

CASE NOTE

A MARKED IMPROVEMENT: THE HIGH COURT OF AUSTRALIA'S APPROACH TO TREATY INTERPRETATION IN *MACOUN v COMMISSIONER OF TAXATION* [2015] HCA 44

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I INTRODUCTION

In the fifteenth volume of this publication, I reviewed the approach to treaty interpretation adopted by the High Court of Australia in *Maloney v The Queen* ('*Maloney*').¹ After reviewing the manner in which the six judgments in that case approached the interpretation of the *International Convention on the Elimination of All Forms of Racial Discrimination*,² I concluded that:

the Court's approach to the interpretation of international law leaves much to be desired. All members of the High Court have overlooked the role of customary international law entirely and the majority have, to varying degrees, limited the range of materials to which reference may be made when interpreting treaties to fewer sources than are recognised by international law as legitimate. As a consequence, the High Court risks interpreting statutes inconsistently with international law as it evolves, thereby placing Australia in breach of the international obligations to which Parliament intended to give effect.³

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¹ Patrick Wall, 'The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28' (2014) 15 *Melbourne Journal of International Law* 228. The case has since been reported as *Maloney v The Queen* (2013) 252 CLR 168 ('*Maloney*').

² *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

³ Wall, above n 1, 250–1.

Macoun v Commissioner of Taxation ('*Macoun*'),⁴ which was decided on 2 December 2015, included the most significant questions of treaty interpretation (outside the refugee context, at least)⁵ asked of the High Court since *Maloney*. In the intervening period, the Court referred to the *Vienna Convention on the Law of Treaties* ('*VCLT*')⁶ only twice, and each time in footnotes.⁷

Although, as shall be explained,⁸ the disposition of *Macoun* turned solely on the construction of domestic legislation, the Court considered whether such legislation was consistent with the immunities provided for by the *Convention on the Privileges and Immunities of the Specialized Agencies* ('the *Agencies Convention*')⁹ by way of obiter dicta.¹⁰ It is the question of treaty interpretation that arose in this context that this note will focus on.

As I will outline in this note, the High Court's approach to treaty interpretation in *Macoun* represents a marked improvement since *Maloney*. The Court adopted an orthodox approach that is grounded firmly in the rules of interpretation contained in the *VCLT*, vastly more receptive of extrinsic legal materials and devoid of the hostility to treaty interpretation detectable in many

⁴ *Macoun v Commissioner of Taxation* [2015] HCA 44 (2 December 2015) ('*Macoun*').

⁵ Australia's protection obligations under the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugees Convention*') (as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967)) have been the subject of a significant proportion of the High Court's workload in recent years, though the regularity with which the Court is called on to interpret the *Refugees Convention* is likely to reduce significantly as a result of the replacement of references to it in the *Migration Act 1958* (Cth) with a statutory definition of 'refugee' in late 2014: see *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 5 pt 2; Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]* (2014) 11–13 [2.13]–[2.16] (explaining the nature of the changes), 28–32 [3.36]–[3.52] (recording concerns that the new statutory definition of 'refugee' is inconsistent with Australia's obligations under the *Refugees Convention* and otherwise inappropriate).

⁶ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*').

⁷ *Commonwealth Minister for Justice v Adamas* (2013) 253 CLR 43, 54–5 [31]–[32] nn 31, 33–4 (concerning the interpretation of art 9(2)(b) of the *Extradition Treaty between Australia and the Republic of Indonesia*, concluded 22 April 1992, 1889 UNTS 51 (entered into force 21 January 1995)), which provides that:

Extradition may be refused ... where the Requested State, while also taking into account the nature of the offence and the interests of the Requesting State, considers that, in the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is requested, the extradition of that person would be unjust, oppressive or incompatible with humanitarian considerations.

See also *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26 (27 June 2014) [13] n 32 (French CJ and Gageler J), [71] n 87 (Crennan and Bell JJ) (concerning the interpretation of art 1F(b) of the *Refugees Convention*, which provides that: 'The provisions of this *Convention* shall not apply to any person with respect to whom there are serious reasons for considering that ... he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee').

⁸ See Parts III and IV below.

⁹ *Convention on the Privileges and Immunities of the Specialized Agencies*, opened for signature 21 November 1947, 33 UNTS 261 (entered into force 2 December 1948).

¹⁰ *Macoun* [2015] HCA 44 (2 December 2015) [66]–[82].

of the judgments in *Maloney*. I argue that this can be explained — in part, at least — by four key differences between the two cases: the subject matter of the treaties in question, the nature of the extrinsic materials at hand, the composition of the bench and the quality of the submissions to the Court. Nonetheless, I conclude that there is cause for hope that *Macoun* also represents a shift within the High Court towards an approach to treaty interpretation more in line with the approach set out in the *VCLT*.

In Parts II and III, I will briefly outline the facts, litigation history and the questions of domestic law raised in *Macoun*. Part IV will examine the approach to treaty interpretation adopted at all three stages of the litigation and Part V will examine and seek to explain the differences between the High Court's approaches in *Maloney* and *Macoun*.

II FACTS AND LITIGATION HISTORY

The facts may be stated relatively shortly.¹¹ Between 1992 and 2007, Mr Macoun worked as a sanitary engineer for the International Bank for Reconstruction and Development ('the Bank'), which is a part of the World Bank Group.¹² Whilst so employed, he made regular contributions to the Bank's Staff Retirement Plan so that, once he had retired, he was entitled to receive a pension from the Bank's Retirement Fund. In FY2009, Mr Macoun received pension payments of \$131 302 and, in FY2010, his pension payments totalled \$134 970.

Although Mr Macoun initially lodged tax returns for FY2009 and FY2010 that included these amounts as assessable income (meaning that he was liable to pay income tax on them), he subsequently made requests to the Commissioner of Taxation to have those amounts excluded from his assessable income. The Commissioner refused the requests, thus maintaining that they were taxable. Mr Macoun formally objected to this,¹³ but the Commissioner disallowed the objection.

Mr Macoun sought to have the Commissioner's decision reviewed in the Administrative Appeals Tribunal.¹⁴ He was successful, and the Tribunal (Tamberlin DP) concluded that the pension payments were not assessable income.¹⁵

The Commissioner appealed the Tribunal's decision to the Full Court of the Federal Court of Australia. The Full Court, which comprised Edmonds, Perram and Nicholas JJ, unanimously allowed the appeal.¹⁶

¹¹ Ibid [10]–[18].

¹² The World Bank is made up of two organisations: the International Bank for Reconstruction and Development and the International Development Association. The World Bank Group consists of these two organisations, as well as the International Finance Corporation, the Multilateral Investment Guarantee Agency and the International Centre for the Settlement of Investment Disputes. For further information, see World Bank, *About the World Bank* <<http://www.worldbank.org/en/about>>.

¹³ See *Income Tax Assessment Act 1936* (Cth) s 175A; *Taxation Administration Act 1953* (Cth) pt IVC div 3.

¹⁴ See *Taxation Administration Act 1953* (Cth) s 14ZZ, pt IVC div 4.

¹⁵ *Macoun v Federal Commissioner of Taxation* (2014) 97 ATR 100, 109 [59].

¹⁶ *Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265. In the interests of full disclosure, I should note that I previously worked as the Associate to Perram J. I had no involvement in the *Macoun* case.

Having obtained special leave to do so,¹⁷ Mr Macoun appealed to the High Court. Writing jointly, the five judges hearing the case concluded that Mr Macoun's pension payments were assessable income (and thus liable to income tax), and so dismissed the appeal.¹⁸

III QUESTIONS OF DOMESTIC LAW

As might be guessed from the brief factual summary given above, the disposition of Mr Macoun's case at all three stages of litigation turned primarily — and, in the Federal and High Courts, exclusively — on questions of domestic statutory interpretation, the key provisions being:

- (i) section 6(1)(d)(i) of the *International Organisations (Privileges and Immunities) Act 1963* (Cth) ('the Act'), which allows for the making of regulations conferring certain privileges and immunities upon persons holding an office in an international organisation to which the Act applies (including the Bank);
- (ii) regulation 8(1) of the *Specialized Agencies (Privileges and Immunities) Regulations 1986* (Cth) ('the Regulations'), which confers a wide range of privileges and immunities on such persons, including an '[e]xemption from taxation on salaries and emoluments received from the organisation';¹⁹
- (iii) section 6(1)(d)(i) of the Act, which allows for the making of regulations conferring privileges and immunities on persons who have ceased to hold an office in an international organisation to which the Act applies; and
- (iv) regulation 8(3) of the Regulations, which confers only one privilege or immunity on former officers, namely '[i]mmunity from suit and

¹⁷ Pursuant to s 33(3) of the *Federal Court of Australia Act 1976* (Cth), special leave to appeal is ordinarily required before an appeal from the Full Federal Court can be brought to the High Court. See also *Judiciary Act 1903* (Cth) ss 21 (applications for special leave to appeal to the High Court), 35A (criteria for granting special leave to appeal).

¹⁸ *Macoun* [2015] HCA 44 (2 December 2015). The bench comprised French CJ, Bell, Gageler, Nettle and Gordon JJ.

¹⁹ The full list of immunities, which is set out in *International Organisations (Privileges and Immunities) Act 1963* (Cth) sch 4 pt I, reads as follows:

1. Immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer.
2. Exemption from taxation on salaries and emoluments received from the organisation.
3. Exemption (including exemption of a spouse and any dependent relatives) from the application of laws relating to immigration and the registration of aliens.
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.

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

All three judges of the Full Federal Court and all five judges of the High Court concluded that the combined effect of these provisions — especially (iii) and (iv) above — was that pension payments received by a former officer of a relevant international organisation were not exempt from taxation.²¹ In reaching the opposite conclusion, Tamberlin DP in the Administrative Appeals Tribunal considered that, because the entitlement to the pension payments arose during and because of Mr Macoun's employment with the Bank, it was an 'emolument[] received from the organisation' that continued to attract the exemption from taxation referred to at (ii) above after Mr Macoun's employment with the Bank had concluded.²²

IV TREATY INTERPRETATION

At all three stages of litigation, however, questions of treaty interpretation also arose by virtue of the fact that the Act and the Regulations are designed to give domestic effect to Australia's obligations under the *Agencies Convention*, s 19(b) of which provides, in part, as follows:

Officials of the 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.

The exemptions referred to as being 'enjoyed by officials of the United Nations' are conferred by virtue of s 18 of the *Convention on the Privileges and Immunities of the United Nations* ('the *UN Convention*'),²³ which provides in part as follows:

Officials of the United Nations shall ... be exempt from taxation on the salaries and emoluments paid to them by the United Nations ...²⁴

The perceived relationship between these provisions and the taxability or otherwise of Mr Macoun's pension payments differed at each stage of the litigation. I shall examine each in turn.

A *Administrative Appeals Tribunal*

After concluding that the relevant provisions of domestic legislation rendered Mr Macoun's pension payment exempt from taxation for the reasons briefly stated above, Tamberlin DP referred — under the heading

²⁰ Ibid sch 4 pt II.

²¹ *Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265, 274–6 [39]–[44] (Edmonds and Nicholas JJ), 276 [49] (Perram J).

²² *Macoun v Federal Commissioner of Taxation* (2014) 97 ATR 100, 104–5 [21]–[33] (concluding that the pension payments were 'emoluments'), 105–6 [34]–[38] (concluding that the payments 'were impressed with the character of payments arising from employment') and 106 [39]–[45] (concluding that they continued to be so impressed after the conclusion of the employment).

²³ *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946).

²⁴ Ibid s 18(b).

‘Extrinsic Material’ — to a number of Spanish decisions that had been referred to him by Mr Macoun’s representatives.²⁵ The gist of these decisions was that ‘pensions paid after cessation of office and employment as a United Nations official were exempt from taxation as being “emoluments”’.²⁶ His Honour stressed that these decisions were useful ‘not as binding authority but as providing some indication that the reasoning contended for by [Mr Macoun] is not without significant reasoned support’.²⁷ The ‘relevant principle’ was that:

it is generally desirable that where the same expressions are used in international agreements they should so far as possible be construed in a uniform and consistent manner by both local courts and international courts to avoid a multitude of different approaches ...²⁸

His Honour recognised that the legislative provisions being considered by the Spanish courts were different to the provisions he had been confronted with, but concluded nonetheless that they ‘provide some reasoned guidance on the issue before me in considering the interpretation to be given to the language which has been applied consistently and over a lengthy period in the International Conventions’.²⁹

Referring to art 31(1) of the *VCLT*, his Honour concluded that ‘the ordinary meaning contended for by [Mr Macoun] is consistent with the language used, having regard to the context, object and purpose of [the Act and the Regulations]’.³⁰ His Honour appears to have proceeded on the basis that the *VCLT* was to be used when interpreting both the treaties in question *and* the legislation giving domestic effect to them.

B Full Federal Court

In the course of his appeal to the Full Court of the Federal Court of Australia (which primarily concerned the proper application of the provisions of domestic legislation outlined above), the Commissioner took umbrage at Tamberlin DP’s usage of the Spanish decisions and the *VCLT*. The complaint was not so much that they had been used improperly, but that they had been used at all. The Commissioner’s third and final ground of appeal was thus that:

The Tribunal erred in law in having regard to decisions of Spanish Tribunals and the *Vienna Convention* in construing [the Act and the Regulations] and in reaching its conclusion that the pension payments were exempt from inclusion in the respondent’s assessable income. *The Tribunal should have had no regard to those decisions or to the Vienna Convention.*³¹

²⁵ *Macoun v Federal Commissioner of Taxation* (2014) 97 ATR 100, 108 [54]–[56].

²⁶ *Ibid* 108 [54].

²⁷ *Ibid*.

²⁸ *Ibid* 108 [57], citing *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* (1996) 56 FCR 406, 421 and *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 98 FCR 168, 197.

²⁹ *Ibid* 108 [56].

³⁰ *Ibid* 108 [58].

³¹ Reproduced in *Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265, 272 [27] (emphasis added).

The Commissioner argued that Tamberlin DP ‘placed some reliance upon on [sic] the Spanish decisions in reaching its decision’ and that this was impermissible because the Administrative Appeals Tribunal had been called upon to interpret domestic legislation that ‘gives force to [the *Agencies Convention*] under domestic law only to the extent of the text set out in the Act itself’.³² Tamberlin DP had thus ‘misapplied the principles as to the construction of domestic legislation that implements international instruments’.³³ Mr Macoun responded that, ‘on a fair reading of the reasons for decision’, Tamberlin DP did not rely on the Spanish decisions, but merely considered whether his reasoning was consistent with that adopted elsewhere.³⁴

Although it found unanimously in favour of the Commissioner, the majority of the Full Court agreed with Mr Macoun on this point. Edmonds and Nicholas JJ did not consider that Tamberlin DP had reached his conclusion ‘on the back of the decisions of Spanish Tribunals and the *Vienna Convention*’; ‘[a]t most, the Tribunal drew comfort from those matters or considerations for the conclusion it had already reached’.³⁵

Perram J took a slightly different tack. Whilst agreeing with the reasoning of Edmonds and Nicholas JJ for allowing the Commissioner’s appeal, he explained by way of *obiter dictum* that — in his view — ‘the [*Agencies*] *Convention* properly construed requires Australia not to impose income tax on Mr Macoun’s pension’.³⁶ Although his Honour felt compelled to allow the appeal because he could not interpret the legislation ‘in a way which complies with what seem ... to be Australia’s clear obligations’, he resisted any suggestion that ‘the Tribunal should be criticised for having sought to ascertain the *Convention*’s meaning in the process of construing the Act’.³⁷

Starting with the ordinary meaning of the treaty text — as required by the *VCLT*³⁸ — Perram J considered that there was nothing in s 18(b) of the *UN Convention* (reproduced above) to suggest that the concept of ‘emolument’ does not include a pension payment.³⁹ There was no reason to read it narrowly, ‘particularly so where, as here, the official has diverted a contribution from salary towards pension’.⁴⁰

Turning to the Spanish decisions (which were the only materials bearing on the treaty question with which the Full Court had been supplied), Perram J considered that he was permitted to have reference to them in interpreting s 18 of the *UN Convention* because of their status as ‘judicial decisions’ and thus ‘subsidiary means for the determination of rules of [international] law’

³² Commissioner of Taxation, ‘Applicant’s Outline of Submissions’, Submission in *Commissioner of Taxation v Macoun*, NSD 401/2014, 9 October 2014, [36]–[37].

³³ *Ibid* [38].

³⁴ Andrew John Macoun, ‘Respondent’s Outline of Submissions’, Submission in *Commissioner of Taxation v Macoun*, NSD 401/2014, 17 October 2014, [39].

³⁵ *Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265, 273 [32] (Edmonds and Nicholas JJ).

³⁶ *Ibid* 276 [48] (Perram J).

³⁷ *Ibid* 276 [49] (Perram J).

³⁸ *VCLT* art 31(1).

³⁹ *Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265, 277 [52] (Perram J).

⁴⁰ *Ibid*.

pursuant to art 38(1)(d) of the *Statute of the International Court of Justice* ('*ICJ Statute*').⁴¹ His Honour did not refer to the *VCLT*.

After considering in some detail each of the three Spanish decisions to which the Court had been referred — as well as an Indian decision — Perram J concluded that they supported his preferred interpretation of pensions being included within the concept of 'emoluments'.⁴² As already noted, though, he too allowed the appeal because he considered that — despite the situation at international law — the domestic legislation clearly supported the Commissioner's position.

C High Court

Thanks no doubt to Perram J's observations, the question of whether Australia's legislative arrangements on privileges and immunities are in violation of the *Agencies Convention* was very much a central issue by the time Mr Macoun's case made it to the High Court.⁴³ In seeking special leave to appeal, counsel for Mr Macoun opened his address by stressing the importance of the treaty interpretation issue,⁴⁴ and it appears from the following question — which was asked of counsel for the Commissioner by Bell J during the hearing of the application — that the treaty interpretation issue was central to the grant of special leave:

Mr Hmelnitsky, appreciating there may be great force to what you have put [ie that there are reasons to doubt Perram J's conclusion on the treaty interpretation issue], as things stand there is a judgment of the Full Federal Court in which a justice has expressed the opinion that legislation has been drafted intending to produce a result that puts Australia in breach of its international obligations. Why is that not a special leave point?⁴⁵

Once special leave had been granted, Mr Macoun pressed his view that — should the Court find the pension payments to be taxable — Australia would be in breach of the *Agencies Convention*.⁴⁶ He did so by adopting the reasoning of Perram J and arguing that 'Australia's breach was a strong reason for giving the text [of the Act] a beneficial and purposive meaning designed to implement the *Convention*'.⁴⁷

⁴¹ Ibid 277 [53] (Perram J).

⁴² Ibid 277–8 [54]–[58] (Perram J).

⁴³ Andrew John Macoun, 'Appellant's Submissions', Submission in *Macoun v Commissioner of Taxation*, S100/2015, 19 June 2015, [2].

⁴⁴ Transcript of Proceedings, *Macoun v Commissioner of Taxation* [2015] HCATrans 112 (15 May 2015) 11–15 (R J Ellicott QC):

Your Honours, this is, perhaps, an unusual case to come before this Court, not because of the principles involved but simply because of its extension into other areas geographically. It is of some importance that the superior courts of this nation do, to some extent, reflect on the views that are adopted in other countries.

⁴⁵ Ibid 355–9 (Bell J).

⁴⁶ Andrew John Macoun, 'Appellant's Submissions', Submission in *Macoun v Commissioner of Taxation*, S100/2015, 19 June 2015, [74]–[80].

⁴⁷ Ibid [78].

By way of a Notice of Contention,⁴⁸ the Commissioner sought to challenge Perram J's conclusion on the treaty question and to argue that — properly interpreted — the *Agencies Convention* did *not* require Australia to exclude Mr Macoun's pension from his taxable income.⁴⁹ The Commissioner's detailed submissions in support of this contention followed closely the relevant elements of the regime established by arts 31 and 32 of the *VCLT* and included the following arguments:

- (i) that it was the *VCLT*, and not art 38(1)(d) of the *ICJ Statute*, that should be the starting point for any question of treaty interpretation;⁵⁰
- (ii) that, pursuant to art 31(1) of the *VCLT*, '[t]he ordinary meaning of the word "official" suggests a *present status*';⁵¹
- (iii) that, also pursuant to art 31(1), the ordinary meaning is supported by the context provided by s 18 of the *Agencies Convention* — 'under which the relevant categories of officials and their names have to be designated' — because '[t]he categories refer to classes of current, operating officials, as would the lists of names made known to governments of members';⁵²
- (iv) that, again pursuant to art 31(1), the interpretation contended for 'accords with the object and purpose of the *Agencies Convention*' — which includes ensuring that officials can exercise their functions independently — because 'once a person has left the office of the organisation, the imperative for the exemption from tax, in terms of the exercise of the official's functions, dissipates';⁵³
- (v) that, pursuant to art 31(3)(b), '[t]he practice of States parties to the *UN Convention* and *Agencies Convention* indicates that ... there is no uniform approach to the taxation of pensions'.⁵⁴ This view was supported by reference to a report of the International Law Commission, as well as the decisions of two domestic courts and an international arbitral tribunal. At the hearing of the appeal in Canberra,⁵⁵ the Commissioner additionally relied on *Powell v Secretary-General of the United Nations*,⁵⁶ a decision of the

⁴⁸ *High Court Rules 2004* (Cth) r 42.08.05:

Where a respondent does not seek a discharge or variation of a part of the judgment actually pronounced or made, but contends that the judgment ought to be upheld on the ground that the court below has erroneously decided, or has failed to decide, some matter of fact or law, it is not necessary to give a notice of cross-appeal, but that respondent shall file and serve, within the time limited by rule 42.08.1, a notice of that contention in Form 27.

⁴⁹ Commissioner of Taxation, 'Respondent's Submissions', Submission in *Macoun v Commissioner of Taxation*, S100/2015, 10 July 2015, [2], [8], [54]–[80].

⁵⁰ *Ibid* [58].

⁵¹ *Ibid* [60]–[63] (emphasis in original).

⁵² *Ibid* [60]–[62] (emphasis removed).

⁵³ *Ibid* [64]–[68].

⁵⁴ *Ibid* [54], [69]–[78].

⁵⁵ Transcript of Proceedings, *Macoun v Commissioner of Taxation* [2015] HCATrans 257 (9 October 2015) 2259–99 (J T Gleeson SC).

⁵⁶ *Powell v Secretary-General of the United Nations* (Administrative Tribunal of the United Nations, Judgement No 237, 20 October 1978).

- Administrative Tribunal of the United Nations that records that it was not disputed that ‘nearly all States which are parties to the [UN Convention] tax periodic pension payments’;⁵⁷ and
- (vi) that, finally and pursuant to art 32 of the *VCLT*, the *travaux préparatoires* to the *UN Convention* ‘confirm that it was *not* intended for s 18(b) thereof to create any taxation exemption in respect of pensions paid to former UN officials’.⁵⁸ In fact, ‘[t]he records of the negotiations indicate that the drafters of the *UN Convention* contemplated the possibility of exempting pensions from taxation ... *but deliberately decided against that approach*’.⁵⁹

This interpretation is broadly consistent with academic treatments on the subject.⁶⁰

I would, however, add two caveats to the Solicitor-General’s argument on behalf of the Commissioner that ‘although Justice Perram treated this as an exercise under section 38[(1)](d) of the *International Court of Justice Act* [sic] more strictly it is an exercise under the *Vienna Convention on the Law of Treaties* to interpret a convention’.⁶¹

The first caveat is that — strictly speaking — the rules of interpretation contained in the *VCLT* do not apply to the *UN Convention* or the *Agencies Convention* for at least one, and possibly two, reasons. First, the *UN Convention* and the *Agencies Convention* were concluded before the entry into force of the *VCLT*, which does not operate retrospectively.⁶² Secondly, the *VCLT* applies only to ‘treaties between States’.⁶³ A *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* has been concluded, but has not yet entered into force.⁶⁴ Although the United Nations has not signed or ratified the *UN Convention* or the *Agencies Convention* (and appears not to have signed or ratified any treaties until after the International Court of Justice found that it possessed ‘international personality’

⁵⁷ Ibid 68–9 [XVIII].

⁵⁸ Commissioner of Taxation, ‘Respondent’s Submissions’, Submission in *Macoun v Commissioner of Taxation*, S100/2015, 10 July 2015, [79] (emphasis in original).

⁵⁹ Ibid [79] (emphasis in original).

⁶⁰ See, eg, Rutsel Silvestre J Martha, *Tax Treatment of International Civil Servants* (Martinus Nijhoff, 2010) 236–9, 267–91.

⁶¹ Transcript of Proceedings, *Macoun v Commissioner of Taxation* [2015] HCATrans 257 (9 October 2015) 2152–5 (J T Gleeson SC).

⁶² *VCLT* art 4:

Without prejudice to the application of any rules set forth in the present *Convention* to which treaties would be subject under international law independently of the *Convention*, the *Convention* applies only to treaties which are concluded by States after the entry into force of the present *Convention* with regard to such States.

As noted elsewhere, the *UN Convention* and the *Agencies Convention* were concluded in 1946 and 1947, respectively. The *VCLT* entered into force in 1980.

⁶³ *VCLT* art 1.

⁶⁴ *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, UN Doc A/CONF.129/15 (21 March 1986) (not yet in force).

in 1949),⁶⁵ art 35 of the *UN Convention* describes that treaty as being ‘in force as between the United Nations and every Member which has deposited an instrument of accession’. The International Court of Justice has said that this provision ‘creates rights and duties between each of the signatories and the Organization’.⁶⁶ If it has the effect of making the *UN Convention* a treaty ‘between one or more States and one or more international organizations’⁶⁷ — as opposed to a treaty ‘between States’⁶⁸ — this would be a further reason for the non-applicability of the rules of interpretation contained in the *VCLT*.

This point, however, is of peripheral relevance (at best) because arts 31 and 32 of the *VCLT*, which are identical to arts 31 and 32 of the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, are widely accepted as codifying pre-existing customary international law.⁶⁹

The second caveat is that, whilst the *VCLT* should undoubtedly be the starting point for an exercise in treaty interpretation, art 38(1)(d) of the *ICJ Statute* is far from irrelevant to the task. Article 31(3)(c) of the *VCLT* — which requires ‘any relevant rules of international law applicable in the relations between the parties’ to be ‘taken into account’ when interpreting a treaty — ‘*must* be taken to refer to all recognized sources of international law the emanations of which can in

⁶⁵ *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174. The first such treaty appears to be the *Basic Agreement between the United Nations, the Food and Agriculture Organization of the United Nations, the International Civil Aviation Organization, the International Labour Organization, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization (Members of the Technical Assistance Board), and the Government of Haiti for the Provision of Technical Assistance*, signed 28 June 1951, 118 UNTS 154 (entered into force 8 January 1952).

⁶⁶ *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 179.

⁶⁷ *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, UN Doc A/Conf. 129/15 (21 March 1986) (not yet in force) art 1.

⁶⁸ *VCLT* art 1.

⁶⁹ *Kasikili/Sedudu Island (Botswana v Namibia) (Judgment)* [1999] ICJ Rep 1045, 1059 [18]:

As regards the interpretation of [the *Anglo-German Treaty* of 1890], the Court notes that neither Botswana nor Namibia are parties to the *Vienna Convention on the Law of Treaties* of 23 May 1969, but that both of them consider that Article 31 of the *Vienna Convention* is applicable inasmuch as it reflects customary international law. The Court itself has already had occasion in the past to hold that customary international law found expression in Article 31 of the *Vienna Convention* [references omitted]. Article 4 of the *Convention*, which provides that it ‘applies only to treaties which are concluded by States after the entry into force of the ... *Convention* with regard to such States’ does not, therefore, prevent the Court from interpreting the 1890 *Treaty* in accordance with the rules reflected in Article 31 of the *Convention*.

principle be of assistance in the process of interpretation. *The implicit reference is, of course, to Art 38 para 1 ICJ Statute*'.⁷⁰

As will be evident from the summary I have given, the Commissioner's case in the High Court relied on a significant amount of material relevant to the task of interpreting the relevant treaty provisions that was not before the Administrative Appeals Tribunal or the Full Federal Court. In the course of the hearing of the appeal in the High Court, the Solicitor-General recognised that the Full Federal Court

did not have the benefit of the larger range of materials we now seek to put before the Court and, to the extent [that] we respectfully challenge Justice Perram's analysis of the international law, it is with the acceptance that he did not have the benefit of the critical materials. That is unfortunate, but that is where we are.⁷¹

The Solicitor-General subsequently issued the '*mea culpa* that, clearly enough, the *travaux préparatoires*, if nothing else, should always have been before the court below'.⁷²

In their joint judgment, French CJ, Bell, Gageler, Nettle and Gordon JJ agreed with the Commissioner that 'Australia's international obligations ... do not require Australia to exempt Mr Macoun's monthly pension payments from taxation'.⁷³ In coming to this conclusion, the reasoning of the High Court followed the same basic contours of the argument urged upon it by the Commissioner, as set out above, albeit in less detail and in a slightly different order. The joint judgment also recognised that many of the materials that formed the basis of the Commissioner's arguments and which 'assist in the interpretation of the *Agencies Convention*' 'were not debated before the [Administrative Appeals Tribunal] or the Full Court'.⁷⁴

After setting out the relevant provisions of the *VCLT*,⁷⁵ the Court first examined the ordinary meaning of the relevant words, concluding that '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 specialised agency'.⁷⁶

Secondly, the Court examined the *travaux préparatoires* to the two conventions, namely the records of the Sixth Committee of the General Assembly, finding (a) that they 'confirm[] the *UN Convention* was drafted on the basis that the phrase "salaries and emoluments" did not extend to retirement or

⁷⁰ Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 561 (emphasis added). See also Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, 2009) (Villiger states that '[t]he rules of international law are one of the means of interpretation of the General Rule in Article 31 [of the *VCLT*]. They correspond with the notion of the sources of international law as in Article 38 para 1 of the *ICJ Statute*': at 433); Olivier Corten and Pierre Klein, *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press, 2011) 828–9.

⁷¹ Transcript of Proceedings, *Macoun v Commissioner of Taxation* [2015] HCATrans 257 (9 October 2015) 2146–50 (J T Gleeson SC).

⁷² *Ibid* 2531–3 (J T Gleeson SC).

⁷³ *Macoun v Federal Commissioner of Taxation* [2015] HCA 44 (2 December 2015) [67]. See generally [66]–[82].

⁷⁴ *Ibid* [75].

⁷⁵ *Ibid* [69]–[72].

⁷⁶ *Ibid* [74]–[75].

death benefits',⁷⁷ and (b) that the *Agencies Convention* intended to extend that position to officials of the specialised agencies.⁷⁸

Thirdly, the Court considered the practice of parties to the *Agencies Convention* as reflected in the judicial and arbitral decisions to which the Court was referred.⁷⁹ It found that the practice was inconsistent, leading to the conclusion that '[i]t cannot be said that the *Agencies Convention* properly construed in accordance with the principles identified in the *VCLT* requires Australia *not* to tax Mr Macoun's pension'.⁸⁰ The Court did not address the fact that — strictly speaking — the rules of interpretation contained in the *VCLT* do not apply to the UN Convention or the *Agencies Convention*.⁸¹

V MALONEY AND MACOUN COMPARED

A Examining the Difference

The approach to treaty interpretation in *Macoun* represents a significant departure from — and, I would argue, an improvement on — that adopted in *Maloney* for three key reasons.

First, the interpretation is firmly grounded in the text of arts 31 and 32 of the *VCLT*; the relevant provisions are set out and utilised in a logical and coherent manner. By contrast, in *Maloney* — where all six judges wrote separate judgments — only French CJ and Bell J referred to the *VCLT* when interpreting the treaty at hand,⁸² and none of the analyses could be said to be well-grounded in the *VCLT*.⁸³

Secondly, the Court in *Macoun* is vastly more receptive of extrinsic international legal materials. In the case note on *Maloney*, one of my key criticisms was that 'to varying degrees, [the members of the Court] sought to reduce or eliminate the relevance of extrinsic international legal materials ... that have legitimate interpretive value as a matter of international law'.⁸⁴ Some judges denied any meaningful role to such materials,⁸⁵ whereas others conceded

⁷⁷ Ibid [76]–[78].

⁷⁸ Ibid [78]–[79].

⁷⁹ Ibid [80]–[82].

⁸⁰ Ibid [82] (emphasis in original).

⁸¹ This point was made by Mr Macoun's representatives in a decidedly minor way at a late stage of the proceedings: Andrew John Macoun, 'Appellant's Reply', Submission in *Macoun v Commissioner of Taxation*, S100/2015, 24 July 2015, [27]; Transcript of Proceedings, *Macoun v Commissioner of Taxation* [2015] HCATrans 257 (9 October 2015) 1301–4 (R J Ellicott QC) ('I am not making a big point about it. I am simply saying that, as a strict matter of law, [the *Vienna Convention*] does not apply, but the provisions of it have been accepted as part of the customary international law and therefore, one will pay attention').

⁸² *Maloney* (2013) 252 CLR 168, 180–2 [14]–[15], 185 [22] (French CJ), 255–6 [235] (Bell J).

⁸³ Wall, above n 1, 237 ('Although the majority of the Court accepted some interpretive role for treaty body output, no judge articulated a formal reason why, as a matter of international law, that should be so (nor was this the subject of any detailed submissions)').

⁸⁴ Ibid 231–2. See generally 233–8.

⁸⁵ Ibid 234 ('Hayne J considered that the only extrinsic materials that may be used in interpretation are those that existed when the statute was enacted ... [Crennan J] did not concede to them any interpretive role').

some role in theory but made little use of the materials in practice.⁸⁶ In *Macoun*, by contrast, a wide range of relevant extrinsic material was considered without demur. As discussed below, however, this may be explained by the fact that the two cases involved different types of treaty and different types of extrinsic material.

Of particular note is the treatment of extrinsic material created after the enactment of a statute that gives domestic effect to a treaty. In *Maloney*, Hayne J said the following:

Of course, resort may be had to [a treaty] in interpreting provisions of [the statute that gives domestic effect to it]. But, because [the statute] is to be interpreted ‘by the application of ordinary principles of statutory interpretation’, *the only extrinsic materials that may bear upon that task are materials of a relevant kind that existed at the time [that the statute] was enacted*. Material published later, such as subsequent reports of United Nations Committees, may usefully direct attention to possible arguments about how [the statute] should be construed but any debate about its construction is not concluded by reference to or reliance upon material of that kind.⁸⁷

I criticised this approach as erroneously assuming that international law is static and overlooking ‘the rules of treaty interpretation that allow for evolving interpretations’.⁸⁸

Apparently in reliance on this passage, counsel for Mr Macoun submitted that, when seeking to interpret the treaty provisions in question, the Court should not rely on any material produced after 1963 (when the Act came into force).⁸⁹ The Commissioner, on the other hand, and noting that a range of positions were taken on this question in *Maloney*, submitted that ‘the Court could give considerable weight to this material’.⁹⁰

In its judgment, the Court examined a number of extrinsic materials that post-dated 1963 without even referring to the debate concerning the permissibility of doing so. In the circumstances, such silence should be

⁸⁶ Ibid 250:

although willing to accept a role for extrinsic international legal materials in treaty interpretation, French CJ, Kiefel and Bell JJ did not make much use of them when interpreting the *Convention*. Like Hayne and Crennan JJ — who did not concede to such materials any meaningful interpretive role — French CJ, Kiefel and Bell JJ rarely referred to such materials. Gageler J, by contrast, ‘considered the contribution that might be made by ... relevant international legal materials to almost every interpretive question posed’.

⁸⁷ *Maloney* (2013) 252 CLR 168, 198–9 [61] (Hayne J) (emphasis added) (citations omitted).

⁸⁸ Wall, above n 1, 234.

⁸⁹ Transcript of Proceedings, *Macoun v Commissioner of Taxation* [2015] HCATrans 257 (9 October 2015) 1283–9 (R J Ellicott QC):

The point we are seeking to make is that the respondent’s evidence of state practice from 1985 to 2014 concerning the Specialized *Agencies Convention* and the *UN Convention* cannot be relied upon to discern the proper interpretation of Item 2 of Part I in the Fourth Schedule [to the Act]. In other words, as this Court indicated in *Maloney’s Case*, there is a point beyond which you cannot go for the purposes of relevant context in relation to international law. It stops, therefore — I think it is 18 October 1963.

⁹⁰ Ibid 2479–82, 2500–2 (J T Gleeson SC).

considered an implied repudiation of Hayne J's position that such materials cannot 'bear upon' the interpretive task.

The third key difference between the Court's approach to treaty interpretation in *Maloney* and *Macoun* is one of temperament. In *Maloney*, one could detect in many of the judgments a hostility towards the process of treaty interpretation, with warnings of "'interpretations" which rewrite the [treaty] text";⁹¹ the elevation of 'non-binding extraneous materials over the language of the text';⁹² the risk that states parties may 'be taken to have agreed that which they have not';⁹³ and the threat of the treaty text being 'supplemented' by non-binding extrinsic materials.⁹⁴ In *Macoun*, by contrast, the interpretive task is approached in a dispassionate manner reminiscent of the construction of a domestic statute. The Court simply examines the relevant provisions, along with other materials that may be of assistance to the interpretive exercise, and reaches a conclusion.

B Explaining the Difference

What, then, explains the vastly different approaches to treaty interpretation adopted in two judgments that are separated by only two and a half years?⁹⁵ Four factors are worthy of examination.

The first is the nature of the treaties being interpreted. Although the rules of interpretation contained in the *VCLT* apply equally regardless of subject matter, they have — at times — been applied differently as between human rights conventions and more 'traditional' treaties, such as those conferring privileges and immunities. Human rights treaties are, after all, of a fundamentally different nature to 'traditional' treaties, as the International Court of Justice explained in the *Reservations to the Convention on Genocide* advisory opinion:

In [a human rights treaty] the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.⁹⁶

It is this difference that has caused some — most notably the European Court of Human Rights — to emphasise that a 'dynamic' or 'evolutive' approach is required when interpreting a human rights convention.⁹⁷ This approach emphasises that 'the *Convention* is a living instrument which ... must be

⁹¹ *Maloney* (2013) 252 CLR 168, 185 [23] (French CJ).

⁹² *Ibid* 221–2 [134] (Crennan J).

⁹³ *Ibid* 235 [175] (Kiefel J).

⁹⁴ *Ibid* 255–6 [235] (Bell J).

⁹⁵ Judgment in *Maloney* was handed down on 19 June 2013, and in *Macoun* on 2 December 2015.

⁹⁶ *Reservations to the Convention on Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23. See also Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *European Journal of International Law* 529, 531, 533.

⁹⁷ Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 3rd ed, 2010) 172, 188; Orakhelashvili, above n 96, 533–8; George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 *European Journal of International Law* 509; Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 *Human Rights Law Review* 57.

interpreted in the light of present day conditions’;⁹⁸ it has at its heart ‘the rejection of the idea that [rights protected by the *European Convention on Human Rights*] must be interpreted in the light of what their meaning was taken to be back in the 1950s’ (when the *European Convention on Human Rights* was drafted).⁹⁹ Although many argue that the evolutive approach is perfectly consistent with the purposive approach to interpretation prescribed by art 31 of the *VCLT*,¹⁰⁰ and observe that it has been endorsed by the International Court of Justice,¹⁰¹ others see in this approach ‘attempts to deviate from the basic principles of international law’ so as to ‘allow an exorbitant interpretation ... which far exceeds the clear meaning of the texts in question, and thus to enlarge the scope of the *Convention* by judicial pronouncements’.¹⁰² This has become ‘[o]ne of the most contentious, disputed and discussed issues in treaty interpretation’.¹⁰³ Given the concerns expressed in *Maloney* about interpretations that rewrite treaty text or override consent, it would appear that the Court’s approach in that case was driven in part by a concern not to adopt evolutive interpretations of human rights treaties. There was no reason for such a concern to arise in *Macoun*.

A second, related factor is the nature of the extrinsic materials that the Court was asked to use when interpreting each treaty. In *Maloney*, these were a resolution of the General Assembly and the output of the Committee on the Elimination of Racial Discrimination. Neither are materials of a kind expressly mentioned in arts 31 or 32 of the *VCLT* (though, for the reasons given in the earlier note, they are materials that had a legitimate role to play in the interpretation of the Convention).¹⁰⁴ In *Macoun*, on the other hand, the extrinsic materials were evidence of subsequent practice in the application of the treaty and the *travaux préparatoires*. Both are expressly given an interpretive role by the *VCLT* and are thus — to use the words of the Solicitor-General — of a ‘more conventional’ nature than the extrinsic materials in *Maloney*.¹⁰⁵ This may

⁹⁸ *Tyrer v United Kingdom* (1978) 26 Eur Court HR (ser A) [31].

⁹⁹ George Letsas, ‘Intentionalism and the Interpretation of the *ECHR*’ in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff, 2010) 257. For the *European Convention on Human Rights*, see *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010).

¹⁰⁰ See Letsas, above n 97; Orakhelashvili, above n 96, 533–8; Letsas, above n 99, 532–6.

¹⁰¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16. The advisory opinion states that ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation’: at 31 [53] (emphasis added).

¹⁰² Heribert Golsong, ‘Interpreting the *European Convention on Human Rights* beyond the Confines of the *Vienna Convention on the Law of Treaties*?’ in R St J MacDonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993) 147, 151.

¹⁰³ Fitzmaurice, above n 97, 188.

¹⁰⁴ Wall, above n 1, 231–8.

¹⁰⁵ Transcript of Proceedings, *Macoun v Commissioner of Taxation* [2015] HCATrans 257 (9 October 2015) 2496 (J T Gleeson SC).

explain why the Court appeared to be more comfortable in using them as interpretive aids.

A third factor is that, in addition to the interpretive task being different, the identity of the interpreter was also different. Whilst French CJ, Bell and Gageler JJ sat on both cases, the composition of the bench was otherwise different, with Hayne, Crennan and Kiefel JJ being replaced by Nettle and Gordon JJ.¹⁰⁶ Given that Hayne and Crennan JJ took the most restrictive approaches to treaty interpretation in *Maloney*,¹⁰⁷ it might have been anticipated that their departure from the Court would lead to the adoption of more expansive approaches to treaty interpretation. Furthermore, whilst all six judges wrote separate judgments in *Maloney*, there was a single joint judgment in *Macoun*; it may be that the processes that lead to the production of a joint judgment had some influence.

Finally, the submissions on the questions of treaty interpretation were of a higher quality in *Macoun* than in *Maloney*. In *Maloney*, none of the parties, interveners or amici curiae made detailed submissions explaining why the extrinsic material on which they sought to rely was relevant as a matter of international law.¹⁰⁸ The same could be said of the submissions in *Macoun* in the Administrative Appeals Tribunal and the Full Federal Court. In the High Court, however, the Commissioner's written submissions concerning treaty interpretation were very thorough; aided no doubt by the human and other resources available to the Commonwealth (including the Office of International Law within the Attorney-General's Department), the submissions set out and applied the relevant provisions of the *VCLT* in a clear and methodical manner.¹⁰⁹ It is little surprise that the Court followed them so closely.

VI CONCLUSION

In *Macoun v Commissioner of Taxation*, the High Court of Australia adopted a significantly more orthodox approach to treaty interpretation than the one it adopted just two and a half years earlier in *Maloney v The Queen*. The approach in *Macoun* is a marked improvement: it is firmly grounded in relevant provisions of the *VCLT*, vastly more receptive of relevant extrinsic materials and significantly less hostile to the task of treaty interpretation. As a result, the risk of which I previously warned — that 'the High Court risks interpreting statutes inconsistently with international law as it evolves, thereby placing Australia in breach of [its] international obligations'¹¹⁰ — appears to have dissipated somewhat.

In this note, I have suggested that four factors assist in explaining this improvement: the differences in the type of treaty being examined in each case, the differences in the type of extrinsic material before the Court, the differences

¹⁰⁶ In the period between *Maloney* and *Macoun*, Crennan and Hayne JJ were replaced on the High Court by Nettle and Gordon JJ, respectively.

¹⁰⁷ Wall, above n 1, 234–5.

¹⁰⁸ Ibid 237.

¹⁰⁹ Commissioner of Taxation, 'Respondent's Submissions', Submission in *Macoun v Commissioner of Taxation*, S100/2015, 10 July 2015, [54]–[80]. The submissions can be found on the High Court's website: see High Court of Australia, *Case S100/2015* <http://hcourt.gov.au/cases/case_s100-2015>.

¹¹⁰ Wall, above n 1, 251.

in the composition of the bench and the differences in the quality of the submissions of the parties. Because of these differences — particularly the first and second — it is impossible to conclude that, were it faced again with a case like *Maloney*,¹¹¹ the Court would approach the interpretive task any differently. The dispassionate and methodical manner in which it approached the interpretive task in *Macoun*, however, gives cause for hope that this case is evidence of a shift within the High Court towards an approach to treaty interpretation more in line with the approach set out in the *VCLT*.

For legal practitioners whose work involves the consideration of international law in Australian courts, it is the last of the four differences identified that will be of most interest. The comparative analysis in this note suggests that a structured and logical approach by practitioners leads to a structured and logical approach by courts. The practitioner that clearly explains the process of treaty interpretation and the relevance of the various materials on which she seeks to rely, therefore, does a great service to all those who have an interest in improving the manner in which Australian courts approach questions of international law.

¹¹¹ That is, a case in which the Court was invited to interpret a human rights treaty by reference to materials such as General Assembly resolutions and the output of United Nations human rights treaty bodies.