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The priority of not offending foreign states: dispatching Australians to face remote justice

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The very nature of extradition involves the sending of individuals to face justice in remote localities. Unlike civil law states, which generally don't extradite their own nationals, Australia and other common law states have readily surrendered their citizens to face justice in foreign states. While that usually involves returning the person to the state where the offence occurred, the emergence of trans-national criminal activity and the expansive extra-territorial jurisdiction exercised by some states can lead to persons being extradited to countries with which they have had no direct connection and in which they have never set foot. This paper considers some of the developments in international extradition law; with particular emphasis on the extent to which Australia will consider matters such as the quality of the foreign justice system and the likely treatment of the person should they be surrendered.

1 The changing nature of criminal activity and laws

In earlier times extradition largely involved the pursuit and return of citizens who were fugitives from justice in their own land. That is reflected in the earliest recorded extradition treaties, including in the following extract from the Treaty between the Kings of Andarig and Leilan and an unidentified third party in about 1750 BC:[1]

> "(he who) from a foreign land escapes, and is seen in my country, I shall not hide him, I shall not sell him for silver; on that very same day I shall send him home safely."

More recently, with the industrial revolution of the 18th and 19th centuries and the development of new commercial structures and greater flow of people between states, new types of criminal activity emerged, including activity that crossed national

[1] Jesper Eidem, "The Leilan Treaties", Yale Tell Leilan Research, Yale University Press; Aughterson, *Exradition: Australian Law and proceduret*, Law Book Company, p 3.

boundaries. Under this new order, increasingly extradition applications involved requests for the surrender of non-nationals of the requesting state.

That trend has continued apace. The computer age, multi-national corporations, and the ever increasing trade and movement of people between states have given rise to yet new forms of criminal activity and the capacity for people to commit offences which have impact well beyond their national borders. This is exemplified by the "Love Bug" virus of 2000. In May 2000 this virus appeared on the internet and spread around the world in 2 hours. It is estimated to have affected 45 million users in over 20 countries and to have caused between US$2 and 10 billion in damage.

The laws of many states have changed, and continue to change, in response to these developments, and include the introduction of economic crimes that have extra-territorial effect.

Traditionally, the jurisdiction of states over crime is categorized under five principles: the territorial principle; the nationality principle; the passive personality principle; the protective principle; and the universality principle. To some extent, the capacity to deal with trans-national crime can be catered for under a broad approach to the territorial principle, so that jurisdiction arises where any one element of the offence occurs in the state in question. On that basis, for example, a state has jurisdiction where acts are carried out in that state pursuant to a conspiracy, even though the person charged as being a party to that conspiracy has never entered the state.[2]

However, multi-national corporate structures and the growth of international trade has made it difficult for states to control anti-competitive commercial practices in circumstances where the proscribed conduct, though having an affect on the prosecuting state, is carried out by foreign corporations on foreign soil. In those circumstances, the territorial principle has no application, as no conduct constituting an element of the alleged offence has occurred in the affected state.

Accordingly, some states have taken an expansive approach to the protective principle to justify an extra-territorial application of certain laws, including anti-trust laws.[3] The protective principle is based on the premise that a state has jurisdiction where conduct, though occurring outside its borders, affects the vital interests of that state. It is a very subjective jurisdictional basis, as it is an open question as to what are a state's vital interests.[4] Given the extension of the protective principle to anti-trust

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2 For example, in *Griffiths v United States of America* (2005) 143 FCR 182, it was held that Australia could extradite Griffiths to the United States to face charges of conspiracy to engage in internet software piracy in the United States in violation of United States law, even though at all relevant times he was physically located in Australia. While the case was considered from the perspective of the principle of double criminality, clearly it was sufficient that part of the conspiracy was carried out in the United States to establish jurisdiction under the territoriality principle.

3 It has also been suggested that increasingly extra-territorial legislation, which includes the imposition of criminal penalties, is being used to promote foreign policy objectives: see, for example, Senz and Charlsworth, 'Building Blocks: Australia's Response to Foreign Extraterritorial Legislation', [2001] Melb JIL 3. The authors give as an example the United States *Helms-Burton Act* of 1996, which it is said aims to isolate Cuba and to enforce the US economic embargo on that country.

4 See, generally, Aughterson, n 1 above, pp 52-53.

laws, it is evident that at least some states have taken the view that it applies where a state's economic interests are affected by extra-territorial conduct.

In the United States, for example, the protective principle has been applied in order to prosecute extra-territorial breaches of the *Sherman Act*, which prohibits anti-competitive contracts, combinations, and conspiracies in restraint of trade, and the *Clayton Act*, which is concerned with preventing activity, such as mergers and acquisitions, which may restrain trade.[5] They are designed to facilitate the effective working of the marketplace and to protect it from practices such as price fixing, market division, bid rigging, boycotts, and tying arrangements.

The *Restatement [Third] of (US) Foreign Relations Law* recognizes that laws can be passed in relation to conduct occurring outside the state where that conduct has or is intended to have substantial effect within the state. However, s 403 provides: "a state may not exercise jurisdiction … with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable". In relation to the question of what is 'reasonable', there seems to have been wide latitude allowed in prosecuting cases involving drug trafficking[6] and alleged *Sherman Act* violations.

Under the *Sherman Act*, an 'effects' test is used, so that it is not a question of whether the conduct takes place on United States soil, but whether the conduct has an effect in the United States. It is "the situs of the effect, not the conduct, that is crucial": *United Phosphorous Ltd v Angus Chemical Co*:[7] In relation to import commerce, the *Sherman Act* applies to foreign conduct "that was meant to produce and did in fact produce some substantial effect in the US": *Hartford Fire Insurance Co v California*.[8] In *Hartford Fire Insurance*, the alleged anticompetitive conduct was undertaken by foreign re-insurers in the United Kingdom. The United States antitrust laws were applied where a group of British reinsurance companies were accused of conspiring to limit the availability of certain types of insurance coverage in the United States.[9]

Similarly, in *US v Nippon Paper Industries Co Ltd*,[10] the court refused to dismiss a federal criminal indictment against a Japanese manufacturer of facsimile paper. It was alleged that Nippon Paper Industries (NPI) had participated in a conspiracy with other fax paper manufacturers to increase the price of thermal fax paper to be sold in North America, in violation of the *Sherman Act*. The indictment claimed that the manufacturers sold the fax paper, in Japan, to trading houses, which in turn sold the

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5 As to the extension of the *Sherman Act* to conduct involving trade or commerce with foreign states, see s 7 of the Act.

6 See, for example, *United States v Alomia-Riascos* 825 F 2d 769 (4th Cir 1987).

7 US Dist (ND Ill Oct 13, 1994).

8 113 S Ct 2891 at 2909 (1993). In relation to other foreign commerce, it appears that there is a more limited jurisdiction imposed by the *Foreign Trade Antitrust Improvements Act* [codified at 15 USC s 6a] – the FTAIA limits subject matter jurisdiction over US export commerce to conduct having a "direct, substantial and reasonably foreseeable" effect on domestic US commerce, on US import trade, or on export commerce of a person engaged in such commerce in the US.

9 It was argued that comity consideration should exclude the application of United States laws given the potential conflict with United Kingdom law and policy. However, the court held that comity requires abstention in this context only where there is in fact a true conflict between domestic and foreign law. There was no such conflict here, as the foreign re-insurers did not face direct conflicting requirements under United States and United Kingdom laws.

10 109 F 3d 1 (1st Cir 1997).

paper to foreign customers. It was said that they not only raised the prices to the trading houses for fax paper to be exported to North America, but also sold discrete quantities of fax paper to the trading houses on condition that such quantities be sold to North American customers at specified prices. While separate indictments against the trading houses alleged specific conduct within the United States in furtherance of the scheme, it was argued that the indictment in relation to the manufacturers disclosed no overt acts undertaken in furtherance of the conspiracy within the United States. It was held that even if this were so, it was not necessary to prove that any proscribed conduct took place within the United States in order to establish a cognizable Sherman Act offence. Accordingly, even if the alleged proscribed conduct occurred entirely in Japan, it was held that liability under United Stats law could arise so long as the conduct was intended to have, and did in fact have, substantial anticompetitive effects in the United States. It was said that to hold otherwise would mean that price fixers could locate their conspiracy offshore when seeking to influence competition in United States' markets.[11]

Such laws expose citizens of Australia and other countries to liability to prosecution in foreign states and, pursuant to bilateral extradition treaties, extradition to those states. On that basis, today citizens might be extradited not only to face prosecution in states to which they have travelled and allegedly committed offences, but also to countries in which they have never set foot.

2 Extradition of a state's own nationals

Civil law states tend not to extradite their own citizens and in some cases there is a constitutional prohibition on doing so.[12] This stems from Greek and Roman practice, though Roman law did allow the surrender of citizens who did violence to the ambassadors of other countries while in Roman territory.[13] On the other hand, civil law states tend to exercise jurisdiction over their nationals wherever in the world the conduct occurs, so that prosecution can take place in the event of a refusal to extradite.[14] This is based on the notion that citizenship carries benefits as well as obligations and a state has in interest in the conduct of its citizens no matter where that conduct occurs; the conduct of citizens abroad affects the reputation of the state.

The civil law approach has been justified on a number of grounds, including that a person should not be withdrawn from his or her natural judges, that rehabilitation is best accomplished in the person's habitual surroundings, that there are inherent disadvantages in being subjected to trial under a foreign system and language and

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11 For the approach to the extra-territorial operation of antitrust laws in Europe, see, for example, *Chemical Industries v Commission* [1972] ECR 619; *Ahlstrom v Commission* (1988) ECR 5193; *Gencor v Commission* (1999) ECR II-753. Some states have resisted foreign antitrust laws by enacting blocking legislation; such as measures to prevent the blocking states' nationals providing evidence, information or documents to any relevant antitrust hearing, and baring the enforcement of any judgment within the territory of the blocking state: see, for example, the United Kingdom's *Protection of Trading Interests Act* 1980, Australia's *Foreign Proceedings (Excess of Jurisdiction) Act* 1984, and Canada's *Foreign Extraterritorial Measures Act* 1985.

12 SD Bedi, *Extradition in International Law and Practice*, 1968, p 94; E Palmer, *The Austrian Law of Extradition and Mutual Assistance in Criminal Matters*, 1983, p 61.

13 E Clarke, *A Treatise Upon the Law of Extradition*, (1888), pp 17-18.

14 See Aughterson, note 1 above, pp 127-129.

remote from friends and resources, that there is a potential for bias against foreigners, and that a state owes a special duty to its citizens.[15]

Common law states have not had the same concerns. Jurisdiction is based primarily on territoriality and as a criminal act is viewed as an offence against the peace of the community in which it occurred, it is considered that an alleged offender should be tried by his or her neighbours at or near that locality.[16] Accordingly, extradition laws in common law countries, including those in Australia,[17] generally make no distinction between citizens and non-citizens. Indeed, one American commentator has suggested that the United States "manifests almost an enthusiasm for extraditing its own citizens to places abroad".[18]

While bilateral extradition treaties entered into between states invariably include discretion to refuse extradition of a state's own nationals, such provisions cater for the sensitivities and legal limitations of civil law states.[19]

3 Protections provided to nationals

It follows that Australians can be extradited to foreign countries with which they have had little or no contact and where they will face trial in circumstances where the language, laws, processes and customs are foreign to them.

Generally, the object and concern of modern extradition treaties and other extradition arrangements has been not only to facilitate the return of persons to foreign states in accordance with the terms of the treaty, but also to protect the rights of the individual. As stated in *Bou-Simon v Attorney-General (Cth)*:[20]

> Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country.

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15 Ibid pp 128-129.

16 See I A Shearer, *Extradition in International Law*, (1971) pp 121-122; Herman F Woltring, 'Extradition Law', (1987) Law Inst J 919 at 922; H C Biron and K E Chalmers, *The Law and Practice of Extradition*, (1903) p 7. Biron and Chalmers note, at p 7, that the territorial base of jurisdiction had its origin "in the most primitive tribal stage of human history. The offender had but few means of escape, and if he evaded arrest it was not as a rule because he had fled from the borders of his own commune. In that rare event the tendency was to regard him as beyond the reach of punishment". There are limitations to the approach adopted by civil law states, including the practical difficulties in conducting a trial remote from the primary sources of evidence.

17 Since mid 1995, approximately 20% of persons extradited from Australia have been Australian citizens: see Australian Government Attorney-General's Department, Annual Reports for the years 1995-1996 to 2003-2004, www.ag.gov.au, 'Publications' – 'Annual Reports' folders. While, s 45 of the *Extradition Act* does allow for the prosecution of Australian citizens in relation to conduct occurring in foreign states, that will have no utility unless the relevant Australian criminal law has extrad-territorial effect.

18 John G Kester, 'Some Myths of United States Extradition Law', (1988) 76 Geo LJ 1441 at 1474-1475.

19 For examples of treaty provisions, see Aughterson, n 1 above, pp 130-131.

20 [1998] FCA 1097.

Similarly, in *Foster v Minister for Customs and Justice*, Drummond J stated that the law of extradition:[21]

> is not concerned only with matters affecting Australia's national interests but also with the protection of the fugitive from injustice in the extradition country.

However, in Australia the trend has been towards facilitating extradition and reducing the protections afforded to those who are sought by foreign states. Certain of the protections that are now provided, and those that are not, are outlined below.

Underlying that lack of protection is the pretence in this country that the legal systems and processes of all countries with which Australia has extradition arrangements are fair and reasonable.[22] That assumption is reflected in the judgment of French J in *Cabal v United Mexican States (No 3)*.[23] In response to a submission that the requesting State had an ulterior purpose in seeking the extradition of Cabal, his Honour stated:

> It is no light matter for the magistrate or this Court to conclude that there are substantial grounds for believing that the requesting country is acting in bad faith, especially given the necessary assumption that the offences have been committed. There is also the existence of the Treaty itself to which regard must be had. Where there is a treaty in force, its existence no doubt reflects a degree of mutual trust and confidence between the contracting parties as to their bona fides and the fairness of treatment that would be meted out by one or the other to a fugitive who has been surrendered.

Even if that assumption were correct, as noted by Shearer the conditions in a treaty state can suddenly deteriorate through a coup or emergency situation, or there may be "a steady erosion of the rule of law such as in Zimbabwe".[24] Others have questioned the underlying justification of the premise. In *Cabal v United Mexican States*,[25] the Full Court of the Federal Court stated:

> Australia has extradition treaties with many countries. A number of these countries have legal systems very different from our own. Some of them would not be regarded as affording those charged with serious criminal offences anything approximating what we would consider a fair trial. They appear to have very little regard for the importance of an independent judiciary and the rule of law. Some are reputed to be governed by regimes which are thoroughly corrupt.

It remains that the Australian extradition legislation draws little distinction as between states. The only distinction that does exist is in relation to whether or not, by treaty or regulation, there is need to establish a *prima facie* case as a precondition to surrender.

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21 (1999) 164 ALR 357 at 368.

22 See the observations in the Report of the Joint Standing Committee on Treaties of the Parliament of the Commonwealth of Australia, *Extradition – a review of Australia's law and policy*, Report 40, August 2001, 30.

23 (2000) 186 ALR 188 at 268.

24 Joint Standing Committee on Treaties Report 40, note 22 above, 30.

25 Ibid 30-32

As noted below, [26] incongruously that protection has been preserved only in relation to extradition to most member states of the British Commonwealth and to certain other countries where there would be relatively less concern as to legal and procedural safeguards.

Further, the trend has been to reduce the involvement of the courts in the process and to expand the executive discretion.

3.1 Judicial involvement in the process

There are four steps in the Australian extradition process, each involving a discrete exercise of power.[27] First, pursuant to section 12 of the Act, a request is made to an Australian magistrate for the issue of a warrant for the arrest of the person sought. Second, following the formal request for extradition, the Attorney-General must determine whether the application should proceed. Third, in the event that the matter is to proceed, it is referred to a magistrate for determination as to whether the person is 'eligible for surrender'. The magistrate 'is not at large',[28] jurisdiction being confined to a consideration of whether the necessary documentation has been produced,[29] whether double criminality can be established, whether there are any 'extradition objections' under section 7 of the Act and, where imported by treaty or regulation, whether a *prima facie* case can be established.[30] At the fourth step, it is the Attorney-General, and not the courts, who determines all other matters, including any additional human rights protections under the relevant treaty.[31] It is also the Attorney-General who is to be satisfied that the person will not be subjected to torture, that appropriate assurances have been given in relation to the non-imposition of the death penalty, and that a speciality assurance has been given.[32] The Attorney-General also has a general discretion to deny surrender.[33]

Consequently, other than in relation to the limited objections under s 7 of the Act,[34] there is a principle of 'non-inquiry' by the courts into the conditions or circumstances awaiting the person in the requesting state, including whether the rule of law or human rights norms are observed. For example, in *Stanton v DPP*,[35] while the court was concerned as to the likelihood of a fair trial if the persons sought were extradited

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26 See, below, n 41 and 42 and related text.

27 See generally, *Harris v Attorney-General of the Commonwealth* (1994) 52 FCR 386, 389, where the Full Federal Court characterised the stages of the extradition process as (1) commencement; (2) remand; (3) determination by a magistrate of eligibility for surrender; and (4) executive determination that the person is to be surrendered. See also *DPP v Kainhofer* (1995) 185 CLR 528, 533-38 for 'a brief conspectus of the Act'.

28 *Kainhofer v DPP (No 2)* (1996) 70 FCR 184, 189.

29 As to which see s 19(3) of the Act. The documents include a statement of the conduct constituting the extradition offence, which forms the basis for consideration of the principle of double criminality.

30 Pursuant to section 21 of the Act, there is a right of review and, ultimately, appeal from the determination of the magistrate.

31 See s 22(3)(e) of the Act. For example, in *Federal Republic of Germany v Parker* (1998) 101 A Crim R 234, 252 it was held that whether there had been production of the additional information required by the treaty in relation to the identity of the person sought was a matter for the Attorney-General.

32 See s 22(3) of the Act.

33 See s 22(3)(f) of the Act.

34 As to which, see below at Part 3.4.

35 Federal Court, Spender J, 12 January 1993.

to the Philippines, it was acknowledged that the Act gave no scope for judicial review on that ground. In the event, the Attorney-General subsequently refused surrender.

While there is potential for review of the Attorney-General's determination under section 39B of the Judiciary Act,[36] that review is not on the merits of the decision, but is concerned with whether the matter was within power and whether the appropriate process was followed.[37] Certainly, where any determination rests on discretion, it is difficult to show that its exercise has miscarried.[38] As noted by the Full Court of the Federal Court in *Papazoglou v Republic of the Philippines*:[39]

> While determinations made by the Attorney-General under ss 16 and 22 of the *Extradition Act* can be reviewed pursuant to s 39B of the *Judiciary Act*, that review is limited in scope. Even if the Attorney-General ultimately decides that a person should not be surrendered, that person may be required to spend a considerable time in custody without any court having power to determine whether there is evidence to support the charges and, as this case shows, without a court having power to consider whether the proceedings against the person constitute an abuse of the court's process.

Even those matters that are considered by the magistrate – whether the relevant documentation has been produced, whether double criminality can be established, whether there are any extradition objections, and, where imported by treaty, whether a *prima facie* case can be established – are of limited scope.

3.2 Establishment of a prima facie case

Generally, the requirement under earlier extradition legislation to establish a *prima facie* case has been removed. While such a requirement can be imported by regulations applying to a particular country,[40] generally it has not been incorporated into modern extradition treaties.[41] Ironically, by virtue of the Extradition

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36 *DPP v Kainhofer* (1995) 185 CLR 528, 541; *Federal Republic of Germany v Parker* (1998) 101 Crim L R 234, 252; *Foster v Minister for Customs and Justice* (1999) 164 ALR 357, 359; *Forsyth v United Kingdom* Federal Court, 19 August 2003, Carr J, [38].

37 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357, 359-60 per Drummond J.

38 It seems that in the context of extradition proceedings, the only successful application for review was in *De Bruyn v Republic of South Africa* (2005) 143 FCR 162: see Joint Standing Committee on Treaties Report 40, n 22 above, 57. For a relatively recent unsuccessful application under s 39B, see *McCrea v Minister for Customs & Justice* (2005) 145 FCR 269. Compare the approach now in the United Kingdom. In *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 545-546, Lord Bingham, with whom the other Law Lords agreed, stated:

> In *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, the European Court held that the orthodox domestic approach of the English courts had not given the applicants an effective remedy for the breach of their rights under article 8 of the Convention because the threshold of review had been set too high. Now, following the incorporation of the Convention by the Human Rights Act 1998 and the bringing of that Act fully into force, domestic courts must themselves form a judgment whether a Convention right has been breached (conducting such inquiry as is necessary to form that judgment) and, so far as permissible under the Act, grant an effective remedy.

39 (1997) 74 FCR 108, 140. In that case, where it was argued that great injustice would result if extradition were ordered, the court noted: 'A decision by the Attorney-General to surrender the person cannot be challenged on the merits': at 128.

40 See s 11(4), (5) and (6) of the Act.

41 Though see agreements or treaties with Hong Kong art 5; Israel art XI(iii); Republic of Korea art 3; Norway art 8; and United States of America art XI.

(Commonwealth) Countries Regulations, it is a precondition to extradition to most member states of the British Commonwealth.[42]

The abolition of the requirement to establish a *prima facie* case in the mid 1980s was said to be justified in the interests of efficiency and speed of handling requests, and so as to give reciprocity of treatment to those foreign countries that did not apply – or even understand – the *prima facie* evidence requirement.[43] The decision has been criticised as being 'over-hasty and unwise' and as a 'mistake'.[44]

On the other hand, it has been suggested that the requirement to establish a *prima facie* case 'reflects an unjustified attitude of superiority on the part of common law systems and is considered "alien and unacceptable" by civil law countries' and that in the civil law system there is no equivalent to a committal hearing and that these countries find it 'impossible or prohibitively expensive' to meet the requirement.[45] While some commentators have disputed the potential difficulties facing civil law states,[46] Shearer has noted:[47]

> I suggest that the sense of justice of most people would be offended by any law, statutory in basis or not, that can have people taken away from their own home to a distant country to face trial on matters alleged against them and in relation to which the courts in their own country have no power to review for probable

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42 However, the requirement has been removed in relation to South Africa, the United Kingdom and Canada: see Extradition (South Africa) Regulations 2001; Extradition (Canada) Regulations 2004; Extradition (United Kingdom) Regulations 2004; Extradition (commonwealth Countries) Regulations 1998. In referring to this different approach in relation to Commonwealth countries, the Joint Standing Committee on Treaties of the Australian Parliament has noted: 'we found it incongruous that quite different standards of proof apply to extradition requests from Commonwealth countries and civil law countries, and that far more supporting evidence is required from countries whose systems of justice closely resemble Australia's. Conversely, less is required of countries where the implications of agreeing to surrender a person are potentially much more onerous, in that the legal system is quite different, proceedings may well be conducted in another language, and there may be reservations about due legal process and the protection of human rights': see Joint Standing Committee on Treaties of the Parliament of the Commonwealth of Australia, *An Extradition Arrangement with Latvia and an Agreement with the United States of America on Space Vehicle Tracking and Communication*, Report 36, October 2000, 13; Joint Standing Committee on Treaties Report 40, n 22 above, 21.

43 Joint Standing Committee on Treaties Report 36, n 42 above, Submission 8, 50-51. See also Joint Standing Committee on Treaties Report 40, n 22 above, 2-3. As to the object of facilitating the conclusion of extradition treaties with civil law states, see *Hansard*, House of Representatives, 9 December 1987, 3069, 3078-79, 3108.

44 Shearer has stated:

> In my view, the abandonment of the *prima facie* requirement in Australia's extradition treaty and legislative policy was over-hasty and unwise. It is unjust that a person (especially an Australian citizen) may be extradited to a foreign country on the mere demand (albeit subject to certain safeguards) of that country's authorities and without any opportunity for an Australian court to examine the evidence.

See Joint Standing Committee on Treaties Report 36, n 42 above, Submission 8, 50-51; Joint Standing Committee on Treaties Report 40, n 22 above, 3. Dr David Chaikin, a Senior Assistant Secretary of the International Branch in the Attorney-General's Department when the key policy changes were made in the mid-1980s has also expressed the view that, in making the changes, Australia 'went too far' and that 'it was a mistake': Report 40, 29.

45 See submission to the Joint Standing Committee on Treaties by the Commonwealth Attorney-General's Department: Report 40, n 22 above, 26.

46 See Joint Standing Committee on Treaties Report 40, n 22 above, 44-45.

47 Ibid 29. Shearer has also expressed the view that the perceived difficulty said to be facing civil law states 'has been greatly exaggerated': ibid 44-45.

cause or reasonable suspicion. The civil law countries do not return our favour: they refuse altogether to surrender their own citizens, *prima facie* case or no *prima facie* case.

3.3 Documentation and Double Criminality

The principle of double criminality holds that a person will not be extradited where the conduct for which extradition is sought is not considered criminal in the requested state. Its rationale is that a state should not be required to surrender a person to a foreign state, and allow its criminal processes to be used, for conduct which it does not itself consider criminal.[48]

The primary documentation produced to the magistrate is the statement of 'the conduct constituting the offence' pursuant to s 19(3)(c)(ii) of the Act. It is this document that forms the basis for the determination of whether double criminality can be established. Section 10(2) provides:

> A reference in this Act to conduct constituting an offence is a reference to the acts or omissions, or both, by virtue of which the offence has, or is alleged to have, been committed.

By section 19(2)(c), the magistrate must be satisfied that at the time of the extradition request the 'conduct constituting the offence', or equivalent conduct, would have constituted an offence in the state or territory in Australia where the extradition hearing is held. That is determined solely by reference to the section 19(3)(c)(ii) statement.[49]

The Federal Court has interpreted the term 'conduct constituting the offence' broadly. Rather than focusing on the words 'by virtue of which' the offence has been committed in section 10(2), in *Zoeller v Federal Republic of Germany* the Court placed emphasis on the words 'is alleged to have been committed', concluding that the statement of conduct was not invalid because it alleged facts, "which goes beyond the facts necessarily constituting the offence" in the requesting state and that it did not follow that "the magistrate may have regard only to those facts which are absolutely necessary ingredients of the foreign offence".[50] It was added that the "magistrate is no expert in foreign law. He is not required to determine what the facts are that are the necessary facts to constitute the foreign crime".[51]

However, it is suggested that the reference in section 10(2) to the acts by which the offence 'has, or is alleged to have, been committed', simply reflects the fact that extradition may be sought of persons either charged with or convicted of an offence. The effect of the approach adopted by the Federal Court seems to be that the 'conduct

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48 See Aughterson, note 1 above, pp 59-60.

49 *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282, 300.

50 *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282, 300. See, also, *Cabal v United Mexican States* (2001) 108 FCR 311, 341. Cf *De Bruyn v Republic of South Africa* (1999) 96 FCR 290, 292-93, 296-97.

51 Ibid. It seems to have been assumed in *Zoeller v Federal Republic of Germany* (1988) 19 FCR 64, 90 that under earlier legislation the magistrate could inquire as to the nature of the offence in the requesting state.

constituting the offence' is whatever the requesting state specifies in the section 19(3)(c)(ii) statement, regardless of whether it bears any relationship to the conduct that will be prosecuted following surrender.[52]

In *Government of Canada v Aronson*,[53] where a similar provision was considered,[54] the House of Lords held that a person could be extradited only if the conduct relevant to the ingredients of the foreign offence constituted a corresponding offence under the United Kingdom law. Lord Bridge gave examples of the 'startling results' were the law to be otherwise.[55] For example, double criminality would not depend on whether the acts charged were criminal in both states, but on the manner in which the statement of conduct were drafted. As noted by Lord Lowry:[56]

> The "act or omission constituting the offence" cannot in my opinion mean "the conduct, as proved by the evidence, on which the charge is grounded," because the evidence of such conduct could prove something more than what has been charged. In such a case the conduct proved would not be the act or omission constituting the offence of which the fugitive is accused …

Under the approach adopted by the Federal Court, where a person is charged with an offence that is not a crime in Australia, but, incidentally, the statement of conduct makes reference to acts or omissions that would constitute a crime in this country it seems that double criminality will be established. That will be so even though that additional conduct will have no relevance to the actual offence charged following extradition. That is the very outcome that the principle of double criminality was intended to avoid.

3.4 Extradition objections

Section 7 of the Act provides for objections to extradition where the offence is a political offence; where there is actual or potential discrimination on account of race, religion, nationality or political opinions; where the offence is a military offence; and where there would be exposure to double jeopardy.

With the rise of terrorism, the political offence objection has fallen into disfavour and, increasingly, has been interpreted narrowly.[57] In the United Kingdom it has been abolished.[58]

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52 More recently, the term 'acts or omissions by virtue of which an offence is alleged to have been committed' was considered by the High Court of Australia in *Truong v The Queen* (2004) 205 ALR 72, in the context of the operation of the speciality principle under s 42 of the Act. In relation to that decision, see Aughterson, 'The Extradition Process: An Unreviewable Executive Discretion', [2005] AYBIL 13, n 51.

53 [1990] 1 AC 579.

54 Under s 3(1)(c) of the Fugitive Offenders Act, a person could be extradited only if 'the act or omission constituting the offence' would constitute an offence against the law of the United Kingdom. Compare the consideration of *Aronson* in *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282, 296-97.

55 [1990] 1 AC 579, 589-90.

56 Ibid 609.

57 See Aughterson, note 1 above, pp 89-111.

58 In relation to other European Union States, that is consistent with art 9 of the 14 October 2002 protocol to the 2000 *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*, which provides that no offence may be regarded as a political

Also, given the approach taken by the Australian courts, the discrimination objection to extradition will be difficult to establish. As noted by French J in *Cabal v United Mexican States (No 3)*:[59]

> It is no light matter for the magistrate or this Court to conclude that there are substantial grounds for believing that the requesting country is acting in bad faith, especially given the necessary assumption that the offence has been committed. There is also the existence of the Treaty itself to which regard must be had. Where there is a treaty in force, its existence no doubt reflects a degree of mutual trust and confidence between the contracting parties as to their bona fides and the fairness of treatment that would be meted out by one or the other to a fugitive who has been surrendered.

The same approach is not taken by all states. As noted by North J in *McCrea v Minister for Justice and Customs*:[60]

> The reluctance of courts in some jurisdictions such as Australia to adjudicate upon decisions of sovereign states concerning extradition is not universal. For instance, in some European countries it has been held to be legitimate for adjudicative bodies to enquire into the sufficiency and effectiveness of assurances: Aylor (1993) 100 ILR 665; see especially the submission of Commissionaire du Gouvernement Vigouroux which sets out the practice of a number of European nations. In due course, the law in Australia may take account of such jurisprudence and move to an acceptance that the doctrine of non-adjudication has less of a place in cases involving questions of fundamental human rights, such as cases involving the death penalty.

The cautious approach adopted in Australia is exacerbated by the expansive construction given by the Federal Court to 19(5) of the Act, which prohibits the magistrate from receiving evidence 'to contradict an allegation that the person has engaged in conduct constituting an extradition offence'. This provision was first enacted in 1985, with the abolition of the requirement to establish a *prima facie* case, on the rationale that an extradition hearing is not intended to determine guilt or innocence and, accordingly, evidence to that effect should not be led.[61] One consequence is that a person is unable to lead clearly exculpatory evidence, such as alibi evidence.[62]

However, in *Cabal v United Mexican States (No 3)*,[63] French J held that s 19(5) also operated to exclude such evidence where the person objected to extradition on the

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offence as between member states. There is provision for member states to derogate from this principle, but not in relation to defined terrorist offences. However, under the UK Act the political offence exception has been discarded generally.

59 (2000) 186 ALR 188, 268. See, also, *Dutton v O'Shane* Supreme Court NSW, James J, 20 November 2002, [321].

60 [2004] FCA 273 para 56.

61 Extradition (Commonwealth Countries) Amendment Bill 1985, Second Reading Speech, Attorney-General Mr L Bowen, House of Representatives 1985 Debates, vol HR 140, 596. See, also, Joint Standing Committee on Treaties Report 40, n 22 above, 58.

62 See *Todhunter v Attorney-General (Cth)* (1994) 52 FCR 228, 250.

63 (2000) 186 ALR 188, 266.

basis of actual or potential discrimination on account of his or her race, religion, nationality or political opinions, stating that s 19(5):[64]

> excludes debate before the magistrate that the charges have been falsely fabricated because of the person's political opinion. That wider consideration, if available at all, is reserved for the Attorney-General in deciding whether to issue a notice under s 16 and, ultimately, whether to surrender the requested person under s 22.

It is unlikely that section 19(5) was ever intended to have that effect. It is noted that in introducing section 19(5), and having abolished the general requirement to establish a prima facie case, the objective was to avoid a mini trial in this country on the merits of the case. Under the new arrangements, whether or not a case existed against the person sought was no longer the concern of the Australian magistrate at an extradition hearing. However, extradition objections remain a matter for the magistrate in this country and there will be circumstances where apparent innocence of the offence could be suggestive of an ulterior purpose on the part of the requesting state.

In a submission to the Joint Standing Committee on Treaties, Julian Burnside QC made the compelling point that it is difficult to demonstrate discrimination without being able to lead evidence that the charges were false:[65]

> … where a requested person seriously alleges [such] an extradition objection … it is likely that the person did not "engage in the conduct" … That is to say, it is likely that the person has been falsely accused. There is an argument that this prevents evidence being led to show, for example, that the requested person has been "framed" for political reasons.

4 Conclusions

Australia offers few protections to those of its citizens who are the subject of extradition applications and who are sought for prosecution in foreign states. Perhaps arising from undue concern as to the prospect of offending foreign states, the Australian courts have read down those protections that do exist. Certainly, other states, including European states, do not seem to share the same concerns; whether responding to extradition applications or seeking the return of alleged offenders.

In relation to the latter, the United States of America, for example, has not infrequently resorted to abduction in order to secure the return of alleged offenders, notwithstanding the existence of extradition treaties which, at least impliedly, exclude such conduct. That practice has the support of the Supreme Court of the United States, which has taken the view that it will not inquire into the circumstances in which an accused has been brought before the United States courts, even where there has been a breach of the principles of international law,[66] and that the constitutional guarantee of

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64 Ibid.

65 Joint Standing Committee on Treaties Report 40, n 22 above, 59.

66 Though looked at from the quite different perspective of responding to an extradition request, compare the view expressed by the High Court of Australia in *United Mexican States v Cabal* (2001) 209 CLR 165, 190:

due process is satisfied where the accused is given a fair trial in the United States in accordance with constitutional procedural safeguards.[67]

In contrast to the approach adopted in Australia, the new extradition legislation in the United Kingdom expands both the role of the judiciary and human rights protections.[68] The *Extradition Act (UK) 2003* creates two categories of countries, dealt with separately under Parts 1 and 2 of the Act. By regulation, countries are categorised as falling within either Part 1 or Part 2 and they can be moved between those categories. Different processes apply to each Part, with more rigorous processes applying to Part 2 countries.[69] While it seems that Part 1 mainly caters for member states of the European Community, by s 1(3) of the Act a country cannot be designated for the purposes of Part 1 where the death penalty may be imposed under the general criminal law of that country. Also, even within Parts 1 and 2, differing regimes can apply.[70]

Importantly, under the United Kingdom legislation, the role of the executive has been greatly diminished. The Secretary of State considers only whether appropriate assurances have been given in relation to speciality and non-imposition of the death penalty.[71] Even then, the courts must themselves form a judgment whether a Convention right has been breached.[72]

In the course of the 2001 review of Australia's extradition law and policy, and in the context of the expanded role given to the executive under Australian extradition law, it was suggested that:[73]

> The Minister is a political animal and is entitled to take into account all sorts of political considerations as well as legal considerations. It is very difficult to know exactly how he would treat any particular case. I think Australian

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> Australia … has a very substantial interest in surrendering the person in accordance with its treaty obligations. If Australia fails, when requested, to return a person against whom there is probable cause for concluding that he or she has committed an extraditable offence, it breaches its obligations under international law. If Australia fails to comply with a treaty, the rules of international law entitle the other party to the treaty to repudiate or suspend the performance of its own obligations under the treaty.

See, also, *Truong v The Queen* (2004) 205 ALR 72, 102, 108 per Kirby J.

67 *Ker v Illinois* 119 US 436 (1886); *United States v Alvarez-Machain* 112 S Ct 2188, 119 L Ed 2d 441at 450 (1992).

68 See the United Kingdom *Extradition Act 2003* and, in relation to certain provisions of that Act, see Aughterson, 'The Extradition Process: an Unreviewable Executive Discretion?', 24 AYBIL 13 at 28-32. See, also, above n 38.

69 Principally, in relation to Part 1 states a backing of warrant procedure is used; there is no application to the executive and the process is entirely in the hands of the courts, including a determination as to whether the safeguards under the European Convention on Human Rights have been preserved.

70 For example, the requirement to establish a *prima facie* case has been preserved in relation to all states other than member states of the European Community [Part 1 states] and certain other specified states [presently Part 2 states]; namely Australia, Canada, Israel, New Zealand, South Africa, and the United States of America: *Extradition Act* s 84. The Secretary of State can designate states as not having to meet this requirement: se 84(7).

71 *Extradition Act UK* ss 94 and 95.

72 See *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 and, above, n 38.

73 Report 40 Joint Standing Committee on Treaties, n 22 above, 56.

> nationals are entitled to feel safe in their country and not to have to depend upon a minister who, of course, in turn relied upon departmental advice.[74]

As noted by Gyles J in *De Bruyn v Republic of South Africa*:[75]

> The [Extradition] Act affects the liberty of the subject in a drastic fashion – the consequences are far more serious than being charged with a crime in Australia. Principles which are applicable in this case (where it might be thought that the appellant has few merits) are equally applicable to the case of a long-standing Australian citizen with an impeccable record. The questions which arise under this statute cannot be dealt with as though they are ordinary commercial or administrative law issues.

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[74] In relation to departmental advice, it was also suggested: "It may be expected that human rights considerations except in the most extraordinary circumstances or in cases required by law (see eg death penalty safeguard) will be given a lower priority than international law enforcement interests and considerations of good bilateral relations": ibid 55.

[75] (1999) 96 FCR 290, 295. See, also, *Timar v Republic of Hungry* [Full Court of Federal Court, 5 November 1999, Weinberg J]; Joint Standing Committee on Treaties Report 40, n 22 above, 30.