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This edition provides an update of recent and interesting international legal developments affecting Australia and distinctive contributions made by Australia to contemporary international legal issues during January 2009.

UN Security Council– Authorisation for the Use of Force – Piracy and Armed Robbery off the Somali Coast

Australia is considering deploying a warship to join an international force to provide security to vessels using shipping lanes near the Horn of Africa and act against pirates operating off the Somali coast. Australia would join a number of other States including the United States, China, the United Kingdom, India and Russia. The deployment may also be used in counter-piracy operations in the Indian ocean (Source: 'Australia to take on Somali Pirates', Sydney Morning Herald, 9 January 2009, 4).

By way of background, the Security Council has been 'gravely concerned' by the acts of piracy and armed robbery at sea against vessels off the Somali coast and by the serious threat posed to the safety of commercial maritime vessels. For example, maritime contractors for the World Food Programme are reluctant to deliver food aid to Somalia without naval warship escorts. The Security Council has determined that incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia and continue to constitute a threat against international peace and security in the region. Points of interest arising from the most recent resolutions on this issue, each of which is binding upon Australia under international law as a State Party to the UN Charter [1945] ATS 1, may be summarised as follows:

(i) Security Council Resolution 1838 (7 October 2008), adopted under Chapter VII of the UN Charter, called upon States interested in the security of maritime activities to actively take part in the fight against piracy on the high seas off the coast of Somalia, in particular by deploying naval vessels and military aircraft, and to use the necessary means in conformity with international law to repress acts of piracy. The Council affirmed that the Resolution only applied with respect to the situation in Somalia, shall not affect the rights or obligations or responsibilities of member States under international law with respect to any situation and shall not be considered as establishing customary international law.

(ii) Security Council Resolution 1844 (20 November 2008), adopted under Chapter VII of the UN Charter, imposed a number of targeted measures. First, States were required to prevent the entry into or transit through their territories of individuals, other than their nationals, designated by a UN Sanctions Committee. Designated individuals or entities are those who engage in or provide support for acts that threaten the peace, security or stability of Somalia, have violated the arms embargo or obstructed the delivery of humanitarian assistance. The travel ban would be inapplicable where it is determined on a case-by-case basis that travel was justified by humanitarian need, to further peace and national reconciliation in Somalia or regional stability. Second, States are required to freeze the funds, financial assets and economic resources in their territories which are owned or controlled, directly or indirectly, by designated individuals or entities or by individuals or entities acting on their behalf or at their direction. Furthermore, these funds, assets or resources should not be made available by their nationals or any individuals or entities within their territory to or for the benefit of designated individuals or entities. However, these asset freezes do not apply where States determine that funds, assets or resources are necessary for (i) basic expenses, including paying for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, public utility charges or reasonable professional fees associated with legal services under national law for the routine holding or maintenance of frozen funds, other financial assets and economic resources as notified to the Committee; (ii) extraordinary expenses as approved by the Committee; (iii) satisfying judicial, administrative or arbitral liens previously entered

into as notified to the Committee and not benefiting designated persons. States may also freeze prior interest or other earnings due on accounts or payments due under contracts, agreements or obligations. Finally, States must also take the necessary measures to prevent the direct or indirect supply, sale or transfer of weapons, military equipment, technical assistance and financial services to designated individuals or entities. Security Council Resolution 1844 (2008) also mandated a number of additional obligations including listing and delisting procedures and information-gathering requirements.

(iii) Security Council 1846 (2 December 2008), adopted under Chapter VII of the UN Charter, called upon States, in cooperation with the shipping industry, the insurance industry and the International Maritime Organisation, to issue to ships entitled to fly their flag guidance on avoidance, evasion and defensive techniques and measures to take if under the threat of or attack. It also called for the provision of technical assistance to Somalia and nearby coastal States to ensure coastal and maritime security. The Resolution called upon States to actively take part in the fight against piracy and armed robbery, consistent with this Resolution and relevant international law, by deploying naval vessels and military aircraft, and through seizing and disposing of boats, vessels, arms and other related equipment used in piracy and armed robbery off the coast of Somalia or where there is a reasonable ground for suspecting such use. As authorised by the Transitional Federal Government of Somalia, States may for 12 months enter into the territorial waters of Somalia and use all necessary means to repress piracy and armed robbery at sea in a manner consistent with such action as permitted on the high seas with respect to piracy under relevant international law. However, such measures should not have the effect of denying or impairing the right of innocent passage to the ships of third States. Finally, States have been called upon to co-operate in determining jurisdiction and prosecuting individuals responsible for acts of piracy and armed robbery consistent with applicable international law including international human rights law and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation [1993] ATS No 10 (entry into force for Australia 20 May 1993).

(iv) The Security Council has also addressed the lack of capacity and national law which has hindered international action to date, leading some pirates to be released without facing trial. Security Council Resolution 1851 (16 December 2008), adopted under Chapter VII of the UN Charter, invited States to conclude arrangements with those countries willing to take custody of pirates in order to embark law enforcement officials (so-called “shipriders”) to facilitate the prosecution of detained persons, provided that the advance consent of the Somali government was obtained for the exercise of third State jurisdiction by these shipriders in Somali territorial waters. The Security Council also called upon States to establish an international cooperation mechanism to share information and conclude arrangements consistent with the United Nations Convention against Transnational Organized Crime [2004] ATS No 12 (entry into force for Australia 26 June 2004). Noting Somalia’s primary role in rooting out piracy, States which have received advance notification may undertake all necessary measures that are appropriate in Somalia to suppress piracy and armed robbery at sea provided that such action is consistent with applicable international humanitarian and human rights law. Finally, States have also been urged to make their citizens and vessels available for forensic investigation at the first port of call immediately following an act or attempted act of piracy.

(v) Resolution 1853 (19 December 2008), adopted under Chapter VII of the UN Charter, provided for certain measures to improve the implementation of and compliance with the arms embargo. It also clarified that the arms embargo does not apply to weapons and military equipment, technical training and assistance intended to support the African Union Mission in Somalia (AMISOM) or supplies and technical assistance intended to develop security sector institutions within Somalia.

(vi) Security Council Resolution 1863 (16 January 2009), adopted under Chapter VII of the UN Charter, welcomed the reinforcement of AMISOM to protect key installations in Mogadishu, including the airport, seaport and other strategic areas. It also foreshadowed the transition to a United Nations Peacekeeping Operation to replace AMISOM with a mandate to facilitate humanitarian assistance, provide security for key political infrastructure, protect UN personnel and those involved in the political process, implement the Djibouti Peace Agreement and rebuild Somali security forces and the judiciary. The question of a peacekeeping mission would be decided by the Security Council before 1 June 2009.

The Security Council considers that the 1982 United Nations Convention on the Law of the Sea [1994] ATS No 31 (entry into force for Australia 16 November 1994) sets out the legal framework applicable to combating piracy and armed robbery at sea. States have also been requested by International Maritime Organization Resolution A-1002(25) to issue advice and guidance to ships entitled to fly their flag on appropriate precautionary measures to protect themselves from attack or actions to take if under attack or the threat of attack. Additionally relevant is the Communiqué of the International Conference on Piracy around Somalia held in Nairobi, Kenya of 11 December 2008.

The Security Council has consistently affirmed Somalia’s sovereignty, territorial integrity, political independence, unity and rights over offshore natural resources, including fisheries, in accordance with international law and the Djibouti Peace Agreement. However, the Transitional Federal

Government of Somalia, lacking the capacity to itself interdict pirates or patrol international and territorial sea lanes, has requested international assistance. Piracy attacks have also expanded geographically to include the hijacking of the M/V Sirius Star 500 nautical miles off Kenya and unsuccessful attempts east of Tanzania. Piracy may also play a role in financing violations by armed groups of the arms embargo established under Resolution 1814 (2008) which in turn is fuelled by escalating ransom payments. The European Union has established a coordination unit to support the surveillance and protection activities currently being carried out by some European States as well as operation 'Atalanta' to combat piracy. Peace and stability within Somalia, strengthening State institutions, economic and social development and respecting human rights and the rule of law are also considered to be necessary measures for eradicating piracy and armed robbery.

Treaty Action – Optional Protocol to the Convention on the Elimination of Discrimination against Women

An Optional Protocol to the Convention on the Elimination of Discrimination against Women (CEDAW) [1983] ATS No 9 (entry into force for Australia 27 August 1983) was accepted by the UN General Assembly in 1999 and became operational in 2000. Australia announced its intention to become a Party to the Optional Protocol on 24 November 2008 and acceded to the Optional Protocol in December 2008. The Optional Protocol is expected to enter into force for Australia three months after lodging the instrument of accession (approximately March 2009). The Optional Protocol provides for complaints to be taken to the CEDAW Committee, the principal UN Body responsible for overseeing implementation of the Convention, alleging a breach of their rights under CEDAW. Like the other human rights complaints mechanisms, domestic remedies must first be exhausted. States are obliged to respond to the findings of the CEDAW Committee within six months and provide information on action taken in light of the Committee's views and recommendations. The CEDAW Committee can also initiate an inquiry to investigate claims of serious violations of CEDAW. A model communication for complaints to the CEDAW Committee under the Optional Protocol can be found at www.un.org/womenwatch/daw/cedaw/opmodelform.html.

Litigation - United Kingdom - Intergenerational Compensation Claims - Nuclear Experimentation in Australia during 1950s

A compensation claim brought by 998 ex-servicemen and approximately 250,000 children of ex-servicemen from the UK, New Zealand, Fiji and elsewhere commenced against the Ministry of Defence before Mr Justice Foskett of the United Kingdom High Court. It is claimed that servicemen were negligently exposed to dangerous levels of radiation during nuclear testing conducted between 1952 and 1958 on the Monte Bello islands off north-west Australia, in Maralinga in South Australia and on Christmas Island, also known as Kiritimati, a remote South Pacific atoll. The plaintiffs also claim that the UK government adopted a 'cavalier attitude' to military personnel which it allegedly used as 'guinea pigs' to gauge the impact of nuclear explosions upon human health. It is claimed that servicemen were issued with boiler suits and gloves but no other protective gear and warned to turn their backs when bombs were detonated. New Zealand commissioned scientific research which appeared to demonstrate genetic damage in their veterans arising from radiation exposure including cancer, skin defects, fertility problems and reduced life expectancy. The UK government maintains that few were exposed to radioactivity, disputes scientific evidence and argues that compensation claims are now statute barred. (Source: Peter Walker, The Guardian, 21 January 2009).

Treaty Action – Negotiation of an Anti-Counterfeiting Trade Agreement – Continuing Public Consultations

Australia has been participating in negotiations for an anti-counterfeiting trade agreement (ACTA) throughout 2007 and 2008. Other States include Canada, the European Union, Japan, Jordan, South Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, the United Arab Emirates and the United States. There is also an acknowledgement of the need to attract support from those States in which counterfeiting and piracy is particularly problematic such as within South East Asia. These States intend to establish a new standard of intellectual property enforcement to combat trade in counterfeit and pirated goods. This would complement existing intellectual property enforcement mechanisms such as the World Trade Organisation's Agreement on Trade Related Aspects of Intellectual Property Rights [1995] ATS No 38 and institutions such as the World Intellectual Property Organization, the World Customs Organization, Interpol and the Intellectual Property Experts Group within the context of

Asia-Pacific Economic Cooperation. The magnitude of counterfeiting and piracy products was estimated in 2005 to be up to US\$200 billion. The Agreement is intended to tackle the international trade in counterfeit and pirated goods and redress the adverse impacts upon intellectual property rights holders, consumers and governments as well as their socio-economic implications.

Negotiations commenced with the convening of a Global Congress on Combating Counterfeiting in 2004. Negotiations to date have addressed civil, border and criminal enforcement, enforcement practices, international cooperation and institutional arrangements. Draft proposed text on internet issues is expected to be discussed in March 2009. The proposed legal framework is expected to address the issues of criminalising intellectual property rights infringements, border measures including customs seizures, civil enforcement such as injunctions, digital piracy, CD and DVD disc piracy, internet distribution and information technology.

DFAT has invited submissions from individuals and groups on the merits of the ACTA to guide Australia's participation during the negotiations. The advantages of Australian participation include greater law enforcement cooperation and standardising 'best practice' enforcement methods. Careful consideration will be given to the possible implications of the proposed Agreement and Australia's participation in negotiations is without prejudice to a final decision on whether Australia would join any future treaty.

Relevant resources include a DFAT Discussion Paper on an International Proposal for a Plurilateral Anti-Counterfeiting Trade Agreement, 13 November 2007 and the Group of 8 document, 'Reducing IPR Piracy and Counterfeiting through more Effective Enforcement.' (Source: www.dfat.gov.au/trade/acta/index.html).

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