HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND HEYDON JJ

ANTONY GORDON OATES APPELLANT

AND

ATTORNEY-GENERAL FOR THE COMMONWEALTH
OF AUSTRALIA & ANOR RESPONDENTS

Oates v Attorney-General (Cth) [2003] HCA 21
Date of Order: 4 March 2003
Date of Publication of Reasons: 10 April 2003
S431/2002

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

J E Griffiths SC with S E Pritchard for the appellant (instructed by Michell Sillar)

A Robertson SC with S B Lloyd and G A Hill for the respondents (instructed by Australian Government Solicitor)

CATCHWORDS

Oates v Attorney-General (Cth)

Extradition – Request for surrender of alleged fugitive offender from foreign state – Where extradition treaty exists with foreign state – Whether offences referred to in request were offences listed in extradition treaty – Whether request lawful.

Constitutional law (Cth) – Executive power – Power to request surrender of alleged fugitive offender from foreign state – Whether power abrogated by statute – Whether limitations, conditions, exceptions or qualifications imposed upon power to request surrender – Whether power may only be exercised in relation to extraditable offences as listed in extradition treaty with foreign state – *Extradition Act* 1988 (Cth), ss 3, 11, 40.

Statutory interpretation – Executive power – Power to request surrender of alleged fugitive offender from foreign state – Whether power abrogated by statute – Whether statute abrogates power by express words or necessary implication – *Extradition Act* 1988 (Cth), ss 3, 11, 40.

Extradition Act 1988 (Cth), ss 3, 11, 40.
Extradition (Foreign States) Act 1966 (Cth), ss 9, 21.
Poland (Extradition: Commonwealth of Australia and New Zealand) Order in Council 1934 (UK).
Extradition Act 1870 (UK), s 2.
Extradition Acts 1870-1935 (UK).

1 GLEESON CJ, McHUGH, GUMMOW, KIRBY, HAYNE AND HEYDON JJ. This was an appeal from a decision of the Full Court of the Federal Court (O'Loughlin and Whitlam JJ, Conti J dissenting)[1], which dismissed an appeal from Lindgren J[2]. On 4 March 2003, the Court made an order dismissing the appeal with costs. The following are our reasons for that order.

The nature of the proceedings

2 The case concerns the lawfulness of a request made by the first respondent for the extradition of the appellant from the Republic of Poland.

3 The appellant was a director of Bell Resources Ltd, a company based in Western Australia. On 11 January 1995, a complaint was laid against him by an officer of the Australian Securities Commission, and a warrant was issued for his arrest. At the time, the appellant was resident in Poland, where he had resided since 1991.

4 On 7 July 1996, the first respondent signed a document in the following terms:

> "REQUEST FOR THE EXTRADITION TO AUSTRALIA FROM THE REPUBLIC OF POLAND OF
>
> ANTONY GORDON OATES
>
> I, Daryl Williams, Attorney-General of Australia, on behalf of the Government of Australia hereby request that Antony Gordon Oates, who is accused in the State of Western Australia of the following offences:
>
> - one count of conspiracy to defraud contrary to section 412 of the *Criminal Code* of Western Australia;
>
> - eight counts of improper use of position as a company director contrary to section 229(4) of the *Companies (Western Australia) Code*; and

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1 *Oates v Attorney-General (Cth)* (2002) 189 ALR 216.

2 *Oates v Attorney-General (Cth)* (2001) 181 ALR 559.

- eight counts of failure to act honestly as a company director contrary to section 229(1) of the *Companies (Western Australia) Code*;

be returned to Australia to be dealt with according to law.

Dated at Perth,
this 7th day of July 1996.

Daryl Williams [signed]
Attorney-General"

5 Section 412 of the Criminal Code of Western Australia made it an offence for any person to conspire with another to defraud the public or any person. Section 229(1) of the Companies Code of Western Australia provided that an officer of a corporation should at all times act honestly in the exercise of his powers and the discharge of the duties of his office, and provided a penalty for breach. Section 229(4) of the same Code made it an offence for an officer of a corporation to make improper use of his position to gain, directly or indirectly, an advantage for himself or any other person or to cause detriment to the corporation.

6 The request was communicated to the Republic of Poland, and, on 22 October 1996, the appellant was arrested. He remained in custody until 22 May 1997. There have been legal proceedings in Poland between the appellant and the authorities of that country, but they are not relevant to the issue before this Court.

7 The claims for relief made in the Federal Court were somewhat wider than those with which this Court is now concerned. The claims that were pursued in the appeal to this Court were for a declaration that the request was invalid, and an order quashing the request. The ground upon which it was contended that the request was invalid, and should be quashed, was that the offences to which it referred were not offences listed in the Treaty of Extradition of 1932 ("the 1932 Treaty") to which the Commonwealth of Australia and the Republic of Poland were parties.

8 The respondents did not accept that the offences referred to in the request were not offences listed in the 1932 Treaty. However, even if that were so, the respondents contested the proposition that the request, on that account, would be invalid. The respondents also argued that, in any event, the claims for relief

should be dismissed on discretionary grounds related to delay on the part of the appellant. In the Federal Court, Lindgren J, and the majority in the Full Court, decided in favour of the respondents on all grounds.

9 For the purpose of determining the appeal to this Court, it is necessary to deal only with the second of those three issues. It raises a question of general importance concerning the capacity of the Executive Government to request the extradition from a foreign country, to Australia, of a person alleged to have committed an offence against a law of Australia, in circumstances where there is a treaty of extradition between Australia and the foreign country. A related, but different, question, concerning the capacity to request extradition where there is no treaty, was considered by this Court in *Barton v The Commonwealth*[3].

10 It is necessary to examine the legislative context in which the issue arises.

The legislation and the 1932 Treaty

11 Under the Extradition (Poland) Regulations 1999, which came into force on 2 December 1999, a new treaty of extradition between Australia and Poland took effect. However, the request with which we are concerned was signed and communicated before that date. The case was conducted in the Federal Court, and in this Court, on the basis that the validity of the request was determined by the *Extradition Act* 1988 (Cth) ("the 1988 Act"), and that the relevant treaty was the 1932 Treaty.

12 The 1932 Treaty was entered into on 11 January 1932 between His Majesty the King and the President of the Republic of Poland. It applied in respect of the Commonwealth of Australia by force of the *Poland (Extradition: Commonwealth of Australia and New Zealand) Order in Council* 1934 (UK). The Order in Council was made pursuant to s 2 of the *Extradition Act* 1870 (UK) ("the Act of 1870"). That section provided:

> "2. Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state.

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3 (1974) 131 CLR 477.

> Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in or suspected of being in the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.
>
> Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement.
>
> ..."

13 It may be noted that s 2 speaks of arrangements with respect to the *surrender to* a foreign state of fugitive criminals. The provisions of the Act of 1870 were, with only one exception, concerned with that matter. They established a detailed legislative scheme affecting, and protecting, the rights of persons, whether alien or subject, in the United Kingdom or (relevantly) Australia, whose surrender might be sought by a foreign state. As Mason J pointed out in *Barton*, it was, and is, settled law in the United Kingdom and Australia that a fugitive offender cannot be arrested for extradition overseas in the absence of a warrant issued under the authority of statute. Wrongful arrest could give rise to tortious liability, and could be an occasion for the remedy of habeas corpus. The Act of 1870 "put beyond doubt the abrogation of the executive power formerly enjoyed by the Crown of surrendering fugitive offenders ..., a power which had already been diminished by the *Habeas Corpus Amendment Act* of 1679"[4]. The only exception to the Act's exclusive concern with surrender to a foreign state was s 19, which provided that where, in pursuance of an arrangement with a foreign state, a person accused of an extraditable crime was surrendered by the foreign state, such person should not, until he had been restored or had an opportunity of returning to the foreign state, be tried for any offence other than a crime which may be proved by the facts on which the surrender was grounded ("speciality").

14 It may also be noted that the reference in s 2 to limitations, conditions, exceptions and qualifications is a reference to restricting the operation of a particular Order in Council. The Act also, in s 3, spoke of "restrictions" which prohibited the surrender of a fugitive whose offence was of a political character, or the surrender to a state which had no effective law of speciality, and which

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4 (1974) 131 CLR 477 at 497.

imposed a time limit between committal to prison and surrender within which surrender could not occur. But both s 2 and s 3 were concerned only with the *surrender* of fugitives; neither was concerned with extradition from a foreign state. In particular, the power given by s 2 to restrict the operation of an Order in Council was a power to provide for limitations, conditions, exceptions and qualifications on the *surrender* of fugitives. It was not a power to limit the circumstances in which a requisition or request for extradition might be made.

15 The Order in Council of 1934 recited the terms of the 1932 Treaty, and ordered that, as from 4 January 1935, the Act of 1870 and later amending Acts would apply, in respect (relevantly) of Australia, in the case of Poland under and in accordance with the 1932 Treaty.

16 The 1932 Treaty was in the English language and the Polish language. Article 1 contained an engagement by the parties to deliver up to each other, in the circumstances and on the conditions stated, fugitives accused or convicted of any of the crimes or offences enumerated in Art 3.

17 Article 3 provided that extradition should be reciprocally granted for certain listed offences when they were punishable in accordance with the laws of both parties. There were then listed 29 offences or classes of offence. They included (in the English language version) fraud by a director or public officer of a company. At the end of the list it was stated that extradition was also to be granted for participation in any of the aforesaid crimes or offences, before, during, or after the crime was committed. In the nature of things, it was improbable that there would be precise correspondence between the elements of all offences identified in the English language version of the Treaty and those of the offences known to Polish law described in the Polish language version of the Treaty. For example, the English language version referred to fraud by a trustee. A Polish court might need to decide, upon a requisition by Australia for surrender of a fugitive in Poland, the nature of the corresponding offence against Polish law, and whether the alleged conduct of the fugitive was punishable in accordance with the law of Poland.

18 Not surprisingly, Art 3 makes no reference to certain offences that would now be regarded as likely to give rise to the possibility of extradition. For example, it refers to piracy, destruction of vessels at sea, and assault on board a ship on the high seas with intent to inflict death or do grievous bodily harm, but it does not refer to hijacking an aircraft. Nor does it refer to trafficking in illegal drugs. Furthermore, as the facts of the present case illustrate, developments in corporations law in Australia have resulted in the creation of many offences not

known, at least in their modern form, in 1932. Whether such an offence, or conduct giving rise to the offence, would fall within the generic description of fraud by a company director, or its Polish counterpart, may give rise to controversy in a particular case.

19 Article 5 provided that extradition should not take place if the fugitive had already been tried and discharged or punished, or was still under trial, in the state applied to, for the offence in question. Article 6 denied extradition where a relevant limitation period in the state applied to had expired. Article 7 denied extradition for an offence of a political character. Article 8 dealt with the matter of speciality. Article 9 dealt with the procedure to be followed when making a requisition for extradition. Articles 10 and 11 dealt with the arrest of the fugitive. Article 12 relevantly stipulated that extradition should take place only if the evidence was found sufficient, according to the laws of the state applied to, to justify the committal for trial in that state of the fugitive. Article 13 dealt with matters of procedure and evidence in deciding whether to extradite.

20 Consistently with the scheme of the Act of 1870, subject to the matter of speciality, the focus of the treaty was upon the obligations of one state party to arrest, and surrender to the other, a fugitive who was within the territory of the former party, and the conditions to which those obligations were subject. Except for making stipulations as to procedure, the treaty said nothing about requests for extradition. In particular, it said nothing about requests by one party to the other for the surrender of a fugitive, not pursuant to obligations undertaken in the treaty, but as a matter of comity. The treaty obliged Australia to surrender fugitives to Poland, in certain circumstances, and upon certain conditions. When, by legislation, it was given effect in Australian municipal law, it provided a legal foundation for the arrest and surrender of such a person. Under the treaty, Poland undertook reciprocal obligations vis-a-vis Australia. Save for speciality, the treaty was wholly concerned with the circumstances in which, the procedures according to which, and the conditions upon which, each state party would be obliged to apprehend and surrender to the other a person in its territory.

21 The Act of 1870 was amended or supplemented, in respects that are presently immaterial, by the *Extradition Act* 1873 (UK), the *Extradition Act* 1895 (UK), the *Extradition Act* 1906 (UK), the *Extradition Act* 1932 (UK) and the *Counterfeit Currency (Convention) Act* 1935 (UK). By s 6 of the lastmentioned Act, the Act of 1870 and the later Acts may be cited by the collective title "the Extradition Acts, 1870 to 1935".

22 In 1966, the Parliament enacted the *Extradition (Foreign States) Act* 1966 (Cth) ("the 1966 Act") which, by s 6, excluded the operation of the Imperial Acts known as the Extradition Acts 1870 to 1935. Section 9 of the 1966 Act provided, so far as relevant:

> "9 (1) Where, immediately before the commencement of this Act -
>
> (a) under an Order in Council in force under the Imperial Acts known as the Extradition Acts, 1870 to 1935, those Acts applied in the case of a foreign state specified in the Order; and
>
> (b) those Acts, as they so applied, extended to the Commonwealth,
>
> this Act applies in relation to that state.
>
> (2) If the operation of the order was subject to any limitations, conditions, exceptions or qualifications, then, subject to this Part, this Act applies in relation to that state subject to those limitations, conditions, exceptions or qualifications."

23 The 1966 Act was divided into five Parts. Part I, which included a definition section and s 6 to which reference was earlier made, was described as Preliminary. Part II, which included s 9, dealt with the application of the Act. Part III dealt with the subject of extradition to foreign states, and contained provisions similar to many of the provisions of the Act of 1870. Part IV, which contained only four sections, dealt with extradition from foreign states. Part V dealt with miscellaneous matters.

24 Part IV comprised ss 20 to 23. Section 20 defined "extraditable crime" to mean an offence against an Australian law that was described in the First Schedule. That Schedule enumerated 33 offences or groups of offence. It included "[a]n offence against the law relating to companies". Section 22 provided that where a person accused or convicted of an extraditable crime is surrendered by a foreign state, the person may be brought into Australia and delivered to the proper authorities to be dealt with according to law. Section 23 dealt with the matter of speciality. It is s 21 that is of present interest. It provided:

> "21. Where a person accused or convicted of an extraditable crime is, or is suspected of being, in a foreign state or within the jurisdiction of, or of a

part of, a foreign state, the Attorney-General may make a requisition to that state for the surrender of the person."

25 The 1966 Act was in force when *Barton* was decided. The plaintiffs were Australian citizens, alleged to have committed, in Australia, offences against the law relating to companies. They were temporarily resident in Brazil. Through its Embassy in Brazil, the Commonwealth requested the Government of Brazil to detain them pending a request for extradition to Australia. The request, evidently adverting to a potential problem of reciprocity, noted that there were deportation procedures under the *Migration Act* which could be applied in the event of a fugitive being sought by Brazil from Australia. The plaintiffs contended that, there being no treaty, and the 1966 Act being inapplicable, the request was invalid for want of power in the Executive Government to make it. The Court rejected that contention.

26 The 1966 Act was replaced by the 1988 Act. That was the statute in force at the time relevant to this appeal.

27 The principal objects of the Act were stated in s 3 as follows:

"3. The principal objects of this Act are:

(a) to *codify* the law relating to the extradition of persons *from* Australia to extradition countries and New Zealand and, in particular, to provide for proceedings by which courts may determine whether a person is to be, or is eligible to be, extradited, without determining the guilt or innocence of the person of an offence;

(b) to *facilitate* the making of requests for extradition *by* Australia to other countries; and

(c) to enable Australia to carry out its obligations under extradition treaties." (emphasis added)

28 The general structure of the 1988 Act is similar to that of the 1966 Act. Part IV deals with extradition to Australia from foreign countries. Its purpose is as stated in s 3(b). It includes s 40, which provides:

"40. A request by Australia for the surrender of a person from a country (other than New Zealand) in relation to an offence against a law of Australia of which the person is accused or of which the person has been

convicted shall only be made by or with the authority of the Attorney-General."

29 When s 40 of the 1988 Act is compared with s 21 of the 1966 Act, the following differences appear. First, s 40, evidently drafted with an eye to the problem that arose in *Barton*, refers generally to "an offence" rather than an "extraditable crime", or an "extradition offence". The latter is an expression with a defined meaning used in other parts of the Act and, in particular, Pt II, which deals with extradition from Australia. Secondly, and apparently for the same reason, s 40 refers to a "request" rather than a "requisition". Thirdly, whereas s 21 of the 1966 Act empowered the Attorney-General to make a requisition, s 40 of the 1988 Act is expressed in terms which assume the existence of a power in the Executive Government to make a request, and restrict the exercise of the power to the Attorney-General or a person acting with the authority of the Attorney-General. This assumption is reinforced by the language of s 3(b).

30 Part I of the 1988 Act includes s 11, which is headed: "Modification of Act in relation to certain countries". It provides relevantly:

> "11(1) The regulations may:
>
> (a) state that this Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country, being a treaty a copy of which is set out in the regulations; or
>
> (b) make provision instead to the effect that this Act applies in relation to a specified extradition country subject to other limitations, conditions, exceptions or qualifications.
>
> (2) For the purposes of subsection (1), but without otherwise affecting the generality of that subsection, the reference in paragraphs (1)(a) and (b) to this Act applying subject to limitations, conditions, exceptions or qualifications is deemed to include a reference to this Act applying subject to a modification to the effect that a number of days greater or less than the 45 days referred to in paragraph 17(2)(a) applies for the purposes of that paragraph.
>
> (3) Until the regulations make provision as mentioned in subsection (1) in relation to an extradition country, being a foreign state to which paragraph (c) of the definition of 'extradition country' in

> section 5 applies, this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions or qualifications to which the former Foreign Extradition Act, in its application in relation to the extradition country as a foreign state, was subject by virtue of section 9 of that Act."

31 As will appear, s 11(3) is important to the argument of the appellant. Its history goes back to s 2 of the Act of 1870. In the Act of 1870, which empowered the Queen to make Orders in Council directing that the Act apply in the case of a particular foreign state, Her Majesty was also empowered, by such order, to limit its operation, or to make it subject to such conditions, exceptions and qualifications as may be deemed expedient. Section 9 of the 1966 Act, which is the provision referred to in s 11 of the 1988 Act, provided that the Act should apply in relation to a state where, under an Order in Council in force under the Extradition Acts 1870 to 1935, those Acts applied in the case of the state. Sub-section (2) of s 9 followed the scheme of s 2 of the Act of 1870 by providing that, if the operation of an Order in Council was subject to any limitations, conditions, exceptions or qualifications, then the 1966 Act applied in relation to that state subject to those limitations, conditions, exceptions or qualifications. The scheme was followed through into s 11 of the 1988 Act. As is reflected in the heading of s 11, from the time of the Act of 1870, the legislation has always allowed for extradition arrangements with particular states to be subject to limitations, conditions, exceptions or qualifications seen as appropriate to the particular circumstances. For example, the criminal justice system of a particular state, or the forms of punishment imposed, might lead Australia, when making an extradition treaty with that state, to seek some qualifications upon Australia's obligations to extradite a person to that state. This is a necessary feature of a legislative scheme under which there is an Act dealing generally with the subject of extradition, which is then, by Order in Council or regulation, made to apply in the case of bilateral arrangements with particular states. It allows for a measure of flexibility in such arrangements.

Barton v The Commonwealth

32 At the time of the decision in *Barton*, the 1966 Act was in force. The issue for decision was whether a request made by Australia to the Federative Republic of Brazil, a state with which Australia had no extradition treaty, for the detention, with a view to surrender, of fugitives from Australian justice was invalid. McTiernan and Menzies JJ pointed out that the concept of invalidity is

not easy to relate to a communication, and that the real question must be whether the making of such a request was unlawful[5]. All members of the Court answered that question in the negative. All agreed that it was within the executive power of the Commonwealth to make such a request, and that nothing in the 1966 Act excluded that power, or limited it in any manner that had relevance to the case. In particular, s 21 of the 1966 Act did not limit the power of the Executive Government to make a request for extradition to a state with which Australia had no extradition treaty.

33 In the course of discussing the meaning and effect of s 21 of the 1966 Act, members of the Court made observations as to its possible effect upon the power of the Executive to make a request for extradition, to a state with whom Australia had treaty arrangements, outside the scope of those arrangements. Barwick CJ expressed the view that the Australian Government could not seek to obtain the surrender from a treaty state of a fugitive who had not committed an extraditable crime as defined in the Act[6]. Jacobs J said that the question did not need to be determined, and expressed no view[7]. McTiernan and Menzies JJ said that, unless statute, either expressly or by implication, has deprived the Executive of part of its inherent power, it may make such requests as it considers proper for the assistance of other states in bringing fugitive offenders to justice. They pointed out that it was understandable that Parliament should confine executive power in relation to extradition from Australia without doing the same in relation to extradition to Australia[8].

34 Mason J examined in detail the history of the executive power in relation to surrender, and requests for surrender, of fugitives, emphasising the difference between the considerations that apply to surrender of a person present in Australia and a request for the surrender of a person resident in a foreign state. For reasons which he explained, he attached less significance to reciprocity than Barwick CJ[9]. Mason J stressed the principle that a statute will not be held to

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5 (1974) 131 CLR 477 at 490.

6 (1974) 131 CLR 477 at 487.

7 (1974) 131 CLR 477 at 508.

8 (1974) 131 CLR 477 at 491.

9 (1974) 131 CLR 477 at 503.

abrogate a prerogative of the Crown unless it does so by express words or necessary implication. He regarded the power to seek and obtain the surrender by a foreign state of a fugitive offender as a power essential to a proper vindication and an effective enforcement of Australian law, and said that it was not to be supposed that Parliament intended to abrogate the power in the absence of a clearly expressed intention to that effect[10].

35 Barwick CJ was the only member of the Court in *Barton* who reached his decision with any apparent hesitation[11], and it is evident that the reason for his hesitation was the importance which he attributed to reciprocity. However, as the other members of the Court acknowledged, and as the history of extradition legislation shows, the considerations relevant to surrender of a person from the United Kingdom, or Australia, are materially different from those which determine whether a request may be made to a foreign state to surrender a person to the United Kingdom or Australia. Such a request is an act of international intercourse, and it is for the state to which it is made to determine what its response will be. States may invoke comity as well as obligation, and if a requested state, which is not bound to accede to a request, chooses to do so, perhaps on terms as to reciprocity, then that is a matter for it. In the present case, the respondents contend, and the appellant denies, that Poland is under a treaty obligation to surrender the appellant. But the appellant's argument depends, not only upon his contention that Poland is not under such an obligation, but, additionally, upon the proposition that, in those circumstances, it is unlawful for the first respondent to request surrender.

36 The decision in *Barton* is not determinative of the issue in the present case; but it makes the result for which the appellant contends a surprising one. It means that, if Australia had no treaty of extradition with Poland, the request under consideration would have been lawful, but, because there is a treaty, then the request would be unlawful if it related to offences not covered by the treaty.

37 The resolution of the issue raised by the appellant depends upon a consideration of the effect, if any, of the 1988 Act upon the executive power to seek the surrender by a foreign state of a fugitive offender, a power "essential to

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10 (1974) 131 CLR 477 at 501.

11 (1974) 131 CLR 477 at 488.

a proper vindication and an effective enforcement of Australian municipal law"[12], bearing in mind that the statute will not be held to have abrogated the power unless it does so by express words or necessary implication.

The lawfulness of the request

38 The statement, in s 3 of the 1988 Act, of its principal objects, distinguishes between the extradition of persons from Australia and the making by Australia to other countries of requests to extradite fugitives to Australia. The object of the Act is to codify the law relating to the former subject. The object of the Act in relation to the second subject is different: it is to facilitate the making of requests. It is the second subject with which we are concerned.

39 Section 40 of the Act is not expressed as a source of power to make requests for extradition. The power to make a request is vested in the Executive Government. Section 40 assumes the existence of the power, and regulates its exercise by providing that a request shall only be made by or with the authority of the Attorney-General. The request in the present case complied with that provision.

40 The appellant contended that s 11(3) of the 1988 Act operated so as to impose a further control upon the exercise of the power to make a request for extradition. The respondents did not deny that, at least as a theoretical possibility, in the case of a particular foreign state, there might be limitations, conditions, exceptions or qualifications to which the 1966 Act, in its application to that state, was subject by virtue of s 9 of that Act, and which could affect the power to request extradition. The respondents disclaimed any submission that limitations, conditions, exceptions or qualifications of the kind referred to in s 11(3) could only relate to extradition from Australia. However, they contended that there was nothing of that kind that affected the power to request extradition in the present case.

41 Section 9 of the 1966 Act picked up the Order in Council of 1934, by which the 1932 Treaty with Poland became applicable in Australia. It made the 1966 Act apply in relation to Poland. Further, it provided that if the operation of the Order in Council was subject to any limitations, conditions, exceptions or

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12 (1974) 131 CLR 477 at 501 per Mason J.

qualifications, then the Act applied in relation to Poland subject to those limitations, conditions, exceptions or qualifications.

42 Reference has been made above to the terms of the Order in Council of 1934, and of the 1932 Treaty. There is nothing, either in the Order in Council, or in the treaty, which, in express terms, imposes any limitation, condition, exception or qualification upon the power of either state party to the treaty to make a request to the other. Upon analysis, the argument for the appellant amounted to the proposition that the Order in Council, or the treaty, or both, by implication restricted the capacity of each state party to make to the other a request for extradition by limiting it to a capacity to make requests only in relation to extraditable offences listed in the treaty. This proposition cannot be sustained.

43 The 1932 Treaty defined the circumstances in which, and the conditions subject to which, each party was obliged to surrender fugitives to the other. It had nothing to say about the capacity of the parties to communicate or receive requests involving an appeal to comity, rather than obligation. There is no reason to interpret the treaty as denying, by implication, such a capacity; and there is good reason not to do so. Article 31 of the Vienna Convention on the Law of Treaties requires that the treaty be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[13]. Apart from the matter of speciality, the treaty was concerned with rights to demand the surrender of fugitives, and obligations to comply with such demands. It was not concerned with restricting the capacity to make communications which did not invoke treaty obligations, and it is not clear what useful purpose would have been served by doing so. Furthermore, as Lindgren J pointed out[14], practical difficulties could result from the appellant's interpretation of the treaty. In a case such as the present, where there was a dispute as to whether the offences referred to in the request were offences of a kind listed in the treaty, it would be necessary for the Polish authorities, and the Polish courts, to form a view, according to their law, as to Poland's obligations under the treaty. They should not be required, additionally, to form a view as to the lawfulness, according to Australian law, of the request, or to defer acting on the request until that issue had been fully litigated in the Australian courts.

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13 cf *Riley v The Commonwealth* (1985) 159 CLR 1 at 15 per Deane J.

14 *Oates v Attorney-General (Cth)* (2001) 181 ALR 559 at 571-573 [50]-[55].

44 Similarly, the Order in Council of 1934 had nothing to say about the capacity of one state to make requests of another, or to invoke comity rather than obligation. Its only operative provision ordered that the Act of 1870 would apply, in respect of Australia, in the case of Poland. The Act of 1870, except for the section dealing with speciality, was concerned entirely with the surrender to a foreign state of fugitives.

45 It is true that a request for extradition of a person in the position of the appellant might have the effect of setting in train steps that result in a loss of that person's liberty pending the determination by the foreign state of the request and, if that determination is favourable to the request, interruption of the individual's life in the foreign state and removal, probably in custody, to Australia. It is an established principle, frequently applied by this Court, that legislation is construed, in the event of ambiguity, to uphold fundamental rights and to avoid unnecessarily diminishing them[15]. However, in this case, that principle cannot assist the appellant. There is no ambiguity in either the 1966 or 1988 Act so far as *requests* for extradition are concerned. In neither Act is there a relevant express restriction on the Executive's power to make a request and the foregoing principle of construction cannot fill the omission so as to give rise to an implied restriction.

46 The Federal Court was right to reject the argument that the lawfulness of the request depended upon the offences of which the appellant was accused being offences of a kind listed in the 1932 Treaty.

Other issues

47 The Federal Court also rejected the appellant's contention that the offences alleged against him were not offences of a kind listed in the 1932 Treaty. For the reasons already given, it is unnecessary for this Court to enter into that issue, which turns upon matters specific to the case. Similarly, it is unnecessary to consider the discretionary ground relied upon by the respondents.

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15 *Potter v Minahan* (1908) 7 CLR 277 at 304; *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18; *Coco v The Queen* (1994) 179 CLR 427 at 437.

Gleeson CJ
McHugh J
Gummow J
Kirby J
Hayne J
Heydon J

Conclusion

48 For those reasons, it was appropriate to dismiss the appeal with costs.