

BETWEEN:



COMMISSIONER OF TAXATION
Appellant

KAMAL JAYASINGHE
Respondent

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APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues arising and short answers thereto

2. There are two issues in the appeal, which should be resolved as follows.
3. *First*, in determining whether a person “holds an office in an international organisation” within s 6(1)(d)(i) of the *International Organisations (Privileges and Immunities) Act 1963* (Cth), (**IOPI Act**) and “holds an office in the United Nations” within reg 10(1) of the *United Nations (Privileges and Immunities) Regulations 1986* (Cth) (**UN Regulations**), is that enquiry resolved by:
 - a. the application of some Australia common law conception of “office” to the facts of the case; or
 - b. deciding whether the international organisation in question – here the UN – has established and designated an office which the person holds? **The latter enquiry is to be preferred.**
4. *Secondly*, does Taxation Determination TD92/153 (the **Ruling**), read with s 357-60 of

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Australian Government Solicitor
Level 42, MLC Centre, 19 Martin Place
Sydney NSW 2000

Ph: (02) 9581 7622
Fax: (02) 9581 7778
Email: david.morris@ags.gov.au
Contact: David Morris

Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TA Act**), preclude the Appellant (**Commissioner**) from taxing the Respondent's United Nations Office for Project Services (**UNOPS**) earnings in the 2010 and 2011 income years? **No**

Part III: Notice under s 78B of the Judiciary Act 1903

5. The Commissioner certifies that he has considered whether a notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and has concluded that such notice need not be given.

Part IV: Citations for decisions below

6. The judgment of the Full Federal Court (**FFC**) is reported as *Commissioner of Taxation v Jayasinghe* [2016] FCAFC 79; (2016) ATC 20-571. The decision of the Administrative Appeals Tribunal (**AAT**) is reported as *Jayasinghe v Commissioner of Taxation* [2015] AATA 456; (2015) ATC 10-398.

Part V: Facts

7. The Respondent is a qualified civil engineer who was engaged during the 2010 and 2011 income years by UNOPS, an operational arm of the UN, to perform work in Sudan as a project manager for the building of a road (AAT [9]-[10]). The Respondent was engaged by UNOPS under an "Individual Contractor Agreement" (**ICA**). That agreement provided that the Respondent was engaged by UNOPS as an "*international individual contractor to provide specialist services*". His contract level was as an "*International Specialist - ICA, Level 3*" (AAT [13], [15], [27]). The terms and conditions incorporated in the ICA are extracted by Allsop CJ at FFC [31]. Under those terms and conditions, the Respondent was given the legal status of an independent contractor vis-à-vis UNOPS; was not made a staff member of the UN or UNOPS under the UN Staff Regulations; and was not made an official of the UN or UNOPS entitled to the privileges of an official under the *Convention on the Privileges and Immunities of the United Nations* [1949] ATS 3 (**UN Convention**). The ICA stated that the Respondent was responsible for paying any tax levied by his Government on his earnings from UNOPS and that UNOPS would not reimburse such taxes (AAT [29], [31]).
8. The ICA, from May 2010, also included a clause 4.1.4 which relevantly provided that "*in general, all international individual contractors are considered "experts on mission for*

the United Nations” within the terms of s 22 of Article VI of the [UN] Convention”.

9. In September 2013 the Commissioner assessed the Respondent upon his earnings from his UNOPS engagement in the 2010 and 2011 income years. The Respondent objected to the assessments, contending that his earnings were exempt under the IOPI Act, the Ruling, or both.
10. The Commissioner’s decision to disallow the objection on both grounds was referred to the AAT for review under Part IVC of the TA Act.
11. The AAT set aside the objection decision, finding that the taxpayer was the holder of an “office” in an international organisation within the meaning of the IOPI Act and UN Regulations and that, in addition, he was a person who worked as an employee of UNOPS and was therefore entitled to the benefit of the Ruling (AAT [52], [60], [64]).
12. The Commissioner appealed against both bases of the Tribunal’s decision. Both grounds of challenge were rejected by Pagone and Davies JJ (**FFC Majority**), but each ground of challenge was upheld by Allsop CJ.

Part VI: Argument

Issue 1 – Construction of s 6(1)(d)(i) of the IOPI Act and reg 10(1) of the UN Regulations

13. The question of construction raised by the first and second grounds of appeal was one on which the Court below was divided at a high level of principle. That question concerns the meaning of the expressions “*a person who holds an office in an international organisation*” within s 6(1)(d)(i) of the IOPI Act, and “*a person who holds an office in the United Nations*” within reg 10(1) of the UN Regulations, made under s 6.
14. The meaning for which the Commissioner contends, which was adopted by Allsop CJ, is that a person “*holds an office*” in an international organisation under s 6(1)(d)(i), and in the UN under reg 10(1), if that organisation has established and designated an office which the person holds. That approach seeks to construe the composite expression “holds an office in an international organisation” in s 6(1)(d) having regard to the context in which it appears in the IOPI Act read as a whole, as well as the international law framework which underlies the IOPI Act. As Allsop CJ observed (FFC [25]), when the statute is construed in this way, one apprehends a structural coherence between s 6 of the IOPI Act (and the regulations made under it) and the UN Convention, which leads to the conclusion that, in

deciding whether a person holds an office in the UN for the purpose of the IOPI Act and UN Regulations, one should look to whether the person has been appointed as an official according to the arrangements and affairs of that organisation. This approach is supported by the words “holds” and “in”, which naturally direct attention to the incidents of the relationship between a person and an international organisation as agreed upon between them.

15. The alternative meaning for which the Respondent contends, which was adopted by the AAT and the FFC majority, is that the notion of “office” in s 6(1)(d)(i) and reg 10(1) has what is said to be its “ordinary English meaning” in the sense described by Rowlatt J in *Great Western Rail Co v Bater* [1920] 3 KB 266 (see AAT [33], [35], [44]; FFC [47]) (Bater). On that approach, whether a person holds an office within s 6(1)(d)(i) of the IOPI Act is to be discerned without regard to (i) the particular arrangements set in place in the international organisation in question; (ii) the framework of privileges or immunities for which provision is made in the other paragraphs of s 6(1) of the IOPI Act; or (iii) to the provisions of the UN Convention, to which Australia is party, including the concept of an “official” therein.

16. For the following reasons, the first meaning is to be preferred.

Allsop CJ’s approach is supported by textual, contextual and purposive considerations

17. The statutory language which must be construed is the phrase “holds an office in an international organisation” in s 6(1)(d) of the IOPI Act and “holds an office in the United Nations” in reg 10(1) of the UN Regulations. As Allsop CJ observed, attention is immediately directed to the conception of the holding of an office “in” the organisation in question – here the UN – as opposed to the undertaking of an identified physical activity with the organisation such as is described in ss 6(1)(c) and (e), namely, being accredited to or in attendance at a conference, serving on a committee, participating in work or performing a mission (FFC [14]).

18. The different paragraphs in s 6(1) and different suites of privileges and immunities in the five schedules to the IOPI Act provide for nuanced differences in the regulations that may be made for different categories of persons associated with international organisations in particular ways, within the limits set within the schedules (see FFC [15] per Allsop CJ). Thus, if a person holds a “high office” in an international organisation – as prescribed by

regulation – that person may be conferred the privileges and immunities in the Second Schedule; whereas if the person holds an office in the international organisation which does not qualify as a high office, the person may be conferred the partially overlapping but not identical privileges and immunities in the Fourth Schedule. Section 6(1) of the IOPI Act also distinguishes between, relevantly, persons who hold an office in an international organisation, who may be conferred the privileges and immunities in the Fourth Schedule, and persons who are “*servicing on a committee, or participating in the work of*” a relevant international organisation or performing “*a mission on behalf of*” any such organisation, any of which may be conferred the overlapping but not identical privileges in the Fifth Schedule. The structure of the statutory scheme therefore assumes the existence of some criterion by which to distinguish between the different categories of personnel described in s 6(1), who are respectively entitled to different sets of privileges and immunities.

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19. The UN Regulations give practical operation to the scheme of privileges and immunities the conferral of which is facilitated by the regulation making power in ss 6(1) and 13 of the IOPI Act, by extending the sets of privileges and immunities contained in the Schedules to the Act to particular classes of persons entitled to receive them. Importantly, reg 10(1) provides that a person who holds an office (other than a high office) in the UN is entitled to those privileges and immunities appearing in Part I of the Fourth Schedule to the IOPI Act, including the exemption from taxation on salaries and emoluments received from the international organisation in item 2. However, if the person has a relationship with the UN in terms described by s 6(1)(e) of the IOPI Act, reg 11(1) provides that the person is entitled to those privileges and immunities appearing in Part I of the Fifth Schedule to the IOPI Act excluding, significantly, the taxation exemption available for conferral in item 2A of the Fifth Schedule. This points to a construction of *all* of the terms within s 6(1) of the IOPI Act that accords significant legal consequences to the ways in which the relevant international organisation has itself chosen to engage personnel to carry out the work of the organisation.
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20. A construction that looks to the designation of a person by the organisation with which they are associated derives contextual support from particular provisions of the statutory scheme beyond s 6(1) of the IOPI Act and reg 10(1) of the Regulations. Subsection 6(2) of the IOPI Act makes clear that the regulation-making power in s 6(1) may be exercised in
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relation to particular international organisations and particular offices within them. As regards the UN, the designation by the UN Regulations of specific “high offices” which are particular to that organisation as ones attracting the privileges and immunities in the Second Schedule – namely, those of Secretary-General, Under Secretary-General and Assistant Secretary-General – provides a powerful indicator that the holding of an “office” (other than a high office) in the UN is also a matter that is to be uniquely determined by that organisation. Furthermore, those aspects of the statutory scheme providing for the waiver of privileges and immunities conferred on UN personnel point in the same direction. The UN Secretary-General may waive any privileges and immunities to which an office holder would otherwise be entitled (IOPI Act, s 10; UN Regulations, reg 12(2)). This aspect can be reconciled only with the UN being able to organise its affairs so to determine who may benefit, and how, from privileges and immunities conferred on specific classes of personnel, in the first place.

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21. Allsop CJ’s reasons and conclusion are consistent with the statutory purpose of the IOPI Act. This Court recognised in *Macoun v Commissioner of Taxation* (2015) 90 ALJR 93 (*Macoun*) that the privileges and immunities outlined in the IOPI Act are not conferred for the benefit of the individual concerned but to assist international organisations in the performance of their functions. That “functional necessity” purpose—which the Court viewed as being “reinforced” by the waiver provisions referred to at [20] above—was explained as follows (at [54]):

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The purpose of conferring the privileges and immunities in that manner is not for the benefit of, or personal to, the persons connected with those international organisations, but is rather to assist the organisations in the “performance of [their] functions.”

22. This Court also recognised in *Macoun* (at [54]) that the purpose of making a taxation exemption available for conferral on officers of international organisations was to ensure that the international organisation “*secures the services of an officer who remains independent by reason of not having to submit to the taxation jurisdiction of a Convention State (whether the State of his or her nationality or residence, or a State in which he or she is located whilst working for the organisation)*”. In this way, the statutory scheme assumes that international organisations will determine which of their personnel are to attract

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privileges and immunities conferred under international law. That being so, “one is naturally led to seek to understand how the organisation in question conceives of the notion of an office held by someone in it”, as Allsop CJ remarked below (FFC [16]).

23. The construction adopted by Allsop CJ’s is also supported by reference to Australia’s international obligations.
24. In *Macoun*, this Court stated that the IOPI Act should be construed “in a manner which accords with Australia’s international obligations if such a construction is open” (at [67]); see also *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 15 [34] (*QAAH*) and *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at 630 [53] (*WZAPN*). In *QAAH* the majority said (at [34]) that Australian courts will endeavour to adopt a construction of a domestic Act and regulations, “if that construction is available”, which conforms to the relevant Convention and that the relevant Convention will be construed by reference to the principles stated in the *Vienna Convention on the Law of Treaties* [1974] ATS 2 (*VCLT*), even though the VCLT had not been enacted as part of the law of Australia. While an international convention may be used in construing a Commonwealth Act, it is the words of the Act which nonetheless govern.
25. A construction of the expression “holds an office” in the IOPI Act and UN Regulations which is consistent with the meaning of the word “official” in the UN Convention is a construction which is “available” or “open” in the language of *QAAH* and *Macoun* and, as explained below, recognises a coherent statutory scheme that implements Australia’s international obligations.
26. In this respect, the UN Convention relevantly enables the UN to make choices between:
 - a. creating an *office* and attracting the privileges and immunities in s 18 in Article V; or
 - b. engaging an *expert on a mission* and attracting the different set of privileges and immunities under s 22 in Article VI; or
 - c. requiring a person to perform a task or tasks which do not attract any privileges or immunities.
27. As the International Court of Justice (*ICJ*) explained in its advisory opinion on Article VI,

s 22 of the UN Convention,¹ the essence of the distinction between a s 18 official and a s 22 expert on a mission is that the former holds an administrative position established within the UN whereas the latter performs a mission for the UN. The ICJ explained the UN's extensive practice in engaging experts on mission across a wide range of areas including, relevantly to the Respondent's mission, "technical assistance" work.

28. Critically, the privileges and immunities conferred on persons *who hold an office in the UN* under Part I of the Fourth Schedule to the IOPI Act and reg 10(1) of the UN Regulations parallel those conferred on *UN officials* under section 18 of the UN Convention. Similarly, the different set of privileges and immunities conferred on persons performing a mission on behalf of the UN under Part I of the Fifth Schedule to the IOPI Act and reg 11(1) of the UN Regulations mirror those accorded to experts performing missions for the UN (other than UN officials in Article V) under section 22 of the UN Convention. By way of illustration, an expert on a mission may benefit from inviolability of papers and documents under each of s 6(1)(e)(i) and item 3 of Part I of the Fifth Schedule to the IOPI Act and also under s 22(c) of the UN Convention, whereas the holder of an office under s 6(1)(d)(i) of the Act, or an official under s 18 of the UN Convention, will not be so entitled. Conversely, a tax exemption may be granted to UN officers under s 6(1)(d)(i) and item 2 of Part I of the Fourth Schedule to the IOPI Act and reg 10(1) of the UN Regulations, and is conferred on UN officials under s 18(g) of the UN Convention, but such a privilege is not conferred on experts on a mission under either the UN Convention or the UN Regulations made under the IOPI Act.
29. Disjunction between the categorisation of UN personnel under the IOPI Act and UN Convention thus produces the result that privileges or immunities that the UN deliberately structures its affairs so as *not to* engage (e.g. a tax exemption for a person who is not an official) would be awarded under domestic law. More worryingly, privileges or immunities that the UN had deliberately structured its affairs *to* engage for someone it had designated to be an expert on a mission such as the Respondent (e.g. those under ss 22(a), (c), (d) and (f) of the UN Convention) would be incapable of conferral under domestic law, because the person would be treated by Australia as a holder of an office who could be conferred Fourth

¹ *Applicability of Article VI, Section 22, of the Convention on Privileges and Immunities of the United Nations (Advisory Opinion)* [1989] ICJ Rep 177 at [47]-[48].

Schedule privileges and immunities but not those under the Fifth Schedule. Such disjunction is readily avoided by construing the categories of UN personnel referred to in the IOPI Act and UN Regulations, and the legal consequences that attach thereto, in a manner which is harmonious with the designation of personnel by the UN itself.

30. Notably, Allsop CJ's conclusion that the statute "*require[es] an understanding of how the organisation views the person to answer the question whether he or she is an officer or official of, or holds an office in, that organisation*" provides a workable construction that not only synchronises the IOPI Act and the UN Convention in a way that is open on the language of the former, but is also apt to produce conformity between the IOPI Act and a range of other international instruments. That is because the enquiry identified by Allsop CJ is not based upon a set of inflexible criteria, but rather is molded to respond to the internal arrangements of the organisation in question and the international conventions to which it is subject.
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31. By way of example, the International Bank of Reconstruction and Development (**IBRD**), which had employed the taxpayer in *Macoun*, is declared under the *Specialized Agencies (Privileges and Immunities) Regulations 1986* (Cth) (**Agencies Regulations**) to be an international organisation to which the IOPI Act applies. The IBRD is also a specialized agency covered by the *Convention on the Privileges and Immunities of the Specialized Agencies* [1988] ATS 41 (**Agencies Convention**). Section 19 of the Agencies Convention (which effectively echoes s 18 of the UN Convention) confers upon officials of the specialized agencies privileges and immunities which substantially mirror those included in Part I of the Fourth Schedule to the IOPI Act. Section 18 of the Agencies Convention provides for the manner in which the specialized agencies are to specify the categories of officials to which the privileges and immunities set out in section 19 shall apply. The *Articles of Agreement of the International Bank for Reconstruction and Development* [1947] ATS 15 in turn provide that the IBRD President, subject to the general control of the Executive Directors, shall be responsible for the organization, appointment and dismissal of the officers and staff (Article V, section 5(b)). The World Bank staff rules then contain details as to the relevant appointment process. There are thus subtle differences in the manner in which IBRD officers and UN officers are appointed under the protocols in place in the respective organisations. However, so long as the notion of an office in the IBRD
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under s 6(1)(d)(i) of the IOPI Act and Agencies Regulations is construed as referring to a position designated as such by the IBRD itself, then a person holding that position will attract the benefits of the Fourth Schedule, in conformity with the requirements of s 19 of the Agencies Convention.

32. A further example is to be found in the Customs Co-operation Council (**CC Council**), which is declared by the *Customs Cooperation Council (Privileges and Immunities) Regulations 1979* (Cth) to be an international organisation to which the IOPI Act applies. The *Convention Establishing the Customs Co-operation Council* [1961] ATS 1 (**CCC Convention**) relevantly distinguishes between the CC Council, representatives of members to it, officials and experts, and the privileges and immunities accorded to each: Article XIII. Section 17, Article VI in the Annex to the CCC Convention provides for the privileges and immunities of officials of the Council, which, again, relevantly replicate those appearing in Part I of the Fourth Schedule to the IOPI Act. Section 16 provides that the CC Council will specify the categories of officials to which that article applies. Once more, then, consistency between the international treaty and Australian law is promoted by respecting the choices made by the CC Council as to who comprises an official therein when construing who is an office holder under the domestic provisions.
33. Finally, the construction set out at paragraph [14] above is consonant with, and supported by, the principle of construction to the effect that revenue laws directed to particular sectors of activity should be interpreted by reference to the meanings in use within those fields of activity: see *Herbert Adams Pty Ltd v Federal Commissioner of Taxation* (1932) 47 CLR 222 at 227 per Dixon J. That general principle has additional strength in the present context by virtue of the matters set out at paragraphs [25]-[26] and [29]-[30] above.

The error in the approach of the AAT and FFC majority

34. The error in the reasoning of the FFC Majority is most apparent in the statement (FFC [51]) that “[t]he text of the [IOPI] Act is not ambiguous and is not to be read down by reference to extrinsic materials which do not form part of Australian law”. That proposition relegates considerations of context and purpose to those cases where there is thought to be ambiguity in the words used. However, as Mason pointed out in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Limited* (1985) 157 CLR 309 at 315, in a passage cited by Allsop CJ at FFC [3]:

the judgments in *Teoh* to suggest that the ratification by Australia of a treaty is irrelevant to the proper construction of a domestic statute *in pari materia*. Indeed, Mason CJ and Deane J said at 287 that “*the fact that [a] Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law*” and McHugh J said at 315 that international conventions “*may, of course, affect the interpretation or development of the law of Australia*”.²

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- b. In *Bradley v The Commonwealth of Australia* (1973) 128 CLR 557, Barwick CJ and Gibbs J held at 582 that since the UN Charter and certain resolutions of the Security Council had not been carried into effect within Australia by appropriate legislation, they could not be relied upon as a justification for executive acts that were otherwise found to be unjustified under Commonwealth legislation. Nothing in their Honour’s reasons suggests that the UN Charter and resolutions of UN bodies are incapable of providing relevant context for the interpretation of a domestic provision where constructional choices are available.
- c. In *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at [61] this Court found that Allsop J, sitting as a member of the Full Federal Court, had, in considering the operation of the *Migration Act 1958* (Cth), erroneously inverted the steps which an Australian court should take in situations
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- in which international instruments have been referred to in, or adopted wholly or in part by, Commonwealth enactments. Callinan, Heydon and Crennan JJ observed that the first step in such a circumstance is to ascertain, with precision, what the Australian law is, that is to say what and how much of an international instrument Australian law requires to be implemented, and that the subsequent step is the construction of so much only of the instrument, and any qualifications

² Each of Mason CJ and Deane J, and McHugh J, proceeded to state the principle that where a statute is ambiguous, the courts should favour that construction which accords with Australia’s obligations under a treaty or international convention, referring to *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38. However, while this principle is posited as a basis upon which international law might affect the construction of domestic legislation, in neither of the judgments is it posited as an exhaustive account of the circumstances in which an international treaty may affect the construction of a domestic statute in accordance with the contextual approach demanded by *CIC*.

or modifications of it, as Australian law requires. While their Honours eschewed a construction of the Commonwealth legislation which began with an examination of the relevant refugee Convention, nothing said by the Court in *NBGM* detracts from the proposition – clearly upheld in *QAAH* at 15 [34], which was heard at the same time as *NBGM* – that in undertaking the task of construing domestic legislation, the international framework in which it sits may be of interpretative assistance, including for the purposes described in s 15AB(1) of the *Acts Interpretation Act 1901* (Cth).

10 d. In *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, French CJ affirmed the principle deriving from *NBGM* that, in any dispute about the application of an Australian law which gives effect to an international convention, the first logical step is to ascertain the operation of the Australian law (at 24). However, his Honour also said that: “[W]here, as in the case of the *Migration Act*, the Act uses terminology derived from or importing concepts which are derived from the international instrument, it is necessary to understand those concepts and their relationships to each other in order to determine the meaning and operation of the Act”.

20 38. In light of the above, Allsop CJ was correct in rejecting the proposition that context cannot be examined unless some ambiguity is revealed; and in holding that the consideration of applicable international treaties as part of a contextual analysis of a Commonwealth statutory provision (FFC [12]):

...is not to invert the process of statutory interpretation by giving any false precedence to context, or to a convention that might be part of the context; rather it is to appreciate that the context of the statute (when read first and last) assists in the fixing of the statutory meaning to those words.

39. The appellant draws attention to several additional difficulties with the reasoning of the FFC majority.

30 40. *First*, their Honours adopted a reasoning process that isolated the term “office” in the IOPI Act from the statutory phrase in which it appeared. That is not a proper approach to construction to composite statutory expressions: see *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 397-402; *Alphapharm Pty Ltd v H Lundbeck A-S* (2014) 254

CLR 247 at 271-272 [61]. In any event, there is no single or authoritative meaning of the term “office” which may be divined from common law authority, absent reference to statutory context. Rather, as the FFC majority and AAT correctly observed, the authorities recognise that the word “office” is capable of a variety of meanings depending in the context in which the word is used: FFC [45], [47]; AAT [36]; *Sykes v Cleary* (1992) 176 CLR 77 at 96-97; *Grealy v Commissioner of Taxation* (1989) 24 FCR 405 at 411-412.

41. Despite that observation, the reasoning of the majority at FFC [47] (and see also AAT [35]) wholly depends upon what their Honours took to be the meaning of the term “office” proffered in 1920 by Rowlatt J *Bater*, without regard to any consideration of context or purpose at all. Their Honours said (FFC [47]):

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The oft cited authority on the meaning of “office” is Great Western Railway Co v Bater [1920] 3 KB 266. In that case Rowlett J said at 274 that an office was something “which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders...”: see also Edwards v Clinch [1982] AC 845, 860, 864. “” (sic) The role of project manager occupied by the taxpayer was an “office” within the meaning of “office” ascribed by Rowlett J in Bater. The Tribunal found at [44]:

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This evidence indicates that the position of Project Manager for the Project was for a substantial period, which took many months. The evidence also indicates that after the Applicant left the position of Project Manager, another person was appointed to act in the position. The position was to this extent independent of the identity of the individual incumbent. It existed before his service and continued after his service.

On those findings, the taxpayer’s position as Project Manager was “an office in an international organisation”, namely, the UN, within the meaning of the statutory text in s 6 of the 1963 Act and reg 10(1) of the 1986 Regulations.

42. The vice in this approach was suitably identified by Allsop CJ as follows (FFC [33]):

It is not just a process of deciding what the word “office” means in the dictionary or by reference to authority referable to other contexts. Here the context assists in fixing the meaning of the statute as requiring an understanding of how the organisation views the person to answer the question whether he or she is an officer or an official of, or holds an office in, that organisation.

43. Secondly, the FFC majority erred in assuming (at FFC [47]) that a broad construction of the word “office” would “*facilitate fulfilment of the purpose of furthering the functions of the United Nations*”. In the present case, UNOPS expressly engaged the Respondent on the basis that he would *not* be exempt from taxation on his UN earnings and conducted its affairs on this basis (for example, the Respondent was not entitled to benefit from the tax equalisation scheme available to UN staff members under clause 3.3 of the UN Staff Regulations). As such, the conferral of a tax exemption on the Respondent – which the UN / UNOPS specifically contemplated would *not* apply – cannot be said to have assisted *the organisation* in the performance of its functions. Further, to expose the UN to decisions by Australian courts which prevent it from determining access by *its* own personnel to privileges and immunities available under the UN Convention undermines rather than advances the functional necessity rationale for the relevant treaty provisions: see UN Convention ss 20, 23; UN Charter, Article 105(2). The assumption upon which the FFC majority proceeded in undertaking its purposive reasoning was flawed.

44. Similarly, their Honours erred in assuming (FFC [51]) that resort to the international law materials led to a “*reading down*” of the meaning of an “office” under Australian law. As has already been emphasised, there is no fixed or static meaning of the term “office” under Australian law. If, which is denied, some Australian or English common law conception of “office” is open or available on the domestic statute, Allsop CJ’s alternative construction is also open or available and should be preferred because such a constructional choice accords with Australia’s treaty obligations: *Macoun* at [67], *QAAH* at [34], *WZAPN* at [53]. That does not involve any narrowing of meaning, but rather is an interpretative exercise in fixing meaning in the first place.

45. Thirdly, the passage in *Bater* which is cited by the FFC majority at [47], and upon which

their Honours based their conclusion, is incapable of providing useful assistance on the notion of an office in other statutory contexts, given the qualifications that are attached to it. The first qualification is that Rowlatt J's finding was directed to the specific question at issue in that case: whether the clerk in question held "*a public office or employment of profit*" within Schedule (E) in s 2 of the *Income Tax Act, 1853* (16 & 17 Vict. c.34) (at 272). In contrast, the word "office" in s 6(1)(d) of the IOPI Act appears in the very different context of the IOPI Act, which confers privileges and immunities for the benefit of the identified international organisations to which it applies.

- 10 46. The second qualification is that, although Rowlatt J inclined to the view that an office or an employment of profit, in that context, referred to "*a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders*", his Honour did not go on "*to give effect to that contention*" (at 274). His Honour's decision rested instead on earlier authority that had taken as "common ground" between the parties that permanent officials of a clerical kind would be officers within Schedule (E).
- 20 47. The third qualification is that the decision of Rowlatt J was ultimately reversed by the House of Lords: *Great Western Railway Company v Bater* [1922] 2 AC 1, which found that the clerk in question did not hold a relevant public office. As to Rowlatt J's postulated meaning of an "office", Lord Atkinson inclined to the view that it was sound but declined to decide the point (at 15); while Lord Wrenbury emphasised the unintelligible nature of the legislation in question, which was said to make it impossible to satisfactorily ascertain and declare its meaning, and said that in each case the inquiry would be different (at 31-33). In the Court of Appeal ((1922) 8 TC 231), Scrutton LJ made similar observations about the difficulties in formulating any clear definition of the relevant statutory expression (at 241), whereas Sterndale MR found Rowlatt J's formulation to be attractive, albeit that it was impossible to apply as an absolute definition in every case (at 238).

Application of Correct Approach

- 30 48. If this Court prefers the construction of the phrase "*person who holds an office in an international organisation / the United Nations*" upheld by Allsop CJ then, on the facts found by the Tribunal, the Respondent did not hold an office in UNOPS for the purposes of the IOPI Act and UN Regulations. In 1946, the UN Secretary-General recommended to

10 the General Assembly that the privileges and immunities in Art V (and Art VII) of the UN Convention should be granted to all “*members of staff ... with the exception of those who are recruited locally and who are assigned to hourly rates*”. The General Assembly adopted this by resolution in the 50th Plenary session on 7 December 1946. Thus, as observed by Allsop CJ (FFC [30]), to understand who is an official of the UN for its own purposes, one first needs to understand whether someone is a member of staff. The Respondent’s contract with UNOPS made clear that he was not engaged as a staff member of the UN, or an official, in accordance with the procedures contemplated by the UN Staff Regulations and Article 101 of the UN Charter (AAT [29], [31]).³ Those contractual arrangements dealing with the status of the Respondent in the organisation of the UN should be determinative or at least of substantial assistance in construing the relevant statutory language (see FFC [32];cf FFC [51]). The UN engaged the Respondent as an expert on a mission and, in doing so, determined that he should be accorded any privileges and immunities as such. He is thus to be accorded Fifth Schedule privileges, not including an immunity from taxation.

Issue 2 – Effect of the Ruling

49. Section 357-60(1) of the TA Act, read with the Ruling (set out in full in Annexure A), does not preclude the Commissioner from taxing the Respondent’s UNOPS earnings.
- 20 50. The Commissioner accepts that public rulings are to be construed by reference to the purpose for which the Commissioner is empowered to make them (FFC [55]); and that a taxpayer is entitled to read the Ruling presently in issue in an unvarnished way and as containing an expression of how the Commissioner views the law (FFC [38]). The Commissioner contends, however, that the reading of the Ruling proffered by Allsop CJ bears the relevant “unvarnished” quality and ought to be preferred to the readings suggested by the AAT and the FFC majority.
51. Allsop CJ read the text of the Ruling as conveying to an ordinary reader that if they were an employee of an international organisation, but were engaged by the organisation as an expert, they would not fall within the phrase “*person who holds an office*” for the purposes of the IOPI Act. His Honour concluded that on the facts as found by the Tribunal, the

³ Article 100 of the UN Charter makes clear that for the purposes of the UN the concept of a ‘staff member’ and an ‘official’ are synonymous.

Respondent was engaged by UNOPS as an expert. In those circumstances, the manner in which, in his view, a taxpayer would understand the Ruling is straightforward and is readily aligned with what a taxpayer in the Respondent's position would already understand about his or her circumstances. His Honour said (FFC [38]):

First, Mr Jayasinghe was entitled to read [the Ruling] and to ask himself whether he was a person who worked as an employee of the organisation. For the reasons expressed by the Tribunal, and as expressed by Pagone and Davies JJ, I would agree that Mr Jayasinghe worked as an employee of UNOPS. That, however, is not the end of the matter. A person in the position of Mr Jayasinghe would have been required to ask himself whether he was either a person who was locally engaged by UNOPS and paid an hourly rate (plainly he was not); or whether he was a person "engaged by the organisation as an expert or consultant". That would have taken Mr Jayasinghe to the terms of his engagement. The terms of Mr Jayasinghe's engagement included the provision that, as an international individual contractor, he was considered "an expert on mission for the United Nations" within the terms of s 22 Article VI of the UN P&I Convention.⁴ Thus, whether or not he worked as an employee of UNOPS, he was engaged by that organisation as an expert on mission.

- 10
- 20 52. In contrast, the FFC Majority's interpretation of the Ruling is difficult to align with the circumstances of a taxpayer in the Respondent's position. It is also difficult to align with the whole of the language of the Ruling. Their Honours concluded that "*the terms of the ruling are not to be read as removing from the class of persons working as employees,*

⁴ This clause appeared in the version of the ICA Policy (incorporated into the Respondent's contract) effective from 1 May 2010 until the end of the 2011 income year. The ICA Policy effective from 1 July 2009 until 30 April 2010 did not include that wording, but clause 1.1 relevantly divided individual contractors into persons engaged by UNOPS for a defined period of time to perform support services (such as administrative and secretarial support) and specialist services (such as expert advisory services; technical skills and/or knowledge). Clause 3.1 of that version provided that individual contractors are not UN officials as defined under the UN Convention and that "*individual contractors who are experts on a mission for the United Nations, within the meaning of Section 22, Article VI of the [UN Convention] are accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions in particular those set out in said Section 22*". The earlier policy thus linked specialists engaged under ICAs with the protections accorded under s 22 of the UN Convention.

those persons who both work as employees and are engaged as experts and consultants" (FFC [56]) is simply not what the Ruling says.

53. The AAT's approach to the meaning of the expression "engaged as an expert" suffers from its own difficulties. The AAT concluded that the Respondent was not so engaged because his duties were not confined to "*advis[ing] or giv[ing] opinions from time to time as to the implementation, design or progress of the [road] work*", but included "*managerial, administrative, negotiation, supervision and numerous other activities*". However, that also is not what the Ruling says. Paragraph 3 of the Ruling says that in determining whether a person holds an office, the relevant international organisation is required to apply the tests stipulated therein. The Ruling makes clear in that paragraph that some determinative weight is to be given to the international organisation's own designation of a person. On the view taken by both the AAT and FFC Majority, that is a consideration that is given no weight whatsoever. For that reason alone the Ruling cannot mean what it has thus far been held to mean.

Part VII: Applicable provisions

54. The following provisions, applicable to the appeal, are annexed hereto:
- a. *International Organisations (Privileges and Immunities) Act 1963* (Cth), ss 3(1), 5(1), 6(1), 6(2), 10, 11, 13 and the Second, Third, Fourth and Fifth Schedules (compilation prepared 10 July 2008).
 - b. *United Nations (Privileges and Immunities) Regulations 1986* (Cth), reg 3, 6, 7, 8, 10, 11, 12 (compilation prepared 7 August 2000).
 - c. *General Convention on the Privileges and Immunities of the United Nations* [1949] ATS 3, Articles V and VI.
 - d. *Charter of the United Nations* [1945] ATS 1, Chapter XV and Article 105.
 - e. UN General Assembly Resolution on "Privileges and Immunities of the Staff of the Secretariat of the United Nations", 7 December 1946.
 - f. Staff Regulations of the United Nations, ST/SGB/2009/6, effective from 1 July 2009 to 31 December 2011, Scope and Purpose clause, reg 1.1, 4.1, Annex II.
 - g. *Taxation Administration Act 1953* (compilation prepared 27 September 2013), s 357-

h. Taxation Determination TD92/153.

55. As at the date of these submissions, the provisions of the IOPI Act and UN Regulations listed in (a) and (b) above are still in force in the form appearing in the compilations identified, save that ss 11(2) and 13(2) of the IOPI Act have been amended in minor respects, as described in the Annexure at footnotes (i) and (ii).

Part VIII: Orders sought by the Commissioner

56. The appeal be allowed.

57. Set aside the order of the Full Federal Court made on 9 June 2016, and in its place order
10 that:

a. The appeal be allowed.

b. The decision of the Administrative Appeals Tribunal made on 29 June 2015 be set aside and in lieu thereof it be ordered that the decision under review be affirmed.

Part IX: Estimate of time for oral argument

58. The Appellant estimates that two hours will be required for the presentation of the Commissioner's oral argument.

Dated 21 December 2016

20 J O Hmelnitsky SC



T L Phillips

ANNEXURE A

PART V – APPLICABLE STATUTORY PROVISIONS

International Organisations (Privileges and Immunities) Act 1963 (Cth)

(Compilation prepared on 10 July 2008 for 4 July 2008 to 28 June 2013)

3 Interpretation

(1) In this Act, unless the contrary intention appears:

international organisation to which this Act applies means an organisation that is declared by the regulations to be an international organisation to which this Act applies, and includes:

- 10 (a) an organ of, or office within, an organisation that is so declared;
- (b) a commission, council or other body established by such an organisation or organ; and
- (c) a committee, or sub-committee of a committee, of such an organisation, organ, commission, council or body.

5 International organisations to which Act applies

(1) The regulations may declare an organisation:

- 20 (a) of which Australia and a country or countries other than Australia are members; or
 - (b) that is constituted by a person or persons representing Australia and a person or persons representing a country or countries other than Australia;
- to be an international organisation to which this Act applies.

6 Privileges and immunities of certain international organisations and persons connected therewith

(1) Subject to this section, the regulations may, either without restriction or to the extent or subject to the conditions prescribed by the regulations:

- 30 (a) confer upon an international organisation to which this Act applies:
 - (i) juridical personality and such legal capacities as are necessary for the exercise of the powers and the performance of the functions of the organisation; and
 - (ii) all or any of the privileges and immunities specified in the First Schedule;
- (b) confer:
 - (i) upon a person who holds, or is performing the duties of, an office prescribed by the regulations to be a high office in an international organisation to which this Act applies all or any of the privileges and immunities specified in Part I of the Second Schedule; and

(ii) upon a person who has ceased to hold, or perform the duties of, such an office the immunities specified in Part II of the Second Schedule;

(c) confer:

(i) upon a person who is accredited to, or is in attendance at an international conference convened by, an international organisation to which this Act applies as a representative of:

(A) a country other than Australia;

(B) another international organisation to which this Act applies; or

(C) an overseas organisation to which this Act applies;

10 all or any of the privileges and immunities specified in Part I of the Third Schedule; and

(ii) upon a person who has ceased to be accredited to such an organisation, or has attended such a conference, as such a representative the immunities specified in Part II of the Third Schedule;

(d) confer:

(i) upon a person who holds an office in an international organisation to which this Act applies (not being an office prescribed by the regulations to be a high office) all or any of the privileges and immunities specified in Part I of the Fourth Schedule; and

20 (ii) upon a person who has ceased to hold such an office the immunities specified in Part II of the Fourth Schedule; and

(e) confer:

(i) upon a person who is serving on a committee, or is participating in the work, of an international organisation to which this Act applies or is performing, whether alone or jointly with other persons, a mission on behalf of such an organisation all or any of the privileges and immunities specified in Part I of the Fifth Schedule; and

30 (ii) upon a person who has served on such a committee or participated in such work or has performed such a mission the immunities specified in Part II of the Fifth Schedule.

(2) Regulations made for the purposes of this section may be of general application or may relate to:

(a) particular international organisations to which this Act applies;

(b) particular offices or classes of offices;

(c) particular conferences, committees or missions or classes of conferences, committees or missions; or

(d) representatives of particular countries, of particular international organisations to which this Act applies or of particular overseas organisations to which this Act applies.

40

10 Waiver

The regulations may make provision for or in relation to the waiver of any privileges or immunities to which an international organisation or a person is entitled by virtue of this Act or the regulations.

11 Certificates by Minister

(1) The Minister may give a certificate in writing certifying any fact relating to the question whether a person is, or was at any time or in respect of any period, entitled, by virtue of this Act or the regulations, to any privileges or immunities.

10 (2) In any proceedings, a certificate given under this section is evidenceⁱ of the facts certified.

13 Regulations

(1) 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.

20 (2) Regulations under this Act may be expressed to take effectⁱⁱ from a day specified in a written determination made by the Minister under this subsection for the purposes of the commencement of those regulations. If the purpose or object underlying those regulations is to implement an international instrument (whether or not that purpose is expressly stated in those regulations), the day must not be earlier than the day on which the instrument becomes effective for Australia.

(3) Subsection (2) has effect despite anything in the *Legislative Instruments Act 2003*.

(4) If a determination under subsection (2) is made after the commencement of the *Legislative Instruments Act 2003*, the determination is a legislative instrument for the purposes of that Act.

Second Schedule

Part I

30 *Privileges and Immunities of High Officer of International Organisation*

The like privileges and immunities (including privileges and immunities in respect of a spouse and children under the age of twenty-one years) as are accorded to a diplomatic agent.

Part II

Immunities of Former High Officer of International Organisation

ⁱ The *Statute Update Act 2016* (Cth), Schedule 3, clause 27 substituted “evidence” for “prima facie evidence”.

ⁱⁱ The *Acts and Instruments (Framework Reform) (Consequential Provisions) Act 2015*, Schedule 1, clause 316 substituted “take effect” for “commence”.

Immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer.

Third Schedule

Part I

Privileges and Immunities of Representative accredited to, or attending Conference convened by, International Organisation

1. Immunity from personal arrest or detention.
- 10 2. Immunity from suit and from other legal process in respect of acts and things done in his capacity as such a representative.
3. Inviolability of papers and documents.
4. The right to use codes and send and receive correspondence and other papers and documents by couriers or in sealed bags.
5. Exemption (including exemption of the spouse of the representative) from the application of laws relating to immigration, the registration of aliens and the obligation to perform national service.
6. Exemption from currency or exchange restrictions to such extent as is accorded to a representative of a foreign government on a temporary mission on behalf of that government.
- 20 7. The like privileges and immunities, not being privileges and immunities of a kind referred to in any of the preceding paragraphs, as are accorded to a diplomatic agent, other than exemption from—
 - (a) excise duties; and
 - (c) duties on the importation or exportation of goods not forming part of personal baggage.

Part II

Immunities of Former Representative accredited to, or attending Conference convened by, International Organisation

- 30 Immunity from suit and from other legal process in respect of acts and things done in his capacity as such a representative.

Fourth Schedule

Part I

Privileges and Immunities of Officer (other than High Officer) of International Organisation

1. Immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer.
2. Exemption from taxation on salaries and emoluments received from the organisation.
3. Exemption (including exemption of a spouse and any dependent relatives) from the application of laws relating to immigration and the registration of aliens.
- 10 4. Exemption from the obligation to perform national service.
5. Exemption from currency or exchange restrictions to such extent as is accorded to an official, of comparable rank, forming part of a diplomatic mission.
6. The like repatriation facilities (including repatriation facilities for a spouse and any dependent relatives) in time of international crisis as are accorded to a diplomatic agent.
7. The right to import furniture and effects free of duties when first taking up a post in Australia and to export furniture and effects free of duties when leaving Australia on the termination of his functions.

Part II

Immunities of Former Officer (other than High Officer) of International Organisation

20 Immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer.

Fifth Schedule

Part I

Privileges and Immunities of Person serving on Committee or participating in Work of, or performing Mission on behalf of, International Organisation

1. Immunity from personal arrest or detention.
2. Immunity from suit and from other legal process in respect of acts and things done in serving on the committee, participating in the work or performing the mission.
- 30 2A. Exemption from taxation on salaries and emoluments received from the organisation.
3. Inviolability of papers and documents.
4. The right, for the purpose of communicating with the organisation, to use codes and to send and receive correspondence and other papers and documents by couriers or in sealed bags.
5. Exemption from currency or exchange restrictions to such extent as is accorded to a representative of a foreign government on a temporary mission on behalf of that government.

6. The like privileges and immunities in respect of personal baggage as are accorded to a diplomatic agent.

Part II

Immunities of Person who has served on Committee or participated in Work of, or performed Mission on behalf of, International Organisation

Immunity from suit and from other legal process in respect of acts and things done in serving on the committee, participating in the work or performing the mission.

United Nations (Privileges and Immunities) Regulations 1986 (Cth)

- 10 (Compilation prepared on 7 August 2000 for period from 1 July 2000 to date)

3. Act applies to United Nations

The United Nations is an international organisation to which the Act applies.

...

6. Privileges and immunities of the Secretary-General of the United Nations

- (1) The office of Secretary-General of the United Nations is a high office in the United Nations.
- (2) A person who holds, or is performing the duties of, the office of Secretary-General of the United Nations has the privileges and immunities specified in Part I of the Second Schedule to the Act.
- 20 (3) A person who has ceased to hold, or perform the duties of, the office of Secretary-General of the United Nations has the immunities specified in Part II of the Second Schedule to the Act.

7. Privileges and immunities of an Under Secretary-General of the United Nations

- (1) The office of Under Secretary-General of the United Nations is a high office in the United Nations.
- (2) A person who holds, or is performing the duties of, the office of Under Secretary-General of the United Nations has the privileges and immunities specified in Part I of the Second Schedule to the Act.
- 30 (3) A person who has ceased to hold, or perform the duties of, the office of Under Secretary-General of the United Nations has the immunities specified in Part II of the Second Schedule to the Act.

8. Privileges and immunities of an Assistant Secretary-General of the United Nations

- (1) The office of Assistant Secretary-General of the United Nations is a high office in the United Nations.
- (2) A person who holds, or is performing the duties of, the office of Assistant Secretary-General of the United Nations has the privileges and immunities specified in Part I of the Second Schedule to the Act.

(3) A person who has ceased to hold, or perform the duties of, the office of Assistant Secretary-General of the United Nations has the immunities specified in Part II of the Second Schedule to the Act.

...

10. Privileges and immunities of officers (other than high officers) of the United Nations

(1) Subject to subregulation (2), a person who holds an office in the United Nations, other than a person who holds, or is performing the duties of, an office specified in subregulation 6 (1), 7 (1) or 8 (1), has the privileges and immunities specified in Part I of the Fourth Schedule to the Act.

10 (2) A person to whom sub-regulation (1) applies does not have the right to export furniture and effects free of duties when leaving Australia on the termination of his or her functions.

(3) A person who has ceased to hold an office in the United Nations, other than an office specified in subregulation 6 (1), 7 (1) or 8 (1), has the immunities specified in Part II of the Fourth Schedule to the Act.

11. Privileges and immunities of persons performing missions for the United Nations

(1) A person who is performing, whether alone or jointly with other persons, a mission on behalf of the United Nations has the privileges and immunities specified in paragraphs 1, 2, 3, 4, 5 and 6 of Part I of the Fifth Schedule to the Act.

20 (2) A person who has performed a mission on behalf of the United Nations has the immunities specified in Part II of the Fifth Schedule to the Act.

12 Waiver of privileges and immunities

(1) The Security Council of the United Nations may waive any privileges and immunities to which:

(a) the United Nations; or

(b) a person upon whom privileges and immunities are conferred by regulation 6, is entitled by virtue of the Act or these Regulations.

30 (2) The Secretary-General of the United Nations may waive any privileges and immunities to which a person upon whom privileges and immunities are conferred by regulation 7, 8, 10 or 11 is entitled by virtue of the Act or these Regulations.

(3) The government of a country referred to in regulation 9 may waive any privileges and immunities to which a person upon whom privileges and immunities are conferred by that regulation is entitled by virtue of the Act or these Regulations.

General Convention on the Privileges and Immunities of the United Nations
[1949] ATS 3

Article V

Officials

Section 17. The Secretary-General will specify the categories of officials to which the provisions of this article and article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.

10 **Section 18.** Officials of the United Nations shall:

- (a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;
- (b) be exempt from taxation on the salaries and emoluments paid to them by the United Nations;
- (c) be immune from national service obligations;
- (d) be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;
- (e) be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government
20 concerned;
- (f) be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys;
- (g) have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

Section 19. In addition to the immunities and privileges specified in section 18, the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

30 **Section 20.** Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

Section 21. The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this article.

Article VI

40 Experts on Missions for the United Nations

Section 22. Experts (other than officials coming within the scope of article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

- (a) immunity from personal arrest or detention and from seizure of their personal baggage;
- (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;
- (c) inviolability for all papers and documents;
- (d) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;
- (e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;
- (f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

Section 23. Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

Charter of the United Nations [1945] ATS 1

CHAPTER XV

THE SECRETARIAT

Article 97

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Article 98

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

Article 99

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Article 100

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 101

10 1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.

3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

CHAPTER XVI

MISCELLANEOUS PROVISIONS

20 ...

Article 105

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

30

UN General Assembly Resolution, 7 December 1946

76(I). Privileges and Immunities of the Staff of the Secretariat of the United Nations

The General Assembly,

Having considered the proposal of the Secretary-General [Documents A/116 and A/116/Add 1] that, in accordance with Section 17 of Article V of the Convention on the Privileges and Immunities of the United Nations, the categories of officials to which the provisions of Articles V and VII shall apply should include all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates;

- 10 *Approves* the granting of the privileges and immunities referred to in Articles V and VII of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates.

Fiftieth plenary meeting

7 December 1946

Staff Regulations of the United Nations, ST/SGB/2009/6, effective from 1 July 2009

Scope and purpose

- 20 The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of human resources policy for the staffing and administration of the Secretariat. For the purposes of these Regulations, the expressions “United Nations Secretariat”, “staff members” or “staff” shall refer to all the staff members of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter. The Secretary-General, as the chief administrative officer, shall provide and enforce such staff rules consistent with these principles as he or she considers necessary.

30 ...

Article I

Duties, obligations and privileges

Regulation 1.1

Status of staff

- (a) Staff members are international civil servants. Their responsibilities as staff members are not national but exclusively international;
- (b) Staff members shall make the following written declaration witnessed by the Secretary-General or his or her authorized representative:

“I solemnly declare and promise to exercise in all loyalty, discretion and

conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other source external to the Organization.

“I also solemnly declare and promise to respect the obligations incumbent upon me as set out in the Staff Regulations and Rules.”

10 (c) The Secretary-General shall ensure that the rights and duties of staff members, as set out in the Charter and the Staff Regulations and Rules and in the relevant resolutions and decisions of the General Assembly, are respected;

(d) The Secretary-General shall seek to ensure that the paramount consideration in the determination of the conditions of service shall be the necessity of securing staff of the highest standards of efficiency, competence and integrity;

(e) The Staff Regulations apply to all staff at all levels, including staff of the separately funded organs, holding appointments under the Staff Rules;

20 (f) The privileges and immunities enjoyed by the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who are covered by them to fail to observe laws and police regulations of the State in which they are located, nor do they furnish an excuse for non-performance of their private obligations. In any case where an issue arises regarding the application of these privileges and immunities, the staff member shall immediately report the matter to the Secretary-General, who alone may decide whether such privileges and immunities exist and whether they shall be waived in accordance with the relevant instruments.

...

Article IV

Appointment and promotion

Regulation 4.1

30 As stated in Article 101 of the Charter, the power of appointment of staff members rests with the Secretary-General. Upon appointment, each staff member, including a staff member on secondment from government service, shall receive a letter of appointment in accordance with the provisions of annex II to the present Regulations and signed by the Secretary-General or by an official in the name of the Secretary-General.

Annex II

Letters of appointment

(a) The letter of appointment shall state:

40 (i) That the appointment is subject to the provisions of the Staff Regulations and of the Staff Rules applicable to the category of appointment in question and to changes which may be duly made in such regulations and rules from time to time;

- (ii) The nature of the appointment;
 - (iii) The date at which the staff member is required to enter upon his or her duties;
 - (iv) The period of appointment, the notice required to terminate it and the period of probation, if any;
 - (v) The category, level, commencing rate of salary and, if increments are allowable, the scale of increments, and the maximum attainable;
 - (vi) Any special conditions which may be applicable;
 - (vii) That a temporary appointment does not carry any expectancy, legal or otherwise, of renewal. A temporary appointment shall not be converted to any other type of appointment;
 - (viii) That a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service;
- (b) A copy of the Staff Regulations and the Staff Rules shall be transmitted to the staff member with the letter of appointment. In accepting appointment the staff member shall state that he or she has been acquainted with and accepts the conditions laid down in the Staff Regulations and in the Staff Rules;
- (c) The letter of appointment of a staff member on secondment from government service signed by the staff member and by or on behalf of the Secretary- General, and relevant supporting documentation of the terms and conditions of secondment agreed to by the Member State and the staff member, shall be evidence of the existence and validity of secondment from government service to the Organization for the period stated in the letter of appointment.

Taxation Administration Act 1953 (Cth)

(Compilation prepared on 27 September 2013 for 1 July 2013 to 11 March 2014)

357-60 When rulings are binding on the Commissioner

- (1) Subject to subsection (5), a ruling binds the Commissioner in relation to you (whether or not you are aware of the ruling) if: (a) the ruling applies to you; and (b) you rely on the ruling by acting (or omitting to act) in accordance with the ruling

Taxation Determination TD92/153.

Income tax: who is a 'person who holds an office' as specified in various regulations made under the International Organisations (Privileges and Immunities) Act 1963 ?

10 1. Salaries and emoluments received from an international organisation by a person who holds an office in that organisation may be exempt from Australian income tax under regulations made under the *International Organisations (Privileges and Immunities) Act 1963* (IO(P+I)A). The availability and extent of exemption varies from organisation to organisation, and in this regard individual regulations should be consulted. The question arises, however, who is a 'person who holds an office' for the purposes of the regulations under the IO(P+I)A.

2. The Department of Foreign Affairs and Trade, who administer the [IOPI Act] and regulations, take the view that the phrase 'person who holds an office' in relation to a prescribed international organisation covers those people who work as employees for that organisation. They do not accept, however, that the phrase includes either:

- persons who are locally engaged by the organisation and paid at an hourly rate; or
- persons engaged by the organisation as experts or consultants.

20 We agree with those views.

3. In determining whether a person holds an office, the relevant international organisation is required to apply these tests. As a practical matter, if the international organisation designates a person as one who holds an office in that organisation, we will accept, in the absence of contrary evidence, that this designation is sufficient evidence of the status of that person. If the other requirements of the regulations are satisfied, that person will be entitled to the privileges and immunities available to a person who holds an office in that organisation.

Note: For experts or consultants who are Australian residents, income received from the international organisation may be exempt under section 23AG of the *Income Tax Assessment Act 1936*. For more details, reference should be made to the provisions of 23 AG.