

HIGH COURT OF AUSTRALIA

FRENCH CJ,
BELL, GAGELER, NETTLE AND GORDON JJ

ANDREW JOHN MACOUN

APPELLANT

AND

COMMISSIONER OF TAXATION

RESPONDENT

Macoun v Commissioner of Taxation
[2015] HCA 44
2 December 2015
S100/2015

ORDER

1. *Leave granted to the respondent to file out of time the Notice of Contention annexed to the affidavit of Stephen Vorreiter filed 15 June 2015.*
2. *Appeal dismissed.*

On appeal from the Federal Court of Australia

Representation

R J Ellicott QC with M J Hirschhorn and M E Ellicott for the appellant (instructed by Hazan Hollander)

J T Gleeson SC, Solicitor-General of the Commonwealth with J O Hmelnitsky SC and T L Phillips for the respondent (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Macoun v Commissioner of Taxation

Income tax – *International Organisations (Privileges and Immunities) Act* 1963 (Cth) – Exemption from taxation on salaries and emoluments received from certain international organisations – Whether monthly pension payments exempt from taxation.

International law – Treaty interpretation – Privileges and immunities of specialized agencies – Whether Convention on the Privileges and Immunities of the Specialized Agencies requires Australia not to tax monthly pension payments received by former officer of specialized agency.

Words and phrases – "emolument", "pension", "salary".

International Organisations (Privileges and Immunities) Act 1963 (Cth), s 6(1)(d)(i), Fourth Schedule.

Specialized Agencies (Privileges and Immunities) Regulations (Cth), reg 8(1).

Convention on the Privileges and Immunities of the Specialized Agencies [1988] ATS 41, Sections 18-19, 22.

FRENCH CJ, BELL, GAGELER, NETTLE AND GORDON JJ.

Introduction

1 Section 6(1)(d)(i) of the *International Organisations (Privileges and Immunities) Act* 1963 (Cth) ("the IOPI Act") and reg 8(1) of the Specialized Agencies (Privileges and Immunities) Regulations (Cth) ("the SAPI Regulations") confer upon a person who holds an office in an international organisation to which the IOPI Act applies¹ an exemption from taxation on salaries and emoluments received from the organisation.

2 The International Bank for Reconstruction and Development ("the IBRD"), part of the World Bank, is an international organisation to which the IOPI Act applies. The appellant, Mr Macoun, a former sanitary engineer with the IBRD, received monthly pension payments from a Retirement Fund established under the IBRD's Staff Retirement Plan ("the SRP") in the 2009 and 2010 income years, when he no longer held an office in the IBRD. The respondent ("the Commissioner") sought to include the monthly pension payments in Mr Macoun's assessable income for the 2009 and 2010 income years².

3 The issue was whether that part of the monthly pension payments which was otherwise liable to tax under s 27H of the *Income Tax Assessment Act* 1936 (Cth) ("the ITAA 1936") became exempt income under s 6-20(1) of the *Income Tax Assessment Act* 1997 (Cth) ("the ITAA 1997") by reason of the IOPI Act and the SAPI Regulations.

4 Three questions were raised on appeal.

5 First, do s 6(1)(d)(i) and the Fourth Schedule to the IOPI Act and reg 8(1) of the SAPI Regulations together confer a taxation exemption in respect of that part of the monthly pension payments Mr Macoun received from the Retirement Fund at a time when he had ceased to hold an office in the IBRD? The answer is no.

1 Defined as a "Specialized Agency" by regs 2 and 3 and Item 6 of the Schedule to the SAPI Regulations.

2 The Commissioner accepts that the effect of s 27H of the *Income Tax Assessment Act* 1936 (Cth) is that the proportion of the pension payments that represents the return of Mr Macoun's contributions is not subject to taxation.

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6 Second, do those monthly pension payments fall outside the phrase "salaries and emoluments received from the organisation" in Item 2 of Pt I of the Fourth Schedule to the IOPI Act? The answer is yes.

7 Third, does the Convention on the Privileges and Immunities of the Specialized Agencies³ ("the Agencies Convention"), properly construed in accordance with the principles under the Vienna Convention on the Law of Treaties⁴ ("the Vienna Convention"), require Australia not to tax Mr Macoun's monthly pension payments? The answer is no.

8 The second and third of these questions are raised by a notice of contention filed by the Commissioner out of time. The Commissioner should be given leave to raise those questions.

9 These reasons will consider the facts, the decisions below, the statutory framework and the Conventions and then turn to consider each question.

Facts

10 The facts are not in dispute.

11 Between 1992 and 2007, Mr Macoun worked overseas as a sanitary engineer for the IBRD. During his employment with the IBRD, Mr Macoun participated in the SRP⁵. The SRP was a contributory defined benefit plan under which participants were required to make regular contributions equivalent to 7 per cent of their gross salary⁶. These contributions were deducted each pay period from the participants' salary⁷. During his employment with the IBRD, Mr Macoun contributed US\$200,842 to the SRP.

3 [1988] ATS 41.

4 [1974] ATS 2.

5 The SRP was amended with effect from 1 July 1997 ("the 1997 SRP"). Accordingly, subsequent citations of the SRP contain references to relevant provisions of both the SRP and the 1997 SRP.

6 Art 6.1(a) of the SRP; Art 9.1 of the 1997 SRP.

7 Art 6.1(a) of the SRP; Art 9.1 of the 1997 SRP.

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12 Participation in the SRP was optional for employees under the age of 62 on fixed term appointments⁸. Participation in the SRP was mandatory for employees who had regular appointment status prior to attaining the age of 62⁹, as did Mr Macoun from September 1993 onwards. The IBRD provided the SRP as an "integral part of the total compensation and benefits package offered to staff"¹⁰. After salaries, the IBRD regarded the SRP as "the most valuable element of that package"¹¹.

13 The SRP required the IBRD to make contributions to fund the liabilities of the SRP that were not funded by the participants' contributions¹², to pay the administrative expenses of the SRP¹³ and to hold the assets of the SRP as a Retirement Fund¹⁴.

14 A participant ceased to participate in the SRP upon termination of their service¹⁵ and was thereafter referred to as a "retired participant". Upon termination at the "normal retirement date" of 62 years, the retired participant was "retired on a normal pension"¹⁶. If the participant retired between the ages of 55 and 62, or after having completed at least three years of eligible service,

8 Art 2.1(b)(iii) of the SRP; Art 2.1(b)(iii) of the 1997 SRP.

9 Art 2.1(a) of the SRP; Art 2.1(a) of the 1997 SRP.

10 *World Bank Group Staff Retirement Plan Handbook*, (1993) at 1.

11 *World Bank Group Staff Retirement Plan Handbook*, (1993) at 1.

12 Art 6.2(a) of the SRP; Art 9.2(a) of the 1997 SRP.

13 Art 6.2(b) of the SRP; Art 9.2(b) of the 1997 SRP.

14 Arts 6.2(c) and 8.1 of the SRP; Art 11.1 of the 1997 SRP.

15 Art 2.3 of the SRP; Art 2.3 of the 1997 SRP.

16 Art 4.1 of the SRP; Art 3.1(a) of the 1997 SRP. See also Art 5 of the SRP and Art 8 of the 1997 SRP, which provide that if a retired participant becomes a participant again (ie is restored to service) the pension shall cease.

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participation in the SRP was also terminated and they "retired under the Plan on an early retirement pension"¹⁷.

15 The early retirement pension became effective on the normal retirement date unless the retired participant elected to receive monthly pension payments from the date of their retirement, calculated in accordance with formulae in the SRP¹⁸. Mr Macoun retired from the IBRD in 2007, aged 60, and elected to receive monthly pension payments. At the time of Mr Macoun's retirement, Art 5.1 of the 1997 SRP addressed the payment of pensions and Art 5.1(b) provided:

"All pensions ... shall be payable at one-twelfth the annual rate, prorated for fractions of months, at the end of each calendar month beginning with the month in which they become effective".

16 The pension did not become "effective" until the participant became a "retired participant"¹⁹. All payments under the SRP were paid only from the Retirement Fund²⁰.

17 In the 2009 income year, Mr Macoun received pension payments from the Retirement Fund of A\$131,302 and, in the 2010 income year, he received pension payments from the Retirement Fund of A\$134,970. He originally lodged returns for those income years that included as assessable income the pension payments received in each of those years. He subsequently lodged requests to amend those returns to exclude the pension payments as assessable income. The Commissioner refused those requests and issued amended assessments which included the monthly pension payments in Mr Macoun's assessable income for the 2009 and 2010 income years.

18 Mr Macoun objected against the amended assessments. The Commissioner disallowed the objection.

17 Art 4.2(a) of the SRP. Under Art 3.2(a) of the 1997 SRP, the participant "is retired on an early retirement pension".

18 Art 4.2 of the SRP; Art 3.2 of the 1997 SRP.

19 Arts 4.1(a) and 4.2(b) of the SRP; Arts 3.1(a) and 3.2(b) of the 1997 SRP.

20 Art 12.1 of the SRP; Art 5.1(a) of the 1997 SRP.

Earlier decisions

19 Mr Macoun sought review of the Commissioner's decision in the Administrative Appeals Tribunal ("the AAT"). The AAT set aside the decision under review and substituted the decision that the monthly pension payments Mr Macoun received in the 2009 and 2010 income years did not form part of his assessable income and were exempt from Australian income tax²¹.

20 The Commissioner appealed to the Full Court of the Federal Court of Australia. The Full Court allowed the appeal, set aside the decision of the AAT and affirmed the Commissioner's decision²². As the parties had reached an agreement that the Commissioner was to pay Mr Macoun's costs of the appeal irrespective of the outcome, a further order was made accordingly.

21 Edmonds and Nicholas JJ held that reg 8(1) of the SAPI Regulations confined the privileges specified in Pt I of the Fourth Schedule to the IOPI Act to persons holding an office in a specialized agency and that Mr Macoun did not hold an office in the IBRD (a specialized agency) in the 2009 and 2010 income years. As a result, the privilege conferred by Item 2 of Pt I of the Fourth Schedule to the IOPI Act was not available to Mr Macoun in respect of the monthly pension payments received by him in the 2009 and 2010 income years, "even if such payments continued to be 'emoluments' to which he became entitled while holding office in the IBRD"²³.

22 The third member of the Full Court, Perram J, also allowed the appeal. His Honour agreed²⁴ with Edmonds and Nicholas JJ but concluded, by way of obiter, that as a matter of public international law the Commonwealth is not permitted to levy income tax on Mr Macoun's pension²⁵. This matter is addressed in the third question in this appeal.

21 *Macoun v Federal Commissioner of Taxation* 2014 ATC ¶10-354.

22 *Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265.

23 *Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265 at 275 [44].

24 *Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265 at 276 [49].

25 *Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265 at 278 [58].

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Statutory framework and the Conventions

23 This appeal is concerned with the proper construction of the IOPI Act and the SAPI Regulations. They have a post-World War II genesis. Their legislative history may be summarised as follows.

Legislative history

24 The *International Organizations (Privileges and Immunities) Act* 1948 (Cth) ("the 1948 Act") (and the regulations made under it) conferred privileges and immunities on officials of the United Nations ("the UN") in accordance with the Convention on the Privileges and Immunities of the United Nations²⁶ ("the UN Convention").

25 Article V of the UN Convention is entitled "Officials". Sections 18 and 20 in that Article relevantly provide:

"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;

...

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. ..."

26 [1949] ATS 3.

7.

26 In 1961, the regulations made under the 1948 Act were expanded to confer juridical personality and legal capacity on international organisations including the IBRD²⁷.

27 In 1962, Australia sought to accede²⁸ to the Agencies Convention. At around that time, the International Organizations (Privileges and Immunities of Specialized Agencies) Regulations (Cth)²⁹ ("the 1962 Regulations") were made. Australia's accession to the Agencies Convention was not accepted by the UN, due to reservations that were attached with Australia's accession notification³⁰. The 1962 Regulations were still made and, like the 1961 regulations, conferred juridical personality and legal capacity on specialized agencies including the IBRD³¹.

28 The Agencies Convention relevantly provided in Art VI:

"18. Each specialized agency will specify the categories of officials to which the provisions of this article and of article VIII shall apply. It shall communicate them to the Governments of all States parties to this Convention in respect of that agency and to the Secretary-General of the United Nations. The names of the officials included in these categories shall from time to time be made known to the above-mentioned Governments.

19. Officials of the specialized agencies shall:

(a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

27 SR No 64 of 1961 (Cth) amending the International Organizations (Privileges and Immunities) Regulations (Cth) (SR No 20 of 1959).

28 [1962] ATS 13.

29 SR No 105 of 1962.

30 See Australia's Instrument of Accession (and Reservation) to the Agencies Convention (1962); UN Response to Australia's Instrument of Accession (1962).

31 reg 3 of the 1962 Regulations.

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- (b) Enjoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the specialized agencies and on the same conditions as are enjoyed by officials of the United Nations;

...

- 22. Privileges and immunities are granted to officials in the interests of the specialized agencies only and not for personal benefit of the individuals themselves. Each specialized agency shall have the right and the duty to waive the immunity of any official in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the specialized agency."

29 The Agencies Convention was attached as a schedule to the 1962 Regulations. The privileges and immunities in the Agencies Convention were given force of law in Australia by operation of reg 4(1). However, reg 4(3) of the 1962 Regulations provided that reg 4(1) did not apply to the extent that any Act or regulation (other than the 1948 Act or regulations made under it) "makes provision in relation to privileges and immunities of a Specialized Agency or a person in relation to whom the Convention applies".

30 As at 1962, s 23(y) of the ITAA 1936³² provided:

"23. The following income shall be exempt from income tax:—

...

- (y) the official salary and emoluments of an official of a prescribed organization of which Australia and one or more other countries are members, to the prescribed extent and subject to the prescribed conditions".

31 At the time when the 1962 Regulations (including reg 4(3)) came into force, reg 4AB(2)(c)³³ of the Income Tax and Social Services Contribution

32 At this time the ITAA 1936 was called the *Income Tax and Social Services Contribution Assessment Act 1936* (Cth).

33 Inserted by SR No 39 of 1957 (Cth).

Regulations (Cth) ("the ITAA 1936 Regulations") prescribed the IBRD as an organisation to which s 23(y) of the ITAA 1936 applied and exempted from income tax the official salary and emoluments of an official of the IBRD who was a resident of Australia only "to the extent that the official salary and emoluments are for services rendered out of Australia".

32 Therefore, by reason of s 23(y) of the ITAA 1936, reg 4AB of the ITAA 1936 Regulations and reg 4(3) of the 1962 Regulations, the tax exemption applicable to IBRD officials in respect of official salaries and emoluments derived from s 23(y) and not from the 1962 Regulations.

33 In 1963, the IOPI Act was enacted. It repealed the 1948 Act but by s 2(2) continued in force any regulations that had been made under the 1948 Act and which were still in force at the time of the enactment of the IOPI Act.

34 The IOPI Act, as enacted, contained schedules providing for categories of privileges and immunities that could be conferred by regulations on persons, including officers and former officers of international organisations. The 1962 Regulations, s 23(y) of the ITAA 1936 and reg 4AB of the ITAA 1936 Regulations continued in force.

35 The 1962 Regulations were repealed in 1986³⁴ and the SAPI Regulations were made. Shortly after the making of the SAPI Regulations, Australia again deposited an instrument of accession (without reservation) to the Agencies Convention with the UN, which this time was accepted, leading to Australia's accession on 9 May 1986³⁵.

36 That accession was significant. Australia's international obligations could no longer be satisfied by continued adherence to the scheme introduced in 1962. If payments were properly characterised as salaries or emoluments of a person holding a relevant office, they should be exempt from tax even if the person was an Australian resident rendering the service in Australia. From 24 April 1986, being the date when the 1962 Regulations (including reg 4(3)) were repealed and the SAPI Regulations came into force, the IOPI Act and the SAPI Regulations together conferred a tax exemption for the salaries and emoluments received from prescribed international organisations by current officers of those

34 International Organizations (Privileges and Immunities of Specialized Agencies) Regulations (Repeal) (Cth) (SR No 64 of 1986).

35 [1988] ATS 41.

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organisations, wherever the service was rendered. Without reg 4(3) of the 1962 Regulations, the limited exemption afforded by s 23(y) of the ITAA 1936 and reg 4AB of the ITAA 1936 Regulations no longer operated to exclude the broader exemption consistent with Australia's obligations under the Agencies Convention.

37 Accordingly, s 23(y) of the ITAA 1936 and reg 4AB of the ITAA 1936 Regulations were repealed in 1988³⁶. Since that time, the IOPI Act and the SAPI Regulations have been the source of any privilege or immunity conferred on officers or former officers of the IBRD in relation to official salaries and emoluments. Neither the IOPI Act nor the SAPI Regulations have been relevantly amended since their enactment.

Relevant provisions of the IOPI Act and the SAPI Regulations

38 What then do the IOPI Act and the SAPI Regulations provide? Section 6(1)(d) of the IOPI Act provides the mechanism by which privileges may be conferred on officers of international organisations and is in the following terms:

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

...

(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
- (ii) *upon a person who has ceased to hold such an office* the immunities specified in Part II of the Fourth Schedule". (emphasis added)

36 *Taxation Laws Amendment Act (No 2) 1988* (Cth), s 10; *Income Tax Regulations (Amendment) 1988* (Cth) (SR No 196 of 1988).

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39 Regulation 8 of the SAPI Regulations³⁷ is in the following terms:

"Privileges and immunities of officers (other than high officers) of Specialized Agencies

- (1) Subject to subregulation (2), *a person who holds an office in a Specialized Agency*, other than a person who holds, or is performing the duties of, an office specified in Column 3 of an item in the Schedule^[38], has the *privileges and immunities* specified in Part I of the Fourth Schedule to the [IOPI] Act.
- (2) A person to whom subregulation (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 in relation to a Specialized Agency.
- (3) *A person who has ceased to hold an office in a Specialized Agency*, other than an office specified in Column 3 of an item in the Schedule, has the *immunities* specified in Part II of the Fourth Schedule to the [IOPI] Act." (emphasis added)

40 The Fourth Schedule to the IOPI Act is in two parts and provides:

"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.

37 The SAPI Regulations were made pursuant to the regulation-making powers in ss 6(1) and 13 of the IOPI Act.

38 The relevant office specified in Column 3 of Item 6 in the Schedule to which attention is directed by reg 8(1) and (3) is the President of the IBRD, an office never held by Mr Macoun.

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3. Exemption (including exemption of a spouse and any dependent relatives) from the application of laws relating to immigration and the registration of aliens.
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

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

41 The IOPI Act applies to "international organisations" that are declared by the SAPI Regulations to be ones to which the IOPI Act applies³⁹. The SAPI Regulations specify that the IBRD is a "Specialized Agency", and is therefore an international organisation to which the IOPI Act applies⁴⁰.

42 How do the IOPI Act and the SAPI Regulations interact with the ITAA 1997? The answer is found in s 6-20(1) of the ITAA 1997, which provides that an amount of ordinary income or statutory income is "exempt income" if it is made exempt from income tax by a provision of the ITAA 1997 or another Commonwealth law. Pension payments from a foreign fund would ordinarily be

39 s 5(1) of the IOPI Act.

40 regs 2 and 3 and Item 6 of the Schedule to the SAPI Regulations.

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taxed as assessable income, unless a relevant exemption applied⁴¹. Mr Macoun claims exemption under another Commonwealth law, namely the IOPI Act read with the SAPI Regulations.

43 It is against that background that the three questions on appeal are to be determined.

Analysis – Question 1

44 The first question is – do s 6(1)(d)(i) and the Fourth Schedule to the IOPI Act and reg 8(1) of the SAPI Regulations together confer a taxation exemption in respect of that part of the monthly pension payments Mr Macoun received from the Retirement Fund at a time when he had ceased to hold an office in the IBRD? The answer, as has already been indicated, is no.

45 A number of matters should be noted at the outset.

46 First, s 6(1)(d) of the IOPI Act and reg 8 of the SAPI Regulations distinguish between a person who *holds* an office in an international organisation and a person who has *ceased to hold* such an office. A person who *holds* an office is given the "privileges and immunities" specified in Pt I of the Fourth Schedule to the IOPI Act. A person who has *ceased to hold* such an office is given the "immunities" specified in Pt II of the Fourth Schedule. A clear distinction is drawn between a person who holds an office and a person who has ceased to hold such an office. That distinction cannot be ignored.

47 Second, although the Fourth Schedule to the IOPI Act forms part of the IOPI Act, it is only given operative effect by force of the SAPI Regulations. Section 6(1)(d)(ii) of the IOPI Act makes clear that regulations made under the IOPI Act cannot confer any of the "privileges" specified in Pt I of the Fourth Schedule upon a person who has ceased to hold a relevant office. The SAPI Regulations cannot confer upon a person who has ceased to hold a relevant office the privilege of "[e]xemption from taxation on salaries and emoluments received from the organisation" because that privilege is in Pt I of the Fourth Schedule but not replicated in Pt II.

48 Third, the conclusion that the privilege of "[e]xemption from taxation on salaries and emoluments received from the organisation" in Item 2 of Pt I of the

41 s 27H(1)(a) and the definition of "annuity" in s 27H(4) of the ITAA 1936. See also ss 6-5 and 6-10 of the ITAA 1997.

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Fourth Schedule is limited to "a person who holds an office" in a specialized agency is supported by the fact that the other privileges and immunities listed in Pt I of the Fourth Schedule relate, by their nature, to the period in which a person holds an office.

49 These textual matters confirm that in seeking to identify whether a privilege or immunity is applicable under the IOPI Act and the SAPI Regulations, there are two important questions – what is the office, in what organisation, in relation to which the claim is made; and does the person currently hold (in the case of Pt I of the Fourth Schedule), or did the person formerly hold (in the case of Pt II of the Fourth Schedule), that office. In this appeal, Mr Macoun at one time held a relevant office but in the relevant income years he no longer held that office. As a result, Pt I of the Fourth Schedule does not apply to him.

50 Fourth, the relevant exemption in Item 2 of Pt I of the Fourth Schedule is "from taxation on salaries and emoluments *received from the organisation*" (emphasis added). The text of the exemption is important. It is focused on receipt of the salaries and emoluments, and it is focused on their receipt from the organisation. The focus on receipt – in an exemption which applies only to officers currently holding office and which is not replicated in relation to officers who have ceased to hold office – points to the relevant consideration being receipt during the course of employment, rather than the entitlement arising during the course of employment.

51 This fourth matter establishes that, factually, Mr Macoun faces two additional hurdles. He did not *receive* the monthly pension payments whilst he was an officer of the IBRD and he did not receive the monthly pension payments from the IBRD (rather he received them from the Retirement Fund established under the SRP, which is separate from the IBRD⁴²).

52 The fact that Mr Macoun cannot satisfy these two conditions to enable him to avail himself of the privilege of taxation exemption in Pt I of the Fourth Schedule is a complete answer to the view expressed by the AAT that the monthly pension payments were an emolument "arising from an office or

42 See Arts 6.2, 8.1, 8.2 and 12.1 of the SRP; Arts 5.1(a), 9.2, 11.1 and 11.2(a) of the 1997 SRP.

employment" or which "crystallised during the course of ... employment"⁴³. On that basis, the question whether a pension payment is an emolument is not relevant in the determination of the first question in this appeal.

53 As the Commissioner submitted, the grant of the privilege in the form of taxation exemption contained in Pt I of the Fourth Schedule to the IOPI Act depends on the *status* of the grantee as the office holder as and when the relevant amount is received. That distinction is reinforced by the text of the immunity for former officers in Pt II of the Fourth Schedule, which is limited to "[i]mmunity from suit and from other legal process in respect of acts and things done in his [or her] capacity as such an officer". The immunity has two limitations. It is limited to immunity from suit and other legal process and, significantly, in respect only of acts and things done as an officer. It does not extend to acts and things done after the person ceases to be an officer.

54 That construction is consistent with the statutory purpose or purposes of the IOPI Act. The IOPI Act sets the upper limits of the privileges and immunities which might be conferred by the regulations by reference to identified organisations and identified capacities of persons engaged in the work of those organisations⁴⁴. 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"⁴⁵. That purpose of functional necessity is reinforced by the inclusion in the IOPI Act⁴⁶ and the SAPI Regulations⁴⁷ of a provision allowing for a specialized agency to waive any

43 *Macoun v Federal Commissioner of Taxation* 2014 ATC ¶10-354 at 6,182-6,183 [32]-[34].

44 See also the Second Reading Speech for the International Organizations (Privileges and Immunities) Bill 1963: Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 May 1963 at 1161, 1163; Australia, Senate, *Parliamentary Debates* (Hansard), 21 August 1963 at 95-96.

45 See also the Second Reading Speech for the International Organizations (Privileges and Immunities) Bill 1963: Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 May 1963 at 1162; Australia, Senate, *Parliamentary Debates* (Hansard), 21 August 1963 at 96. See also s 22 of the Agencies Convention.

46 s 10 of the IOPI Act.

47 reg 10 of the SAPI Regulations.

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privileges or immunities to which a current or former office holder is entitled under the IOPI Act and the SAPI Regulations. The privilege of exemption from taxation whilst an officer of a specialized agency is designed 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). Of course, when the officer ceases to hold the office, the interest of the international organisation disappears. In contrast, the interest of the international organisation in respect of the immunity from suit and other legal process for former officers in Pt II of the Fourth Schedule continues after an officer ceases to hold the office, because the independence of officers is served by confidence that they will not face civil liability or criminal prosecution for their official acts after they cease to hold that office.

Mr Macoun's pension was not a vested right

55 Contrary to Mr Macoun's submissions, his right to receive the pension was not a vested right which existed when he was an office holder⁴⁸. During his time as an officer of the IBRD, Mr Macoun's right to the pension was not an accrued obligation; it was "at best an inchoate [right] in process of accrual but subject to a variety of contingencies"⁴⁹. The right to the pension did not arise until Mr Macoun ceased to hold office and ceased to be a participant in the SRP. Indeed, when he ceased to hold an office, the inchoate right could mature into one of a number of different forms, payable to different people. Those forms included a disability pension⁵⁰, a death benefit as a pension payable to a surviving spouse⁵¹ or in a lump sum⁵², or a withdrawal benefit⁵³.

48 cf *Shepherd v Federal Commissioner of Taxation* (1965) 113 CLR 385 at 396; [1965] HCA 70.

49 See, by way of example, *Federal Commissioner of Taxation v James Flood Pty Ltd* (1953) 88 CLR 492 at 507-508; [1953] HCA 65.

50 Art 4.3 of the SRP; Art 3.4 of the 1997 SRP.

51 Art 4.4(a) of the SRP; Art 4.1(a) of the 1997 SRP.

52 Art 4.4(b) of the SRP; Art 4.1(b) of the 1997 SRP.

53 Art 4.5 of the SRP; Art 4.3 of the 1997 SRP.

56 On the other hand, whilst he was an officer of the IBRD, Mr Macoun had the right, indeed the obligation, to be a participant in the SRP and to contribute 7 per cent of his gross remuneration to the SRP. The IBRD was obliged to fund the balance of the SRP⁵⁴. Whilst Mr Macoun was an officer of the IBRD, his salary and emoluments received from the IBRD were exempt from tax under Item 2 of Pt I of the Fourth Schedule to the IOPI Act. The Commissioner did not tax his inchoate right to the pension.

Accidents of timing

57 Mr Macoun submitted that if the question posed by the exemption in the IOPI Act and the SAPI Regulations was answered simply by an enquiry as to the timing of the receipt of salary or emolument, any payment of salary or emolument *after* the officer ceased to hold an office (but which was undoubtedly salary or emolument earned *before* the officer ceased to hold an office) would be taxable. Mr Macoun submitted that this "anomaly" weighed against the interpretation of the IOPI Act adopted in these reasons and by the Full Court.

58 These "accidents of timing" were said by Mr Macoun to be inconsistent with the view that, on the proper construction of the IOPI Act and the SAPI Regulations, that part of the monthly pension payments Mr Macoun received from the Retirement Fund that did not reflect a return of his contributions to the SRP in the 2009 and 2010 income years did not attract the privilege of exemption from taxation.

59 That contention should be rejected for at least two reasons. First, it proceeds from a false premise. The privileges and immunities granted to an officer are granted "in the interests of the specialized agencies only and not for personal benefit of the individuals themselves"⁵⁵. It is the specialized agency that may waive any privileges or immunities, not the individual officer⁵⁶. Second, as the Commissioner submitted, it is always possible for an international organisation to order its affairs to ensure that any payment of salaries or emoluments to an officer is received by that officer while they continue to hold an office, even if the officer has ceased to perform their usual duties. It may also

54 See [11]-[13] above.

55 Section 22 of the Agencies Convention.

56 s 10 of the IOPI Act; reg 10 of the SAPI Regulations; Section 22 of the Agencies Convention.

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be, although for present purposes it is unnecessary to decide, that if salary or emoluments were both due and payable while an officer continued to hold office, they should be regarded as "received" during office even though not in fact paid until after the officer ceased to hold office⁵⁷.

60 For those reasons, that part of the monthly pension payments Mr Macoun received under the Retirement Fund that did not reflect a return of Mr Macoun's contributions to the SRP in the 2009 and 2010 income years does not attract the privilege of exemption from taxation under the IOPI Act and the SAPI Regulations.

Analysis – Question 2

61 The second question is – do the monthly pension payments Mr Macoun received at a time when he no longer held an office in the IBRD fall outside the phrase "salaries and emoluments received from the organisation" in Item 2 of Pt I of the Fourth Schedule to the IOPI Act? For the reasons set out in relation to question 1, the answer is yes. Mr Macoun did not receive the monthly pension payments whilst he was an officer of the IBRD and he did not receive the monthly pension payments from the IBRD.

62 There is, though, another reason why those monthly pension payments fall outside the phrase "salaries and emoluments received from the organisation" in Item 2 of Pt I of the Fourth Schedule to the IOPI Act. The monthly pension payments do not fall within the phrase "salaries and emoluments".

63 A distinction may be drawn between each of the terms "pension", "salary" and "emolument". This issue was addressed in *Nette v Howarth*⁵⁸. The context was different but the decision is instructive. Rich J described a "pension" as "in the nature of deferred pay, and usually given upon retirement for past services"⁵⁹. "Salary" was described as "a definite payment for personal services arising under some contract, and ... computed by time"⁶⁰. Finally, "emoluments" were

57 cf *Coles Myer Finance Ltd v Federal Commissioner of Taxation* (1993) 176 CLR 640 at 662; [1993] HCA 29.

58 (1935) 53 CLR 55 at 60, 65; [1935] HCA 22.

59 *Nette v Howarth* (1935) 53 CLR 55 at 60.

60 *Nette v Howarth* (1935) 53 CLR 55 at 60.

described as "the advantages in money or money's-worth which flow from occupation of an office or the like"⁶¹.

64 In the present appeal, Mr Macoun relied upon a finding by the AAT that his monthly pension payments were an emolument⁶² and the Federal Court's refusal to consider that question on appeal⁶³. The notice of contention filed by the Commissioner in this Court seeks to affirm the decision below on the additional ground that the Federal Court ought to have decided that the AAT erred in law in finding that the monthly pension payments received by Mr Macoun were "emoluments received from the organisation" within the meaning of Item 2 of Pt I of the Fourth Schedule to the IOPI Act. Mr Macoun contended that this Court should not reconsider that question as it involved a finding of fact by the AAT. Mr Macoun's contention should be rejected⁶⁴. As Mason J pointed out in *Hope v Bathurst City Council*⁶⁵, when it is necessary to engage in a process of construction to determine the meaning of a word (or phrase) in a statute (as in this appeal), a question of law will be involved where it is contended that there is only one conclusion open.

65 The phrase "salaries and emoluments" in Item 2 of Pt I of the Fourth Schedule to the IOPI Act recognises that the payments which an international organisation may make to a person who holds an office may be of a variety of characters. It is apparent that "emolument", appearing as it does in the phrase "salaries and emoluments", is intended to capture a broader range of additional benefits than "salaries". However, in the context of Item 2 of Pt I of the Fourth Schedule to the IOPI Act and the SAPI Regulations, that phrase is subject to the two conditions referred to earlier – the emolument must be received whilst the person is an officer of a specialized agency and the emolument must be received from the specialized agency. A monthly pension payment does not, and cannot,

61 *Nette v Howarth* (1935) 53 CLR 55 at 60.

62 *Macoun v Federal Commissioner of Taxation* 2014 ATC ¶10-354 at 6,182 [32].

63 *Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265 at 273-274 [34]-[35].

64 See, for example, *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 450-451 [24]-[27]; [2001] HCA 12.

65 (1980) 144 CLR 1 at 8-10; [1980] HCA 16. See also *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 451 [27].

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satisfy those conditions. Indeed, adapting the language of Rich J in *Nette v Howarth*, monthly pension payments are not "advantages in money or money's-worth which flow from occupation of an office or the like"⁶⁶. A pension does not flow from occupation of an office. It flows only on and from cessation of that office⁶⁷.

Analysis – Question 3

66 The third question – does the Agencies Convention properly construed in accordance with the principles under the Vienna Convention require Australia *not* to tax Mr Macoun's monthly pension payments – was not the subject of detailed submissions and debate before the AAT and the Full Court below, but was discussed by Perram J in the Federal Court⁶⁸.

67 It was common ground that the Court should seek to construe the IOPI Act in a manner which accords with Australia's international obligations if such a construction is open⁶⁹. Mr Macoun submitted that Australia's international obligations under the Agencies Convention required that the monthly pension payments be exempt from taxation, and that s 6(1)(d)(i) and the Fourth Schedule to the IOPI Act and reg 8 of the SAPI Regulations should be given a beneficial and purposive meaning designed to implement those obligations. The answers to the first and second questions raised in this appeal show that such a construction is not open. But examination of Australia's international obligations demonstrates that, in any event, those obligations do not require Australia to exempt Mr Macoun's monthly pension payments from tax.

68 What then are Australia's international obligations?

66 (1935) 53 CLR 55 at 60.

67 See [14]-[16], [63] above.

68 *Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265 at 275-278 [46]-[60].

69 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 15 [34]; [2006] HCA 53; *Minister for Immigration and Border Protection v WZAPN* (2015) 89 ALJR 639 at 649 [53]; 320 ALR 467 at 478; [2015] HCA 22.

69 The applicable principles of construction are not in dispute. The meaning of the Agencies Convention is to be construed according to the rules of construction in the Vienna Convention⁷⁰. Article 31(1) provides that a treaty must 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".

70 Article 31(2) of the Vienna Convention states:

"The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

71 Article 31(3) provides that, together with the context, the following is also to be considered:

- "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties."

72 Finally, reference should be made to Art 32 of the Vienna Convention, which provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Art 31 or to determine the meaning when the interpretation according to Art 31 is ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.

70 *Maloney v The Queen* (2013) 252 CLR 168 at 180-181 [14], 255-256 [235]; [2013] HCA 28.

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73 What then is the proper construction of the Agencies Convention arising from the application of the Vienna Convention?

74 It is necessary to turn first to the words of the Agencies Convention. Section 19(b) of the Agencies Convention provides that "[o]fficials" of specialized agencies shall "[e]njoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the specialized agencies and on the same conditions as are enjoyed by officials of the United Nations". Section 18 provides that specialized agencies will specify the categories of officials to which Art VI (which contains Sections 18 and 19) applies and from time to time make known to the governments of all State parties to the Agencies Convention the names of the officials to be included in these categories.

75 On the ordinary meaning of the words, the Agencies Convention does not prohibit States distinguishing between officers and former officers and does *not* prohibit a State taxing a pension received by a former officer of a specialized agency. That construction is consistent with both State practice and the preparatory works. Although these materials were not debated before the AAT or the Full Court, they assist in the interpretation of the Agencies Convention.

76 The starting point in understanding the context of the text, object and purpose of the Agencies Convention is the UN Convention. Its terms have been addressed earlier⁷¹ and are relevant because Section 19(b) of the Agencies Convention picks up for officials of specialized agencies the "same exemptions from taxation ... enjoyed by officials of the United Nations". The Sixth Committee reported to the General Assembly on the work of the Sub-Committee on Privileges and Immunities as follows⁷²:

"The Sub-Committee on privileges and immunities examined another proposal submitted by the Advisory Group of Experts on administrative and budgetary matters, made with a view to exempting all members of the staff of the Organization from taxation on retirement benefits and exempting their beneficiaries from taxation on death benefits, either in the form of a lump sum or benefits paid by the Organizations to widows and orphans. The Sub-Committee decided, without prejudice to

71 See [25] above.

72 United Nations, *Privileges and Immunities of the United Nations: Report of the Sixth Committee to the General Assembly*, UN Docs A/43/Rev.1, A/43/Rev.1/Corr.1, A/43/Rev.1/Corr.2 and A/43/Corr.1 (1946) at 643-644.

this question being taken up and considered separately at a later stage, that a provision to this effect should not be included in the general Convention."

77 As the Commissioner submitted, this confirms the UN Convention was drafted on the basis that the phrase "salaries and emoluments" did not extend to retirement or death benefits.

78 Next, the preparatory works in relation to the Agencies Convention must be considered. Its terms have been addressed earlier⁷³. A Sub-Committee of the Sixth Committee reported in 1947⁷⁴. It recorded that the Sub-Committee agreed that the immunity from suit in Section 19(a) would continue after the officials had ceased to be officials⁷⁵. The last sentence of [22] of the report stated that "[i]t was thought, further, that this interpretation in fact followed from the wording of the Section as a whole and it was pointed out that paragraph (b), dealing with exemption of official salaries from taxation, required a similar interpretation if it was to receive its proper effect". That sentence must be read with the next paragraph, which in fact addressed the applicable provision in the Agencies Convention (Section 19(b)) by reference to the corresponding provision in the UN Convention. The report recorded that there was still debate about the final form and effect of the provision in the UN Convention and then went on to state:

"The majority of the Sub-Committee considered that the position of officials of the Specialized Agencies with regard to this matter should be the same as that of officials of the United Nations and therefore they adopted the following text:

73 See [28] above.

74 United Nations General Assembly, Sixth Committee, *Co-ordination of the Privileges and Immunities of the United Nations and of the Specialized Agencies: Final Report of Sub-Committee 1 of the Sixth Committee*, UN Doc A/C.6/191 (1947).

75 United Nations General Assembly, Sixth Committee, *Co-ordination of the Privileges and Immunities of the United Nations and of the Specialized Agencies: Final Report of Sub-Committee 1 of the Sixth Committee*, UN Doc A/C.6/191 (1947) at [22].

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'(b) Officials of the Specialized Agencies shall enjoy the same exemption from taxation in respect of the salaries and emoluments paid to them by the Specialized Agencies and on the same conditions as is enjoyed by officials of the United Nations.'

The effect of this text is to make whatever system is in force in respect of officials of the United Nations automatically be applicable to officials of the Specialized Agencies."

79 As seen earlier, the officials of the UN were not to get an exemption from taxation on their pensions. In each preparatory work, the taxation exemption was not extended to pensions.

80 Next, the State practice of parties to the Agencies Convention in dealing with exemption from taxation for periodic pensions must be considered. The State practice is not consistent. The position adopted by the UN may be illustrated by reference to *Powell v Secretary-General of the United Nations*⁷⁶. This decision is significant for a number of reasons. First, it records that it was not in dispute that nearly all States which are parties to the UN Convention tax periodic pension payments⁷⁷. Second, after citing the passage from the preparatory works for the UN Convention referred to above, the decision records the Secretary-General of the UN's argument that the preparatory works "clearly excluded pension paid to former staff members from section 18(b) of the [UN] Convention"⁷⁸. Third, the decision records that it was admitted by the parties that periodic pension payments are subject to national taxation⁷⁹.

76 Judgment No 237 of the Administrative Tribunal of the United Nations (13 February 1979).

77 *Powell v Secretary-General of the United Nations*, Judgment No 237 of the Administrative Tribunal of the United Nations (13 February 1979) at 69 [XVIII].

78 *Powell v Secretary-General of the United Nations*, Judgment No 237 of the Administrative Tribunal of the United Nations (13 February 1979) at 70 [XIX].

79 *Powell v Secretary-General of the United Nations*, Judgment No 237 of the Administrative Tribunal of the United Nations (13 February 1979) at 70 [XX].

81 A similar view was reached in later decisions of courts in France and the Netherlands⁸⁰, and in a decision of an arbitral tribunal constituted by the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization ("UNESCO") to consider the question of the tax regime governing pensions paid to retired UNESCO officials residing in France⁸¹. Of particular significance was the statement that the Secretary-General of the UN had "left it to the parties to an agreement on privileges and immunities to decide what provision to make ... particularly with regard to the exemption of retirement pensions from taxation"⁸².

82 For present purposes, it is sufficient to record, as is the fact, that there is still no generally accepted State practice with regard to the exemption of retirement pensions from taxation⁸³. It cannot be said that the Agencies Convention properly construed in accordance with the principles identified in the Vienna Convention requires Australia *not* to tax Mr Macoun's pension.

80 See, eg, Decision 01PA04215 of the Paris Administrative Court of Appeal (7 November 2003); *X v State Secretary for Finance*, Supreme Court of the Netherlands (16 January 2009), in (2010) 41 *Netherlands Yearbook of International Law* 394 at 400 [3.3.5]-[3.3.6].

81 *United Nations Juridical Yearbook*, (2001) 421 at 430 [40], 431 [47], 432 [48]-[49], 434 [52]-[55]. At 434 [54], it is recorded that the provision in dispute in that decision was modelled on Section 18(b) of the UN Convention.

82 Arbitration Tribunal constituted by the Government of the French Republic and UNESCO to consider the question of the tax regime governing pensions paid to retired UNESCO officials residing in France, *United Nations Juridical Yearbook*, (2001) 421 at 434 [55].

83 See, for example, *X v State Secretary for Finance*, Supreme Court of the Netherlands (16 January 2009), in (2010) 41 *Netherlands Yearbook of International Law* 394 at 399-400 [3.3.4]-[3.3.6]. See also *Commissioner of Income-tax v Kolhatkar* (1994) 211 ITR 850 (High Court of Bombay); *Serafin and Yolanda*, Supreme Court of Andalusia (appeal number 478/2001, 17 January 2003); *Enrique*, Supreme Court of Catalonia (appeal number 1227/2003, 28 March 2007).

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Orders

83 The appeal should be dismissed. The parties agreed that there should be no order as to costs.

