the temporary injunction was extended to 24 January 1992 by Ryan J. but on 24 January 1992 his Honour dissolved the injunction.

4. On 7 February 1992, Ryan J. ordered the trial, as a preliminary issue, of the following question:

> "Was the making of the Diplomatic Privileges and Immunities Regulations (Amendment) being Statutory Rule 1992 No. 7 authorised by and within the power conferred by Section 15 of the Diplomatic Privileges and Immunities Act 1967?"

The preliminary issue came on for hearing before Olney J. on 13 April 1992. On 16 April 1992 his Honour delivered his judgment and answered the question in the negative. That answer reflected a determination that the Diplomatic Privileges and Immunities Regulations (Amendment) 1992 was beyond the power conferred by s.15 of the Diplomatic Privileges and Immunities Act 1967. The Minister, the Commissioner and the Commonwealth of Australia now appeal against that decision.

5. The case involves a consideration of the relevant regulations against the provisions of the Diplomatic Privileges and Immunities Act 1967 which was enacted to give effect to Australia's obligations under the Vienna Convention on Diplomatic Relations 1961. It also requires a consideration of the Articles of the Convention relating to the protection of diplomatic mission premises and diplomatic agents. It does not involve any inquiry by this Court into the question whether and to what extent Indonesian Military Forces have engaged in human rights violations against the people of East Timor. It is useful to begin these reasons by setting out the relevant provisions of the Act, the Convention and the Regulations.

Statutory Framework - The Act

6. The Diplomatic Privileges and Immunities Act 1967 is expressed in its preamble to be "An Act relating to Diplomatic Privileges and Immunities, and for other purposes". Section 6 excludes the operation of other laws in the following terms:

> "6. It is hereby declared to be the intention of the Parliament that this Act shall operate to the exclusion of:
> (a) any Imperial Act, law of the Commonwealth or rule of the common law in force in a State or in a Territory immediately before the commencement of this Act; or
> (b) any law of a State or of a Territory made after the commencement of this Act;
> that deals with a matter dealt with by this Act."

At first blush it might appear that the section would exclude the application of any rule of the common law applying rules of customary international law which relate to the matters of diplomatic relations dealt with by the Act. But the preamble to the Convention, which is in a schedule to the Act, preserves the operation of rules of customary international law, to the extent that they govern questions not expressly regulated by the Convention. It has been suggested however that s.6 would operate to exclude any variation of diplomatic immunity by prerogative action including a treaty - Crawford and Edison - International Law and Australian Law in Ryan - International Law in Australia 2nd Edition at p 94 note 9.

7. Section 7 gives the "force of law" to various Articles of the Convention. The parts relevant for present purposes are:

> "7(1) Subject to this section, the provisions of Articles 1, 22 to 24 (inclusive) and 27 to 40 (inclusive) of the Convention have the force of law in Australia and in every external Territory.
> (2) For the purposes of those provisions as so having the force of law:

> (a) a reference in those provisions to the receiving State shall be read as a reference to Australia and, where the context so permits, as including a reference to every State of the Commonwealth and every Territory;
> .
> .
> .
> (c) the reference in paragraph 1 of Article 22 to agents of the receiving State shall be read as including a reference to members and special members of the Australian Federal Police, members of the police force of a State or of a Territory and persons exercising a power of entry to premises;
> .
> .
> .
> (5) For the purposes of section 38 of the Judiciary Act 1903, a matter arising under the Convention as having the force of law by virtue of this section shall be deemed not to be a matter arising directly under a treaty."

The section operates by reference to obligations imposed upon Australia as a State for the purposes of international law. It creates obligations under Australian municipal law which in terms affect "Australia and, where the context so permits... every State of the Commonwealth and every Territory". This is to be read as an obligation imposed upon the executive or more precisely the Crown in right of those various polities.

8. The regulation making power is set out in s.15:

> "15. The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act."

The Convention

9. The English text of the Vienna Convention is contained in the schedule to the Act. It opens with a preamble:

> "The States Parties to the present Convention,
> Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,
> Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,
> Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their

differing constitutional and social systems,
Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,
Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,
Have agreed as follows:..."

There then follow the various Articles of the Convention. A number of terms used in the Convention are defined in Article 1. They include:

"the "premises of the mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission."

The functions of diplomatic missions are enumerated in Article 3 (although not exhaustively):

"1. The functions of a diplomatic mission consist inter alia in:
(a) representing the sending State in the receiving State;
(b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
(c) negotiating with the Government of the receiving State;
(d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
(e) promoting friendly relations between the Sending State and the receiving State, and developing their economic, cultural and scientific relations."

10. Article 22 provides for the protection of the premises of diplomatic missions:

"1. The premises of the mission shall be inviolable. the agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

The person of the diplomatic agent is also protected by Article 29:

> "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

Article 30 confers upon the private residence of a diplomatic agent the same inviolability and protection as the premises of the mission.

The Regulations

11. The Diplomatic Privileges and Immunities Regulations (Amendment) (SR 1992 No. 7) amended the Diplomatic Privileges and Immunities Regulations by introducing two new Regulations, 5A and 5B in the following terms:

> "5A.(1) The Minister may certify, in the form set out in the Schedule, that in his or her opinion removal of a prescribed object described in the certificate from prescribed land or premises described in the certificate would be an appropriate step within the meaning of Article 22 or 29 of the Convention.
> "(2) In deciding whether to issue a certificate, the matters to which the Minister is to have regard include:
> (a) the nature of the prescribed object;
> (b) the proximity of the object to the premises of a mission or to the residence of the head, or another diplomatic agent, of a mission;
> (c) the period for which the object has been on the prescribed land or premises.
> "(3) A certificate takes effect when the certificate is issued, unless a later time or day is specified in the certificate.
> "(4) A certificate has effect for a period of 30 days from the day when the certificate was issued.
> "(5) Subregulation (4) does not prevent the issue of further certificates in respect of matters stated in a certificate.
> "(6) The Minister is to cause a copy of a certificate to be laid before each House of the Parliament within 15 sitting days of that House after the day when the certificate is issued.
> "5B.(1) In this regulation:
> 'prescribed officer' means:
> (a) a member or special member of the Australian Federal Police; or
> (b) a member of the police force of a State or Territory; or
> (c) a member of the Australian Protective Service.
> "(2) A prescribed officer, with such assistance as the officer reasonably believes is necessary and with

such force as is necessary and reasonable, may remove a prescribed object described in a certificate from prescribed land or premises described in the certificate.
"(3) A prescribed officer must not remove a prescribed object from prescribed land or premises before giving a reasonable opportunity to a person:
(a) who is apparently in control of the object; or
(b) who placed the object on the land or premises;
to remove the object from the land or premises and take it to a location:
(c) where it may lawfully be placed; and
(d) that is more than 100 metres from the premises of the mission referred to in the certificate or the residence of the head, or another diplomatic agent, of the mission.
"(4) When a prescribed officer removes a prescribed object from prescribed land or premises, the officer may retain the object for a period of 7 days from the day when the object is removed from the land or premises.
"(5) At the end of the 7 days, the prescribed officer must take reasonable steps to return the prescribed object to a person referred to in paragraph 3(a) or (b) or (if that person is not entitled to possess it) the owner, unless:
(a) proceedings in respect of which the object may afford evidence (including an appeal to a court in relation to those proceedings) were begun before the end of the 7 days and have not been completed; or
(b) the officer is otherwise authorised by a law, or an order of a court, of the Commonwealth or of a State or Territory to retain, destroy or dispose of the object."

Regulation 2 of the Diplomatic Privileges and Immunities Regulations (Amendment) provides for the insertion in Reg.2 of the principal Regulations of the following additional definitions:

"'prescribed land or premises' means land or premises belonging to the Commonwealth or a State or Territory to which the public has access;
'prescribed object' means an object or a structure that is on prescribed land or premises within 100 metres of the premises of a mission or of the residence of the head, or another diplomatic agent, of a mission;"

Scheduled to the Regulations is a form of certificate which can be issued by the Minister.

The Minister's Certificate
12. The certificate signed by the Minister on 16 January 1992 was in the following terms:

"COMMONWEALTH OF AUSTRALIA

Diplomatic Privileges and Immunities Regulations
CERTIFICATE
I, Gareth Evans, Minister of State for Foreign Affairs
and Trade, certify that in my opinion the removal of
the following prescribed objects:
CROSSES
from prescribed land or premises, being the prescribed
land located within 50 metres of the boundary of the
premises of the Indonesian Embassy described below,
and in proximity to the premises of the Indonesian
Embassy situated at 8 Darwin Avenue, Yarralumla in the
Australian Capital Territory, would be an appropriate
step within the meaning of Article 22 or 29 of the
Convention.
The reasons for the issue of this certificate are that
the presence of the prescribed objects on that land or
those premises could lead to:
the impairment of the dignity, or the
disturbance of the peace, of the mission
or of the head, or other diplomatic agent
of, the mission.
This certificate has effect from 3.30 p.m. the 16th day
of January 1992
Dated this 16th day of January 1992
(Signed)
GARETH EVANS
Minister of the State for Foreign Affairs and Trade"

Further Amendments to the Regulations
13. The Diplomatic Privileges and Immunities Regulations were further amended on 10 February 1992. A definition of the word "certificate" was introduced:

"'certificate' means certificate referred to in
subregulation 5A(1)."

Sub-regulation 5A(1) was amended by omitting the words "in his or her opinion" appearing in that sub-regulation and substituting the words "to give effect to" for the words "within the meaning of". Sub-regulation 5A(2) was amended by adding a further sub-paragraph (d) at the end:

"(d) whether a measure other than removal of
the object would give effect to the
special duty of Australia under Article 22
of the Convention."

14. Paragraph 5B(3)(d) was omitted and a new sub-paragraph (d) substituted to read:

"(d) that is not on prescribed land or premises
described in the certificate."

The schedule setting out the form of the certificate was amended by deleting the words "in my opinion" and substituting the words "to give effect to" for the words "within the meaning of".

15. Notwithstanding these amendments, the Court proceeded to consider the question defined for it on the basis of the Regulations as they stood at the commencement of the proceedings.

Reasons for Decision of the Trial Judge

16. His Honour identified the single issue for determination as the question whether the making of the Regulations was a valid exercise of the regulation making power conferred by s.15 of the Act. The answer to the question he considered could be ascertained by resorting to basic principles requiring an examination of the statutory power in pursuance of which the Regulations were made and the limits set on that power by the nature and purpose of the Act and of its substantial provisions.

17. His Honour considered that sub-ss.7(1) and 7(2)(a) read with Article 22, had the effect of an enactment that:

> "Australia is under a special duty to take all appropriate steps...to prevent any disturbance of the peace of a diplomatic mission or impairment of its dignity."

This was a duty imposed by the Parliament, subject only to the provisions of s.7 of the Act which, in the present context, do not affect the generality of the formulation set out above. Given that the power conferred by s.15 is to make regulations "not inconsistent with (the) Act" his Honour concluded that nothing in the Regulations could validly affect the nature and extent of the duty imposed by s.7. He accepted that a regulation prescribing a procedure whereby the duty imposed by sub-s.7(1) could be enforced would fall within the ambit of the power to make regulations "necessary or convenient ... for ... giving effect to (the) Act". Noting that neither the Convention nor the Act defined conduct which could amount to a disturbance of the peace of a mission or impairment of its dignity, his Honour accepted that the existence of an object or structure on public land within 100 metres of the premises of a mission could constitute a disturbance of the peace or an impairment of the dignity of a mission. Whether it does or does not, he concluded, would depend upon the particular facts of the case and upon the proper construction of Article 22 (2) of the Convention. Not every prescribed object would constitute a disturbance or impairment within Article 22, nor would every step capable of being taken to prevent a disturbance or impairment be "an appropriate step". But a regulation which enables the meaning of the words of the convention to be expanded or contracted is not a regulation "not inconsistent with (the) Act" and would therefore fall outside the power conferred by s.15. The crux of his Honour's decision is contained in the next three paragraphs of his reasons for judgment:

> "The real effect of regulation 5A is to permit the Minister to decide that an object constitutes a threat to the peace, or an impairment of the dignity, of a mission and further that the removal of the object will be an appropriate step to prevent such threat or impairment. He does this simply by forming an opinion that the removal of a particular prescribed object or class of prescribed objects would be an appropriate step under article 22 or article 29 and certifying to that effect.
> The regulation making power clearly does not extend to authorising regulations to be made defining the meaning of terms used in the Act. Nor does it contemplate that regulations may authorise the Minister, or indeed any other person or authority, to be the arbiter of what constitutes a threat to the peace, or an impairment of the dignity, of a mission or of what steps are appropriate to prevent any disturbance of the peace of a mission or impairment of its dignity. To achieve either of those ends very

> specific powers would be required in the Act itself. What the regulations purport to do is something which Parliament has neither done itself or delegated to the regulation making authority the power to do. The regulations are neither necessary nor convenient for the giving effect to the Act. They are clearly inconsistent with the Act. For these reasons the regulations are not a valid exercise of power under section 15 of the Act."

Grounds of Appeal

18. Leave to appeal having been granted by Sweeney J. on 8 May 1992 in the event that it should be required, the grounds of appeal are as follows:

> "1. That the decision was wrong in law.
> 2. That the Learned Judge ought to have held that the Diplomatic Privileges and Immunities Regulations (Amendment) being Statutory Rule 1992 No 7 were valid ("the regulations").
> 3. The Learned Judge ought to have held that the regulations were authorised by and were within the power conferred by Section 15 of the Diplomatic Privileges and Immunities Act 1967.
> 4. The Learned Judge ought to have answered the said question in the affirmative."

The Contentions

19. The appellants submit that absent any regulation Australia would have the obligation and necessarily the power to take all appropriate steps to prevent any disturbance of the peace of a diplomatic mission or any impairment of its dignity. This would require as a minimum in response to an existing or apprehended state of affairs, that the relevant Minister form a view as to whether the dignity of a mission is being or may be impaired. The Minister would then have to form a view as to the nature and timing of appropriate steps and direct executive action accordingly. That ministerial assessment would, on this hypothesis, be subject to review to ensure that it went no further than required by the Act. In any such review, it was submitted, a Court would be slow to disregard the reasonably formed views of the Minister with respect to matters of degree and judgment with the special knowledge and experience of the Minister's department. The Regulations merely set out administrative steps which would be followed by the executive in any event in the narrow class of cases to which they apply. On this basis, it was submitted, the Regulations are not inconsistent with the Act but deal with matters convenient to give effect to it. To the extent that they admit of a construction keeping them within the scope of the Act, they should be so construed. Alternatively, if the Act does not permit the reasonably formed views of the Minister to be accorded a special place, the Regulations are valid but ministerial action which is not in every respect objectively an appropriate step, is subject to review.

20. The respondent contended that the Regulations can only be valid if they fall within the scope and object of the Act and its plan. The Act should be construed consistently with Australia's international obligations including the right to freedom of expression established by Article 19 of the International Covenant on Civil and Political Rights. The Court should not uphold any action purportedly taken under the Act which interferes with freedom of expression unless such a conclusion is inescapable. Articles 22 and 29 should be strictly construed. The respondent submitted that the scope and object and the statutory plan of the Act are concerned with the prevention of acts

objectively constituting a disturbance of the peace or impairment of the dignity of a mission not acts which in somebody's opinion may constitute such a thing. The regulation making power in s.15 can only be employed in respect of disturbances and impairments which exist as a matter of objective fact. This, it is said, is consistent with recognition of the right of freedom of expression. The Regulations permit action to be taken in respect of something which in the Minister's opinion is a disturbance or impairment whether or not it is actually so. That is contrary to the scope and object and the plan of the act and represents an unnecessary and unjustified interference with freedom of expression.

21. Alternatively it was put that the Regulations represent an impermissible sub-delegation of legislative power in that they purport to give the Minister a power in effect to make a regulation. Further in the alternative, in providing that action may be taken on the basis of the opinion of the Minister, the Regulations were said to be inconsistent with the Act and for that reason invalid. The further alternative submission was put that in failing to provide a definition of the expression "certificate" for the purpose of reg.5B, the Regulations are so uncertain as to be unintelligible and ultra vires. Nor, it was said, do they serve any purpose reasonably proportionate to the object of the Act in that they permit action to be taken on the basis of the Minister's opinion when the Act and the Convention which it incorporates are expressed in objective terms. Before discussing these contentions further, the scope of the international obligation said to be advanced by the making of the regulations should be considered.

The Inviolability of Diplomatic Premises

22. Article 22 incorporates in its terms the principle of international law that diplomatic premises shall be inviolable. The concept of inviolability is variously defined. It has been expressed as "the right of the sending State to have its diplomatic premises, its diplomatic personnel and all official records and communications safeguarded against interference of any sort" - Grieg - International Law (2nd Edition) 1976 Butterworths p 238. Although criticised as "not particularly precise" it has also been said that it implies "immunity from all interference, whether under colour of law or right or otherwise, and connotes a special duty of protection, whether from such interferences or from mere insult on the part of the receiving State" - Parry - British Digest of International Law Vol. 7 p 700, cited in Brownlie - Principles of Public International Law 4th Edition Oxford (1990) p 353 note 37 and in Mann F.A. - Further Studies in International Law Clarendon Press (1990) Ch 12 p 326.

23. The modern concept of inviolability may be seen as an evolution of the venerable principle cited by Grotius that the "suite also and the effects of ambassadors, in their own way are inviolate" - Grotius - De Jure Belli ac Pacis Libri Tres (1646) Bk II Ch. XVIII - VIII - 1. Inviolability extends to the mission premises and the residence of the ambassador although in respect of the former it is a distinct form of State immunity attaching to a building used for government purposes while in respect of the latter it is an aspect of the ambassador's personal immunity. The degree of inviolability is the same in each case - Hardy - Modern Diplomatic Law Manchester University Press (1968) p 43; Sen - A Diplomat's Handbook of International Law and Practice - Martinus Nijhoff pp 110-111. The principle was at one time associated with a legal fiction that the person and premises of ambassadors were outside the territory of the receiving State - Grotius Bk II Ch.XVIII - IV 7. See for example the Hungarian Supreme Court decision of In Re Zoltan Sz noted in McNair and Lauterpacht Annual Digest of Public International Law Cases 1927-1928 pp 372-373. But that fiction has been long discredited - R. v. Turnbull Ex parte Petroff (1971) 17 FLR 438 at 442-444 (Fox J.). Contemporary international law draws a distinction between the territory of the receiving State on which the sending State's mission stands and the sending State's primary jurisdiction and control over the members of the mission and their activities in the embassy - Fawcett - The Law of Nations (1971) pp 64-65 adopted in Radwan v. Radwan (1972) 3 All ER 967 at 973-974 (Cumming-Bruce J.). The principle is at least in part an extension of a duty at international law to protect embassy premises - Denza Diplomatic Law - Oceana Publications (1975) p 79. The duty arises, under the Vienna Convention, out of the necessity to "ensure the efficient performance of the functions of diplomatic missions as representing States", sometimes called functional necessity -

Preamble to Vienna Convention on Diplomatic Relations.

24. The text of Article 22 discloses two aspects of inviolability. These were explained by the International Law Commission in its commentary on the draft Article thus:

> "From the point of view of the receiving State this inviolability has two aspects. In the first place the receiving State is obliged to prevent its agents from entering the premises for any official purpose whatsoever (paragraph 1). Secondly, it is under a special duty to take all appropriate steps to protect the premises from any invasion or damage, and to prevent any disturbance of the peace of the mission or impairment of its dignity (paragraph 2). The receiving State must, in order to fulfil this obligation, take special measures - over and above those it takes to discharge its general duty of ensuring order."
> Year Book of the International Law Commission 1958 Vol.2 p 95

The duty of the receiving State under Article 22(2) to protect diplomatic missions against intrusion or physical attack was emphatically asserted by the International Court of Justice in United States v. Iran (1980) ICJ Rep. 3. The United States Embassy at Tehera n, its consulates at Tabriz and Shiraz having been occupied by militant demonstrators and diplomatic and consular personnel taken hostage, the Court held that:

> "...the action required of the Iranian Government by the Vienna Conventions and by general international law was manifest. Its plain duty was at once to make every effort and to take every appropriate step to bring these flagrant infringements of the inviolability of the premises archives and diplomatic and consular staff of the United States Embassy to a speedy end, to restore the consulates at Tabriz and Shiraz to United States control, and in general to re-establish the status quo and to offer reparation for the damage."

25. The scope of the terms "peace" and "dignity" in relation to mission premises are not defined in the Convention and were not discussed in the commentary. They are capable, in ordinary English usage, of covering a wide range of circumstances. The notion of the "dignity" of the mission would extend to enjoin some classes of "mere insult" as suggested in the Parry definition of inviolability. The evidence of pre-convention State Practice in relation to demonstrations outside or criticism directed to diplomatic missions is limited. The Harvard Draft Convention on Diplomatic Privileges and Immunities published in 1932 would have required the receiving State to protect the premises acquired or used by a mission or occupied by a member of the mission against any invasion or other act tending to disturb "the peace or dignity of the mission" or of its members. In the commentary which accompanied that Draft it was proposed that the special duty of protection included protection against crowds or mobs collected in the vicinity of the premises for the purposes of expressing abuse, contempt or disapproval of the sending State or its mission:

> "A similar duty would seem to exist to protect such premises against so called "picketing". This being an act tending to disturb the peace and dignity of the mission". - 26 AJIL 20-21 (supp 1932 at 55-56).

In Satow's Guide to Diplomatic Practice 4th Edition Longmans (1957) it said at para 354 in relation to published criticism of diplomats, that "it is the duty of Government to prevent attacks against diplomatic agents in countries to which they are accredited where publication is under the control of the Government". Two examples cited of the suppression of critical publications were from Peru in 1856 and Switzerland during the First World War in relation to "propaganda directed against the German Minister and military attache".

26. The incidents of inviolability of diplomatic missions are similar to those attaching to the premises of international organisations. C.W. Jenks in International Immunities Stephen and Sons Ltd London (1961) at p 48 posited an obligation on the receiving State to provide special measures of police protection against organised demonstrations designed to influence or express disapproval of the organisation or its policies or one or more of its member states. The obligation was said to be implicit in all of the existing arrangements governing international immunities. It was described as a detailed implication of the inviolability of premises:

> "The fact that the premises themselves remain inviolate does not sufficiently fulfil the obligation to protect their inviolability if their accessibility or amenities are seriously interfered with by occurrences in the immediate vicinity."

In Hardy - Modern Diplomatic Law - Manchester University Press (1968) at p 46 it is said that:

> "Demonstrations against foreign governments and their premises, usually the product of East-West or anti-colonial tensions do not in themselves give rise to international responsibility unless the receiving State has failed to take the necessary action to limit the attack or punish the offender."

It seems that the writer intended that statement to extend to demonstrations that would not involve any intrusion or physical attack for he went on to refer to local laws which in some capitals control demonstrations and acts of picketing directed against foreign missions.

27. A more recent statement of British practice would not extend the concept of inviolability to protect diplomatic missions from expressions of public opinion. In its report on the 1984 Libya Peoples Bureau Incident in which shots were fired from the Bureau upon peaceful demonstrators outside the premises, the House of Commons Foreign Affairs Committee stated:

> "Our view is that although the "peace of the mission" may not be entirely identical to the Queen's peace, the receiving State's duty to protect the peace of the mission cannot be given so wide an interpretation as to require the mission to be insulated from expressions of opinion within the receiving State. Provided always that work at the mission can continue normally, that there is untrammelled access and egress and that those within the mission are never in fear that the mission might be damaged or its staff injured, the requirements of Article 22 are met. A breakdown of the public order outside mission premises would put in jeopardy the fulfilling of obligations under Article 22, an orderly expression of opposition to the policies of the sending State cannot of itself do so." - First Report from Foreign Affairs

Committee - (1984-1985) HC 127 p xvii.

The Committee in that case had before it two conflicting opinions about the duty of the receiving State. Professor G. Draper expressed the view that allowing demonstrators to form up behind barriers in the immediate frontage of the Libyan mission premises was incompatible with Article 22. The Head of the Diplomatic Service, Sir Anthony Acland, considered it essential that demonstrations be adequately controlled and policed "so that there is no damage done physically or otherwise to the mission or the people within it". Referring to the demonstration which had been permitted outside the Libyan embassy he said:

> "I do not think in that case the peace of the mission within the mission or the impairment of its dignity really applied, this country having the tradition of freedom of demonstration."

The Committee appears to have preferred the Acland view. A White Paper accepting the Committee's report and recommendations was subsequently published by the United Kingdom Government. On the question of demonstrations outside diplomatic missions it said at para 85(g):

> "The Government accept that demonstrations outside diplomatic missions should be allowed so long as they do not imperil the safety or efficient work of the mission."
> Cmnd 9497 Misc. No. 5 (1985) and see Higgins: U.K. Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report (1986) 80 AJIL 135

This approach was consistent with that taken in R. v. Roques referred to at p xvii of the Committee Report. Anti-apartheid protesters who demonstrated on a pavement immediately outside the South African Embassy in Trafalgar Square were charged with obstructing a police officer on the basis that the demonstration was in breach of the Diplomatic Privileges Act 1964 (UK) which it was the duty of the police to apply. The charge was dismissed in the Bow Street Magistrates Court on 15 June 1984 on the basis that impairment of the dignity of the mission "required abusive or insulting behaviour and that political demonstrations do not themselves amount to such". The case is referred to in Harris - Cases and Materials on International Law 4th Edition - Sweet and Maxwell (1991) p 333 and Lewis - State and Diplomatic Immunity - 2nd Edition Lloyds of London Press Ltd (1985) para 14.20.5. It has been welcomed as "a robust approach to Article 22" along with the decision of the Foreign Affairs Committee not to recommend statutory distances for demonstrations - Higgins - The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience (1985) 79 AJIL 641 at 650-651. A similar view was expressed in 1970 by Kerr J. in the Supreme Court of the Australian Capital Territory in Wright v. McQualter (1970) 17 FLR 305, a case arising out of student conduct in the course of a political demonstration outside the United States Embassy in Canberra. His Honour observed at 321:

> "If there were in the last analysis no more in this case than a quite peaceful gathering on the basis of persons shouting slogans and carrying placards of the kind in question here, with no risk of intrusion or damage to the premises I would have some doubt whether there was any basis for believing that such action in such a place could reasonably amount to impairing the dignity of the mission, which is, after all a political body. As such it must presumably accommodate itself to the existence of strong

> disagreement with some of the policies of its government and to the direct and forceful verbal expression of such disapproval. I appreciate that something may turn on the closeness of those concerned to the premises and on the extravagance or insulting nature of the language used, but, for myself, I would like to keep the whole subject open until, if ever, it arises for decision."

28. The difficulty of defining the limits of peaceful protest and that which may infringe Article 22 was referred to in a statement made in 1984 of the Australian Government approach to its obligations by Mr W.H. Bray of the Department of Foreign Affairs in Diplomatic and Consular Immunities and Privileges in Australia at p 350 in Ryan ed. International Law in Australia 2nd Edition Law Book Co. (1984). Referring to para 2 of Article 22 the writer said:

> "In practice this provision has assumed importance for those foreign missions in Australia which have been the target of protests and demonstrations, some involving physical violence. It is clear that the duty of the receiving State to protect the premises is something above the normal: there is "a special duty to take all appropriate steps". The Australian Government interprets this as meaning that its duty is to take appropriate steps, on the best information available, to anticipate any intrusion or damage, disturbance of the peace of the mission or impairment of its dignity. International practice is that the duty is not absolute - indeed it is difficult to envisage that it could be. The missions of some countries unaccustomed to the freedom to protest in a democratic society do not really accept this. At the same time some of the groups who are prominent in protests and demonstrations have brought with them to this country the deep enmities of their homeland, and the urge for violence is frequently not far below the surface. It is a difficult path for the police to tread in controlling a demonstration to find a balance between reasonable freedom to protest and the proper duty of the Australian Government under Art. 22 of the Convention."

29. There is no doubt that where external protesters or demonstrators threaten the security interests of a diplomatic mission, the receiving State is obliged to protect those interests by regulation or prohibition of the threatening activity. The dignity interest divorced from security considerations in relation to diplomatic mission premises is more contentious. It has been asserted that there is no diplomatic dignity interest in contemporary international law at all and that although once derived from the respect accorded by sovereign governments to each other it is no longer so today - Bederman - Recent Developments - (1987) 27 Virginia J. of Int'l L p 399 at 423. The express terms of Article 22 and 29 apart however, the International Law Commission recognised a dignity interest in its commentary on the draft convention which formed part of its report to the General Assembly of the United Nations. It described the object of the immunity from the civil and criminal jurisdiction of the receiving State thus:

> "... the objection of the immunity is that the

> diplomatic agent should be able to discharge his duties in full freedom and with the dignity befitting them." - Yearbook of the International Law Commission 1958 Vol.2 p 99 - Commentary on Article 30 of the Draft (now Article 32 of the Convention.)

The entitlement of the head of a diplomatic mission to "respect" and "due deference" is also discussed in Murty - The International Law of Diplomacy - New Haven Press, New Haven (1989) p 390. In Finnzer v. Barry [1986] USCADC 334; 798 F 2d 1450 (1989), the US Court of Appeals for the District of Columbia Circuit rejected a First Amendment challenge to a statute of the District of Columbia which on various conditions prohibited persons from carrying flags, banners or placards within 500 feet of any foreign embassy. Judge Bork, writing for the majority, asserted the dignity interest of diplomatic missions as "compelling" in the sense necessary to withstand First Amendment attack upon a law designed to protect it. At p 1458 he said:

> "We think it clear beyond quibble that since the founding of our nation adherence to the law of nations and most particularly that branch of the law that demands security for the persons and respect for the dignity and peace of foreign emissaries has been regarded as a fundamental and compelling national interest."

And at 1460:

> "The Vienna Convention...codified both the responsibility to provide security to foreign embassies and the responsibility to protect them from affront."

Chief Judge Wald dissenting, expressed serious doubt about the majority opinion that the framers of the Constitution understood that the protection of foreign embassies from insult was one of the central obligations of the law of nations. She distinguished security interests which had been held sufficiently important to justify certain content neutral restrictions on speech in the vicinity of embassies - CISPES (Committee in Solidarity with the People of El Salvador) v. Federal Bureau of Investigations 770 F 2 d 468 and Concerned Jewish Youth v. McGuire [1980] USCA2 270; 621 F 2d 471. She said at 1484:

> "While the law of nations does impose some obligation to protect the dignity of foreign embassies, that obligation is flexible and does not require protection from all insult especially at the expense of constitutional guarantees."

And at 1486 quoting from the decision of the US Supreme Court in Termincello v. Chicago [1949] USSC 77; 337 US 1, 4 (1949):

> "... a function of free speech under our system of government is to invite dispute. It may indeed best serve its higher purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

The judgment of the majority was reversed in part in the Supreme Court sub nom. Boos v. Barry [1988] USSC 44; 485 US 312 (1988). The Court, by majority, held that the prohibition on display of placards etc was a content based restriction on political speech in a public forum and was in

violation of the First Amendment. It did not however decide the question whether a "dignity interest" was recognised at international law.

30. Neither State practice nor the writings of jurists nor judicial decisions have exposed an exhaustive definition of the peace and dignity in respect of which a diplomatic mission is entitled to the protection of the receiving State. Protection against intrusion and damage fall well within the entitlement but they are, in any event, explicitly mentioned in para.2 of the Article. The concepts of disturbance of the peace and impairment of the dignity of the mission are wider. The commission of a nuisance which interferes with the quiet of a mission would no doubt constitute a disturbance of its peace. The prolonged broadcast by a public address system of loud speeches or music in the vicinity of the mission premises could fall into that category. Sustained chanting of slogans or the organised passing and repassing of people outside the premises in such a way as to compromise or deter access to them would also be capable of amounting to a disturbance of the peace of the mission. The rights to undisturbed peace and unimpaired dignity overlap. However, the dignity of the mission may be impaired by activity that would not amount to a disturbance of its peace. Offensive or insulting behaviour in the vicinity of and directed to the mission may fall into this category. The burning of the flag of the sending State or the mock execution of its leader in effigy if committed in the immediate vicinity of the mission could well be construed as attacks upon its dignity. So too might the depositing of some offensive substance and perhaps also the dumping of farm commodities outside mission premises in protest against subsidy policies of the sending State. Any such incident would have to be assessed in the light of the surrounding circumstances. But subject to protection against those classes of conduct, the sending State takes the receiving State as it finds it. If it finds it with a well established tradition of free expression, including public comment on matters of domestic and international politics, it cannot invoke either Article 22(2) or Article 29 against manifestations of that tradition. And beyond the particular circumstances of the domestic culture such activity is an expression of the human rights and fundamental freedoms of speech and assembly accepted in a number of international conventions and specifically asserted in Articles 19 and 20 of the Universal Declaration of Human Rights (adopted and proclaimed by General Assembly Resolution 217A(III) of 10 December 1948) and Articles 19 and 21 of the International Covenant on Civil and Political Rights which entered into force on 23 March 1976 and to which Australia is a party. It does not seem that a protest or demonstration conducted outside the premises of a diplomatic mission would by reason of its critical content and mere proximity to the mission amount to an impairment of its dignity. On similar reasoning it would not amount to an attack on the dignity of the relevant diplomatic agent. Whether proximity might give rise to the possibility of impairment of the dignity of the mission or an attack upon the dignity of the agent is another question. But it is difficult to see how the lawful placement of a reproachful and dignified symbol on public land in the vicinity of a mission would amount to a disturbance of its peace or an impairment of its dignity or an attack upon the dignity of its officers. Subject to those general considerations however, the notions of peace and dignity in this context involve evaluative judgments and are not amenable to clear rules of definition.

The Validity of the Regulations

31. Section 7 of the Diplomatic Privileges and Immunities Act 1967, in its application to Article 22 of the Convention, imposes upon the Crown as a matter of municipal law the obligations undertaken by Australia at international law as a receiving State under that Article. The obligations thus imposed upon the Crown in right of the Commonwealth and, where context permits, the Crown in right of the States and Territories, include the "special duty to take all appropriate steps ... to prevent any disturbance of the peace of the mission or impairment of its dignity". Similarly in respect of Article 29, the relevant duty is to take all appropriate steps to prevent any attack on the dignity of a diplomatic agent. The Parliament has therefore left to the Executive the task of determining what steps are "appropriate" in the discharge of its duty. Like "reasonable" which finds its way into various statutory discretions, "appropriate" is a relative term which taken by itself imports a requirement to consider the circumstances of any given case as a whole - R v. Archdall and Roskiuge; Ex parte Corrigan [1928] HCA 18; (1928) 41 CLR 128 at p 136; Opera House Investments Pty Ltd v. Devon Buildings Pty Ltd [1936] HCA 14; (1936) 55 CLR 110 at 116

(Latham C.J.) and 117 (Starke J.). As with the word "reasonable" the permitted range of steps left to Executive judgment by the word "appropriate" confers almost a legislative discretion - cf Giris Pty Ltd v. Federal Commissioner of Taxation [1969] HCA 5; (1969) 119 CLR 365 at 372 (Barwick C.J.), 380-381 (Menzies J.), 382 (Windeyer J.). Nevertheless in exercising that judgment and powers necessary to discharge its duty, the Executive is to be guided and controlled by the policy and purpose of the Act so far as that is manifest in it - Giris Pty Ltd v. Federal Commissioner of Taxation (supra) at p 384 (Windeyer J.); Deputy Federal Commissioner of Taxation v. Truhold Benefit Pty Ltd [1985] HCA 36; (1985) 158 CLR 678 at 687. There are limiting criteria. Relevantly for the present discussion, they require that any steps taken be for the purpose of preventing disturbance of the peace of the mission or impairment of its dignity or to prevent any attack on the dignity of a diplomatic agent. If not able to be related to one or other of those purposes or some other aspect of the duty imposed by para.2 of Article 22 or by Article 29, they could not be justified. The limits on the duty and its incident powers are as difficult to define as the concepts of peace of the mission and its dignity which draw their meanings directly from their usage in international law. There are however, some measures which could not be supported because their purpose would fall outside that of maintaining the peace and dignity of the mission or preventing an attack on the dignity of its head according to the fullest range of those terms. The Executive could not, in my opinion, take steps pursuant to its duty under s.7 merely to prevent offence to the sending State by criticism of it directed to its ambassador in the vicinity of its diplomatic mission. On the other hand, it is arguable that measures of a kind reasonably designed to prevent the possibility of a disturbance of the peace or impairment of the dignity of the mission could be justified. The restriction of demonstrations to a certain minimum distance from the mission premises could fall within that category.

32. Given that, as the appellant contends, a Minister discharging the duty imposed on the Crown by the Act would have a wide discretion as to the range of steps "appropriate" to that purpose, the question arises as to the kinds of regulations that may be made within the description "necessary or convenient to be prescribed for carrying out or giving effect to this Act" within the meaning of s.15.

33. The power conferred by s.15 is given according to a well established statutory formula which authorises regulations to be made strictly ancillary to the Act but not so as to extend its scope or general operation - Shanahan v. Scott [1957] HCA 4; (1956) 96 CLR 245 at 253-254. The criteria of necessity and convenience are not subjective. The regulations must in their substance be "capable of being regarded as ... necessary or convenient for giving effect to or carrying out the (Act)" - Esmonds Motors Pty Ltd v. The Commonwealth [1970] HCA 15; (1970) 120 CLR 463 at 467 (Barwick C.J.). Within those limits the breadth of the power depends upon the level of detail to which the Act itself descends:

> "The ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains. An important consideration is the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned.
> In an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the Governor-General to work out that policy by specific regulation, a power to make regulations may have a very wide ambit. Its ambit may be very different in an Act of Parliament which deals specifically and in detail with the subject to which the statute is addressed."
> Morton v. Union Steam Ship Co. of New Zealand Ltd [1951] HCA 42; (1951) 83 CLR 402 at 410.

The principle thus stated has been applied in many cases, each of which tend to turn on the nature of the statutory and regulatory schemes under consideration e.g Spence v. Teece (1982) 41 ALR 648 at 651-652 (Deane J.); Deputy Commissioner of Taxation v. Taylor (1983) 2 NSWLR 139 at 144-145 (Lee J.); Alice Springs Abattoirs v. Commonwealth of Australia (1985) 4 NSWLR 73 at 84-85 (Lee J.).

34. The Diplomatic Privileges and Immunities Act 1967, through s.7, imposes duties upon the Executive which are expressed in the words of the Convention itself. Those words and particularly Articles 22 and 29 are capable of application to the full range of constitutional statutory and administrative regimes of the States which are party to the Convention. It is a paradigm of an act which in the words of the High Court in Morton v. Union Steam Ship Co. of New Zealand Ltd "lays down only the main outlines of policy". Given the evaluative nature of the judgments necessarily involved in determining questions relating to the application of Articles 22 and 29 that is not surprising. How the relevant appropriate steps are to be taken, whether by Executive action or pursuant to regulation, is left open. What will be the appropriate steps for a particular case or class of cases is also left open. No step will be authorised however in relation to the peace or dignity of the mission or the dignity of a diplomatic agent which has as its purpose something beyond maintaining that peace or dignity such as the silencing of protest to avoid offence being taken by the sending State. A regulation purporting to empower such excessive reach would be beyond the authority conferred by s.15.

35. In the present case, the critical and operative fact which puts the procedures created by reg. 5A and 5B in train is the Minister's opinion that removal of an object from public land within 100 metres of a diplomatic mission would be an appropriate step within Article 22 or Article 29. The regulations do not purport to empower the Minister to do anything more than consider, in the particular class of case they cover, whether removal of the object is an appropriate step. They do not make his or her opinion conclusive of that fact. They provide a procedural mechanism which is properly regarded as ancillary to, or a vessel for the performance of, the duty imposed by the Act. If in a particular case the Minister's opinion is formed and steps are taken for a purpose other than that contemplated by the Act, then that particular exercise of power will be ultra vires the Act and the regulations.

36. The essentially semantic point was made by counsel for the respondents, that in failing to provide a definition of the expression "certificate" for the purposes of reg.5B the regulations are so uncertain as to be unintelligible and ultra vires. There is, in my respectful opinion, no merit in that submission. The regulations are plainly to be read together and the certificate referred to in reg.5B is clearly intended to be a certificate of the kind for which reg.5A provides.

37. In my opinion and for these reasons the regulations are valid and the appeal should be allowed. That does not, of course, conclude the question whether removal of the crosses was a valid exercise of the power conferred by the Act and by the regulations. That will depend upon the limits of the notions of dignity of the mission and the dignity of the relevant diplomatic agent.

38. I agree that the parties should have the opportunity to make submissions on the costs of the appeal.

INTRODUCTION

EINFELD J. On 12 November 1991 at the Santa Cruz Cemetery in Dili, East Timor, members of the Indonesian military forces fired without warning upon a large group of peaceful protesters, killing at least 60 Timorese people: International Commission of Jurists (Australian Section), Timor Tragedy (July 1992) pp 29-34; Amnesty International, East Timor: After the Massacre: (21 November 1991) p 5. Other reports suggested that more than 100 people died but it has now been estimated by a senior Indonesian general to have been at least 200: Sydney Morning Herald 4 November 1992, p 15. The Government of Indonesia established a commission of inquiry into the massacre: Timor Tragedy p 36. The commission found that killings of unarmed civilians occurred and that members of the military forces of Indonesia were the perpetrators. A number of Indonesian

military personnel were tried and convicted of complicity in the massacre: Timor Tragedy, pp 54-56. The scale of the massacre, the presence of Western witnesses and some publicly available contemporaneous film footage made this event particularly visible and repugnant to the international community.

2. A cousin of the first respondent to this appeal was one of the victims of the Dili massacre. On 18 November 1991 the first respondent and one of his countrymen placed 124 white crosses (presumably one for each person believed to be killed) about 50 centimetres high on the grass verge next to the footpath outside the Indonesian Embassy (the embassy) in Canberra. A demonstration was conducted and maintained outside the embassy by a number of persons belonging to one or more of three groups including a Sydney-based group representing the East Timorese community. The second respondent is a representative of this group. These groups also placed other objects on public land close to the embassy, including a demountable hut first described as the East Timorese Embassy but later called the East Timorese Information Centre, and a flagpole with various flags and banners. After negotiations with the first appellant (the Minister), the persons other than those belonging to the Sydney-based group agreed to relocate themselves and their insignia to a new position diagonally across the road some 50 metres from the outer perimeter of the embassy. The respondents refused to remove the crosses.

THE INITIAL PROCEEDINGS

3. After certain regulations were hurriedly made to permit the Minister to authorise the removal of the crosses, an injunction was granted ex parte by Justice Olney on 17 January 1992 restraining their removal. The respondents were for some reason required by the appellant to give the usual undertaking as to damages. On 20 January the respondents filed an application in this Court, relying on the Administrative Decisions (Judicial Review) Act 1977 (the ADJR Act) and section 39B of the Judiciary Act 1903. They sought, among other things, injunctive relief, a declaration that the regulations were invalid, and a declaration that the Minister's decision was invalid. They also gave notice of a motion returnable on 23 January seeking an extension of the interim injunction until the hearing and determination of the proceeding. The motion was part heard by Justice Ryan on 23 January, and the injunction was extended to the next day. On 24 January at the completion of the hearing, his Honour dissolved the interim injunction, and on 26 January, members of the Australian Federal Police under the command of their Commissioner (the second appellant) removed the crosses and placed them in the custody of the respondents' solicitor where they apparently remain to this day.

THE APPEAL

4. The relevant legislation is fully set out in Justice Gummow's judgment, a draft of which I have had the advantage of reading. Section 7 of the Diplomatic Privileges and Immunities Act 1967 (the Act) states that certain provisions of the Vienna Convention on Diplomatic Relations (the Convention) "have the force of law" in Australia. They include article 22(2) of the Convention, which states that:

> The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

5. Also included is article 29, which is concerned with the head of a mission or a member of the diplomatic staff of a mission:

> ... The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

A mission is a diplomatic mission: s. 4(1) of the Act.

6. Section 15 of the Act states:

> The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

7. On 15 January 1992, the Governor-General made the Diplomatic Privileges and Immunities (Amendment) Regulations, SR No 7 of 1992 (the regulations) which contained regulations 5A and 5B. Regulation 5A(1) empowered the Minister to certify that, in his or her opinion, removal of an object from the premises of a mission, or from land within 100 metres of the premises of a mission, or from land belonging to the Commonwealth or a State or Territory to which the public has access, would be an appropriate step within the meaning of article 22 or 29 of the Convention. Regulation 5A(6) provided that the Minister must table the certificate before each House of Parliament within 15 sitting days of that House after the day when the certificate is issued. Regulation 5B provided, amongst other things, that a prescribed officer, including a member of the Australian Federal Police, may remove the object covered by a certificate, subject to a regime provided in the regulation.

8. The regulations came into force on 16 January and the Minister signed a certificate on that day authorising the removal of crosses within 50 metres of the boundary of the embassy because these objects "could lead to the impairment of the dignity, or the disturbance of the peace, of the mission or of the head, or other diplomatic agent of, the mission". Presumably the certificate was in due course tabled in both Houses of the Parliament.

9. The respondents first challenged the validity of the regulations. On the order of Justice Ryan this question, apparently at the wish of the parties, was tried as a separate issue by Justice Olney, who decided that they were invalid: (1992) 35 FCR 235. That decision is the subject of this appeal. It is difficult to see how the crosses could have disturbed anyone's peace. The case really concerns their possible impairment of the embassy's "dignity". The regulations have been subsequently amended but the amendments have no effect on the determination of this appeal.

WHETHER THE MINISTER'S DECISION IS OF AN ADMINISTRATIVE CHARACTER

10. Although not specifically argued, the first question involved is the Court's power to review the Minister's decision depending on whether it has an administrative character within the meaning of section 3 of the ADJR Act. I agree with Justice Gummow that it is not necessary to decide this question finally because the matter is in any case justiciable under section 75(v) of the Constitution or in this Court under section 39B of the Judiciary Act and section 21 of the Federal Court Act. Nevertheless, the applicability of the ADJR Act is of some significance. I respectfully agree with Justice Lockhart when he said in Hamblin v Duffy [1981] FCA 38; (1981) 50 FLR 308 at 314 that the ADJR Act is intended to "remove technicalities and complexities surrounding the law relating to judicial review and to improve procedures for judicial review of administrative decisions". The policy of the Act is towards a broad rather than a narrow interpretation of decisions of an "administrative character": Evans v Friemann [1981] FCA 85; (1981) 53 FLR 229 at 237 per Fox J.

11. The problem here is whether the Minister's decision has more of a legislative than an administrative character. The basic distinction is that the one involves the creation of rules having general application while the other involves the application of those general rules to particular cases: Hamblin at 314. However, as Justice Gummow deftly researched in Queensland Medical Laboratory v Blewett [1988] FCA 423; (1988) 84 ALR 615, there have been instances of legislation directed at particular cases. There are also examples of administrative action which determine the content of a general rule, such as a policy formed to structure a broad discretion. Delegated legislation, unlike policy, is normally required to be tabled in the Parliament, but it is not uncommon for administrative rules to be also subject to this procedure.

12. Justice Gummow appears to be inclined to the view that the present decision is not of an administrative character because the certificate changes the law. This approach apparently relies on the very real possibility, even likelihood, that the certificate might actually authorise conduct by police which would, apart from the Act, be in breach of or not be justified by other laws, such as the laws against assault, trespass, noise pollution, unlawful assembly, and others. Some of these intrusions would occur, for example, where the prescribed land was private property. Most administrative decisions do not have this type of impact and I am not sure that this is the true effect of the certificate in this case where the original site of the crosses, as well as the altered site of the rest of the protest, seem to be public land. Moreover, the certificate may not have authorised the removal of the crosses from the site altogether but merely to a place 100 metres from the embassy.

13. In my view, the decision here is of an administrative character. The regulations themselves are general in nature. They lay down procedures to govern what would otherwise lie in the broad discretion of the police, and narrow the discretion by laying down a regime for the removal of objects and their preservation. The Minister's decision is limited to particular cases. As such it seems to me to be administrative, being a particular application of the general rules provided in the regulations.

THE PRIMARY JUDGE'S CONSTRUCTION OF THE REGULATIONS

14. Justice Olney held that regulation 5A was invalid because it authorised the Minister to be the arbiter of what is an appropriate step for protecting the mission. The phrase "in his or her opinion" was construed by his Honour as authorising the Minister to issue a certificate on the basis of his subjective opinion regardless of whether the removal of the objects in question was in fact an appropriate step to be taken. The Act only authorised the executive to take appropriate steps to protect a mission. As such, regulation 5A was inconsistent with the Act.

15. Justice Gummow's view is that regulation 5A must be construed as only authorising the formation of an opinion consistent with the Act. This principle lies behind section 46(1)(b) of the Acts Interpretation Act 1901 which states that where an Act confers upon any authority power to make regulations, those regulations are to be read so as not to exceed the power of that authority. Wide discretions are often vested in Ministers and other officials of the executive government but courts exercise supervision to ensure that the discretion is exercised consistent with the purposes of the Act: Minister for Aboriginal Affairs v Peko-Wallsend Limited [1986] HCA 40; (1986) 162 CLR 24 at 39. As Professor H.W.R. Wade noted in his authoritative work on the subject:

> ...courts have an ingrained repugnance to legislative devices for making public authorities judges of the extent of their own powers, or for exempting them from judicial control...the minister must act reasonably and in good faith, and upon proper grounds. The courts should always be able to afford protection against an abuse of power such as the Act cannot have been supposed to authorise.

(Administrative Law, 6th Edition p 446)

16. I therefore respectfully agree with Justice Gummow that there is no reason to permit this particular regulation to have any other meaning or application but I am not entirely sure that this disposes of the problem posed by Justice Olney. His Honour's approach raises the issue whether, even within those limitations, a regulation which calls for the formation of a conclusion, whether subjective or not, on what the facts are, regardless of the true position or based upon a misapprehension of the relevant subject matter, can be lawful.

Necessary or convenient

17. In Carbines v Powell [1925] HCA 16; (1925) 36 CLR 88, the High Court pronounced on a regulation made under the Wireless Telegraphy Act 1905 prohibiting the manufacture of broadcast

receivers. The Act did not expressly provide for such manufacture although it permitted the establishment and operation of wireless telegraph stations. The argument for the validity of the regulation was that it was "necessary or convenient" for carrying out or giving effect to the Act. Isaacs J, who wrote the principal judgment, conceded the reasonableness and desirability of the regulation but said that the question was not whether the power should exist but whether it did exist. He said at 92, repeating what he had said in an earlier case:

> It is not open to the grantee of the power actually bestowed to add to its efficacy, as it is called, by some further means outside the limits of the power conferred, for the purpose of more effectively coping with the evils intended to be met...The authority must be taken as it is created, taken to the full, but not exceeded. In other words, in the absence of express statement to the contrary, you may complement, but you may not supplement, a granted power.

18. In Shanahan v Scott [1957] HCA 4; (1957) 96 CLR 245, the majority judgment of the High Court cited Carbines v Powell with approval and, after reviewing other authorities, said at 250 that a power to make regulations necessary or convenient for giving effect to an Act

> ...does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add a new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.

19. The majority said at 254 of the particular regulation being considered that it was

> ...much more than an elaboration, a filling in or a fulfilment of the plan or purpose which the main provisions of the Act have laid down or, if the expressions be preferred, have "outlined" or "sketched". It means that an attempt has been made to add to the general plan or conception of the legislation and to extend it into a further field of regulation...

20. The question for determination in this case is thus whether the regulations are authorised by the Act in that the procedure they prescribed was an appropriate means of implementing articles 22 and 29 of the Convention. The High Court has held that the test of validity in such circumstances is "whether the regulation is capable of being considered to be reasonably proportionate to the pursuit of the enabling purpose": South Australia v Tanner [1989] HCA 3; (1989) 166 CLR 161 at 165. At 168, the High Court stated that it "is not enough that the court itself thinks the regulation inexpedient or misguided".

21. In my experience it is often unhelpful and not often useful to divide matters such as this into issues for separate trial. Because of the parties' choice to do so in this case, the question whether regulation 5A authorised this particular certificate is not for present decision. Nevertheless, the respondents argued that the meaning of "certificate" was so vague as to make the regulations unintelligible. Again I respectfully agree with Justice Gummow's reasons for rejecting that submission, but there seem to me to be problems with the certificate in this case which throw light

on the validity of the regulations in that its terms highlight the issues involved in whether they are a valid exercise of the regulation-making power.

22. First, the certificate, following the form provided in the schedule of SR7, attempts to concertina the different wording of the two articles. The only "appropriate steps" required to be taken under article 22(2) in this instance are steps to prevent impairment of dignity of "the mission". This is different or additional to "the premises of the mission" and apparently includes the "members" and perhaps "the business or activities" of the mission. On the other hand, the "appropriate steps" under article 29 are to prevent an "attack" on the person, freedom or dignity of the head of mission. There may well be a difference between such an attack and the relevant impairment. The difference is demonstrated by the difficulty of conceiving circumstances when passive objects of the kind employed in this protest, assuming that they could disturb peace or impair dignity, could constitute an "attack" on person, freedom or dignity. Yet the certificate seeks to achieve the envisaged protection for both entities by one set of words which does not accord with the two articles.

23. Another problem with the certificate is its opinion that the crosses could lead to the adverse consequences stated. Very many things, actions and objects might fit within that framework. Parked motor vehicles belonging to the next door neighbours of the embassy, or to persons visiting the area to deliver milk or bread or to perform other domestic or public services, are examples. The tools of a visiting tradesman or a telephone linesman could do so as well. There are many other possibilities. As I read them, the Convention and the Act do not require that appropriate steps be taken to intercept all things that could possibly have the consequences in question; they obligate the host country to provide protection from any actual or true adversities of the defined or prescribed kind.

24. On the face of regulation 5A, it seems to me that before the Minister certifies at all, there must be available a genuine or reasonable ground for concluding that removal of the object in view is an appropriate step to prevent and protect the mission from the stated adverse consequences, because the object has already brought about these consequences, or if not removed, it will or is likely to do so. To the extent that the regulations posit action to be taken on the basis of a conclusion that removal of objects could be necessary to avoid the consequences to which the Convention refers, a question arises as to their capacity to meet the Convention's injunction that appropriate steps are to be taken to protect missions and their heads from the delineated happenings. Whether permitting the formation and certification of a conclusion that a particular action is such a step is a necessary or convenient means of providing that protection, if it does not also require an objective view to be formed that the relevant harm has resulted or will probably result if the action is not taken, seems to me to be the centrepiece of Justice Olney's decision.

CONSTRUING THE ACT

25. The first means of investigating the validity of the regulations is to ascertain whether they are authorised by the Act in that they relate in some way to the obligation to protect embassies, in this case the Indonesian Embassy, from impairment of dignity.

Interpretation of treaties

26. As Justice Gummow mentions, international obligations incorporated directly into domestic law are to be interpreted according to principles of international law, not domestic law. The Vienna Convention on the Law of Treaties (the Treaties Convention) provides two aids in this connection:

> 1. A treaty is to be interpreted in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose: art 31(1).
> 2. Subsequent practice in the application of the treaty provides assistance in its interpretation: art 31(3)(b).

27. Because of its vagueness and width, the phrase "impairment of dignity" in article 22 is particularly troublesome. An "attack on dignity" under article 29, whilst having additional

connotations, is no less difficult to construe. It is therefore necessary to give attention to the two principles of the Treaties Convention.

Purposes

28. "Dignity" is defined in modern dictionaries as "worth", "worthiness", "excellence", "honourable or high estate, position or estimation". These "ordinary" meanings do not add much to the task of interpretation here. The dual use of the word in these articles must therefore be examined in the context of the Convention and its purposes. Article 3 of the Convention states:

> (1) The functions of a diplomatic mission consist inter alia in:
> (a) representing the sending State in the receiving State;
> (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
> (c) negotiating with the Government of the receiving State;
> (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
> (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.
> (2) Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

29. In this context the two articles appear to be seeking to ensure the capacity of a diplomatic mission and its personnel to carry out their duties and functions in peace and with minimal impediments. The purpose of the articles is to permit diplomatic representatives to operate with maximum efficiency, quality and freedom of action. It seems that the extent of any interference with the functions of a diplomatic mission must be highly relevant in considering the obligation to protect impairment of dignity.

State practice

30. International application of the Convention by democratic countries indicates that another significant consideration is freedom of speech in the host country. This factor is particularly weighty when dealing with political demonstrations outside embassies. It is useful to consider the practice of countries with considerable experience in dealing with this type of situation, such as the United States and the United Kingdom.

31. The legislation Congress enacted to implement the United States' obligations under the Convention prohibits wilful acts or attempts to "intimidate, coerce, threaten, or harass a foreign official": 18 USC 112(b)(2). On the other hand, the Code of the District of Columbia where foreign embassies in the United States are generally situated was in broader terms. 22-1115 of the Code made it unlawful to display any sign designed or adapted to intimidate, coerce or bring into public odium or into public disrepute any foreign government, within 500 feet of any embassy or consulate. This provision was struck down in Boos v Barry [1988] USSC 44; 485 US 312 (1988). Justice Sandra Day O'Connor, delivering the opinion of the Supreme Court on this point, relied upon the Congressional judgment expressed in its legislation as to what was necessary to comply with the Convention in reaching the conclusion that the District of Columbia Code was too broad or

insufficiently narrow to withstand First Amendment scrutiny. Freedom of speech, including freedom of assembly for public protest, is paramount.

32. The United States therefore appears to allow peaceful demonstrations so long as they do not obstruct, impede or interfere with the conduct of business at the diplomatic establishment. Thus, to block the entry or exit of a mission would be unlawful. See Lee, L., Consular Law and Practice (2nd ed., 1991) pp 406-13.

33. Prior to its accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), the United Kingdom lacked explicit constitutional support for freedom of speech. However, in R v Rogues (1984), a Magistrates' Court held that the impairment of the dignity of a mission required abusive or insulting behaviour and that political demonstrations did not in themselves amount to such behaviour: see Lewis, C., State and Diplomatic Immunity (3rd ed., 1990) p 147. The United Kingdom Government, in the light of a Report by the Foreign Affairs Committee of the House of Commons, stated in its 1985 Review of the Convention (see Lee at 413):

> The Government fully share (sic) the Committee's view .... that the UK's duty to protect the peace of diplomatic missions cannot be interpreted so widely that no demonstrations are allowed outside them. The Government also agree (sic) with the Committee that the essential requirements are that the work of the mission should not be disrupted, that mission staff are not put in fear, and that there is free access for both staff and visitors. How each demonstration is policed in order to ensure that these requirements are met without undue infringement of freedom of speech is primarily a matter for the police. There are some 350 demonstrations a year outside embassies in London. In most cases the police keep demonstrators on the opposite side of the road from a mission so the question of Article 22 being breached seldom arises. But the practice varies in special circumstances (such as the holding of a function at the embassy). The Police are the best judges in each case of the controls required: how to preserve the peace and dignity of a mission is essentially a matter of sensible policing practice rather than a question of law. Only rarely will consultation with the Home Office and the FCO be required, e.g. at time of increased tension.....

34. Thus both of these major countries have taken a restrictive view of "impairment of dignity", linking it to breaches of the peace, and the disruption of the mission's essential functions. In both countries only actual interferences are proscribed. Both nations have interpreted the Convention obligations in a way which takes into account and gives considerable weight to freedom of expression. The United States, in particular, has narrowly interpreted its obligation with respect to preventing the impairment of dignity. There is no specific reference to this phrase in its legislation, and it seems that action to protect dignity is only required where the conduct in question constitutes coercion, threats and harassment of the diplomats. Although this construction may be narrower than the First Amendment requires, the United States has chosen to impose an interpretation of the Convention obligations through the tight wording of its legislation, leaving it to the police to take appropriate steps of enforcement. The United Kingdom has not even constrained police discretion by legislation but by a broad statement of government policy.

35. The importance of this state practice is that it suggests that a narrow interpretation is consistent with compliance with the Convention obligations. If the practices of the United States and the

United Kingdom are insufficient to make a conclusive finding as to what ought to be the Australian interpretation of the Convention, they certainly provide influential examples of how two important democratic countries with experience in the field have interpreted it. Considering the very different constitutional frameworks of these two exemplifying nations, I can think of no reason why, and have found no authority suggesting that, Australia should apply the Convention differently.

An Australian approach

36. Even apart from the assistance given to interpretation by the Treaties Convention, there is in fact good reason to adopt the US/UK approach to the Convention. It is not uncommon in democratic countries that the actions or inactions of other countries are publicly criticised. Sometimes this criticism is verbal, as at public functions or places; sometimes it is written or pictorial such as in publications or mass media or on placards. Foreign countries are criticised in parliaments and newspapers, at universities and sporting events, and elsewhere. If "impairment of dignity" is given a loose or broad interpretation, it is virtually inevitable that there will enter into its definition a subjective element such as "giving offence" or "causing hurt or aggravation". In this event, the Convention could become the basis of a much more comprehensive impediment to freedom of speech than the mere restriction of protests within the vicinity or precincts of embassies. Without the clearest parliamentary expression, this could not be regarded as an acceptable starting point in Australia. Even express legislation would have to withstand the test of constitutionality.

37. In this respect, it is important to emphasise the need to apply the words of articles 22 and 29 of the Convention objectively. The test is not what the foreign country or its mission considers impairs its dignity; it is not the subjective reaction of its government or diplomats to the protest or the objects, or any offence which is taken, that is caught by the Convention. Otherwise the precinct of the embassy would not be the geographical or conceptual limits of action to protect the dignity of diplomatic missions and personnel. Nor can any personal desire of a Minister or government to please or placate the country concerned be decisive. The Act has no function in the context of executive concern about the fate of any Australian initiatives being undertaken with that country at the time, or of our general relations or state of good or bad will. As demonstrated by the title and contents of each, neither the Convention nor the Act was intended to be a weapon in the task of building or maintaining international political harmony or economic co-operation, commendable and important as those tasks are.

CONSTRUING THE REGULATIONS

The domestic application of international human rights norms

38. There is an alternative way of approaching the question at issue here. The right to freedom of expression has been recognised in article 19(2) of the International Covenant on Civil and Political Rights (the ICCPR), which has now been ratified by at least 132 nations. The European Convention, binding on the 27 nations of the Council of Europe, legislates a similar right in article 10, with article 11 dealing with the right to freedom of peaceful assembly and freedom of association with others. There does not appear to have been any consideration by the European Court of Human Rights of these freedoms in the context of diplomatic missions, but all member states, with the exception of Poland which is expected to follow suit shortly, have ratified the Convention and accepted the right of individual petition to the Commission, as well as the compulsory jurisdiction of the Court: Marc-Andre Eissen, Registrar, Cours Europeenne des Droits de l'Homme, Strasbourg 13 November 1992. The American Covention on Human Rights, the parties to which are 21 nations of North and South America, recognises the same rights in articles 13 and 15. The African Charter of Human and Peoples' Rights which has 38 state parties does so in articles 9 and 11, as does the Canadian Charter of Rights and Freedoms which became part of the Constitution by the Canada Act 1982 (UK) and covers all the Canadian provinces, in subsections (b) and (c) of section 2. The Bills of Rights in the constitutions of many African and Asian countries, as well as of the United States of America, also provide for such rights. There is probably no human right, other than the right to life itself, which is more widely acknowledged in international law and constitutional practice than freedom of speech or expression.

39. It therefore seems reasonable to interpret the Convention obligations in a way sensitive to this right. Although the present regulations involve different means of implementing the treaty obligations than those adopted by the United States and the United Kingdom, the question of whether they represent an authorised means of implementing the Convention obligation to prevent the impairment of the dignity of the diplomatic missions in Australia in general, and the Indonesian Embassy in particular, must thus be approached in the context of, and as a balance between, two separate emanations of Australian parliamentary intent: the purposes and functions of the regulations in the context of their enabling Act and purpose, and the internationally recognised fundamental human right of freedom of speech as applicable in Australia.

40. Courts have recognised that legislation should be strictly construed to prevent breaches of fundamental human rights: Citibank Ltd v Commissioner of Taxation (1988) 83 ALR 144 at 152 per Justice Lockhart. On appeal to a Full Court of this Court, reported at (1989) 20 FCR 403, Justice French said at 433:

> The nature of this society and its tradition of respect for individual freedoms, will support an approach to construction which requires close scrutiny and a strict reading of statutes which would otherwise remove or encroach upon those freedoms.

41. His Honour held that this view of Australian society was reinforced by Australia's adherence to the ICCPR which Australia ratified in 1980. I respectfully agree. Also, as a matter of constitutional law, the legislation must be "reasonably capable of being viewed as appropriate and adapted to the terms of the treaty": Richardson v Forestry Commission [1988] HCA 10; (1988) 164 CLR 261 at 347-8 per Justice Gaudron.

42. Human rights are usually expressed as absolutes. They are certainly intended to provide the indefeasible entitlements of every human being. However, their implementation in practice often requires the balancing of one person's rights against another's, and with balancing rights and obligations. The particular right in issue here is a freedom to protest the indiscriminate killings of unarmed civilians including a relative of a protester in the vicinity of the embassy of the country whose military officers were responsible. The rights and obligations with which that right must be balanced are those provided for in or required by articles 22 and 29 of the Convention only, not anything going beyond those articles. The regulations serve, and may only serve, the purpose of implementing those rights and obligations.

Parliamentary intention

43. It is therefore necessary to examine the extent to which a parliamentary intention can be found that fundamental and recognised human rights should apply in Australia, and be curtailed to the minimum extent possible.

44. Australia ratified the ICCPR on 13 August 1980 and Parliament made it a schedule to the Human Rights Commission Act 1981, which was assented to on 14 April 1981 and commenced to operate on 10 December 1981. That Act had as its preamble:

> WHEREAS it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with the provisions of the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons and other international instruments relating to human rights and freedoms.

45. By section 9(1) of its Act, that Commission had among its functions the duties:

> (f) to promote an understanding and acceptance...of human rights in Australia...
> (g) to undertake...educational programs and other programs...for the purpose of promoting human rights...

"Human rights" were defined by section 3(1) as inter alia the rights and freedoms recognised in the ICCPR. By subsection (2) of section 3, it was provided that these rights and freedoms shall be construed as a reference to those recognised in the ICCPR as it applies in Australia. Similar provisions were made in respect of other international instruments applicable to or declarations adopted by Australia.

46. That Act was replaced at the conclusion of its five year "sunset" period on 9 December 1986 by the Human Rights and Equal Opportunity Commission Act 1986 (the Human Rights Act) which commenced on the following day, Human Rights Day. The provisions of section 9(1)(f) and (g) of the earlier Act were reincorporated as functions of the new Commission in section 11(1)(g) and (h) of the Human Rights Act, as was the basic and extended definitions of "human rights". The ICCPR is also a schedule to the Human Rights Act.

47. An intention that courts should be sensitive to the need to interpret the law with regard to the rights in the ICCPR and other international instruments as applicable in Australia is also discernible from section 11(1)(o) of the Human Rights Act:

> where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve human rights issues.

48. Section 12 of the Human Rights Act states that:

> In the performance of its functions, the Commission shall have regard to the principle that every person shall be free and equal in dignity and rights.

"Rights" are not separately defined but apparently include the rights set out in the ICCPR as it applies in Australia. Here "dignity" appears to bear a meaning such as "worth". "The principle" declared in section 12 is not qualified by any other statutory provision or, as far as I am aware, by any edict of the common law. As I read them, therefore, these provisions represent an affirmation by Parliament that at least some of the human rights expressed in the ICCPR and other operative international compacts should have significant application in Australia.

49. The High Court has held very recently that the very ratification of the ICCPR has not, in itself, without specific local legislation resulted in the rights it embodies becoming enforceable as Australian domestic law: Dietrich v The Queen unreported 13 November 1992 per Mason C.J. and McHugh J at p 8-9 of the printed judgment; Brennan J at p 25; Dawson J at p 55; Toohey J at p 67. Justice Deane, while apparently of the same view, expressed no opinion, and Justice Gaudron wrote at page 82 of Australia, as a party to the ICCPR, having "assumed obligations" under its terms. Dietrich concerned the right of a person on a serious criminal charge to counsel. The argument does not appear to have been presented to the Court that the Human Rights Act may be Australian legislation applying at least part of the ICCPR. Indeed it seems to have been conceded by the appellant that there was no such legislation.

50. As a matter of historical practice in Australia, accession to or ratification of international treaties

has been an act of the executive government only. As such the courts have been unwilling to treat them as having anything other than a type of moral or atmospheric effect on domestic law: Bradley v Commonwealth [1973] HCA 34; (1973) 128 CLR 557 at 582. See also Koowarta v Bjelke-Petersen [1982] HCA 27; (1982) 153 CLR 168 at 193, 212, 224. In Dietrich, the High Court somewhat expanded this approach. At pages 9-10, Chief Justice Mason and Justice McHugh said:

> In Jago v Judges of the District Court of N.S.W. (1988) 12 NSWLR 588 at p 569, Kirby P. expressed the view that, where the inherited common law is uncertain, Australian judges may look to an international treaty which Australia has ratified as an aid to the explication and development of the common law. As a suggested example of this approach, the applicant points to the status accorded to the ECHR in English law. In common with the status of the ICCPR in Australian law, the ECHR is not part of English domestic law and thus rights contained in the ECHR cannot be enforced directly in English courts; furthermore, if domestic legislation conflicted with the ECHR, English courts would nevertheless be required to enforce the legislation. However, it is "well settled": Reg v Home Secretary; Ex parte Brind [1991] UKHL 4; (1991) 1 AC 696, per Lord Bridge of Harwich at pp 747-748, that, in construing domestic legislation which is ambiguous, English courts will presume that Parliament intended to legislate in accordance with its international obligations. English courts may also have resort to international obligations in order to help resolve uncertainty or ambiguity in judge-made law: Derbyshire County Council v Times Newspapers Ltd (1992) 3 WLR 28, per Balcombe L.J. at p 44.
> Assuming, without deciding, that Australian courts should adopt a similar, common-sense approach, this nevertheless does not assist the applicant in this case where we are being asked not to resolve uncertainty or ambiguity in domestic law but to declare that a right which has hitherto never been recognized should now be taken to exist. Moreover, this branch of the applicant's argument assumes that Art.14(3)(d) of the ICCPR supports the absolute right for which he contends. An analysis of the views of the Human Rights Committee on communications submitted to it relating to Art.14(3)(d) reveals little more than that the Committee considers that legal assistance must always be made available in capital cases: Pinto v Trinidad and Tobago CCPR/C/39/D/232/1987. However, the European Court of Human Rights has approached that almost identical provision in the ECHR by emphasizing the importance of the particular facts of the case to any interpretation of the phrase "when the interests of justice so require": Monnell and Morris v United Kingdom [1987] ECHR 2; (1987) 10 EHRR 205, at p 225; Granger v United Kingdom [1990] ECHR 6; (1990) 12 EHRR 469, at pp 480-482. As will become clear, that approach is similar to the approach which, in our opinion, the Australian common law must now take.

(The ECHR is what is referred to in this judgment as the European Convention.)

51. Justice Brennan wrote at page 25 of the concept that the ICCPR is a legitimate influence on the development of the common law. Notwithstanding the view of President Kirby in Jago, and the reference by Chief Justice Mason and Justice McHugh to the "commonsense approach" taken in England, Justice Dawson at page 55 doubted whether, although authoritatively permitted to resolve conflict in the meaning of legislation, the use of treaties was permissible to resolve uncertainty in the common law. His Honour held that they could not be used to effect a fundamental change in the common law. Justice Toohey held at page 67 that a treaty may be used as a guide to resolving "unclear" common law, and acknowledged the recent English authority, referred to by Chief Justice Mason and Justice McHugh, that it may also be considered "where there is a lacuna in domestic law": Derbyshire County Council v Times Newspapers Ltd [1992] UKHL 6; (1992) 3 WLR 28 at 44, 61.

52. However, there has also been a periodic practice in Australia of the national executive government submitting international instruments to Parliament for ratification. Examples of federal ratifying legislation include the Genocide Convention Act 1949, the Geneva Conventions Act 1957 approving the ratification of the four Geneva Conventions on the treatment of people affected by war and armed conflict, and the Geneva Conventions Amendment Act 1991 approving two additional protocols to those Conventions. This approach is authorised by the Constitution: s.51(xxix). The Racial Discrimination Act 1975, the World Heritage Properties Conservation Act 1983, the Sex Discrimination Act 1984, and the Crimes (Torture) Act 1988 all gave complete or substantial effect to treaties ratified by Australia but did so by incorporating most of the actual terms of the treaties into purpose-built legislation, rather than merely approving or legislating wholesale ratification.

53. Since at least 1983, the practice has also been pursued of consulting the governments of the Australian states and territories during the treaty negotiation process, and seeking their prior agreement to ratification. An intergovernmental Standing Committee has been established for the consultative process. Part of the reason for the adoption of this practice seems to have been to avoid the need for a "federal clause" being included in treaties so as to permit federations like Australia to escape or avoid their obligations by an assertion of states' rights: see Principles and Procedures for Commonwealth-State Consultation on Treaties, Department of Foreign Affairs and Trade, 1 January 1992.

54. This consultative procedure has other consequences. Together with federal legislation of the ratification or Human Rights Act type, it provides a basis for affirming the existence of a wide consensual acceptance in Australian society that the provisions of the treaties concerned are intended to have application in Australia, and that the rights and obligations contained in them are intended to attach to Australians and other persons in the country to whom they are relevant. Without accepting the existence of this consensus and what is now a very considerable body of legislation as providing an underpinning for enforceability of fundamental human rights in Australia, Australians must be taken to have no constitutional or legislative guarantee of most of the rights in the ICCPR, other than those which the High Court is from time to time in individual case situations willing to imply. Such uncertainty about the ability of citizens to have their fundamental rights implemented in law, as opposed to loudly trumpeted and supposedly understood and accepted, may be unique for any people in the world. In my opinion, it is not or is unlikely to be the parliamentary intention.

55. Whilst authoritatively determining that treaties ratified only by the executive government do not per se become part of domestic law, Dietrich seems to make clear that the statutory approval or scheduling of treaties is not to be ignored as merely platitudinous or ineffectual, but must be given a meaning in terms of the parliamentary will. Thus when the Australian Parliament endorses and acknowledges a treaty by legislation, there being no contrary statutory or clearly applicable common law provision in relation to the matters contained in the treaty, it approves or validates the treaty as part of the law which ought as far as possible to be applicable to and enforceable on or by Australians and others in the country to whom it is available. Similarly, by affirming or declaring the

existence of "the principle" that all persons under its reach possess freedom and rights, including rights under the ICCPR: s. 12 Human Rights Act, Parliament should surely be taken as intending that such rights are bound to be given the force of law wherever possible, including by declaratory relief in appropriate fact situations. The freedoms of speech and assembly, in the form of lawful and peaceful protest, are included. This is not applying international law domestically by reason of a treaty itself or even by reason of Australia's ratification of it. It is applying the law and intent of Parliament.

56. An important recent development has been Australia's accession to the First Optional Protocol to the ICCPR (the Protocol), which came into effect in Australia on 25 December 1991 (ATS 1991 No. 39). This allows individuals who claim that any of the rights enumerated in the ICCPR have been violated by Australia to submit their complaint to the Human Rights Committee (the HR Committee) established under Part IV of the ICCPR. Once the HR Committee reaches a view on the matter, this is forwarded to the state concerned and to the complainant. The matter is reported in the HR Committee's annual report which is publicly available.

57. When the Government announced that Australia, having for the twenty five years since its commencement denied citizens including Aborigines the right to have complaints determined by an external independent body, had at last acceded to the Protocol, the appellant Minister and the Attorney General said:

> Australia's accession to the First Optional Protocol underlines the importance accorded by the Government to the protection of human rights and our conviction that the human rights performance of Australian governments at all levels should be fully open to international scrutiny.

(Australian Government News Release, 25 September 1991)

58. The Protocol does not place Australia in the same position as the United Kingdom and other member states of the Council of Europe in respect of decisions of the European Court of Human Rights under the European Convention. Whereas a determination by the European Court imposes an obligation upon each state party recognising the Court's jurisdiction to conform with that ruling, the HR Committee's report is not binding on an acceding state party. However, the HR Committee reviews and publicises action taken or not taken by the state following release of the Committee's conclusions: see Charlesworth, H., "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" 18(2) MULR 428-434 (1991).

59. Nevertheless, accession to the Protocol appears to have made it likely that the ICCPR will henceforth be treated as affecting and significantly influencing Australian domestic law. In Mabo v Queensland [1992] HCA 23; (1992) 107 ALR 1 Justice Brennan (Mason C.J. and McHugh J concurring) said at 29:

> The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol ..... brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.

Cf Dietrich at pp 8-9 per Mason C.J. and McHugh J.

The constitutional position

60. The specific position of the right to freedom of speech has been significantly entrenched by the High Court in Australian Capital Television Pty Limited v Commonwealth (No. 2) [1992] HCA 45; (1992) 108 ALR 577 and Nationwide News Pty Ltd v Wills [1992] HCA 46; (1992) 108 ALR 681. These decisions, like Dietrich, were delivered after the hearing of this appeal, and my comments and reliance upon them, unaided by argument from the present parties, are therefore limited: see s.78B of the Judiciary Act 1903. In the former case, the High Court considered the validity of legislation regulating political advertising on television and radio. The latter case involved a law prohibiting oral or written communications calculated to bring the Australian Industrial Relations Commission into disrepute. Both laws were struck down as unconstitutional.

61. In the sense that it involved a more extended constitutional implication, the more significant of the two for present purposes is Australian Capital Television. In that case Chief Justice Mason found an implied guarantee of freedom of communication on matters relevant to public affairs and political discussion. His Honour drew a distinction between restrictions on communication which target ideas or information and those which restrict an activity or mode of communication by which ideas or information are transmitted. The Chief Justice said at 597-8:

> In the first class of case, only a compelling justification will warrant the imposition of a burden on free communication by way of restriction and the restriction must be no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked to justify the burden on communication. Generally speaking, it will be extremely difficult to justify restrictions imposed on free communication which operate by reference to the character of the ideas or information. But, even in these cases, it will be necessary to weigh the competing public interests, though ordinarily paramount weight would be given to the public interest in freedom of communication: Cox Broadcasting Corp v Cohn [1975] USSC 44; (1975) 420 US 469, at p 491 et seq...
> On the other hand, restrictions imposed on an activity or mode of communication are more susceptible of justification.

62. Justice Brennan held at 603 that the Constitution precluded the making of a law "trenching upon that freedom of discussion of political and economic matters which is essential to sustain the system of representative government prescribed by the Constitution". Justices Deane and Toohey found an implied guarantee of freedom of communication about political matters. Justice Gaudron at 652 noted the possibility of other rights being additionally found:

> The notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association and, perhaps, freedom of speech generally..... But, so far as free elections are an indispensable feature of a society of that kind, it necessarily entails, at the very least, freedom of political discourse.

63. Justice McHugh saw no need to consider whether there was implied a general freedom of communication with respect to the business of government. It was only necessary to find a right of people to participate in the federal election process. Perhaps Australia's law of compulsory voting may be relevant in this respect.

64. Justice Dawson dissented.

65. The Court took a close look at the legislation under scrutiny. It was argued that the legislation would reduce corruption and undue influence caused by political parties' requirements of substantial funds to pay for advertising on television and radio. But five Justices were unconvinced that the claimed advantages of the legislation provided sufficient justification for it. There is no need to consider here the differing views on the extent of the right. It suffices to note that six Justices agreed that there is a constitutional guarantee of freedom of speech, at least in discussion of federal political matters or public affairs. The controversy which greeted the High Court's decision, as if freedom of speech and other human rights in Australia were in some doubt before their Honours' judgments were published, seems somewhat at odds with the oft proclaimed view of some that a Bill of Rights is not necessary in Australia because the rights are already embedded in the Constitution and the common law.

Australia's relations with foreign countries

66. The present case raises the additional and specific issue of Australia's relations with other states. These relations are a matter of undoubted national import, but they do not merely involve the attitudes or reactions of other states and peoples towards Australia. Australia's and Australians' attitudes to them are relevant to this relationship. If for no other reason - and there are many other reasons - so, therefore, is the conduct of such states towards their own people, or people over whom they exercise control, especially in practising inhumanity, ignoring personal safety or restricting fundamental rights.

67. Political protests in the vicinity of embassies against reprehensible and repulsive conduct committed by the nations and governments represented by such embassies are an important means by which Australian people are able to declare and emphasise their commitment to the sanctity of human life and the fundamental dignity of the human condition. They provide an opportunity to communicate to and try to influence the countries concerned about their human rights violations, and to express broadly, especially to victims of human rights abuses, the depth of feelings and sentiments of the people of Australia to particular instances of brutality or other grossly inhumane conduct. Such protests also enable Australians to indicate consent to our government's ratification or Parliament's approval of such compacts as the ICCPR, and attract publicity so as to enable wider communication and development, on all sides of the argument, of the views of Australians. All this applies whether the country is as here a friendly country, one with whom Australia has fundamental differences but maintains diplomatic relations, or one with whom Australia is at war.

68. The peaceful public expression of such views would appear to fall within the communication which the Constitution protects, such that legislation curtailing such activity will be invalid or should be read down to ensure consistency with the constitutional protection: see s.15A of the Acts Interpretation Act. It is not for me to decide the constitutional question here. I need only rely upon established common law principles as influenced by Parliament's intentions concerning application of the ICCPR to reach the conclusion that substantial weight must be given to freedom of speech in interpreting the regulations in the light of their enabling purpose.

VALIDITY OF THE REGULATIONS

Scrutiny

69. Given the importance of freedom of speech as a fundamental human right of all Australians and others in the country, the Court should particularly subject regulations which bear upon it to close scrutiny. This is because regulations emanate in the executive government and the administration which underpins and supports it. Parliamentary supervision of regulations is exercised only by a power to disallow. In the light of the vast and ever growing volume of such subordinate legislation, often introduced without or at short notice, while the size and resources of the Parliament remain basically unchanged, this facility for effective supervision is very limited.

70. Lord Lowry stated in R v Secretary of State for the Home Department ex parte Brind [1991] UKHL 4; (1991) 1 AC 696 at 763 that administrative acts which have the effect of hindering the communication to the public of ideas and information about Northern Ireland and to deter

broadcasters from reporting Northern Ireland politics deserve the closest scrutiny. See also Bugdaycay v Secretary of State for the Home Department [1986] UKHL 3; (1987) AC 514 per Lord Bridge at 531 and Lord Templeman at 537. In my opinion, because they are subject to no express or clearcut parliamentary supervision, so should the administrative decisions made by way and in the form of the present regulations.

Necessity

71. Before the Governor-General made the present regulations, the protection of foreign embassies in Australia lay in the realm and discretion of the police in the light of the common and any statute law applying to the presence in their vicinity of persons other than their members. It was not suggested on this appeal that existing laws and practices have not previously provided adequate protection to buildings, persons and activities in this regard. Articles 22 and 29 of the Convention have always been able to be policed and enforced in the past. I agree with the US/UK approach that it is a matter for the police and ultimately the courts, as those traditionally involved in dealing with unlawfulness of this category, as to whether protesters infringe the law. No facts have been suggested, and none suggest themselves, to support the Minister's assertion in this appeal that these regulations were needed in order to complement the existing powers of the police to carry out Australia's obligations under the Convention. I can therefore see no basis for upholding them on the ground that they were necessary to implement the articles concerned.

Convenience

72. To be supported, therefore, the regulations must be convenient for this purpose in the traditional sense of appropriate as an adjunct to the Act's purpose and intent. If the Minister's argument is correct, the regulations authorise the addition to the powers and judgment of the police under law, a power of peremptory interference with the right to protest ordered by a Minister of the Crown on the basis that an object may constitute impairment of an embassy's dignity without having to be founded on evidence, either patent or established to the satisfaction of an independent body, of the existence of an actual interference with the embassy's functions at the time. Whether such regulations are a convenient means of implementing Australia's obligations under the Act requires a consideration of the competing factors.

Reasonable proportionality

73. Moreover, the requirement of Tanner that regulations must be reasonably proportionate to the pursuit of their enabling purpose requires a consideration of this purpose in each case. There is no suggestion here that the regulations were designed to meet a threat to the physical safety of embassy buildings or personnel. As I see the position, the enabling purpose of these regulations therefore was to protect members of embassies, in this case the Indonesian Embassy, from conduct which would so impinge upon the conduct of their missions as to affect adversely the exercise of their functions and the carrying out of their duties.

74. The test of reasonable proportionality is susceptible to different standards. In favour of the reasonable proportionality of these regulations to their purpose is firstly that they only relate to objects placed on prescribed land. They do not apply to persons carrying signs, placards and other forms of political protest and therefore leave alternative forms of expression open to protesters. Unlike protests by people, which are often limited in duration by the protesters' time, energy and resources, objects can remain in the ground for substantial periods of time. If they are capable of impairing dignity, they could in some cases be more intrusive than the temporary impairment occasioned by other forms of political protest. In such cases the removal of objects may be argued to be an appropriate step to protect the dignity of a mission.

75. In my opinion, however, these arguments should not prevail. Although the particular facts of the case are not for present resolution, it should be said that provided access to a diplomatic mission is not unduly hindered, the presence of such objects as those involved here could hardly infringe the Convention. Small planted crosses symbolising people killed without cause could not impair the dignity of a mission because they have nothing to do with its freedom to function, however

aggravating it may have been in this case for the members of the mission and the government they represent to have the massacre so poignantly dramatised.

76. But the regulations imply that only objects, not people or both, can cause the dignity of an embassy to be so impaired. People can chant, make noises, cause disturbances, hold banners, crosses and flags, sing or play musical instruments, or for that matter bear tents, coffins, black uniforms or crepe, replicas of dead bodies, and other far more aggressive manifestations of opposition and dissent than silent immobile objects. The effect of the regulations is that fixed noiseless harmless objects bear on dignity but people do not. A law which permits, as an appropriate step to protect an embassy's dignity, the removal of items in that category, such as planted crosses, to more than 100 metres from embassies, while allowing people to congregate close to them and their occupants, is in my opinion artificial and arbitrary, and is unjustified by and disproportionate to its enabling purpose.

77. Without people protesting, perhaps silently walking around or standing with signs and banners as on a vigil, or doing other more demonstrative things to draw the attention of embassy staff, passers by and media to their cause, protests would be rendered sterile and ineffective. Likewise, objects like crosses give a protest, and the cause or events being protested, meaning, appeal and pathos. A hut permits protesting people to rest and take food, shelter from cold or inclement weather, and protect items of protest including petitions, circulars and leaflets to offer to the public. It also enables the period of a protest to be lengthened. These facilities and elements are as important for permitting the protesters to exercise their freedom of assembly and speech as any other aspect of the protest.

78. In their prevention of otherwise apparently law-abiding people to exercise a full selection of their fundamental freedoms to alert diplomats, their governments and the wider public by the most effective available means to the cause which brought them to the area of embassies in the first place, these regulations permit people to protest so long as they do not use tame unthreatening objects certified as impairing the embassies' dignity. They thereby permit the impact and effect of such protests to be reduced, allow arbitrary limits on the protesters' unchallenged and undoubted right to protest to be set, and open the way for the authorities in the countries concerned to form the belief, understandably, that Australians do not seriously care about the cause in question. This result is the complete opposite of what protesters intend. It would undoubtedly be erroneous for anyone to believe that Australians in large numbers do not decry the Dili massacre. In my view, regulations which have such effects and make such distinctions are not directed to the relevant purpose of the Act from which they emanate - the impairment of the embassy's dignity - and contradict the intent of Parliament in favour of maximum freedom of expression.

79. A second argument in favour of the validity of the regulations is that they vest the decision on whether an object is causing a contravention of articles 22 and 29 of the Convention in a Minister with the role of, and having the benefit of advice from a department, dealing with Australia's relations with other countries. The Minister is of course directly accountable to Parliament. Accountability to Parliament is further facilitated by the tabling provisions of the regulations, which assist in ensuring that decisions will be made by a person conscious of the fact that the decision may have to be defended in Parliament.

80. On the other hand, democratic traditions suggest that politicians and bureaucrats are not well placed or traditionally apt to exercise the determinative power to order assaults, invasions of privacy, and restrictions on the human rights of people otherwise complying with the laws which existed when their protest began. In these days of heavy legislative programs and limited times and opportunities for consideration of points of view other than those of or supported or promoted by the executive government, the parliamentary sanction is weak. Basic human rights deserve and require more rigorous protection and effective supervision. This is especially so when, as is the case here, the penalty imposed by the executive is self executing. It is too late for the protesters, whose freedom to protest effectively has already been removed, to have their rights resurrected or reasserted by the Parliament some time later.

81. A third positive argument is that the Minister's decision is subject to supervision by this Court. In carrying out its duty to subject executive decisions to strict scrutiny so as to ensure that freedom of speech is not unreasonably curtailed, courts can restrain Ministerial decisions, where appropriate upon urgent application. The problem with this right is that legal costs impose such a significant barrier to ordinary people having access to the courts as either to remove this safeguard altogether or so to limit it as to create an additional factor for invalidating the regulations. The respondents sought to exercise their right to protest, not to litigate. There should be a heavy burden of justification placed on those who retroactively seek to convert them from legitimate protesters to suppliant litigants, if they are not otherwise infringing the law.

82. In balancing protesters' right to freedom of speech and assembly with maintaining the peace and dignity of an embassy, there is another relevant matter to be considered. As I see the position, nothing will impair a nation's dignity more than the unprovoked killing of unarmed civilians by members of its official armed forces. The contemporaneity of the introduction of these regulations with, and with their use in curtailing, the respondents' protest cannot be ignored. Whilst it was the certificate rather than the regulations themselves which caused the crosses to be removed, it is in my view artificial to suggest that the two are not inextricably linked. Whatever else induced their introduction, undoubtedly the primary intent of the regulations must be taken to be the removal of the respondents' crosses. This removal has nothing to do with and is quite unrelated to any purpose of the Act.

83. In this connection, the right to freedom of speech of the first respondent as a close relative of one of those killed takes on a special dimension. The executive government has introduced by regulation a law designed to prevent or permit to be prevented such people as him and those whom he has elected to join or invited to join him from a full and free opportunity to protest. The ground used to justify that law is that a part of the protest could impair the dignity or disturb the peace of the official representatives of the government which brought this tragedy upon him, when that part of the protest could do and was doing no such thing. In the light of the legal principles which the executive was bound to apply in such circumstances, this law, in my opinion, puts the shoe on the wrong foot. While confronting constitutional protections in this regard, it permits or authorises such an interference with basic rights as to balance the scales too far against protesters' rights and in favour of the rights of those against whom such protests are directed, and for whom Australia's statutory obligations were designed. Not only are the regulations not a convenient means of implementing or giving effect to the Act, in my opinion, the only or overwhelming conclusion open is that they were made for purposes other than those permitted by the Act.

84. SUMMARY OF CONCLUSIONS

1. The scope and meaning of the term "impairment of dignity" is to be found in, and only in, the words and implications of the Act as reflective of the parliamentary intent.
2. This intent is that the obligation to take "appropriate steps" to protect embassies arises when conduct is occurring or threatened which is so undignified and ungracious to visiting foreign diplomats as to impede or bear down on their capacity to carry out the particular tasks they are in Australia to perform.
3. At the same time, such steps must minimise as far as possible interference with, and take full account of, the fundamental right of every person in this country to freedom of speech.
4. That this is the legislative intent is underlined by the fact that whereas the source of the Act is an internationally concluded Convention, nations governed by autocratic, authoritarian or military rule cannot be the arbiters of, or even true contributors to setting, the extent or the limits of free expression granted or

applied in Australia. We must decide our own rules and limits in this regard, and whereas we may and should be influenced by what likeminded nations think or do in the same sphere, we are unlikely to set our standards by those of less benevolent or generous regimes. Australia's values in these regards will certainly not be guided by the nations whose reprehensible actions are being highlighted by particular protests.

5. The Act does not permit the executive government by regulation to determine generally how or where peaceful protests shall be conducted. Nor does it sanction the imposition of a regime by which the executive government is by regulation to determine how much of a human right shall be allowed. If there are to be modifications or exclusions of acknowledged rights, they must be done by the Parliament in full public view in the laws and international treaties it and the nation uphold.

6. As was their manifest intention, these regulations permit or authorise a procedure for the removal of passive objects causing no interference in the conduct by embassies of their legitimate business. As such, they are not authorised by an Act which only requires steps to be taken to prevent impairment of the dignity of embassies consistent with freedom of expression.

7. Moreover, the regulations permit in my opinion an unreasonable curtailment of freedom of speech, so as to lack the reasonable proportionality to their enabling purpose required before this Court can strike them down.

8. It follows, in my opinion, that these regulations are invalid. Although the proper categorisation of the Minister's actual decision in this case is a separate question not yet before the Court, presumably the certificate was not effective to justify the removal of the crosses.

I would dismiss the appeal with costs.

Costs

85. As this is not to be the order of the Court, it is to be hoped that the government will not seek an order for the payment by the respondents of the costs of the appeal and the hearing before Justice Olney. Undertaking as to damages

86. As mentioned earlier, the Minister had required an undertaking that the respondents pay any damages caused to it by the original injunction of Justice Olney. In light of what is, in accordance with the view of the majority, to be the decision in this case, this may result in the respondents being called upon to honour that undertaking by paying for such matters as the costs of the police in removing the crosses, and of their storage and eventual possible destruction, pursuant to regulation 5B(5)(b), by the Australian Government Solicitor. In my opinion, this should not be allowed to occur.

87. When the respondents commenced their protest and purchased/manufactured and positioned their crosses, they were not impeded by any law or act of law enforcement. These regulations changed that position and the respondents' protest has now concluded. Ordinary people or organisations peacefully protesting for proper cause should not be burdened with the expenses or losses of the government in such circumstances. It is important that people without funds be allowed to promote or defend a reasonable position without the additional oppression of the unlimited finances of their opponents. The Minister should be satisfied that the appeal is to be upheld. There should in my opinion be no further recourse to the respondents for the consequences of this success.