



INTERNATIONAL
COMMISSION
OF JURISTS

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

**SUBMISSION BY THE INTERNATIONAL COMMISSION OF
JURISTS AUSTRALIA ON THE CRIMES LEGISLATION
AMENDMENT (SLAVERY, SLAVERY-LIKE CONDITIONS AND
PEOPLE TRAFFICKING) BILL 2012**

The International Commission of Jurists Australia [the 'ICJA'] welcomes the opportunity to comment on the *Crimes Legislation Amendment (Slavery, Slave-like Conditions and People Trafficking) Bill* [the 'Bill'], which is intended to remedy a number of legislative omissions under the current Australian framework for combating people trafficking, slavery and forced marriage.

The ICJA notes that the Bill proposes to amend existing definitions applying to trafficking, slavery and slavery-like offences to endeavour to ensure that a broader range of exploitative conduct is criminalised. The ICJA notes that the Bill further creates new offences of forced labour and forced and servile marriage. Other key changes noted include the extension of the offence of slavery to apply to conduct which renders a person a slave in addition to conduct involving a person who is already a slave; the extension of the existing offences of deceptive recruiting and sexual servitude so the offences apply to non-sexual servitude and all forms of deceptive recruiting and improving reparations to victims.

Moreover, it is noted that the Bill recognises, consistently with the High Court decision in *R v Tang*¹, that servitude may exist whether or not escape is possible or an attempt at escape has been made. These changes go a

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¹*R v Wei Tang* [2008] HCA 39; (2008) 237 CLR 1.

considerable way towards bringing Australia in line with international practice and fulfilling Australia's obligations under the Trafficking Protocol², the *International Labour Organisation Convention No 29 on Forced or Compulsory Labour*, and the *International Covenant on Civil and Political Rights*.³

Notwithstanding this, the ICJA is concerned that the Bill does not fully remedy the gaps in the existing law. In particular, the ICJA is concerned that there are definitional deficiencies in the setting out of elements of the new offences; that the Bill retains some problematic requirements in the existing legislation and that the Bill fails to comprehensively address victim and witness protections. The primary focus of our recommendations is on the enforceability of the proposed offences to ensure that the elements of the offences are sufficiently certain for both the defence and the prosecution.

The ICJA notes that the ICJ Western Australia Branch has made a separate submission on the Bill. The ICJA suggests that close consideration be given to that submission, some of which has been incorporated here.

1.FORCED LABOUR

- 1.1 One of the most important features of the Bill is the extension of the definition of 'forced labour' and the creation of new offences related to forced labour; that is, causing a person to enter into or remain in forced labour, conducting a business involving forced labour and deceptive recruiting for labour or services. Other important features of the Bill are the proposed amendments to the definition of 'threat' which includes 'coercion' and 'deception' and the introduction of a reasonable person test that removes the requirement under the existing legislation that escape be practically impossible in order for the offence of forced servitude to be made out.
- 1.2. The criminalisation of forced labour comprehensively addresses Australia's obligation to suppress forced labour under the *International Labour Organisation Convention No 29 on Forced or Compulsory Labour*. The criminalisation of forced labour is also consistent with the *United Nation's Recommended Principles and Guidelines on Human Rights and Human Trafficking*⁴ which highlights the need to independently criminalise forced labour as part of a wider legal framework for trafficking.
- 1.3. The ICJA notes that migrant workers may well be recruited legally in their home countries but face unscrupulous labour agencies or employers on arrival in Australia who place them in a state of involuntary servitude. The US State Department's 2008 Trafficking in Persons Report documents cases of several men and women from India, the PRC, South Korea, the

²*Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime* adopted by United Nations General Assembly resolution 55/25 of 15 November 2000, entry into force 29 September 2003. Australia ratified this Protocol on 14 September 2005.

³*International Covenant on Civil and Political Rights* (United Nations General Assembly Resolution 2200A (XXI)), 16 December 1966, New York; entry into force 23 March 1976; Australia signed 18 December 1972 and ratified 13 August 1980.

⁴Guideline 4, *United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council (United Nations E/2002/68/Add.1) 20 May 2002.

Philippines, and Ireland migrating to Australia for work, but subsequently being subjected to forced labour, including fraudulent recruitment, confiscation of travel documents, confinement, and debt bondage.⁵

- 1.4 A variety of tools of coercion are used to compel workers to enter into or continue in a state of servitude. Tactics used by abusive labour agents or employers include: changing the conditions of employment from those stipulated or implied in contracts signed before the workers leave their home country such as, for example, a promise of provision of accommodation; confiscating and holding travel documents; confinement; threatening physical force and withholding wages.⁶
- 1.5 For this reason, the ICJA welcomes the creation of the new offences of causing a person to enter into or remain in forced labour and deceptive recruitment for labour or services. In particular, the ICJA commends the adoption of more subtle psychological forms of coercion through the use of the words ‘coercion’ and ‘deception’ in the definition of ‘forced labour’, which would bring the legislation further in line with standards adopted by the *International Labour Organisation Convention No 29 on Forced or Compulsory Labour*.
- 1.6 The ICJA further notes that under the introduction of a new objective test, a person will be considered a victim of forced labour if, because of the use of coercion, threat or deception, “a reasonable person in the position of the victim” would not consider himself or herself to be free to cease providing labour services or leave the place or area where they provide labour or services. The ICJA appreciates that the new language appears to acknowledge that a victim may be subject to forced labour whether or not it is practically possible for them to escape or attempt to escape, as was the case in *R v Kovaks*.⁷
- 1.7 However, the ICJA suggests further clarification vis-à-vis the regard that must be paid to the subjective characteristics of the victim within the reasonable person test. Traffickers, slave traders and deceptive employers prey on the economically, physically, and intellectually vulnerable. Their targets are very often children and young women from racially diverse backgrounds, and their tactics are creative and ruthless, specially designed to trick, coerce, win the confidence of, or overbear potential victims.
- 1.8 The ICJA therefore urges importation of an ‘objective-subjective standard’. The ICJAS submits that it is appropriate when dealing with vulnerable persons from very different cultural and ethnic backgrounds to take into account the particular circumstances where the plaintiff found him or herself, with an awareness of his or her background and essential characteristics. The law should account for those personal characteristics of a plaintiff – including culture, ethnic origin and physical and intellectual capacity– which might affect his or her appreciation of the gravity of the threat and the reasonableness of his or her belief.
- 1.9 On this matter, the ICJA would refer to the wording of the United States Code in relation to the offence of forced labour, which defines serious harm as:

⁵US Department of State, *Trafficking in Persons Report*, Washington (DC): Department of State, June 2008, 62.

⁶*Ibid.*

⁷*R v Kovacs* [2007] QCA 143.

“...any harm, whether physical or non-physical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, *to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.* [Emphasis added.]”⁸

- 1.10 The ICJA suggests that the wording of the United States Code represents international best practice on the criminalisation of forced labour and recommends that a similar approach be taken within the Australian legislative framework.

2. SERVITUDE

- 2.1 The ICJA notes that the proposed definition of ‘servitude’ in the Bill is the proposed definition of forced labour with an additional requirement that ‘the victim is significantly deprived of personal freedom in respect of aspects of their life other than the provision of the labour or the services.’
- 2.2 The Fair Work Act⁹ and National Employment Standards ¹⁰(FWA and NES respectively) contain minimum entitlements for all employees in the Australian workplace system. The ICJA advises consideration of the consistency between the proposed definitions of forced labour and servitude by comparison to minimum acceptable standards and conditions of employment under the FWA and NES. Specifically, clarification is asked in respect of whether a failure to observe an employment entitlement is sufficient to make out deprivation of a personal freedom.
- 2.3 The ICJA further notes that there is no measure as to what constitutes being ‘significantly deprived’. The ICJA submits that a supplementary list of examples of considerations for determining what types of actions/behaviour are significant could assist in providing clarity. Moreover, a second schedule/list that specifies non-exclusive examples of what types of deprivation fall into the category of being ‘in respect of aspects of their life other than the provision of the labour or the services’ would also be helpful. For instance, there should be clarification of whether the control of finances and accounts would amount to a prohibited deprivation.

3. FORCED MARRIAGE

- 3.1 The Bill proposes a new definition of ‘forced marriage’ and creates two new offences related to forced marriage: causing another person to enter a forced marriage and being a party to (but not a victim of) a forced marriage.
- 3.2 The ICJA supports the creation of the new offences, however suggests that certain elements of the new offences require more precise definition. In particular, the ICJA notes that the proposed amendment defines forced marriage in s270.7A so as to exclude unregistered de facto relationships and unregistered cultural and religious marriages. The ICJA can see no

⁸United States Code, Title 18, Part 1, Chapter 77, section 1589(c)(2).

⁹Fair Work Act 2009 (Cth)

¹⁰As set out in the Fair Work Act 2009 (Cth)

reason not to incorporate the definition of marriage set out in the Family Law Act¹¹, which extends coverage over de facto marriages.

- 3.3 The ICJA also advises consideration be taken of marriages that may be unregistered but which are recognised by religious or ethnic community members and which are considered binding within the cultural and religious beliefs of many communities. For some communities religious marriage is considered more binding than official registration. An expansive interpretation of marriage is especially important since there is a risk that the new offence of forced marriage would lead to the practice of clandestine forced marriages going unrecorded to escape the reach of the law.
- 3.4 The ICJA further notes that in the Australian Government's Discussion Paper on Forced and Servile Marriage¹², the two terms appear to be used interchangeably; though servile marriage is described as a practice similar to slavery where a person is considered 'a chattel' which can be sold, transferred or bequeathed into marriage. Servile marriage appears to have an ownership and exploitation component that may not be as evident in forced marriage. As such, the ICJA suggests clarification on the distinction between forced and servile marriage.
- 3.5 The ICJA notes with concern the decision to make forced marriage a strict liability offence. The ICJA recognises that due to the collaborative nature of forced marriage, several individuals within a victim's family network and religious and cultural community may be criminally liable for the offences of incitement, conspiracy and aiding, abetting, counselling or procuring the commission of a forced marriage offence under the Commonwealth Criminal Code.¹³ The ICJA therefore recommends the incorporation of a *mens rea* requirement of intent, knowledge, recklessness or wilful blindness in engaging in conduct which causes another person to enter into a forced marriage.
- 3.6 However, the ICJA is also concerned that the requirement of direct causality exonerates certain culpable persons from liability. It is presently an offence under the *Marriage Act*¹⁴ for a marriage celebrant to solemnise a marriage if the celebrant has reason to believe there is a legal impediment to the marriage, however, there is no formal requirement for a marriage celebrant to satisfy himself that the consent to the marriage is real or not real.
- 3.7 The ICJA recommends consideration of the drafting of parallel civil legislation which creates liability for marriage celebrants and international marriage brokers who fail to conduct due diligence duties and disclosures, and the deregistration or imposition of civil penalties on such celebrants and brokers who fail to conduct due diligence duties and disclosure in relation to issues of consent.
- 3.8 The ICJA recommends the creation of a right to seek a declaration as to the validity of a marriage where the marriage is disputed on the grounds of deception, threat or coercion, and the creation of a comprehensive scheme to deal with children and financial settlement should the marriage be consequently annulled.

¹¹Family Law Act 1975 (Cth); see s4AA for definition of *de facto*

¹²Australian Government, Attorney General's Department, Discussion Paper 'Forced and Servile Marriage' <http://www.ag.gov.au>, p.3.

¹³Criminal Code Act 1995 (Cth) ss11.2, 11.6

¹⁴Marriage Act 1961 (Cth) s100

- 3.9 Further, the ICJA notes that the Bill does not currently address remedies available for people in marriages within the definition of the offence but which were registered prior to the enactment of the proposed new law.
- 3.10 The ICJA also notes that situations that may arise where pregnancy and abortion are at issue in the giving of consent, and that these situations merit close consideration. The extent of the reach of 'coercion, threat or deception' must be carefully delineated since there are many subtle forms of coercion and deception that may be captured by the definition as it currently stands.
- 3.11 The ICJA finally observes that any attempt to criminalise forced marriage must be sensitive to Australia's increased ethnic, cultural and religious diversity along with the diversity of 'marriage like' relationships in Australia. Legislative change to criminalise forced marriage should be accompanied by a holistic outreach program designed to inform and engage with people from ethnically, culturally and linguistically diverse backgrounds.
- 3.12 Essentially, such an outreach program should be designed to ensure that communities have an appreciation of the basic intent and provisions of the new legislation, and that community based grassroots initiatives accompany legislative change in order to support and educate victims and the potential victims of forced marriage. Further the program should facilitate attitudinal and behavioural change among ethnically and culturally diverse communities in Australia where forced marriage and servile marriage may currently be condoned, and promote an awareness of the potential interface between forced marriage, servile marriage and domestic violence.

4. TRAFFICKING IN PERSONS

- 4.1 The ICJA acknowledges that the Bill addresses notable shortcomings in the existing law concerning trafficking in persons; namely that the trafficking in persons offence (s 271.2) cannot presently be used against a person who recruited or engaged another person in a situation of forced labour or non-sexual servitude, but was not involved in his or her transportation, and that servitude and exploitation offences are currently restricted to instances of purely sexual servitude.
- 4.2 However, the ICJA echoes the concerns of the UN Human Rights Council Special Rapporteur on Trafficking in Persons that the Bill retains the problematic requirement of some form of entry to or exit from Australia to constitute a trafficking in persons offence – though not now required for trafficking-related offences such as slavery, servitude, forced labour, forced marriage and deceptive recruiting.¹⁵
- 4.3 Such a requirement for trafficking in persons focuses unduly on the transnational nature of a person's movement, and fails to recognise that force, fraud or coercion exercised on a person to perform or remain in service to a "master" is the defining element of trafficking. The precise nature of the transportation is merely incidental. A person may be transported to a location within his or her own country by force, threats or deception, and still subsequently fall within the definition of a victim of trafficking as stipulated by the *Trafficking Protocol*.

¹⁵UN Special Rapporteur in Trafficking in Persons, especially Women and Children, End of Mission Statement, 30 November 2011, available from <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11664&LangID=E>

- 4.4 The ICJA therefore recommends that the requirement of organising or facilitating ‘the entry, proposed entry or receipt of another person into Australia or the exit or proposed exit of a person out of Australia’ as per s 271.2 of the Criminal Code be replaced with ‘organising or facilitating the transportation or transfer of a person’ in compliance with the definition of trafficking in persons supported by the *Trafficking Protocol*.¹⁶ This would be pursuant to, and sustained by, the external affairs power of the Constitution in giving effect to Australia’s obligations under the Protocol.
- 4.5 The ICJA further notes the creation of a new offence of perpetrators harbouring or concealing a victim of trafficking. The ICJA observes that the use of the word ‘concealing’ represents a departure from the language of the *Trafficking Protocol* which defines trafficking in persons as the “recruitment, transportation, transfer, harbouring or receipt of persons”. The ICJA acknowledges the need to depart from the wording of the Protocol on this point; however, suggests additionally that ‘detaining’ or ‘restraining’ in place of the word ‘harbouring’ would assist in clarifying the scope of the offence. It is important in drafting offences to privilege clarity and precision above exact replication of the wording of international treaties.

5. VICTIMS OF PEOPLE TRAFFICKING

- 5.1 The Bill proposes to amend section 21B(1)(d) of the Crimes Act so that offenders can be ordered “to make reparation to any person in respect of any loss suffered, or any expense incurred, by the person by reason of the offence.” The ICJA welcomes this proposed amendment which appears, *prima facie*, to remove the limitation of the loss having to have been suffered as a direct result of the offence. The Bill goes part of the way towards realising Australia’s obligations under the *United Nations Convention against Transnational Organised Crime*¹⁷ and Article 6(6) of the *Trafficking Protocol*.
- 5.2 However, the ICJA urges that an intention of the Bill to cover non-pecuniary loss be made explicit since s21B of the Crimes Act does not currently provide that a reparation order be made in respect of non-economic loss. Payment for non-material damages resulting from moral, physical or psychological injury, emotional distress, and pain and suffering sustained by the victim as a result of the crime is particularly important in people trafficking and trafficking related offences, where victims are in especially vulnerable positions and often suffer from significant emotional and physical trauma.
- 5.3 Moreover, the stipulation that reparations are to be made to any person in respect of loss suffered by the person excludes the recovery of costs and expenses of necessary funeral and related services by family members in the event of the offence resulting in death. Such damages are deemed necessary and appropriate for trafficking offences in the UNODC

¹⁶*Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime* adopted by United Nations General Assembly resolution 55/25 of 15 November 2000, entry into force 29 September 2003. Australia ratified this Protocol on 14 September 2005.

¹⁷*United Nations Convention against Transnational Organized Crime* adopted by United Nations General Assembly resolution 55/25 of 15 November 2000, entry into force 29 September 2003. Australia ratified this Protocol on 14 September 2005.

Model Law against Trafficking in Persons¹⁸ and the Polaris Project Model Comprehensive State Legislation to Combat Trafficking in Persons.¹⁹

- 5.4 The ICJA further emphasises the importance of alternative remedies to reparations for trafficking victims. Reparations remain an elusive remedy for many victims of people trafficking crimes because of the paucity of cases that are investigated and successfully prosecuted, the unguided nature of orders for reparations, and the possibility that defendants are bankrupt or have divested themselves of assets.
- 5.5 The eligibility of trafficking victims under state and territory statutory victims' compensation schemes is piecemeal and inconsistent. The ICJA therefore joins with the Law Council of Australia and the UN Human Rights Council Special Rapporteur on Trafficking in Persons in calling for the establishment of a federal victims' compensation scheme. Victims of trafficking should be eligible for compensation regardless of whether the offender is identified, arrested or convicted. Further, a victim's immigration status, return to his or her home country or the absence of the victim from the jurisdiction should not prevent payment of compensation from the crime victim's restoration fund.
- 5.6 The ICJA finally notes the inadequacy of Bill in addressing issues of victim and witness protection. The *Trafficking Protocol*²⁰ mandates that States party to the protocol shall protect the privacy and identity of victims of people trafficking, including, *inter alia*, by making legal proceedings relating to such trafficking confidential and by providing assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings in a manner not prejudicial to the rights of the defence.
- 5.7 Victims of trafficking require sensitivity and empathy in their dealings with the criminal justice system. In its 2004 Inquiry into the Trafficking of Women for Sexual Servitude, the Parliamentary Joint Committee on the Australian Crime Commission recommended that consideration should be given to adopting the use of victim impact statements in sentencing for such offences.²¹ In 2005, the Australian Law Reform similarly recommended enacting comprehensive provisions for the use of victim impact statements in federal sentencing more broadly.²² The recommended provisions included key precautions such as precluding a victim from expressing an opinion about the offender's sentence and allowing facts in the statement to be verified.²³

¹⁸UN Office on Drugs and Crime, *Model Law against Trafficking in Persons*, 5 August 2009, available at: <http://www.unhcr.org/refworld/docid/4a794e432.html>

¹⁹Polaris Project Model Comprehensive State Legislation to Combat Trafficking in Persons, 3.9, 2006, available at <http://www.polarisproject.org/images/docs/Model-Comprehensive-State-Legislation.pdf>

²⁰Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime adopted by United Nations General Assembly resolution 55/25 of 15 November 2000, entry into force 29 September 2003. Australia ratified this Protocol on 14 September 2005.

²¹Recommendation 4, Parliamentary Joint Committee on the Australian Crime Commission, Inquiry into the Trafficking of Women for Sexual Servitude, June 2004.

²²ALRC, Sentencing of Federal Offenders, Discussion Paper 70 (2005)

²³ALRC, Sentencing of Federal Offenders, Discussion Paper 70 (2005)

- 5.8 The ICJA advocates the use of victim impact statements in people trafficking and trafficking related offences. However, it also recommends that victims' rights be exhaustively supported by the legislation itself – through a charter of victims' rights or a statement of principles for the minimum standards for the treatment of victims. Such a charter should provide such rights and protections as protocols for sharing of information between agencies involved in victim identification, confidentiality of information exchanged between a victim and a professional giving medical, psychological or legal assistance, confidentiality of the results of medical examinations, and prohibition against public disclosure or publication of identifying information related to the victim.

CONCLUSION

The Bill aims to improve Australia's legislative framework so that the perpetrators of such heinous crimes as slavery, slavery-like offences and people trafficking are charged and sentenced accordingly.

While the ICJA supports the use of criminal sanctions against a broader range of exploitative conduct, it stresses the need for the offences to be set out with clarity and precision, for victim and witness protection to be appropriately addressed and for the legislation to be accompanied by policy which ensure that the changes are supported by education and engagement with culturally and linguistically diverse communities.

The International Commission of Jurists Australia **recommends** the following:

- (1) The importation of an 'objective-subjective standard' in relation to the new reasonable person test needed to establish that a person is a victim of forced labour. The ICJA recommends the test takes into account background and essential characteristics – including culture, religious adherence, ethnic origin, physical, and intellectual capacity – which might affect the plaintiff's appreciation of the gravity of the threat and the reasonableness of his or her belief.
- (2) Consideration of the consistency between the proposed definitions of forced labour and servitude and minimum acceptable standards and conditions of employment under the Fair Work Act and National Employment Standards.
- (3) The provision of a supplementary list of examples of considerations for determining what types of actions/behaviour may constitute significant deprivation for the purposes of making out an offence of servitude. Further, provision of a second schedule/list specifying non-exclusive examples of what types of deprivation fall into the category of being 'in respect of aspects of their life other than the provision of the labour or the services.'
- (4) The incorporation of the definition of "marriage" as defined in the Family Law Act, which creates power over de facto marriages in relation to the offence of forced marriage.
- (5) The expansion of the definition of forced marriage to include marriages that may be unregistered but which are recognised by religious or ethnic community members and which may be considered binding within the cultural and religious beliefs of the community.
- (6) Clarification on the distinction between forced and servile marriage.
- (7) The incorporation of a *mens rea* requirement of intent, knowledge, recklessness or wilful blindness in engaging in conduct which causes another person to enter into a forced marriage.

- (8) The consideration of the parallel civil legislation creating civil liabilities for marriage celebrants and international marriage brokers who fail to conduct due diligence duties and disclosures in relation to issues of consent.
- (9) The creation of a right to seek a declaration as to the validity of a marriage where the marriage is disputed on the grounds of deception, threat or coercion.
- (10) That legislative change to criminalise forced marriage be accompanied by a holistic outreach program designed to inform and engage with people from ethnically, culturally and linguistically diverse backgrounds
- (11) That the requirement of organising or facilitating 'the entry, proposed entry or receipt of another person into Australia or the exit or proposed exit of a person out of Australia' as per s271.2 of the Criminal Code be replaced with 'organising or facilitating the transportation or transfer of a person' in compliance with the definition of people trafficking supported by the *Trafficking Protocol*.
- (12) The substitution of the word 'detaining' or 'restraining' for 'harbouring' in the new offence of 'harbouring or concealing a victim of trafficking'.
- (13) That the improvement of reparations available to victims of trafficking be complemented with an explicit intent to cover non pecuniary loss, including for non-material damages resulting from moral, physical or psychological injury, emotional distress, and pain and suffering suffered by the victim as a result of the crime.
- (14) The extension of reparations to ensure that the recovery of costs and expenses of necessary funeral and related services is available to family members in the event of the offence resulting in death.
- (15) The establishment of a federal victims' compensation scheme which affords victims of trafficking eligibility regardless of whether the offender is identified, arrested or convicted. Further, that a victim's immigration status, return to his or her home country or the absence of the victim from the jurisdiction should not prevent payment of compensation from such a fund.
- (16) Acceptance of victim impact statements in people trafficking and trafficking related offences.
- (17) The support of victims' rights within the legislation itself – through a charter of victims' rights or a statement of principles for the minimum standards for the treatment of victims.

Yours/sincerely,
ICJ AUSTRALIA