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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 August 2009.

Indigenous Rights – Comment on Visit to Australia by UN Special Rapporteur

On 27 August 2009, James Anaya, the United Nations Special Rapporteur on Indigenous human rights delivered a damning statement of entrenched racism in Australia, pointing to the measures being carried out against Indigenous people under the Northern Territory intervention, which he described as 'overtly discriminatory' and 'demeaning'. Mr Anaya said the intervention infringes upon Indigenous rights of self-determination and stigmatises Indigenous communities, and in relation to Australia's compliance with its international human rights obligations, he said: "In my opinion, as currently configured and carried out, the Emergency Response is incompatible with Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, treaties to which Australia is a party, as well as incompatible with the Declaration on the Rights of Indigenous Peoples, to which Australia has affirmed its support."

Mr Anaya acknowledged that affirmative measures are required by the Government under its international obligations to address social disadvantage in Indigenous lives, but warned against measures that did not have due regard to the rights of Indigenous peoples to self-determination and freedom from racial discrimination and indignity. Referring to the special measures of the intervention, Mr Anaya said they must be narrowly tailored, proportionate and necessary to achieve the legitimate objectives of the intervention. Mr Anaya acknowledged the Government's efforts to promote equality in Indigenous health and living standards through the COAG Close the Gap initiative, and the process of reforming the intervention in consultation with Indigenous people, but called for a more holistic approach to addressing Indigenous disadvantage in a manner that is compatible with the objectives of the UN Declaration on the Rights of Indigenous Peoples and which promotes their distinct cultural identity, languages and connections with traditional lands under conditions of equality. Mr Anaya called for genuine consultation with Indigenous peoples and their direct participation in redesigning the intervention and policies at the national level. Mr Anaya urged the Government to act swiftly to reinstate the Racial Discrimination Act 1975 (Cth) and bring the intervention into line with Australia's international obligations. The UN's statement highlights the significant problems with the intervention in its current form and, in view of the Government's national apology and support to the Declaration on Indigenous Rights, is of major concern and an embarrassment to Australia's international reputation on human rights.

(Source: Souheir Edelbi, Coordinator of the Indigenous Working Group, NSW Young Lawyers Human Rights Committee.)

International Criminal Law - War Crimes - Extradition - Croatia

An accused Balkans war criminal sought for prosecution by Croatia has won an appeal against his extradition and been released from custody. Dragan Vasiljkovic, otherwise known as Daniel Snedden, has allegedly committed war crimes while leading a Serb paramilitary unit in Croatia during the early 1990s. The Republic of Croatia is currently seeking his extradition. He has been in custody in Australia since his arrest during January 2006. However, a full bench of the Federal Court of Australia on 2 September 2009 found that there was a substantial or real chance of prejudice if he were sent to Croatia to face prosecution. The Federal Court found that there were grounds for believing that he may be

punished or imprisoned by reason of his nationality or political opinion. He had claimed that he would be detained for longer than a Croatian national and that, as a prominent Serbian political and military figure during the conflict, animosity against him in Croatia would prevent a fair trial. The Federal Court allowed his appeal, finding that he had established a valid objection to extradition. The Croatian authorities are currently considering an appeal to the High Court of Australia.

(Source: Sydney Morning Herald, Alleged war criminal wins appeal to stay, 3 September 2009, 2.)

UN Sanctions – Iraq - Breach by Australian Wheat Board – Investigation Abandoned

The Australian Federal Police have announced that they have abandoned their investigation into kickbacks made by the Australian Wheat Board (AWB) to Iraq. The decision to conclude the investigation was jointly made by the Australian Federal Police, the Australian Securities and Investments Commission, the Commonwealth Director of Public Prosecutions and the Attorney-General's Department. AWB had circumvented UN rules concerning its oil-for-food programme by disguising kickbacks as fees paid to a trucking company. Following the Cole Commission of Inquiry, the Howard government commissioned a multiagency taskforce to pursue criminal charges against 11 former AWB officers and a former senior executive of BHP. In July 2009 the Australian Federal Police commissioned a review of this task force. The review concluded that, due to a range of factors, the prospects of a successful criminal prosecution against any former officer of the wheat exporter were limited and not in the public interest. The Australian Securities and Investments Commission is currently conducting its own enquiry. The Commission has initiated civil penalty proceedings in the Victorian Supreme Court against five former AWB executives and the former chairman, alleging that they breached their duties as directors in knowing about the kickbacks and allowing them to continue. The cases were halted last year after it was decided that criminal charges could possibly be laid. However, it had also been suggested that, notwithstanding much documentary material, the task of identifying breaches of criminal law was always going to be an onerous if not an impossible one. It is unlikely that the Commission will now pursue criminal charges against those former executives who funneled almost \$300 million to Saddam Hussein in breach of UN sanctions.

(Source: Sydney Morning Herald, Police axe probe into kickbacks by AWB, 29-30 August 2009, 1.)

Australian Constitution – Defence Power – Military Courts and Tribunals

On 26 August 2009 the High Court of Australia in *Lane v Morrison* [2009] HCA 29 unanimously declared that the legislation establishing the Australian Military Court was unconstitutional. The Military Court had been created to replace the courts martial system and had determined some 170 cases over the past two years. The cases heard by it included cases related to defence travel card fraud, assault, theft, indecency and damaging defence service property. Sentences ranged from fines and loss of rank and seniority to two months detention. The plaintiff in these proceedings had been charged with an act of indecency without consent and assaulting a superior officer. The High Court found that, although the Military Court purported to be a tribunal established under the defence power, it had in fact been operating as a Commonwealth court under the judicial power. French CJ and Gummow J indicated that legislative changes made in 2006 sought to give the Military Court the reputation of the judicial branch of government for impartiality and non-partisanship but without using the judicial power. In doing so the Court exceeded the defence power of section 51 of the Constitution. It is anticipated that some if not all of the cases heard by the Military Court will have to be redetermined. The Minister for Defence, John Faulkner, and the Attorney-General, Robert McClelland, were seeking legal advice on replacing the system.

(Source: Sydney Morning Herald, Military justice system in tatters, 27 August 2009, 1.)

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