

matter of ordinary human experience'.<sup>8</sup>

The majority also considered it significant that the interactions which the appellant was alleged to have pursued involved 'courting a substantial risk of discovery by friends, family members, workmates or even casual passers-by' and that that level of 'disinhibited disregard of the risk of discovery by other adults is even more unusual as a matter of ordinary human experience'.<sup>9</sup>

The majority further observed that the use of the words 'the court thinks' in s 97(1)(b) has the result that the admissibility of tendency evidence may involve questions on which reasonable minds might reach different conclusions. In view of this, the majority warned that the prosecution should be conservative in deciding whether to rely upon tendency evidence given the risks involved in seeking to adduce tendency evidence that is 'borderline'.<sup>10</sup>

In detailed dissenting judgments, Gageler, Nettle and Gordon JJ were each of the view that the key passages in *Velkoski* were correct statements of principle. Justices Gageler and Gordon held that the trial judge and the Court of Criminal Appeal had erred in concluding that the evidence of one of the 15 year old complainants (EE) was admissible on the other counts.<sup>11</sup> In addition, Nettle J was of the view that there was error in the admission of further counts and evidence as tendency evidence.<sup>12</sup> Each of the dissenting justices considered that it was significant that the act that was the subject of the count relating to EE was in the context of a 'reciprocated' relationship which was of a different character from the alleged acts which were the subject of the other counts.

*Hughes v The Queen* was the second time in two years that the High Court had resolved a divergence between New South Wales and Victorian approaches to the interpretation of the Evidence Act. In *IMM v The Queen*,<sup>13</sup> the High Court by a 4:3 majority found in favour of the approach of the New South Wales Court of Criminal Appeal to the definition of 'probative value'.

## ENDNOTE

- 1 The authors appeared as junior counsel for the appellant and the respondent in the High Court. Any expression of any opinions is their own.
- 2 *Hughes v The Queen* [2017] HCA 20 at [10].
- 3 *Hughes v R* [2015] NSWCCA 330.
- 4 [2014] VSCA 121; (2014) 45 VR 680 at [17], [35].
- 5 [2017] HCA 20 at [12].
- 6 *ibid* at [34].
- 7 *ibid* at [37].
- 8 *ibid* at [57]. See also at [40].
- 9 *ibid* at [57]. See also at [63].
- 10 *ibid* at [42].
- 11 *ibid* at [114], [170] and [225].
- 12 *ibid* at [170].
- 13 [2016] HCA 14; (2016) 257 CLR 300.

# What does it mean to hold an office in an international organisation?

Piotr Klank reports on *Commissioner of Taxation v Jayasinghe* [2017] HCA 26

## Background and significance

The High Court has set out the principles for determining when a person holds an office in an international organisation for the purposes of the *International Organisations (Privileges and Immunities) Act 1963* (Cth) (IOPI Act). If a person does hold such an office, the person is entitled to several privileges and immunities including exemption from Australian taxation.

The respondent, Mr Jayasinghe, was a qualified civil engineer, who was engaged by the United Nations Office of Project Services (UNOPS) under what was known as an 'Individual Contractor Agreement' to work in Sudan as a project manager. Mr Jayasinghe was an Australian resident for tax purposes and the commissioner of taxation (commissioner) assessed the taxpayer on earnings from his engagement with UNOPS.

Mr Jayasinghe objected to the assessments contending that his earnings were exempt from taxation under the IOPI Act, both on the facts and also because the commissioner was bound by his public ruling TD 92/153. Mr Jayasinghe's objection was disallowed and with the aid of counsel appearing pro bono, he appealed to the Administrative Appeals Tribunal. Mr Jayasinghe was successful on both grounds in the Tribunal,<sup>1</sup> and again on the commissioner's appeal to the Full Federal Court.<sup>2</sup>

The commissioner further appealed to the High Court, which unanimously allowed the appeal in respect of both grounds. The primary judgment comprised joint reasons of Kiefel CJ, Keane, Gordon and Edelman JJ. In a short, separate judgment, Gageler J also held in favour of the commissioner for reasons that were consistent with the joint judgment.

## Questions before the High Court

Two questions were considered by the High Court. The first was whether, during the relevant income years, Mr Jayasinghe was a person who held an office in an international organisation within the meaning of s 6(1)(d)(i) of the IOPI Act, such that he was entitled to exemption from taxation on the income he received from UNOPS. The second was

whether, by reason of s 357-60(1) of Schedule 1 to the *Taxation Administration Act 1953* (Cth) and TD 92/153, the commissioner was bound to exempt Mr Jayasinghe from taxation on the income he received from UNOPS.

## Did Mr Jayasinghe hold an office in an international organisation?

Section 6 of the IOPI Act, titled 'Privileges and immunities of certain international organisations and persons connected therewith', relevantly provides for the conferral, by regulations, of privileges and immunities on entities and persons. Different categories of personnel are entitled to different privileges and immunities.

In the present case, the High Court had to consider the proper construction of 6(1)(d)(i) of the IOPI Act. This confers the privileges and immunities in Part I of the Fourth Schedule of the IOPI Act on a person who holds an office in an international organisation to which the IOPI Act applies. One of those privileges is an exemption from taxation on salaries and emoluments received from the organisation, on which Mr Jayasinghe was relying.

In determining whether Mr Jayasinghe was a person who held an office in an international organisation, the High Court did not adopt either the approach advanced by Mr Jayasinghe (which had been accepted by the Tribunal and by the majority in the Full Federal Court), which focussed on the concept of 'office' adopted in domestic law following the decision of Rowlatt J in *Great Western Railway Co v Bater*<sup>3</sup>, nor the approach advanced by the commissioner (and accepted by Allsop CJ in dissent in the Full Court), which focussed on the designation of a position as an office by the international organisation itself.<sup>4</sup>

Rather, Kiefel CJ, Keane, Gordon and Edelman JJ held<sup>5</sup> that in determining whether a person 'holds an office in an international organisation', s 6(1)(d)(i) of the IOPI Act is concerned with the incidents of the relationship between the person and the relevant international organisation. It focuses on the substance of the terms upon which a person is engaged - not whether the relevant

organisation has attributed a particular label to the engagement - and on the relationship between that engagement and the organisation's performance of its functions.

Their Honours held further<sup>6</sup> that the phrase 'a person who holds an office in an international organisation' directs attention to the structure of the organisation and the place of the person within it. The holder of an office in such an organisation may be expected to have a position to which certain duties attach, duties relating to the performance of the organisation's functions and a level of authority with respect to the organisation. The position of the person within the international organisation and the duties and authority associated with it should render explicable why the privileges and immunities are conferred. By comparison, a person whose terms of engagement place him or her outside the organisational structure, and which do not provide that person with any defined duties or authority with respect to the organisation and its functions could not be said to hold an office within the organisation.

Applying the above analysis, Kiefel CJ, Keane, Gordon and Edelman JJ determined that during the relevant period, Mr Jayasinghe did not hold an office in the United Nations (UN), by reason of his being engaged by the UNOPS, within the meaning of s 6(1)(d)(i) of the IOPI Act.<sup>7</sup> Their Honours

considered the incidents of the relationship between Mr Jayasinghe and the UN and held that the Individual Contractor Agreement between Mr Jayasinghe and UNOPS was determinative of the relationship.

In this regard, the terms of the agreement<sup>8</sup> provided that Mr Jayasinghe was engaged in his individual capacity to undertake a non-core function; was paid a monthly fee; had the legal status of an independent contractor; did not have the status of an official of the UN for the purposes of the Convention on the Privileges and Immunities of the United Nations<sup>9</sup> and was considered an expert on mission for the UN within the terms of that convention; was responsible for paying any tax levied by the Australian Government on his UNOPS earnings; and was solely liable for claims by third parties arising from his own negligent acts or omissions in the course of his service under the Individual Contractor Agreement.

#### Was the commissioner bound by TD 92/153?

In the alternative, Mr Jayasinghe relied on the effect of the commissioner's public ruling, TD 92/153. The decision on this point, which turned on the somewhat obscure language of the ruling and on the particular terms of Mr Jayasinghe's engagement, is of

limited significance beyond the specific context of the appeal.

The ruling excluded from its protection 'persons engaged by [an international] organisation as experts or consultants'.<sup>10</sup> Kiefel CJ, Keane, Gordon and Edelman JJ held that whether or not Mr Jayasinghe was engaged as an expert depended on the terms of his engagement, which showed that he was so engaged to perform 'specialist services' in recognition of his 'skills and expertise.' There was no inconsistency between his being engaged as an expert and his performing the functional role of a 'Project Manager'.<sup>11</sup> He was not entitled to exemption by reason of the ruling.

#### ENDNOTES

- 1 *Jayasinghe v Commissioner of Taxation* [2015] AATA 456; (2015) 101 ATR 476.
- 2 *Commissioner of Taxation v Jayasinghe* [2016] FCAFC 79; (2016) 247 FCR 40.
- 3 [1920] 3 KB 266.
- 4 Kiefel CJ, Keane, Gordon and Edelman JJ at [32]-[33], [37].
- 5 Kiefel CJ, Keane, Gordon and Edelman JJ at [37].
- 6 Kiefel CJ, Keane, Gordon and Edelman JJ at [38].
- 7 Kiefel CJ, Keane, Gordon and Edelman JJ at [43].
- 8 Kiefel CJ, Keane, Gordon and Edelman JJ at [42].
- 9 [1949] ATS 3.
- 10 TD 92/153 at [2].
- 11 Kiefel CJ, Keane, Gordon and Edelman JJ at [57].

# Bar Cover

## BARRISTERS SICKNESS & ACCIDENT FUND

Protecting barristers since 1962

- ▶ **Top quality sickness and accident insurance**
- ▶ **Low premiums, excellent value**
- ▶ **We cover your gross income up to \$10,000 per week**
- ▶ **You can claim up to 52 weeks from day one of your illness**

*You should read the Product Disclosure Statement and consider whether the product is appropriate before making your decision.*

**Bar Cover** is issued by Barristers' Sickness & Accident Fund Pty Ltd ACN 000 681 317

- ▶ *We offer cover up to \$2000 per week FREE to readers in your first year.*

*For further information and a PDS, please visit*

**www.barcovers.com.au**

**call (02) 9413 8481**

**or email office@bsaf.com.au**